THE COURT ORDERED that no one shall publish or reveal the name or address of the appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the appellant or of any member of his family in connection with these proceedings.

Trinity Term
[2018] UKSC 47
On appeals from: [2016] EWCA Civ 490

JUDGMENT

R (on the application of AR) (Appellant) *v* Chief Constable of Greater Manchester Police and another (Respondents)

before

Lord Kerr
Lord Reed
Lord Carnwath
Lord Hughes
Lord Lloyd-Jones

JUDGMENT GIVEN ON

30 July 2018

Heard on 21 November 2017 and 23 April 2018

Appellant
Hugh Southey QC
Anita Davies
(Instructed by
Stephensons Solicitors
LLP)

Respondent (1)
Jenni Richards QC
Catherine Dobson
(Instructed by Greater
Manchester Police Legal
Department)

Respondent (2)
Jonathan Moffett QC
Christopher Knight
(Instructed by The
Government Legal
Department)

Respondents:
(1) Chief Constable of Greater Manchester Police
(2) Secretary of State for the Home Department

LORD CARNWATH: (with whom Lord Kerr, Lord Reed, Lord Hughes and Lord Lloyd-Jones agree)

Introduction

1. This appeal concerns the legality under the Human Rights Act 1998 and the European Convention on Human Rights and Fundamental Freedoms ("Human Rights Convention" or the "Convention") of an Enhanced Criminal Record Certificate ("ECRC") issued in respect of the appellant ("AR") under section 113B of the Police Act 1997. The certificate gave details of a criminal charge for which he had been tried and acquitted. The Court of Appeal held that the information contained in the certificate involved no breach of his rights under either article 6.2 (presumption of innocence) or article 8 (right to respect for private and family life). Permission to appeal was given solely in respect of article 8. The main issue in short is whether the admitted interference with his private life involved in the disclosure was justified, having regard in particular to what is said to be the limited utility to its recipients of the information so disclosed. The appeal also raises questions as to the proper role of the appellate courts in reviewing the judge's finding of proportionality under the Convention.

The legislation

2. Part V of the Police Act 1997 provides a legislative framework for the disclosure of criminal records, for example where required in connection with applications for employment or licences. It has been subject to a number of amendments since then. The following references are to the Act as it was in the period material to the certificates issued in this case, that is, between March 2011 and August 2012.

3. Significant amendments made to the scheme under the Protection of Freedoms Act 2012 ("the 2012 Act") came into effect in September 2012. These followed a report by Sunita Mason, the Independent Advisor for Criminality Information Management: *A Common Sense Approach - A review of the criminal records regime in England and Wales* ("the Mason review"). In her Preface she spoke of -

> "… a degree of dissatisfaction with a system that has evolved with the laudable aim of protecting vulnerable people but is now viewed by some as intrusive and an unnecessary bar to

> employment. There is also concern that some people may be treated as 'guilty until proven innocent'."

She recommended "a number of common sense actions to rebalance the system". Although not directly applicable to the case before us, the changes throw some light on the perceived weaknesses of the system at the time, and will need to be taken into account in considering references to our judgment in the future. Also in September 2012 (again in line with the Mason recommendations) there came into force provisions enabling a person dissatisfied with the content of an ECRC to apply for its review by the Independent Monitor established under the Police Act 1997 (sections 117A, 119B). A further important change occurred on 1 December 2012 when the functions of the Secretary of State, formerly carried out by the Criminal Records Bureau, were transferred to the Disclosure and Barring Service ("DBS") by an order made under section 88 of the 2012 Act.

4. The 1997 Act as amended provides for three forms of certificate, only the third of which is in issue in the appeal. Section 112 provides for the issue of "criminal conviction certificates" ("CCCs"), giving prescribed details of every conviction held in central records, not including "spent convictions" (section 112(3)); or stating that there is no such conviction (section 112(2)). CCCs are available to any applicant over 16 on payment of a fee. Section 113A provides for the issue on a more restricted basis of "criminal record certificates" ("CRCs") which differ from CRCs in particular in that they include details of spent convictions and cautions (section 113A(6)). Under section 113A(2) an application for a CRC must be countersigned by a "registered person" with a statement by the registered person that the CRC is required for the purposes of an "exempted question". By section 113A(6) "exempted questions" are ones in respect of which certain provisions of the Rehabilitation of Offenders Act 1974 are disapplied. Typically, they include questions to assess the suitability for admission to certain professions, or for certain offices or employments; or to hold certain licences or permits, or to work with children or vulnerable adults. A "registered person" is a person listed in the register maintained by the Secretary of State under section 120(1) as likely to ask such questions, such as employers or prospective employers, or bodies responsible for appointment to certain voluntary roles, or for granting certain types of licences.

5. Section 113B, which is in issue in this case, deals with a third category "enhanced criminal record certificates" ("ECRCs"). Like CRCs they are issued again on an application countersigned by a registered person for the purposes of an exempted question, but can contain additional information. The relevant definition is in section 113B(3) and (4):

> "(3) An enhanced criminal record certificate is a certificate which -

> (a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records and any information provided in accordance with subsection (4), or
>
> (b) states that there is no such matter or information.
>
> (4) Before issuing an enhanced criminal record certificate the Secretary of State must 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."

(In September 2012, following a recommendation of the Mason review, section 4(a) was amended to refer to information which the chief officer "reasonably believes to be relevant": 2012 Act section 82(1)(c).)

6. Thus, there is an important difference between the contents of CRCs and ECRCs. The information included in a CRC is limited to the facts of convictions or cautions or their absence. By contrast, an ECRC includes information on the basis simply of the chief officer's opinion as to its relevance, and whether it "ought to be included in the certificate".

7. In the case of an ECRC, it must further be shown that the exempted question is being asked for a particular prescribed purpose. The Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002/233) prescribed the purposes for which an ECRC might be required (regulation 5A). They included a range of matters, starting with various categories of work with children (defined in regulation 5C) and with adults (regulation 5B), and extending to such matters as obtaining licences under the Gambling Act 2005 or the National Lottery etc Act 1993, and assessing suitability for employment related to national security, and suitability to obtain a taxi driver licence (regulation 5A(c)-(zf)).

The present case - the facts

8. On 21 January 2011 the appellant ("AR"), then aged nearly 33, was acquitted of rape by the Crown Court sitting at Bolton. He was a married man with children, of previous good character, and a qualified teacher, but was working at the time as a taxi driver. It had been alleged that, shortly after 1.00 am on 4 November 2009, he had raped a 17-year-old woman, who was a passenger in a taxi driven by him. His defence was that there had never been sexual contact with the alleged victim. Both he and the complainant gave evidence and were cross-examined at the trial. There was no scientific evidence to support or undermine the allegation.

9. Following his acquittal, he applied for an ECRC in connection with an application for a job as a lecturer. On 22 March 2011 an ECRC ("the first ECRC") was issued which, under the heading "other relevant information disclosed at the Chief Police Officer's discretion", contained the following statement about the charge and acquittal:

> "On 4/11/09 police were informed of an allegation of rape. A 17 year old female alleged that whilst she had been intoxicated and travelling in a taxi, the driver had conveyed her to a secluded location where he forcibly had sex with her without her consent.
>
> AR was identified as the driver and was arrested. Upon interview he stated that the female had been a passenger in his taxi, but denied having sex with her, claiming that she had made sexual advances towards him which he had rejected. Following consideration by the Crown Prosecution Service, he was charged with rape of female aged 16 years or over, and appeared before Bolton Crown Court on 21/01/11 where he was found not guilty and the case was discharged."

On 20 April 2011 AR submitted an objection to the contents of the certificate, stating:

> "There is no conviction. The jury rejected the complainant's evidence and the disclosure of the allegation is so prejudicial as to prevent me from being fairly considered for employment. Even if the disclosure of the allegation was possibly appropriate the disclosure fails to provide a full account of the evidence given and how the jury came to its conclusion. It is

> wrong, unfair and grossly prejudicial [that] I should have to defend myself every time I apply for employment after the jury have ruled I am an innocent man."

10. The disclosure was upheld on 16 May 2011 by Inspector Kynaston (the officer responsible for the initial decision). AR then appealed to the Information Governance Unit ("IGU") of the Greater Manchester Police in a letter dated 2 June 2011. His letter pointed out that he was a qualified teacher and wanted to pursue that career, but that "now, when I apply for jobs, this rape allegation is disclosed on my CRB and therefore employers will not consider me".

11. The appeal was rejected. The panel took account of a Memorandum dated 20 March 2012, on a standard form, prepared by a Ms Wilson, and signed also by Inspector Kynaston. (I understand that the form was part of the so-called QAF documents, to which I will refer below: para 34.) She noted AR's application for the post of lecturer, and stated her view that the information was "relevant to the post applied for and ought to be disclosed". In answer to a question as to the relevance of the information, she noted that the position of lecturer would give the opportunity for the applicant to befriend vulnerable females of a similar age to the victim, with the risk that he might use his role "to abuse his trust and authority and commit similar offences".

12. In answer to the question "Do you believe the information to be of sufficient quality to pass the test", she said:

> "I believe the information is of sufficient quality to pass the required test because:
>
> > There was sufficient evidence for the CPS to authorise the applicant being charged with Rape, indicating that they believed there to be a realistic prospect of conviction. If the CPS had not believed the allegation, they would not have authorised the charge. This indicates that on the balance of probabilities the allegation was more likely to be true than false.
> >
> > Although the applicant was found not guilty by the jury, the test for criminal conviction is beyond all reasonable doubt, which is higher than that required for CRB disclosure purposes. Therefore the applicant's acquittal does not prove that he was innocent, or even that the jury

> thought he was innocent, just that he could not be proved guilty beyond all reasonable doubt …"

She then reviewed the details of the case at trial, referring for example to the trial judge's comment on the inconsistencies in the complainant's account, which she thought could plausibly be attributed to her admitted intoxication. Ms Wilson concluded this section:

> "Although the IGU review has raised that the acquittal indicates that the allegation might not be true, the legislation and guidance is clear that allegations that might not be true can be disclosed, as the test required for CRB disclosure purposes is lower than this.
>
> Due to the above, I believe that the information is more likely to be true than false and is not lacking in substance, and it is reasonable to believe that the information might be true, and therefore it passes the required test."

13. In answer to the question "do you consider the information is both reasonable and proportionate to disclose", she said that it was. It was relatively recent, and although isolated was "very serious as it relates to an alleged rape using force, by a stranger". She added:

> "If the applicant repeats this alleged behaviour in the [position applied for], vulnerable people could be caused serious emotional and physical harm."

She recognised that disclosure would have an impact on AR's human rights as "he may fail to gain employment in his chosen profession", but this would not prevent him gaining employment in another profession which does not require an enhanced CRB check. She thought it important that the potential employer was made aware of this allegation "in order that they can make an informed recruitment decision and act to safeguard vulnerable people"; and that the potential risk to vulnerable people outweighed the effect of disclosure on his human rights. The Memorandum ended with a comment that the disclosure text was "accurate, balanced, and not excessive … There is no intimation of the applicant's guilt or otherwise in the text".

14. On 28 March 2012 a second ECRC was issued, this time in connection with an application by AR for a licence to work as a private hire driver. The ECRC contained the same information as before. AR wrote to the Criminal Records Bureau

("CRB"), in similar terms to his earlier letter, with further information about his academic qualifications, and his family, and commenting:

> "This will affect the rest of my life and future as nobody will employ me to teach with this disclosed on my CRB."

The disclosure was confirmed by the CRB on 7 August 2012. An internal note indicated that the letter was treated as offering no new information, and as covered by the previous consideration.

The proceedings

15. The present proceedings for judicial review were issued on 21 December 2012. They came before HH Judge Raynor QC (sitting as a Deputy High Court judge), who dismissed the claim in a judgment given on 5 September 2013 ([2013] EWHC 2721 (Admin)). He identified three issues (para 1):

> "(a) whether the disclosure was a breach of the presumption of innocence under article 6.2 of the European Convention on Human Rights;
>
> (b) whether the disclosure was procedurally unfair because it was inconsistent with the claimant's acquittal and/or occurred without consultation, and
>
> (c) whether the retention and disclosure of data regarding the acquittal is and was a breach of article 8 of ECHR."

16. As to article 6.2, he held, having regard in particular to the guidance of the European Court of Human Rights in *Allen v United Kingdom* (2013) 36 BHRC 1; (2016) 63 EHRR 10, that the disclosure involved no breach of that article. The disclosure did not suggest that AR should have been convicted, or that he in fact committed the acts complained of (para 55). Nor was there any procedural unfairness in respect of the decision under challenge in March 2012:

> "When making that decision, account was taken of his previous complaints regarding the March 2011 disclosure, there had been no legal challenge to that disclosure and the Chief Constable in my view was entitled to proceed upon the basis

> that the claimant's complaints were as previously stated. In the event it is plain that the police in the March 2012 review anticipated and considered the matters that the claimant later raised in his letter of 22 June 2012 and, as submitted by the defendants, no suggestion has been made in these proceedings of any further substantive matters that the claimant would have wished to raise." (para 40(e))

The judge also rejected the suggestion that the police, as part of the decision-making process, should have obtained a full trial transcript; a transcript of the summing up was sufficient (para 40(b)).

17. In relation to article 8, he referred in some detail (para 30) to the leading authority of *R (L) v Comr of Police of the Metropolis* [2009] UKSC 3; [2010] 1 AC 410; ("*L's case*"). He concluded (paras 39-40) that the disclosure was "reasonable, proportionate and no more than necessary to secure the objective of protecting young and vulnerable persons". He accepted that the review had proceeded on the "false premise" that the CPS decision to charge itself indicated that the allegation was more likely to be true than false, but considered that the review was carefully considered and fair. On the substance of the allegation he said:

> "The fact of acquittal was recognised, and in my view it was right to comment that nothing could be assumed from the fact of acquittal other than that the jury was not satisfied beyond reasonable doubt of guilt.
>
> Whilst I do not consider that a firm or reliable conclusion as to whether the complainant's account is more likely to be true than false can be gathered from the transcript alone, I am quite satisfied that the Chief Constable was fully entitled to conclude that it was 'not lacking in substance, and that it [was] reasonable to believe that the information might be true'. In my judgment that is a sufficient basis for disclosure (subject to the issue of proportionality), given the other factors reasonably relied upon by the Chief Constable as justifying disclosure as stated in the review, such as the seriousness of the alleged offence, its relevance to the position applied for and its comparatively recent occurrence." (paras 40(c)-(d))

18. On the question of proportionality, having noted that the claimant's employment difficulties had been taken into account, he said:

> "In my judgment, the Chief Constable was justified in concluding that the potential risk to the vulnerable if the claimant obtained a private hire driver's licence and had acted as alleged by the complainant outweighed the detriments that would be caused to him by the disclosure and the interference with his article 8 rights and that disclosure were both justified and proportionate. I am satisfied that the disclosure in the March 2012 ECRC Certificate was no more than was necessary to meet the pressing social need for children and vulnerable adults to be protected and that the balance between that need and respect for the claimant's article 8 rights was struck in the right place." (para 40(f))

19. In the Court of Appeal, McCombe LJ (with whom Lord Dyson MR, and David Richards LJ agreed) dealt at some length with the article 6.2 issue. He reviewed the authorities, domestic and European, including in particular the decisions of the Supreme Court in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18; [2012] 1 AC 48, and of the Grand Chamber in *Allen v United Kingdom* (above). He summarised the effect of those authorities (by reference to the words of Lord Hope at para 111 of *Adams*): that "it is not open to the state to undermine the effect of an acquittal" (para 54). He accepted that there was "some unfortunate language" in the reviewing officer's reasoning:

> "I have in mind here in particular the suggestion that the decision to prosecute indicated that on a balance of probabilities the allegations were more likely to be true than false and the statement of the officer's own conclusion at the end that the 'information might be true'. Nonetheless, a statement that the allegations were more likely to be true on the balance of probabilities does not cast doubt on an acquittal in view of the different, and more exacting, standard of proof in criminal proceeding …" (para 58)

20. He concluded:

> "Taken as a whole, it seems to me that the issue of the certificate did not undermine the appellant's acquittal. Nowhere is it said that he was in truth guilty of the offence. The purport of the certificate is to state the fact of the allegation and of the acquittal. It is no doubt implicit that this is an alert to the potential employer of those facts as to a possible risk to the vulnerable. However, that does not, to my mind, undermine the effect of the acquittal. The effect of the acquittal is that the jury

> was not satisfied, so that they were sure, that the appellant was guilty. The effect of indicating facts from which others may perceive a risk from a particular individual does not contradict the effect of that verdict." (para 60)

21. He dealt more shortly with article 8, relying on the guidance of the Supreme Court in *L's case*. He dismissed the complaint of procedural unfairness, for substantially the same reasons as the judge (para 66). On the roles respectively of the judicial review judge, and the Court of Appeal, he followed the judgment of Beatson LJ in *R (A) v Chief Constable of Kent* [2013] EWCA Civ 1706; 135 BMLR 22 ("*R (A)*"), to which I will need to return. Applying this approach McCombe LJ concluded that the appellate court should only consider the issue of proportionality for itself if it finds that the judge has made "a significant error of principle". He found no such error in Judge Raynor's judgment (paras 75-76).

R (L) v Comr of Police of the Metropolis

22. As already noted, the leading authority on the operation of the ECRC regime (as it appeared in its original form in section 115(6)-(7) of the 1997 Act), and on its relationship to article 8, is the decision of the Supreme Court in *L's case*.

23. In the first judgment, Lord Hope described the background to the legislation, which had given effect, following consultation, to proposals in a Government White Paper, *On the Record: The Government's Proposals for Access to Criminal Records for Employment and Related Purposes in England and Wales* (1996) (Cm 3308). He referred (paras 4-5) to paras 29 and 30 of the White Paper, where it was explained that local records held by police forces contained "a range of information about individuals, including convictions and cautions for minor offences as well as information going beyond the formal particulars of convictions", which might be of legitimate interest to those considering employing individuals for particularly sensitive posts; and that it was thought right for such information to be disclosed "where there are particularly strong grounds for it, such as to combat the risk of paedophile infiltration of child care organisations"; but that "stricter guidelines on what may be disclosed would provide reassurance to those subject to checking …".

24. Before *L's case* the leading authority had been the decision of the Court of Appeal in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068; [2005] 1 WLR 65 ("*X's case*"). That case, like the present, involved a failed criminal charge; but not an actual acquittal following trial. The applicant had applied for a job as a social worker. Although he had no previous convictions, he had once been charged with indecent exposure, but the proceedings had been discontinued when the alleged victim failed to identify him. The ECRC issued by the Chief

Constable contained details of the allegations of indecent exposure under the heading of "other relevant information".

25. The applicant's challenge was rejected by the Court of Appeal. Lord Woolf CJ (paras 36-37) thought that the Act imposed on the Chief Constable a duty to disclose "if the information might be relevant, unless there was some good reason for not making such a disclosure". He inferred that, in the view of Parliament, it was important for the protection of children and vulnerable adults that information be disclosed "even if it only might be true". Given the statutory underpinning of the certificate, he saw little prospect of a successful challenge under article 8(2) of the Human Rights Convention, "absent any untoward circumstance …", adding:

> "I accept that it is possible that there could be cases where the information should not be included in the certificate because it is disproportionate to do so; the information might be as to some trifling matter; it may be that the evidence made it so unlikely that the information was correct, that it again would be disproportionate to disclose it …" (para 41)

26. In *L's case* Lord Hope saw this passage as "a significant departure from the way the White Paper envisaged the scheme would be operated" (para 38). Its effect had 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: Human Rights Act 1998, section 3(1). But in my opinion there is no need for those words to be read down or for words to be added in that are not there. All that is needed is to give those words their full weight, so that proper consideration is given to the applicant's right to respect for her private life." (para 44)

27. *L's case* itself did not involve a criminal charge. The claimant had been employed by an agency providing staff for schools, which required her to apply for an ECRC. The certificate disclosed that she herself had no criminal convictions, but gave details about her child, who had been included on the child protection register on the ground inter alia of alleged inadequate parental supervision by her. It also

referred to allegations that she had refused to co-operate with social services. The agency ended her employment.

28. She brought judicial review proceedings, claiming that the disclosure was in breach of her right to respect for private life under article 8 of the Convention. Her claim failed. It was held in summary that, although article 8 was engaged, the essential issue was whether the disclosure was a proportionate interference with her private life; that in cases of doubt, the applicant should be consulted before making the disclosure; but that, in the particular circumstances of the case, the significance of the information in respect of risk to children outweighed the prejudicial effect which disclosure had on her employment prospects. As Lord Hope said (para 48):

> "… there is no doubt that the facts that were narrated were true. It was also information that bore directly on the question whether she was a person who could safely be entrusted with the job of supervising children in a school canteen or in the playground. It was for the employer to decide what to make of this information, but it is not at all surprising that the decision was that her employment should be terminated."

29. In a concurring judgment, Lord Neuberger thought it realistic to assume that in the majority of cases an adverse ECRC was likely to represent "a killer blow" to the hopes of a person aspiring to a post within the scope of the section (para 75). He observed that disclosable information under section 115 "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"; and that, taken on its own, the statutory test of relevance set too low a hurdle to satisfy article 8. The qualifying requirement to consider whether it "ought to be included" provided "the requisite balancing exercise" necessary to avoid breach of article 8 (paras 77-80). He gave examples of the factors likely to be relevant:

> "… the legislation, through the medium of section 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 article 8 rights of those in respect of whom an ECRC is issued.
>
> Having decided that information might be relevant under section 115(7)(a), the chief officer then has to decide under section 115(7)(b) whether it ought to be included, and, 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." (paras 80-81)

Guidance - statutory and non-statutory

30. Following the initial hearing the court sought more detailed information about the guidance available both to chief officers and to potential employers as to the operation of the ECRC system, and also any evidence about its impact in practice on those affected. We were interested in particular to see what advice was or is given as to the test for the reliability of information, and what if anything is said about disclosures following a trial and acquittal. The resulting picture is not entirely clear or consistent.

31. As has been seen (para 6 above), the Mason review recommended a stricter test of relevance, but it contained no discussion of the test of reliability. It contained some discussion of the ECRC system, with examples, but no reference was made to the issue of disclosure following trial and acquittal.

32. At the time of the decisions with which this appeal is concerned there was no statutory guidance regarding the application of the ECRC regime. Section 113B(4A), which came into force on 10 September 2012, requires the chief officer to have regard to guidance published by the Secretary of State. The current guidance is the *Statutory Disclosure Guidance* (2nd ed, August 2015). Under the heading "Information should be sufficiently credible", it states:

> "This will always be a matter of judgement, but the starting point will be to consider whether the information is from a credible source. … In particular, allegations should not be included without taking reasonable steps *to ascertain whether*

> *they are more likely than not to be true*." (para 18, emphasis added)

The same wording appeared in a version available in some form in July 2012: see *R (A)* at para 12. It seems likely, as Mr Southey QC suggests, that Ms Wilson's use of the expression "more likely to be true than not" reflected some equivalent guidance available at the time, but the actual source has not been identified.

33. The 2015 guidance (like the 2012 version) also addresses the issue whether the information "ought to be included in the certificate", and that of proportionality: whether disclosure pursues "a legitimate aim", and if so whether it is proportionate, "weighing factors underpinning relevancy, such as seriousness, currency and credibility against any potential interference with privacy" (para 22). Nowhere does the statutory guidance address the question of disclosure of criminal allegations following a trial and acquittal.

34. There was at the material time non-statutory guidance in the form of a so-called Quality Assurance Framework ("QAF"). This was described by Mr Moffett QC, for the Secretary of State, as a "non-statutory suite of documents and processes", including "specific documents concerning all aspects of the process". Ms Richards QC for the Chief Constable told the court that it had been originally developed between ACPO (the Association of Chief Police Officers) and the CRB (Criminal Records Bureau) to provide "a standardised framework under which to process, consider and disclose police information for Enhanced Criminal Records and ISA registration checks". She told us that the standard forms used in the present case were part of the then current QAF (Version 7). She referred us, for example, to one of the QAF documents, "GD2 Disclosure Text Good Practice Guidance", in which the purposes of disclosure were said to be to "convey non-conviction information that may identify a potential risk to the vulnerable." Among the listed criteria were:

> "3. It should not include any unnecessary detail or information; only relay the relevant facts.
>
> 4. The disclosure text should be balanced and neutral in tone, offering no opinion, assumption or supposition …"

Again we were not referred to any specific reference to the treatment of acquittals.

35. Mr Moffett referred us to a more recent document issued by the DBS: "Quality Assurance Framework - an applicant's introduction to the decision-making

process for Enhanced Disclosure and Barring Service checks" (March 2014). It discusses the "three primary tests", described as tests of "Relevance", "Truth/Substantiation" and "Proportionality". Under the heading "Substantiation" (p 9):

> "The weight of evidence required is set at a reasonably low level. Some have argued that a higher test, one of a balance of probabilities should be used. Case law, however, asks for consideration of whether there are untoward circumstances that lead the decision-maker *to believe that it is unlikely that the information is true or that the information is so without substance as to make it unlikely to be true*.
>
> A reasonable decision-maker would not disclose the existence of allegations without first taking reasonable steps *to ascertain whether they might be true* …" (Emphasis added)

This, it will be seen, is a rather different emphasis from the statutory guidance: reasonable steps to ascertain whether the allegations "might be true", rather than whether they are "more likely to be true than not." The document goes on to make clear that the disclosure may include "information of matters that did not result in a conviction, a prosecution or even a charge - as long as they pass the tests within QAF". One reason is said to be the need to protect from harm "children and vulnerable adults, both of whom, sadly, are the least likely to make good witnesses", and "less likely to present themselves as credible or believable when set against their abusers". Accordingly, it is said:

> "So, there may not be sufficient evidence to secure a prosecution or even get a case to court (remember, the tests in court are far higher than those required for disclosure) but there may be enough for police to believe that *someone may pose a real risk*." (Emphasis added)

36. This document is also of interest since it contains what appears to be the only specific reference to disclosures following a "not guilty" verdict in a criminal trial. Under the heading "What kind of information can be considered for disclosure?", it includes "incidents for which individuals were found 'Not Guilty' in a court of law (in certain circumstances)". That is supported by a quotation from the judgment of Wyn Williams J in *R (S) v Chief Constable of West Mercia Constabulary* [2008] EWHC 2811 (Admin):

> "I do not suggest for one minute that allegations should not be disclosed in an ECRC simply because the alleged offender has been acquitted. The circumstances surrounding the acquittal are all important. There will be instances where an alleged offender is acquitted but only because the Magistrates (or Jury) entertain a reasonable doubt about the alleged offender's guilt. The tribunal of fact may harbour substantial doubts. In such circumstances, however, it might well be perfectly reasonable and rational for a Chief Constable to conclude that the alleged offender might have committed the alleged offence." (para 70)

The commentary notes that, in that particular case, "the decision-making was found wanting and the challenge against disclosure was upheld", but no further explanation is given. Reference to the judgment of Wyn Williams J shows that the certificate was quashed because the chief officer had failed to take account of the Magistrates' express indication that they regarded it as a case of mistaken identity. It is clear also that the judge (understandably at the time) was guided by the approach of the Court of Appeal in *X's case*, before the reservations expressed in *L's case*.

37. As regards guidance to employers on the use of information disclosed in ECRCs, Mr Moffett drew attention to the Secretary of State's statutory duty to publish a "Code of Practice" in connection with the use of information provided to registered persons (Police Act 1997 section 122(2)). The Code of Practice in force at the relevant time was prepared in 2009. The current version is dated November 2015. The Code (in both versions) requires the registered body to have "a written policy on the suitability of ex-offenders for employment …" and to make it available to applicants; and to notify potential applicants of "the potential effect of a criminal record history on the recruitment and selection process". There is no specific reference to the handling of information in ECRCs, or of information about acquittals, other than a general requirement to "discuss the content of the Disclosure with the applicant before withdrawing the offer of employment".

38. There appears to be no formal evidence as to how ECRCs are used in practice by employers. A recent investigation into DBS by the National Audit Office (February 2018) records:

> "There is no check on what employers have done with the information provided by DBS. Government does not know how many people this information prevented from working with children or vulnerable adults." (para 4.15)

39. There is some evidence that employers are encouraged to treat police disclosures with care. Mr Moffett referred to a document published by Nacro (with the support of DBS) entitled *Recruiting Safely and Fairly: A Practical Guide to Employing Ex-Offenders* (2015). This is directed principally at the employment of those with criminal convictions, said to constitute over 20% of the working-age population, and accordingly "a significant talent pool that organisations cannot afford to ignore". Although there is no specific advice on the handling of information in ECRCs relating to acquittals, emphasis is given to the need to adapt procedures to avoid inadvertent discrimination against those with criminal records, and for the need for a careful and sensitive risk assessment interview where concerns arise from a criminal record check. Mr Moffett also asked the court to note evidence from a report by a company called Working Links (*Tagged for Life: A research report into employer attitudes towards ex-offenders*) that only 5% of employers surveyed would automatically reject a candidate with a criminal record. The same report indicates that only 18% had actually employed someone they knew to have convictions.

40. For more specific advice on the use of non-conviction information, he referred us to a Local Government Association publication (*Taxi and PHV Licensing: Councillors' Handbook*; pp 13-16). Responding to "anecdotal evidence" that some authorities have been reluctant to attach weight to such information, it is noted that such information "can and should be taken into account and may sometimes be the sole basis for a refusal". The following advice is given:

> "When dealing with allegations rather than convictions and cautions, a decision maker must not start with any assumptions about them. Allegations will have been disclosed because they reasonably might be true, not because they definitely are true. It is good practice for the decision makers, with the help of their legal adviser, to go through the contents of an enhanced disclosure certificate with an applicant/driver and see what they say about it. If, as sometimes happens in practice, admissions are made about the facts, that provides a firm basis for a decision." (p 15)

41. Finally, at its request, the court was given some information about the numbers of ECRCs relating to acquittals as a proportion of the whole. Ms Richards gave us the following information for the period 1 April 2017 to 31 March 2018:

> "During that period there were 128,154 applications for Enhanced Criminal Record Certificates ('ECRCs') processed by Greater Manchester Police ('GMP').

> In relation to 80 of the 128,154 ECRC applications, GMP provided information pursuant to section 113B(4) of the Police Act 1997.
>
> 11 of the 80 cases in which information was provided pursuant to section 113B(4) included acquittal information (some may have contained other, non-acquittal information as well, eg allegations which did not result in a trial).
>
> In eight of those 80 cases, the individual disputed the inclusion of such information. Only one of the eight disputes involved the inclusion of acquittal information."

The submissions

42. Mr Southey submits first that the Court of Appeal erred in failing to carry out their own assessment of proportionality. I will deal with that issue in the next section of this judgment.

43. He submits in any event that the treatment of the issue of proportionality by the courts below in the present case was defective. The disclosure in the ECRC should have been found to be in breach of both the substantive and procedural obligations under article 8. As to the latter, it is said, AR was not given an opportunity to make representations before the first ECRC was issued, and accordingly no weight was given to his views, for example on the possibility of alternative employment.

44. The principal dispute has related to the substantive obligation under article 8. There is no dispute that the disclosure involved an interference with AR's rights under the article. The issue is whether, in terms of article 8.2, it was "necessary ... for the protection of the rights and freedoms of others" - in other words, whether it was "proportionate". That issue had to be addressed, in short, (in Lord Neuberger's words: para 29 above) by balancing "the need to protect those vulnerable people whom an ECRC is designed to assist with the article 8 rights of those in respect of whom an ECRC is issued".

45. Mr Southey did not suggest that an ECRC might not sometimes be appropriate following an acquittal. But in his submission, the starting point must be the reliability of the allegations. That could only be assessed by a detailed analysis of the evidence, by reference so far as necessary to the transcript of oral evidence (as indicated by Coulson J in *R (RK) v Chief Constable of South Yorkshire Police*

[2013] EWHC 1555 (Admin), para 57). Further, given the potential harm of disclosure to AR's prospects, and the gravity of the allegations, they should not have been disclosed unless they could be established on the balance of probabilities.

46. The judge had been correct to hold that it was not possible to extract from the available material "a firm or reliable conclusion that the complainant's account is more likely to be true than false". However, neither he nor the Court of Appeal had understood its significance. In his submission, it inevitably undermined the weight which the police had given to the value of the disclosed information in the proportionality balance. That had expressly proceeded on the basis that the complainant's account was likely to be true. Reducing the weight to be given to that side of the balance implied that greater, indeed decisive, weight should have been given to the highly damaging effect of the disclosure on AR and his family.

47. Ms Richards for the Chief Constable did not accept that it was either necessary or practicable to conduct "a mini-trial" of the allegations, or of their probability. As shown by the case law, the decision was one of balance taking into account a range of factors, including the gravity of the alleged conduct and its circumstances, the reliability and relevance of the information, the period that has elapsed since the events in question, and the impact on the applicant. In the present case, the majority of these factors weighed in favour of disclosure: the alleged offence was of the most serious nature, the circumstances were directly related to the employment sought, and the alleged offence was recent. The acquittal indicated only that the jury was not satisfied beyond reasonable doubt that AR was guilty of rape. His acquittal and continuing denial of the offence, and the potential impact of disclosure, were important factors in the balance, but not determinative. Her general approach to the legislation was supported by Mr Moffett for the Secretary of State, although he abstained from comments on the facts of this case.

48. Following the conclusion of the oral hearing, the court asked for further submissions on the relationship of articles 6.2 and article 8 in the present context: in short, if disclosable information was limited by the former to the bare facts of the charge and acquittal, how should that be taken into account in assessing its practical utility to employers under the article 8 balance?

49. Mr Southey submitted that merely informing an employer of the fact of charge and acquittal could not be proportionate, because it would lead them to speculate, rather than make an informed decision, and it risked giving them the impression that the information is more reliable than it really is.

50. Ms Richards did not accept that article 6.2 would preclude a statement that the allegations were more likely to be true than not. However, in her submission,

such a statement was not necessary to make disclosure proportionate. The purpose of disclosure is to draw to the attention of the registered body matters which *may* indicate a potential risk; it is then for the registered body to decide what (if any) further inquiries to make and to undertake its own assessment of any potential risk that the applicant might pose. The disclosure of information in an ECRC forms only part of a recruitment process.

51. Mr Moffett supported that position, adopting the words of the Court of Appeal in this case (para 60):

> "The purport of the certificate is to state the fact of the allegation and of the acquittal. It is no doubt implicit that this is an *alert* to the potential employer of those facts as to the *possible* risk to the vulnerable ..." (His emphasis)

52. He also gives examples of cases where further information had been accepted by the courts as properly included:

i) *R (A) v Chief Constable of Kent Constabulary* (2013) 135 BMLR 22 in which the ECRC recorded that the applicant was found not guilty of four charges of ill-treatment or neglect of a person without capacity, "no evidence being offered" (para 16).

ii) *R (LG) v Independent Monitor* [2017] EWHC 3327 (Admin) in which the ECRC recorded the acquittal of a nurse on charges of theft from a patient, noting that her earlier admission of theft had been ruled inadmissible at trial, and the jury directed to acquit (para 14).

iii) *R (BW) v Independent Monitor* [2015] EWHC 4095 (Admin) in which the ECRC had included the reasons given by a District Judge in the Youth Court for acquitting the applicant of a charge of common assault, including his view that "the burden of proof was not to the required standard and that the benefit of the doubt had to be given to the [applicant]".

He reminds us that, for prosecutions in the Magistrates' Court, the rules envisage that reasons may be given for an acquittal: Criminal Procedure Rules rule 24.3(6).

Proportionality in the appellate court

53. Before turning to the issues arising under article 8 itself, it is necessary to address the dispute as to the correct role of the appellate court in such cases. There was no disagreement as to the correctness of the approach adopted by the HH Judge Raynor: that is, to make his own assessment of proportionality, but giving weight to the views of the primary decision-maker, as the person with relevant statutory or other authority, and institutional competence (*Huang v Secretary of State for the Home Department* [2007] 2 AC 167; *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, paras 30, 34; *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, para 108). There is however an issue about the approach of the Court of Appeal, taking account of the guidance given by the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 ("*In re B*"). The relevant rule at the time, CPR rule 52.11(3), provided simply [The rule is now in CPR rule 52.21.] that the court will allow the appeal where the decision of the lower court was "wrong".

54. In *R (A)* Beatson LJ had sought to summarise the effect of the majority judgments of the Supreme Court in *In re B*:

> "The majority judgments stated that the correct approach for an appellate court is to treat the exercise as an appellate exercise and not as a fresh determination of necessity or proportionality. Their reasoning was based on the requirement for a fair hearing before an independent tribunal under ECHR article 6. They considered that, because there is no obligation under article 6 to provide a right of appeal at all, it is open to domestic law to fashion the scope of any right given. In England and Wales CPR Part 52 limits this to a review of the decision of the lower court: see Lord Wilson at para 36, Lord Neuberger at paras 83 and 85, and Lord Clarke at para 136. It was recognised (see Lord Neuberger at para 88) that if, after such a review, the appellate court considered that the judge had made *a significant error of principle* the appellate court is able to reconsider the issue for itself 'if it can properly do so' because 'remitting the issue results in expense and delay, and is often pointless'." (para 87, emphasis added)

55. Mr Southey submits that a test which depends on the court finding a "significant error of principle" is too narrow, and not supported by the reasoning of the Supreme Court. *In re B* was, he says, a different type of case. The appeal was from the judge's decision on a care order. The judge had had to decide for himself whether the proposed order satisfied the statutory test, on the basis of the oral and

other evidence before him. By contrast, in the present case, the judge was not the initial decision-maker, but was reviewing the decision of the Chief of Police, and he heard no oral evidence. The Court of Appeal was in as good a position as the trial judge to make its own assessment of proportionality, whether or not it found an error of principle in the judge's reasoning.

> "In *In re B* Lord Neuberger identified two 'main issues' for the judge (para 49), the first being whether the 'threshold' in section 31(2) of the Children Act 1989 was satisfied; the second whether, if so, it was 'appropriate to make a care order'. The first issue does not arise in this case."

56. It was in the context of the second main issue (para 72ff) that Lord Neuberger considered the approach to be adopted by an appellate court on an appeal against a decision on issue of proportionality under the Convention. He thought that there should be no departure from the ordinary approach of an appellate court: that of reviewing the trial judge's decision, rather than reconsidering the issue afresh (para 86). He described the approach as follows (para 88, emphasis added):

> "If, after reviewing the judge's judgment and any relevant evidence, the appellate court considers that the judge approached the question of proportionality correctly as a matter of law and reached a decision which he was entitled to reach, then the appellate court will not interfere. If, on the other hand, after such a review, the appellate court considers that the judge made *a significant error of principle* in reaching his conclusion or *reached a conclusion he should not have reached*, then, and only then, will the appellate court reconsider the issue for itself if it can properly do so (as remitting the issue results in expense and delay, and is often pointless)."

57. The contrary view of the minority was that the appellate court, while taking account of the decision of the court below, must make its own assessment of proportionality (paras 116-119 per Lord Kerr; paras 204-205 per Lady Hale). Their view was clearly rejected by the majority. I would observe that this rejection was not simply directed to cases where the first court enjoys the advantage of hearing oral evidence. It also reflected the general policy consideration that the purpose of the appeal is to enable the reasoning of the lower court to be reviewed and errors corrected, not to provide an opportunity for the parties to reargue the same case (see also *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477, para 3 per Lord Reed).

58. Lord Neuberger dealt separately with the "standard" to be applied in deciding whether the judge was entitled to reach his conclusion on proportionality, once satisfied that it was based on justifiable primary facts. He rejected the view suggested in some authorities that the conclusion must be "*plainly* wrong", before the appellate court could interfere:

> "… at least where Convention questions such as proportionality are being considered on an appeal, I consider that, if after reviewing the trial judge's decision, an appeal court considers that he was wrong, then the appeal should be allowed. Thus, a finding that he was wrong is a sufficient condition for allowing an appeal against the trial judge's conclusion on proportionality, and, indeed, it is a necessary condition (save, conceivably, in very rare cases)." (paras 91-92)

Lord Wilson agreed with the main substance of Lord Neuberger's reasoning on this aspect (para 37, approving paras 83-90; and para 46, citing paras 90-91).

59. Lord Clarke, while agreeing generally with Lord Neuberger's reasoning (para 134), added his own comments on this aspect (para 137). Of CPR rule 52.11, he said:

> "The rule does not require that the decision be 'plainly wrong'. However, the courts have traditionally required that the appeal court must hold that the judge was plainly wrong before it can interfere with his or her decision in a number of different classes of case. I referred to some of them in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577, to which Lord Neuberger refers at para 57, at my paras 9 to 23. It seemed to me then and it seems to me now that the correct approach of an appellate court in a particular case may depend upon all the circumstances of that case. So, for example, it has traditionally been held that, absent an error of principle, the Court of Appeal will not interfere with the exercise of a discretion unless the judge was plainly wrong. On the other hand, where the process involves a consideration of a number of different factors, all will depend on the circumstances. As Hoffmann LJ put it in *In re Grayan Building Services Ltd* [1995] Ch 241 at 254,

> ‘generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards have been met, the more reluctant an appellate court will be to interfere with the trial judge’s decision.’
>
> In the present context, it seems to me, in agreement with Lord Neuberger at para 58, that the court should have particular regard to the principles stated by Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, which are quoted by Lord Wilson at para 41.”

60. In *Abela v Baadarani* [2013] UKSC 44; [2013] 1 WLR 2043 (a decision given a few days after *In re B*), Lord Clarke, with the agreement of the rest of the court (including Lord Neuberger), expressed the position more succinctly. The issue in that case was whether there was “good reason” (under CPR rule 6.15(1)) to treat as valid service the steps taken by the claimant to bring the claim form to the attention of the defendant. He said:

> “The judge held that there was. In doing so, he was not exercising a discretion but was reaching a value judgment based on the evaluation of a number of different factors. In such a case, the readiness of an appellate court to interfere with the evaluation of the judge will depend upon all the circumstances of the case. The greater the number of factors to be taken into account, the more reluctant an appellate court should be to interfere with the decision of the judge. As I see it, in such circumstances an appellate court should only interfere with that decision if satisfied that the judge erred in principle or was wrong in reaching the conclusion which he did.” (para 23)

61. In the light of that review, I agree with Mr Southey that the Court of Appeal applied too narrow a test, by asking simply whether the judge’s reasoning disclosed a “significant error of principle”. That expression was indeed used by Lord Neuberger, but he linked it to the question of whether the judge had “reached a conclusion he should not have reached” (*In re B,* para 88). That passage preceded and was separate from his consideration of the “standard” of review (para 91). As Lord Clarke said in *Abela* the question in relation to the standard of review is whether “the judge erred in principle *or was wrong* in reaching the conclusion which he did” (para 23, emphasis added).

62. So far I have omitted any reference to one passage in Lord Neuberger's judgment. After his discussion of the "standard" of review, while acknowledging the "danger in over-analysis", he added the following by way of further explanation:

> "An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii)." (para 93)

He added further comments on categories (iv) and (v) of this analysis (para 94).

63. With hindsight, and with great respect, I think Lord Neuberger's warning about the danger of over-analysis was well made. The passage risks adding an unnecessary layer of complication. Further, it seems to focus too much attention on the subjective view of the appellate judges and their degrees of certainty or doubt, rather than on an objective view of the nature and materiality of any perceived error in the reasoning of the trial judge. The passage has not been without its critics. Professor Zuckerman (*Civil Procedure: Principles and Practice* 3rd ed, paras 24.209-210) has described it as "puzzling", and saw the difference between categories (iv) and (v) as "so fine as hardly to matter". In any event, I do not understand this passage to have been essential to Lord Neuberger's reasoning or that of the majority. (As already noted, Lord Wilson limited his agreement to paras 83-91).

64. In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle - whether of law, policy or practice - which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said (*R (C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47; [2016] PTSR 1344, para 34):

> "… the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong."

65. It follows that in the present case it was sufficient for the Court of Appeal to consider whether there was any such error or flaw in the judge's treatment of proportionality. If there was not, there was no obligation (contrary to Mr Southey's submission) for the Court of Appeal to make its own assessment.

Article 8 - Discussion

66. I turn to the disputes relating to article 8. Was the Court of Appeal correct to find no material error or flaw in the judge's reasoning? I need not dwell long on the procedural aspects. It makes no difference whether this is looked at by reference to article 8, or to common law principles of fairness. The complaint in essence is of lack of consultation, and was rightly rejected for the reasons given by the judge (para 16 above) as endorsed by the Court of Appeal. The officers were fully aware from the evidence at trial of the nature of AR's defence, and his personal circumstances, and they were aware and took account of the potential impact on his employment prospects. As the judge said, there was no indication of any further information he would have wished to advance.

67. Turning to the substantive effect of article 8, Mr Southey's principal submission is that the interference involved in the disclosure could not be justified unless the officers (or the judge) were in a position to form a positive view of likely guilt. This could not be done without a full appraisal of the evidence in the trial. He relies on *R (RK) v Chief Constable of South Yorkshire Police* (above). There Coulson J accepted that the mere fact of acquittal did not render disclosure of the alleged offence disproportionate, but he thought it "a matter of significance in assessing proportionality". In the case before him the police had failed to give it proper weight; on one reading of the documents, they seemed to have "grudgingly noted the acquittal and then gone on to address the allegations as if they had been proved" (para 37). Mr Southey relies particularly on a later passage in which the judge criticised the failure of the police to make any "detailed analysis" of the critical evidence at the trial, which had been provided in transcript form:

> "If the ECRC is going to disclose information in relation to allegations that have been rejected by the jury, on the grounds that the allegations could still be 'substantiated', then at the

> very least that requires a detailed analysis of those allegations by reference to the evidence." (para 57)

68. While I do not question the actual decision in that case, I cannot accept that, as a matter of domestic law or under article 8, it is necessary or appropriate for those responsible for an ECRC to conduct a "detailed analysis" of the evidence at the trial, such as envisaged by Coulson J. That is the task of the judge and jury, who have the advantage of seeing and hearing the witnesses. Whether or not it would be compatible with article 6.2 for the chief officer to express a view on the merits of the case following an acquittal, it is not the proper function of an officer to attempt to replicate the role of the court, or (in Ms Richards' words) to conduct a "mini-trial". Nor can that be read into the language of the statute. His task under section 113B is to identify and disclose relevant "information", not to make a separate assessment of the evidence at trial. As Mr Moffett's examples show (para 52 above), additional information may in some cases be available about the circumstances of the acquittal, including possibly the court's own statements about it, which may give reasons for treating the court's disposal as less than decisive. By contrast in the case considered by Wyn Williams J (para 36 above) the available information should have been taken as a positive indication of innocence. However, in the absence of information of that kind, it is not the officers' job to fill the gap. To the extent that Ms Wilson in the present case saw it as part of her task to assess whether, in the light of the evidence at trial, the allegation was "more likely to be true than false", she was in error.

69. The judge did not make the same error. He went no further than to accept, as he was entitled to do, the Chief Constable's view that the information was "not lacking substance" and that the allegations "might be true". However, that in itself did not mean that disclosure was disproportionate. It was a matter for him to assess whether the information, albeit in the limited form contained in the ECRC, was of sufficient weight in the article 8 balance.

70. It is to be borne in mind that the information about the charge and acquittal was in no way secret. It was a matter of public record, and might have come to a potential employer's knowledge from other sources. If so, a reasonable employer would have been expected to want to ask further questions and make further inquiries before proceeding with an offer of employment. Its potential significance was as the judge found underlined by "the seriousness of the alleged offence, its relevance to the position applied for, and its comparatively recent occurrence" (para 40(d)). These were matters envisaged by Lord Neuberger in *L's case* as potentially justifying disclosure (para 29 above). On the other side, the judge took full account of the possible employment difficulties for AR, but regarded those as "no more than necessary to meet the pressing social need" for which the ECRC process was enacted (para 40(f)). In my view Mr Southey has failed to identify any error in the judge's reasoning.

71. Accordingly, in agreement with the Court of Appeal I would dismiss the appeal.

Postscript

72. Although I have reached a clear conclusion on the limited issues raised by the appeal before us, it gives rise to more general concerns about the ECRC procedure in similar circumstances. I bear in mind that the case preceded the improvements made in 2012 following the Mason report. However, so far as can be judged from the material before us, little attention has been given to the conceptual and practical issues arising from the relationship of the procedure to criminal proceedings. The issue did not arise in *L's case* itself, which did not involve a criminal charge, and where in any event there was no significant dispute as to the correctness of the allegations. Nor was it a subject considered in the Mason review.

73. It seems to have been assumed, at least since the Court of Appeal decision in *X's case*, that a failed prosecution is no bar to the inclusion of the same allegations in an ECRC. This understanding is reflected in the 2014 QAF document, to which Mr Moffett referred, supported by reference to a 2008 judgment of Wyn Williams J (para 36 above). But that passage gives no clear guidance as what weight should be given to an acquittal in different circumstances. As already noted, it makes no reference to the Supreme Court's criticisms of the balance struck in *X's case*.

74. Given that Parliament has clearly authorised the inclusion in ECRCs of "soft" information, including disputed allegations, there may be no logical reason to exclude information about serious allegations of criminal conduct, merely because a prosecution has not been pursued or has failed. In principle, even acquittal by a criminal court following a full trial can be said to imply no more than that the charge has not been proved beyond reasonable doubt. In principle, it leaves open the possibility that the allegation was true, and the risks associated with that.

75. However, I am concerned at the lack of information about how an ECRC is likely to be treated by a potential employer in such a case. Ms Richards was at pains to emphasise that the ECRC is only part of the information available, and will be not necessarily lead to failure. On the other hand, Lord Neuberger assumed that an adverse ECRC would be a "killer blow" for an application for a sensitive post (para 29 above). That view was adopted without question by the Strasbourg court in *MM v United Kingdom* (2013) (Application No 24029/07), but it is not at all clear with respect that it was on based on any objective information or empirical evidence of what happens in practice. We have been shown reports which emphasise the importance of not excluding the convicted from consideration for employment, but they say nothing about the acquitted, who surely deserve greater protection from

unfair stigmatisation. Nor does there appear to be any guidance to employers as to how to handle such issues. Even if the ECRC is expressed in entirely neutral terms, there must be a danger that the employer will infer that the disclosure would not have been made unless the chief officer had formed a view of likely guilt.

76. These issues require further consideration outside the scope of this appeal. Careful thought needs to be given to the value in practice of disclosing allegations which have been tested in court and have led to acquittal. The figures noted above show that the number of ECRCs relating to acquittals represent a very small proportion of the whole. This may suggest that in many cases chief officers find no cause for disclosure of risk in cases following acquittals.