Judicial Communications Office

9 February 2021

COURT DELIVERS JUDGMENT ON CONTENT OF ENHANCED CRIMINAL RECORD CERTIFICATE

Summary of Judgment

The Court of Appeal[1] today dismissed a challenge to information proposed for inclusion in an Enhanced Criminal Record Certificate ("ECRC") disclosing that the appellant previously stood trial for sexual offences against a child in respect of which he was unanimously acquitted.

Background

In 2014 the PSNI was advised by Access NI that the appellant had applied to take up positions as a volunteer in a community organisation and a childcare assistant in a school. An Enhanced Criminal Record Certificate ("ECRC") was required in relation to each post. The appellant had no criminal convictions but had been charged with a total of 11 counts alleging offences of rape, gross indecency on a child, sexual activity with a child and indecent assault arising out of an alleged sexual relationship with a female complainant between August 2008 and November 2010. During that period the complainant was aged between 12 and 14 years and the appellant was aged between 17 and 19 years. He was unanimously acquitted of all charges at Belfast Crown Court in April 2013.

Section 113(B) of the Police Act 1997 ("the 1997 Act") provides that before the Department of Justice ("the Department") can issue an ECRC it must request any relevant chief officer, in this case the Chief Constable of the PSNI, to provide any information which:

- the chief officer reasonably believes to be relevant for the purpose described in the statement under subsection (2), and
- in the chief officer's opinion, ought to be included in the certificate.

The Department carries out its obligations in respect of ECRCs through Access NI.

The process in this case began in March/April 2014 when an Assistant Chief Constable ("ACC") was the decision maker. He was provided with the investigating officer's case summary and the trial papers including the police interviews with the appellant. The file did not contain any substantial information about the trial or why the appellant was acquitted. Information was requested from the Public Prosecution Service ("PPS") but none was provided. The ACC decided to proceed despite the absence of this information and directed that the appellant should be offered the opportunity to make representations in respect of the ACC's proposed disclosure.

The appellant issued a pre-action protocol letter and the PSNI gave an undertaking not to make the disclosure while the decision-making process was ongoing. Responsibility for the disclosure was then taken over by a Superintendent. He decided that he should review the papers and make a fresh independent decision. He contacted the investigating officer who provided him with information

[1] The panel was the Lord Chief Justice, Lord Justice Treacy and Mr Justice Horner. The Lord Chief Justice delivered the judgment of the Court.

which was in part helpful to the prosecution and in a limited way to the appellant. On 19 September 2014 the Superintendent released what he intended to disclose. The appellant's solicitor responded on 3 October 2014 arguing that it was inappropriate for the facts which underlay the charges to be included. The Superintendent took legal advice and on 26 November 2014 revised the disclosure further as follows: –

> "The information held by police is that the applicant was reported to police in 2011 for an alleged rape and other sexual offences. It was alleged that the applicant was involved in a sexual relationship with a then 12 year old female. The applicant was prosecuted by the Public Prosecution Service and found not guilty at Belfast Crown Court on 25 April 2013."

In further correspondence the appellant's solicitor noted that there was a failure to refer to the unanimous verdict of the jury as well as some other matters. By further correspondence the solicitors asserted that there should be no disclosure. On 2 March 2015, the PSNI responded stating that the decision maker made an informed assessment of the risk that the appellant may pose to children. The fact that the appellant was acquitted was given due consideration. The Superintendent noted the differing thresholds applicable in the context of criminal proceedings and public protection. He formed the belief that the applicant posed a threat to children.

The First Instance Proceedings

On 16 April 2015 the proceedings were initiated. The appellant submitted the Crown Court judge's charge to the jury which noted a number of inconsistencies in the complainant's evidence. It was claimed there had been no reliance on this in the earlier representations and no indication as to how long it had been in the possession of the appellant. It was submitted on behalf of the appellant that the trial judge was in some way imposing a burden of proof on the appellant but the Court did not accept that characterisation. It said the provision of the proposed disclosures by the PSNI to the appellant was designed to enable the appellant to make representations as he saw fit. The trial judge was entitled to take the view that the appellant initially proceeded on the basis that the acquittal spoke for itself and that it was only at the stage of issuing proceedings that it was considered appropriate to identify the nature of the inconsistencies in the evidence of the complainant.

The trial judge decided that the critical question was whether there was lawful consideration of the proposed ECRC having regard to the requirements of fairness and whether or not the decision arrived at was a proportionate decision. The trial judge was critical of the decision-making process and considered that the decision maker was "largely if not completely in the dark as to the reasons why the appellant was unanimously acquitted". He said that all reasonable avenues should have been exhausted in pursuit of this information. He commented that as a result of the disclosure of the charge to the jury it was evident that the complainant's evidence at trial "sustained some serious damage" which was not acknowledged in the Superintendent's affidavit where the new information was "batted off somewhat peremptorily".

Despite the failures in the decision-making process the trial judge concluded that the key issue was whether the decision was proportionate. He considered that the most significant issue related to the reliability of the information upon which the proposed disclosure was based. In assessing reliability the trial judge looked first at the complainant's allegations. He reflected that the unanimous acquittal was a significant outcome but noted, however, that the decision-maker was dissatisfied with a range of significant inconsistencies and discrepancies in appellant's interview. The trial judge, although appreciating the importance of the not guilty finding, considered that the view

arrived at by the Superintendent was proportionate. He suggested modest alterations to the text which the PSNI agreed.

The appeal

The appellant relied on three points in the appeal:

- The trial judge erred in finding that the proposed disclosure would be proportionate in its interference with the appellant's rights under Article 8 ECHR. The implications for the appellant's private life are such that he would be denied the chance to pursue his chosen career even though he was unanimously acquitted of all charges against him. On the facts of the case such an outcome was disproportionate and substantially unfair;
- The trial judge erred in finding that procedural failings could not, in and of themselves, amount to a violation of Article 8 ECHR;
- In the alternative, the trial judge erred in the weight that he gave to the views of the primary decision-maker in holding that he should not interfere with the respondent's proposed form of words.

Case law

The leading case on the principles applicable to the making of a disclosure under section 113(B) of the 1997 Act is R (L) v Commissioner of Police for the Metropolis [2010] 1 AC 410. The trial judge extracted a number of relevant legal principles from that case which were not disputed by the parties and which the Court said it was happy to adopt and set out in paragraph [22] of its judgment. After the trial judge had given his judgment the UKSC returned to this issue in R (R) v Chief Constable of Greater Manchester Police [2018 1 WLR 4079 (see paragraphs [24] to 29].

Role of the appellate court

In R (R) v Chief Constable of Greater Manchester Police the UKSC also looked at the role of the appellate court where the issue is proportionality. Order 59 Rule 3 of the Rules of the Court of Judicature provide that every appeal to the Court of Appeal shall be by way of rehearing. The rehearing is based on the record of the evidence at trial and there are limited circumstances in which new evidence can be introduced. The form of the hearing is by submissions from the parties and questions from the Bench. The trial judge is required to give reasons for the decision. The task of the Court of Appeal is to decide whether there was any error in the first instance decision. The appellate court should not interfere with any discretionary judgment which was properly within the ambit of the discretion available to the trial judge.

Consideration

The Court said the starting point in this case was to recognise how the statutory scheme is intended to work. The Chief Constable is required to provide information which he reasonably believes to be relevant to the protection of children and ought to be included in the ECRC. Once provided with the information it is the responsibility of the employer to determine its impact. Unlike the Chief Constable the employer will know precisely the nature of the employment and the policies, practices and governance arrangements in place to ensure the safety of children. When faced with information such as that in this ECRC the employer will need to make a decision about the extent of any enquiry it considers appropriate. That may include seeking and obtaining documentation in respect of the trial such as the judge's charge and taking into account such information as is

provided by the applicant for the post. The employer should then examine the arrangements in place for child protection within the employment environment and identify the nature and extent of any risk. Having done so the relevant person should then make an assessment of the extent to which the mitigating measures in place within the school or other premises are sufficient to deal with the assessed risk if any. It is only then that a decision about the employment or retention of the applicant can be made.

The Court noted that the Chief Constable has a role in initiating the information but is not in a position to make a detailed assessment of the risk issue. It said it is also clear that the assumption that the provision of the information amounts to a "killer blow" in respect of the application for employment may well be indicative of a misunderstanding of the statutory scheme which could unfairly adversely affect an applicant for employment.

The Court noted there was some evidence in the papers in this case that the purpose of the statutory scheme had been misunderstood by the principal of the school to which the appellant sought employment. The appellant indicated that he had provided the principal with full knowledge of the fact that he had previously been charged with and acquitted of sexual offences when he had first applied for a position with the school. He exhibited an email from the principal stating that the loss of the appellant's skills and contribution to the children's learning would leave a gap in provision not easily filled. The Court said that while it appeared the principal was supportive of the appellant taking up a post in full knowledge of his involvement in the criminal trial the appellant also indicated that it was made clear to him by the principal that in the absence of a clean certificate the school would no longer be able to retain him in its employment. It said there appeared to be an implication that the disclosure of the information by way of an ECRC was itself a determination of unsuitability:

> "That is quite wrong. It is plainly quite contrary to the statutory scheme and such a conclusion is undoubtedly unfair to the appellant. It may be that some consideration needs to be given to the ECRC notice incorporating an express indication that it is for the recipient of the notice to explore the information and make a decision about its effect based on the particular circumstances of their own organisation."

The Court described the careful analysis that should be carried out by the employer or other body. It said the effect on the appellant's chosen career will depend upon the analysis carried out by his prospective employer but accepted that his private life has been affected. One of the submissions made to the Court was that there was a significant public interest in the rehabilitation and reintegration of offenders in society. It said this was an individual who has been acquitted in respect of the charges against him and his exclusion from his chosen profession would require the most careful consideration. The Court accepted this submission but said it did not render the disclosure of the information disproportionate or unfair:

> "This was an allegation of a serious offence which was relevant to the positions applied for and had allegedly occurred relatively recently. The trial itself had been in a public court house and the acquittal was not secret. The judge gave substantial weight to the potential effect on the appellant's employment. We detect no error in effecting the balance in favour of disclosure. We accept that the judge identified procedural failings in the process leading up to the decision. The appellant had, however, an opportunity to make representations and indeed by his participation in these proceedings added to those representations. [The trial judge] had to make his own determination of

proportionality and he did so recognising the earlier procedural failings but taking into account the subsequent representations. His conclusion that the disclosure of the information was necessary to meet the pressing social need to protect children was entirely within his area of discretionary judgment. The final point in relation to the wording of the disclosure is in our view without merit. The suggestions made by the learned trial judge were accepted by the Chief Constable and there is nothing in the words used to indicate how they would offend Article 8 ECHR."

Conclusion

The Court dismissed the appeal but emphasised the obligation on the prospective employer to apply the statutory scheme as it was intended.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk