Doc. No. 2009.035 173 CL&J No. 46 (14 Nov. 2009) 725-728

Enhanced Criminal Record Certificates: Some Knotty Questions

Francis Bennion examines a disappointing early decision of the new Supreme Court

Introductory

Many had high hopes of the new Supreme Court, which started work on 1 October. I did not share this optimism, and regrettably have been proved right as respects the court's early decision in *R (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, which I refer to as *L*. This concerned an enhanced criminal record certificate ('ECRC') issued under the Police Act 1997 s. 115. I discussed these matters in an earlier article.[1]

One hope that has not been realised is that the Justices of the new court would be given the level of supporting staff enjoyed by those of its namesake across the Atlantic. The official website gives the total annual amount spent on judicial assistants *for all courts* as currently a measly £202,000. It does not suggest that this will be increased to accommodate the Supreme Court. James Vallance White, a former Principal Clerk to the Judicial Office, records that the Law Lords cherished the ambition to have this type of assistance for a long time before at last being granted a mere four judicial assistants in 1999.[2] In this connection it is interesting to read the remarks of a Court of Appeal judicial assistant, Greg Fullelove, on the HM Courts Service website:

> 'Nobody escapes drafting his or her fair share of "bench memoranda" - notes for the judges which summarise and analyse the appeal before the Court. It is easy to forget that many appeals are prepared by litigants in person who have not had the benefit of legal advice. In some cases, the papers can be chaotic, the issues confused. It will be up to the assistant to impose order in the memorandum. Watching the best of the bar reasoning the cases of the day is, in itself, an education. However, many assistants agree that it is attendance at the pre- and post-court judges' meetings where the real insights come. Here you witness first hand the judges' reactions to the case as presented on the papers and then later their views on the oral argument.'

A generous provision of first-class help for the Justices would inevitably lead to an improvement in the quality of their judgments. As I will show, the judgments in *L* are seriously deficient. In some places they openly contradict each other. In my view (after sixty years in the law) the Supreme Court should strive to present a united view of the law governing a case in a single agreed judgment arrived at in meetings of the participating Justices. The Human Rights Act 1998 has given renewed force to the concept that the law should be certain. Dissent among Justices, or failure to produce a satisfactory judgment reconciling differences, impedes this worthy aim.

A further way in which the judgments in *L* are disappointing is the way the Justices decided the central point in the case. They held that the duty to protect the applicant's privacy under art. 8 of the European Convention on Human Rights was *equal* to the duty of the relevant

---

[1] 'Protection of Children and Vulnerable Adults: Police Disclosure of Damaging Allegations', pp. 277-280, *ante*, www.francisbennion.com/2009/013.htm.

[2] *The Judicial House of Lords*, eds. Louis Blom-Cooper, Brice Dickson and Gavin Drewry (OUP, 2009), p. 42.

chief officer to safeguard persons who are below the age of 18 or adults who are vulnerable. Neither duty is to trump the other, which renders it difficult if not impossible to decide a case where the duties conflict. (The court rightly held that they did not conflict on the facts of *L*).

Finally, the arguments put to the court in *L* ignored important points I raised in my earlier article on the same topic, referred to above. The conclusions in that article have since been affected by the decision in *L*, so it needs to be read alongside the present article.

The Case of *L*

The appellant L was a woman who wanted to obtain employment in a school as a 'casual midday assistant'. The duties involved supervising the schoolchildren during the lunchtime break both in the school canteen and in the school playground. L hoped to obtain this employment through an agency, Client Services Education ('CSE'), whose business was to provide staff to schools, and by which she was currently employed on other duties. For the purpose of furthering the prospects of her success in obtaining the desired employment,

Page 726

L made an application for an ECRC . The certificate issued in response recorded that L had no criminal convictions but under the heading 'other relevant information disclosed at the chief police officer's discretion' it included the following derogatory details regarding L's treatment of her son:

> '[L] . . . came to police notice in January 2002 when her son, aged 13, was put on the child protection register under the category of neglect. It was alleged that [L] had failed to exercise the required degree of care and supervision in that her son was constantly engaged in activities including shoplifting, failing to attend school, going missing from home, assaulting a teacher at school, and was excluded from school. Additionally, it was alleged that during this period [L] had refused to co-operate with the social services. Her son was removed from the child protection register in June 2003 - after he had been found guilty of robbery and [received] a custodial sentence.'

Lord Scott said[3] that it was plain that it was the chief police officer's opinion that these details were relevant to the employment of L as a 'casual midday assistant' at a school and that they 'ought to be included' in the ECRC. Shortly after it was issued, and CSE became aware of its contents, L was informed by CSE that her services were no longer required.

The question for the Supreme Court was whether the arrangements for ECRCs under the Police Act 1997 were compatible with L's right to respect for her private life under art. 8 of the European Convention on Human Rights. Lord Hope said it has been recognised that respect for private life comprises the right to establish and develop relationships with other human beings. Excluding a person from employment in her chosen field is liable to affect her ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of her private life. She is entitled also to have her good name and reputation protected. As Baroness Hale said[4], the fact that a person has been excluded from employment is likely to get about and, if it does, the stigma will be considerable.

Lord Hope said another aspect of the right to respect for private life needed to be brought into account, as it is directly relevant to the effect on a person's private life of the release of information about him or her that is stored in public records. As Lord Bingham of Cornhill CJ said[5] disclosure of personal information that applicants wished to keep to themselves could in principle amount to an interference with the right protected by art. 8. Buxton J put the point more strongly when he said:

---

[3] Paragraph 55.

[4] *R (Wright) v Secretary of State for Health*, [2009] UKHL 3, para. 36.

[5] *R v Chief Constable of the North Wales Police, Ex p AB* [1999] QB 396, 414.

> '. . . a wish that certain facts in one's past, however notorious at the time, should remain in that past is an aspect of the subject's private life sufficient at least to raise questions under art. 8 of the Convention.'

This was endorsed by Lord Woolf MR, delivering the judgment of the Court of Appeal.[6] There is also a common law presumption against disclosure.[7]

Article 8(2)

It was established therefore that L's right under art. 8 was infringed unless her ECRC was saved by the words in art. 8(2) relating to what 'is necessary in a democratic society . . . for the protection of health or morals . . .' In *L* Lord Hope said that 'the state has a duty to provide a scheme which complies with art. 8(2)'.[8] He endorsed[9] a dictum of Lord Woolf in *R (X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65. After noting that it had not been suggested in that case that the legislation itself contravened art. 8 Lord Woolf had gone on:

> 'No doubt this is because disclosure of the information contained in the certificate would be "in accordance with the law" and "necessary in a democratic society" . . . This country must, through its legislature, be entitled to enable information to be available to prospective employers, where the nature of the employment means that particular care should be taken to ensure that those who are working with the appropriate categories of persons can be relied on to do so, without those in their care coming to harm if they are under the age of 18 or vulnerable adults.'

After endorsing that dictum Lord Hope said the issue is essentially one of proportionality.

> 'On the one hand there is a pressing social need that children and vulnerable adults should be protected against the risk of harm. On the other there is the applicant's right to respect for her private life. It is of the greatest importance that the balance between these two considerations is struck in the right place.'[10]

In upholding the inclusion of the derogatory details in L's ECRC (given above), the Supreme Court held that the proportionality test had been met. Lord Hope said that the importance of the matter is shown by the recent large number of ECRCs including information provided by a chief officer of police under the Police Act 1997 s. 115(7), namely 17,500 for 2007/2008 and 21,045 for 2008/2009.[11]

Despite endorsing Lord Woolf's dictum in *R (X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65 cited above, Lord Hope said that the effect of the approach taken in that case was to tilt the balance against the applicant too far and 'encourage 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 correct approach . . . is that neither consideration has precedence over the other . . .'. Lord Hope added that the words 'ought to be included' in s. 115(7)(b) require to be given much greater attention.[12]

On the contrary Lord Scott preferred the approach of Lord Woolf. He said:

> 'I would . . . endorse the approach taken by Lord Woolf CJ in *R (X) v Chief Constable of the West Midlands Police* [2005] 1WLR 65 . . . I agree that the approach accords priority to

[6] [1999] QB 396, 429.
[7] *L*, para. 37.
[8] Paragraph 21.
[9] Paragraph 41.
[10] Paragraph 42.
[11] Ibid.
[12] Paragraphs 44 and 45.

the social need to protect the vulnerable as against any art. 8 rights the applicant for a section 115(7) ECRC may otherwise be entitled to. The applicant, by making the application, authorises the issue of the certificate in accordance with the criteria prescribed by paragraphs (a) and (b) of the subsection. If the decision of the chief police officer to include in the certificate the "additional information" is a decision which cannot be challenged as being unreasonable, having regard to the purpose described in the application (see section 115(7)), an art. 8 challenge to the decision is not, in my opinion, open to the applicant.'

Lord Saville said merely:

'I have had the advantage of reading in draft the judgment of Lord Hope. For the reasons that he gives I would dismiss this appeal.'

Lord Brown also agreed with Lord Hope.

Lord Neuberger said:

'. . . section 115(6)(a)(ii), as expanded by section 115(7)(a), requires the inclusion of a different category of material . . . First, it may frequently extend to allegations of matters which are disputed by the applicant, or even to mere suspicions or hints of matters which are disputed by the applicant. Secondly, the threshold for inclusion in the ECRC is subjective and very low: information must be included in an ECRC if, in the "opinion" of the chief officer, it "might be relevant". So, information would often properly fall within section 115(7)(a) if it was not in fact relevant, or was only very peripherally relevant, to the applicant's suitability for the post in question. It could be information which would unfairly blacken her name, unjustly prejudice her prospects of obtaining the post or any other post for which an ECRC was required (e.g. a spent conviction for dishonesty), or simply embarrass her.'[13]

Lord Neuberger went on to hold that the position would be impossible to justify were it not for s. 115(7)(b).

'While paragraph (a) of s. 115(7) sets a low hurdle for the inclusion of material under s. 115(6)(a)(ii), indeed a hurdle which, if it were the sole hurdle, would be too low to satisfy the art. 8 rights of applicants, paragraph (b) provides for the requisite balancing exercise that justifies the conclusion that there is no art. 8 infringement. In other words, the legislation, through the medium of s. 115(7)(b), rightly acknowledges that the relevant public authority, namely the chief officer, must balance the need to protect those vulnerable people whom an ECRC is designed to assist with the art. 8 rights of those in respect of whom an ECRC is issued . . . in making that decision, there will often be a number of different, sometimes competing, factors to weigh up. Examples of factors which could often be relevant are the gravity of the material involved, the reliability of the information on which it is based, whether the applicant has had a chance to rebut the information, the relevance of the material to the particular job application, the period that has elapsed since the relevant events occurred, and the impact on the applicant of including the material in the ECRC, both in terms of her prospects of obtaining the post in question and more generally. In many cases, other factors may also come into play, and in other cases, it may be unnecessary or inappropriate to consider one or more of the factors I have mentioned. Thus, the material may be so obviously reliable, relevant and grave as to be disclosable however detrimental the consequential effect on the applicant.'[14]

On the nature of the balancing exercise Lord Neuberger agreed with Lord Hope. This 4-1 decision in favour of equal weight to safeguarding and art. 8 compliance is unsatisfactory in the only difficult case, namely where the facts are equally weighted. If the chief officer is

[13] Paragraph 77.

[14] Paragraphs 80 and 81.

unable to make up his mind because the arguments are so close, a deciding principle, such as was favoured by Lord Scott (see above), is surely needed.

An Opportunity to Make Representations

In *L* the Supreme Court introduced a new right to make representations. Lord Hope said:

> '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.'[15]

Lord Brown supported Lord Hope. He said that the balance 'needs to be re-struck less unfavourably to the prospective employee'. One way of doing this is 'by requiring the chief officer in any borderline case, before issuing the certificate, to give the prospective employee an opportunity to state why the information which the officer proposes disclosing ought not in fact to be disclosed'.[16]

Lord Neuberger said:

> 'In some, indeed possibly many, cases where the chief officer is minded to include material . . . on the basis that he inclines to the view that it satisfies section 115(7)(b), he would, in my view, be obliged to contact the applicant to seek her views, and take what she says into account, before reaching a final conclusion . . . where the chief officer is not satisfied that the applicant has had a fair opportunity to answer any allegation involved in the material concerned, where he is doubtful as to its potential relevance to the post for which the applicant has applied, or where the information is historical or vague, it would often, indeed perhaps normally, be wrong to include it . . . without first giving the applicant an opportunity to say why it should not be included.'[17]

These dicta from three different judgments fail to deal with the possibility that even after representations have been made the chief officer may be left in doubt. They also leave the

general position somewhat confused. No less than nine cases are given where there may be a right to make representations:

1. '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.'
2. 'Where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated.'
3. 'Where the information may indicate a state of affairs that is out of date or no longer true.'
4. 'Where the chief officer is not satisfied that the applicant has had a fair opportunity to answer any allegation involved in the material concerned.'
5. 'Where he is doubtful as to its potential relevance to the post for which the applicant has applied.'
6. 'Where the information is historical or vague.'
7. 'In any borderline case.'

[15] Paragraph 46.
[16] Paragraph 63.
[17] Paragraph 82.

8. ‘In some, indeed possibly many, cases.’
9. ‘Where he is doubtful as to its potential relevance.’

We might have expected the new Supreme Court to do better than this in a vital matter affecting thousands of people. I have suggested that in its judgment a court may usefully express its determination of the legal meaning of a relevant enactment in the form of an articulation of the unexpressed words of the enactment.[18] In connection with this I wrote:

> ‘It would improve the clarity of legal reasoning if judges accepted that when they construe a statute what they are in substance doing is declaring or making explicit certain of its implied or unexpressed provisions. It is helpful in many ways when judges accept a responsibility to articulate what seems to them an appropriate version of those provisions which their judicial function requires them to concretise.’[19]

The present is a case where it would have been immensely valuable if the Supreme Court had produced a single judgment acting on this suggestion. As it is I can only suggest the following, based on the above:

> Before providing under s. 115(7) of the Police Act 1997 information relating to any person, a chief officer of police shall afford him an opportunity to make within a stated period representations in writing concerning the information, and shall consider any representations so made.

It would be desirable for the Home Office to issue more detailed guidance for chief officers. This could cover the question of whether a hearing might be held in some cases, and whether at such a hearing the applicant would have a right to be represented.

Has The Applicant Asked For It?

An ECRC can be issued only on the application of the person to whom it relates. It might therefore be thought that the applicant could not complain about anything contained in the certificate. The judgments in *L* deal with this point. Lord Hope said it was no answer to concerns regarding contravention of art. 8 that the ECRC is issued on the application of the persons concerned.

> ‘It is true that they can choose not to apply for a position of the kind that requires such a certificate. But they have in reality no free choice in the matter if an employer in their chosen profession insists, as he is entitled to, on an ECRC The answer to the question whether there is any relevant information is likely to determine the outcome of their job application. If relevant information is disclosed they may as a result be cut off from work for which they have considerable training and experience. In some cases they could be excluded permanently from the only work which is likely to be available to them. They consent to the application, but only on the basis that their right to private life is respected.’[20]

Lord Scott dissented from the proposition in the last sentence of this dictum.[21]

Lord Neuberger said:

> ‘Counsel for the Commissioner of Police argued that . . . art. 8 was not engaged, because, under section 115(1)(a), an ECRC is issued only on the application of the applicant. The argument amounts to this, that a person cannot complain that disclosure of information about her infringes her art. 8 rights where she has consented to the disclosure, and *a fortiori* where she has applied for the disclosure, as happened in this case, pursuant to section 115(1). I have no hesitation in rejecting this

[18] *Bennion on Statutory Interpretation* (5th edn, 2008), s. 179.
[19] Ibid., pp. 506-507.
[20] Paragraph 43.
[21] See para. 59.

argument. Where the legislature imposes on a commonplace action or relationship, such as a job application or selection process, a statutory fetter, whose terms would normally engage a person's Convention right, it cannot avoid the engagement of the right by including in the fetter's procedural provisions a term that the person must agree to those terms.'[22]

A Reminder

In *L* the Supreme Court did not mention some relevant points made in my previous article on this topic, referred to above. These mainly relate to the presumption of innocence and to information which in law is defamatory. Home Office guidance is needed on these. For example police forces ought surely to be advised not to include in an ECRC material which contravenes the European Convention on Human Rights, or indeed common law principles, by offending against the presumption of innocence or which is or may be actionable in tort because it is defamatory.[23]

Repeal of Police Act 1997 s. 115

The Police Act 1997 s. 115 was repealed by the Serious Organised Crime and Police Act 2005. However the case of *L* concerns an ECRC that was issued under s. 115 before the repeal took effect. Section 163(2) of the 2005 Act replaced s. 115 by a new s. 113B, which is of similar effect. This means that the decision and dicta in *L* continue to apply to the replacing provisions. It makes this article applicable to these also, with the necessary modifications.

[22] Paragraph 73.

[23] For further views on the new Supreme Court see my forthcoming article in the *Commonwealth Lawyer*, www.francisbennion.com/2009/036.htm.