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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **4/10/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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JR59's Application [2012] NIQB 66

IN THE MATTER OF AN APPLICATION BY JR59 FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] The applicant challenges a decision by the Chief Constable of the PSNI of 6 July 2011 whereby he decided to issue information to Access NI which subsequently featured in an Enhanced Criminal Record Certificate ("ECRC") issued on 7 July 2011. The impugned information was in the following terms:

> "The applicant was arrested and interviewed by police on 20 October 1997 regarding allegations of indecent assault and gross indecency on a male child aged 8/9 years old between 1988/1990. The applicant strenuously denied the allegations, which were uncorroborated. The Director of Public Prosecutions directed No Prosecution on 13 January 1998 as there was insufficient evidence to sustain a reasonable prospect of conviction."

[2] The disclosure of this information is made pursuant to s115(7) of Part V of the Police Act 1997 (now s113B of the same Act).

[3] The applicant challenges this disclosure contending that:

(i) it is a disproportionate interference with his right to respect for private and family life under Art8 ECHR;

(ii) the Chief Constable failed to take into account all relevant information and assign appropriate weight to such information in particular the matters set out at para3(b)(i)-(v) of the Order 53 Statement;

(iii) the Chief Constable acted in breach of Art8 and in a procedurally unfair manner by sending the ECRC to the prospective employer at the same time as to the applicant [see para3(c)(i)-(ii)]

Background

[3] The applicant applied for an ECRC to permit him to engage with a local football club as a coach.

[4] On 21 June 2011 Mr Sam Coates, Disclosure Manager, Criminal Records Office, wrote to the applicant informing him of his opinion that the information [set out at para1 above] would be relevant to his application for a voluntary position as coach and that this information ought to be disclosed pursuant to s115(7) of Part V of the Police Act 1997. He indicated that in accordance with the judgment of the Supreme Court in L v Commissioner of Police of the Metropolis [2009] UKSC 3 he was offering the applicant the opportunity to make representations as to why he might believe that disclosure would neither be reasonable or proportionate.

[5] The applicant's solicitors replied on 30 June 2011 contending that disclosure would prejudice his application and cause a significant, irreversible and lasting detriment to his right to a private and family life enshrined in Art8. In particular, the solicitor pointed out that the information related to an allegation over 20 years ago, that the DPP scrutinised the evidence, that he was never charged, that the allegation was uncorroborated, that there was no further action taken thereafter and that the applicant strenuously denied the allegation and was consistent throughout in that regard. The solicitor also sought confirmation that no information would be disclosed at that stage.

[6] The applicant avers that his solicitors contacted him to inform him that they had telephoned Mr Coates on 4 July 2011 as he had failed to acknowledge receipt of previous correspondence. He was informed that there was to be a meeting on 6 July 2011 between the Assistant Chief Constable for Criminal Justice, the PSNI Human Rights Advisor Ralph Roche and Sam Coates, the PSNI contact for the applicant's solicitors on 6 July 2011. He avers that his solicitors told him they expected a decision by the end of the week and had requested that no disclosure be made at this stage.

[7] On 8 July 2011 the applicant received the ECRC in the post containing the impugned information. There was no accompanying letter and the applicant noted that the ECRC in his possession was the applicant copy, a copy had been issued to the prospective employer at the same time.

[8] By letter dated 20 July 2011 Mr Coates confirmed that the PSNI had considered his representations and that the issue of disclosure had been decided by the Assistant Chief Constable (Criminal Justice) at the meeting on 6 July 2011. The

letter states that the facts and circumstances regarding the allegations were considered as well as the detailed nature of the allegations. The alleged injured party was aged 9 years old at the time, therefore as the position applied for was with young children, it was considered that disclosure of the relevant factual information was reasonable and proportionate. The case, including the impugned disclosure, was returned to Access NI on 7 July 2011.

[9] By letter dated 11 August 2011 the applicant's solicitors complained about the decision to disclose and the matter of disclosure to the prospective employer at the same time as the applicant. The letter erroneously claimed that the applicant had been given no opportunity to challenge the information contained in the ECRC before it had been seen by the prospective employer.

[10] By response dated 15 August 2011 Mr Coates stated as follows:

> "I refer to your correspondence dated 11 August 2011 and my previous letter dated 20 July 2011.
>
> Approved information disclosed by Police Service of Northern Ireland is assessed using criteria approved by the Association of Chief Police Officers, which is also used by all Constabularies in England and Wales. Approved information does not have to be proven to the point required in order to secure a conviction in the criminal courts.
>
> It was my considered opinion that despite the age of the allegations made against [the applicant] that if this information was to be true that this might indicate a risk to children. The position as coach would provide [the applicant] access to children in a position of significant authority with [the football club]. There is a balance to be struck and the pressing social need to protect children from potential abuse was considered greater than any potential interference with [the applicant's] rights under Article 8 of the Human Rights Act 1998.
>
> The disclosure was the minimum in the circumstances; it did not reveal the detail of the allegations and was balanced in stating that [the applicant] denied the allegations which were uncorroborated.
>
> I have noted your point regarding the issue of a certificate to [the football club]. However disclosure

> bodies such as Access NI and CRB issue certificates to both the applicant and the registered body. This practice is enshrined in Part V of the Police Act 1997; it is not within the gift of the Chief Constable to decide to whom a certificate should be issued.
>
> However you should note that the document "A Managed Approach: A Review of the Criminal Records Regime in Northern Ireland by Sunita Mason" which is published on the DOJNI website, recommends that in future a single certificate should be issued to the applicant; the applicant could then take their certificate to any post they wish to apply for where the information can be verified online.
>
> I would dispute the assertion in your correspondence that on receipt of the certificate that this was the first time [the applicant] had seen the content of the police information being considered for disclosure. My letter to [the applicant] dated 21 June 2011 included the full text of the information, which was disclosed by the PSNI. Your office subsequently responded on behalf of [the applicant] on 30 June 2011.
>
> Thank you for your submission in this case, which will be retained for future reference should [the applicant] apply for any position for which an Enhanced Disclosure Certificate is required. However it is my considered opinion that disclosure regarding [the applicant's] application for a position as coach with [the football club] was both reasonable and proportionate, I will not request that AccessNI issue an amended certificate in this instance."

[11] Assistant Chief Constable Will Kerr has deposed in his affidavit as to his responsibility for criminal justice, his oversight of the criminal records disclosure process and his specific involvement in the impugned decision. At para8 of his affidavit he states:

> "I examined all of the relevant material. There was a general discussion during which the contents of the crime file were referred to, in particular the statements concerned therein and Mr Coates answered any concerns I had with regard to their content. I reflected upon the nature of the position applied for. I was aware that it was a voluntary role

with a sporting organisation and it would involve a considerable level of interaction with young children. I considered the gravity of the original allegations, the time that had elapsed and the absence of any formal outcome in relation to those allegations. I considered that the nature and seriousness of the allegations tipped the balance in favour of disclosure in this case. Having fully considered this matter I completed Section 4 of form AT3 approving disclosure of approved information."

Statutory Framework

[12] Section 115 Part V of the Police Act 1997 [now S113B] provides:

"115 Enhanced criminal record certificates.

(1) The Secretary of State shall issue an enhanced criminal record certificate to any individual who—

(a) makes an application under this section in the prescribed form countersigned by a registered person, and

(b) pays any fee that is payable in relation to the application under regulations made by the Secretary of State.

(2) An application under this section must be accompanied by a statement by the registered person that the certificate is required for the purposes of an exempted question asked—

(a) in the course of considering the applicant's suitability for a position (whether paid or unpaid) within subsection (3) or (4), or

(b) for a purpose relating to any of the matters listed in subsection (5) or

(c)in relation to an individual to whom subsection (6C), (6D) or (6E) applies.

(3) A position is within this subsection if it involves regularly caring for, training, supervising or being in sole charge of persons aged under 18.

….

(6) An enhanced criminal record certificate is a

certificate which—

(a) gives—

(i) the prescribed details of every relevant matter relating to the applicant which is recorded in central records, and

(ii) any information provided in accordance with subsection (7), or

(b) states that there is no such matter or information.

….

(7) Before issuing an enhanced criminal record certificate the Secretary of State shall 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.

…

(9) The Secretary of State shall send to the registered person who countersigned an application under this section—

(a) a copy of the enhanced criminal record certificate, and

(b) any information provided in accordance with subsection (8)."

[13] Art 8 of the European Convention of Human Rights states:

"Everyone has the right to respect for his private and family life, his home and his correspondence.

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] The statutory regime requires the Department of Justice (AccessNI) to issue an ECRC upon the request of an individual to a registered person. In completing that certificate AccessNI will, pursuant to s115(3) [now s113B], consider whether the position offered by the registered person involves regular training, supervision or charge of children. If it is considered to be such a post then the certificate should record the details of every relevant matter contained in central records. In addition, the certificate should include information provided by the relevant chief officer of police pursuant to s115(7). This subsection obliges the relevant chief officer of police to provide any information which, in the chief officer's opinion, might be relevant to the determination of suitability for paid or voluntary work and ought to be included in the certificate.

[15] There is, therefore, a duty imposed in s115(7) upon the Minister of Justice (and AccessNI) to request the Chief Constable to make a judgment about whether there is any information within his knowledge that (i) might be relevant and (ii) ought to be included. The Chief Constable's statutory responsibility is to provide the information which, in his opinion, might be relevant and ought to be included.

[16] The Supreme Court judgment in ***L*** [2009] UKSC 3 considered in detail the law relating to the disclosure of police information. In that case the Commissioner had disclosed information about a woman who had applied for a post as "casual midday assistant" at a school. She had no criminal convictions and no information relevant to her was held on central records. However, the Commissioner disclosed, pursuant to s115(7) that she had come to police notice when her son had been put on the child protection register under the category of neglect for a one year period. This was factually correct. This information issued on an ECRC and, consequently, L lost her agency position as a midday assistant.

[17] The decision of the Supreme Court in ***L*** had been preceded by a Court of Appeal ruling in R (X) v Chief Constable of the West Midlands Police [2005] 1 WLR 65**.** At para36 Lord Woolf CJ had held:

> "Having regard to the language of section 115, the Chief Constable was under a duty to disclose if the information might be relevant, unless there was some good reason for not making such a disclosure.
>
> …
>
> 37. This was obviously required by Parliament because it was important (for the protection of children and vulnerable adults) that the information should be disclosed even if it only might be true. If it *might* be true, the person who was proposing to employ the claimant should be entitled to take it into

> account before the decision was made as to whether or not to employ the claimant. This was the policy of the legislation in order to serve a pressing social need. In my judgment it imposes too heavy an obligation on the Chief Constable to require him to give an opportunity for a person to make representations prior to the Chief Constable performing his statutory duty of disclosure." [my emphasis]

[18] The approach of Lord Woolf was reconsidered by the Supreme Court in ***L.*** At para40 Lord Hope concluded that a decision made pursuant to s115(7) will fall within the scope of Art8(1). The effect is that, in every case, the chief officer of police must consider whether there is an interference with an applicant's private life and, if so, whether it can be justified pursuant to Art8(2).

[19] Lord Hope endorsed, at para41, the view of Lord Woolf in ***X*** that there was no question of the legislation, of itself, being incompatible with Art8 of the Convention. He concluded that the issue was essentially one of proportionality. At para44 he stated:

> "In my opinion the effect of the approach that was taken to this issue in R (X) v Chief Constable of the West Midlands Police has been to tilt the balance against the applicant too far. It has encouraged the idea that priority must be given to the social need to protect the vulnerable as against the right to respect for private life of the applicant….. The words "ought to be included" in section 115(7)(b) require to be given much greater attention. They must be read and given effect in a way that is compatible with the applicant's Convention right and that of any third party who may be affected by the disclosure….."

[20] At para 46 Lord Hope stated:

> "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. In R (X) v Chief Constable of the West Midlands Police Lord Woolf CJ rejected Wall J's suggestion that this should be

> done on the ground that this would impose too heavy an obligation on the Chief Constable [2005] 1 WLR 65, para 37. Here too I think, with respect, that he got the balance wrong. 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. "

Discussion

[21] The voluntary position at the football club that the applicant applied for is likely to involve exposure to, and care for, young people. The police information on the applicant involves an allegation of sexual interference with a 9 year old foster brother. It is common case that the Art8 rights of the applicant are engaged and that the central issue in the case is therefore the proportionality of the disclosure. The applicant accepts that given the nature of the post and the allegation that it is relevant to the post applied for. It is also clear that in accordance with the decision of the Supreme Court in ***L*** he was given and took the opportunity to make representations through his solicitors.

[22] The role of the Court in assessing a judicial review challenge to an ECRC was recently considered by Lord Justice Munby and Mr Justice Beatson in R (B) v Chief Constable of Derbyshire [2011] EWHC 2362. At para65 of the judgment Munby LJ addressed the issue of the Court's role in evaluating an Art8 challenge to a disclosure decision. He stated:

> "65. The function of the court is one of review, not decision on the merits. But what is the appropriate standard of review? That was not an issue considered by the Supreme Court in *L* though it had been touched on tangentially by the Court of Appeal: R (L) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department intervening) [2007] EWCA Civ 168, [2008] 1 WLR 681, paras[40]-[41]. But subsequent authority makes it clear that the applicable standard of review is not the *Wednesbury* test of irrationality; what is required in this sensitive area of human rights is the more intense standard of review described by Lord Steyn in R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532, para [27]. In a case such as this, proportionality requires the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or

reasonable decisions; this goes further than the traditional grounds of review inasmuch as it requires attention to be directed to the relative weight accorded to interests and considerations: R (H and L) v A City Council [2011] EWCA Civ 403, [2011] UKHRR 599, para [41].

66. That is therefore the approach we have to apply when considering the substance of the chief officer's opinion. But if and insofar as there is a 'reasons' challenge – and part of Mr de Mello's attack here goes to the reasons as set out by Ms Davies – the court must not be astute to find failings. I venture to repeat what I said very recently in R (E, S and R) v Director of Public Prosecutions [2011] EWHC 1465 (Admin), para [62], a 'reasons' challenge to a Crown Prosecutor's decision to prosecute which, in the event, was held by the Divisional Court not to have been compliant with the relevant guidance issued by the Director of Public Prosecutions:

> '… a decision such as this is to be read in a broad and common sense way, applying a fair and sensible view to what the decision maker has said … as Lord Hoffmann pointed out in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, reasons should be read on the assumption that, unless she has demonstrated the contrary, the decision maker knew how she should perform her functions and which matters she should take into account.'

And I went on to point out the need to have very much in mind his warning that an appellate court – and the same must also go for this court – must "resist the temptation to subvert the principle that they should not substitute their own discretion for that of the [decision maker] by a narrow textual analysis which enables them to claim that he misdirected himself."

[23] Having assessed the balance which the decision maker has struck in the present case, I am satisfied that the decision maker was plainly aware of, and took into account, the matters referred to in para3(b)(i)-(v) of the applicant's Order 53 Statement. The decision was only arrived at after a full examination of all relevant

matters including the original crime file and was considered at very senior level by the Assistant Chief Constable. In my judgement therefore I see nothing wrong with the assessment that the material ought to be disclosed.

[24] The applicant also contended that simultaneous disclosure to the registered person/prospective employer was in breach of his Art8 rights and procedurally unfair.

[25] The respondent, in my view correctly,submitted that the statutory formula outlined in s115(7), as informed by the ruling of the Supreme Court in ***L***, was properly applied in the present case having regard to the foregoing:

(i) The case was identified as a borderline case;
(ii) all relevant materials were considered by the chief officer;
(iii) the Applicant was given an opportunity to make representations on this issue and, through his solicitor, did so;
(iv) those representations were considered;
(v) the chief officer was aware of the potential for interference with the applicant's private life;
(vi) the chief officer considered the nature of the role applied for and the involvement with young children;
(vii) there was no presumption of disclosure;
(viii) the judgment of the chief officer was that it was proportionate to disclose a restricted text of material to Access NI.

[26] The applicant also contended that the decision to disclose the information to the registered person simultaneously with disclosure to him was in breach of his Art8 rights and procedurally unfair. However, under the Police Act 1997 the responsibility for issuing the disclosure certificate does ***not*** rest with the Chief Constable. S115(9) provides:

> "(9) The Secretary of State *shall* send to the registered person who countersigned an application under this section—
>
> (a) a copy of the enhanced criminal record certificate, and
>
> (b) any information provided in accordance with subsection (8)." [my emphasis]

[27] The statutory role of the Chief Constable is to provide the Department of Justice with information which, in his opinion, might be relevant for the statutory purposes and ought to be included in the ECRC. It is also clear that an applicant can, at any point prior to the issuing of an ECRC by AccessNI, withdraw his application in which case no certificate would issue. By letter dated 21 July 2011 the applicant was advised of the proposed disclosure and could then have decided to withdraw his application. But if he had done so he would have lost an important opportunity to attempt to persuade the Chief Constable that the impugned material should not

be included in the certificate. If he had been successful the applicant would, in all probability, have had little difficulty in taking up the voluntary position with the football club and the potentially devastating consequences of disclosure thereby avoided. He chose, understandably, to exercise his important right and made representations through his solicitor. S115(1) places an obligation on the Secretary of State to issue an ECRC to an individual who makes an application and to send to the registered person who countersigned an application a copy thereof. It would have been open to the applicant's advisers to state, in the event that their representations in opposition to disclosure were rejected, that the application for the certificate was deemed to be withdrawn. Although that was not expressly put in this way in their representations it is tolerably clear that they did not want disclosure to automatically follow should their representations fail.

[28] The requirement of proportionality and procedural fairness relates to every aspect of the process including the solicitor's request in his letter dated 30 June 2011 that no information be disclosed at that stage (see para6 above). Procedural fairness in this case, in light of those representations and the fine balance that the police themselves recognised, required that the respondent should have gone back and given the applicant's solicitor an opportunity to consider his position in relation to the application in light of the failed representations. I note from para6 of Mr Coates' affidavit (3 November 2011) that the procedure adopted by PSNI and AccessNI has been subject to recent review. The review recommended that the current system of issuing dual certificates (to employer and employee) be replaced by a single criminal record certificate that is issued to the applicant only. Under this recommendation the applicant would be responsible for the disclosure of the certificate (Recommendation 7). As pointed out in the previous paragraph it would have been open to the applicant's advisers to state that if the representations were rejected that the application for a certificate should be withdrawn. In that eventuality the issue of disclosure would not arise under the statute since the disclosure duty is triggered by an extant application. It seems to me that the solicitor's request in his letter dated 30 June 2011 that no information be disclosed at that stage was an attempt to achieve just that result. The failure to attempt to accommodate this request disproportionately disadvantaged the applicant who was denied the opportunity he sought.

[29] This was an application for a voluntary post in a football club to which the applicant's own children were connected. Given the age and unsupported nature of the allegation which was only brought to the police's attention many years after the alleged incident which was consistently denied, as well as the potentially devastating consequences for the applicant and his family in the local community and beyond, simple fairness required that the solicitor's modest request for deferral should have been acceded to, thus providing the applicant with the opportunity to protect his own interests without, in any way, compromising the justifiable interests which prompted the police to form the opinion that disclosure was justified.

Conclusion

[30] Accordingly, for the above reasons I conclude that the procedural flaws referred to above resulted in the disclosure constituting a disproportionate interference with the applicant's right to private and family life under Art8.