Neutral Citation No: [2021] NICA 11	*Ref:*	**MOR11415**
	ICOS No:	**XXXX**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:*	**09/02/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY KC FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE POLICE SERVICE OF NORTHERN IRELAND

Mr Coll QC with Mr Anthony (instructed by MSM LAW Solicitors) for the Appellant
Dr McGleenan QC with Mr McLaughlin QC (instructed by Crown Solicitor) for the Respondent

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Before: Morgan LCJ, Treacy LJ and Horner J

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against the decision of Maguire J dismissing the appellant's challenge to information proposed for inclusion in an Enhanced Criminal Record Certificate ("ECRC") disclosing that the appellant previously stood trial for sexual offences against a child in respect of which he was unanimously acquitted. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] In early 2014, the PSNI was advised by Access NI that the appellant had applied to take up positions as a volunteer in a community organisation and a childcare assistant in a school. An ECRC was required in relation to each post. The appellant had no criminal convictions but had been charged with a total of 11 counts alleging offences of rape, gross indecency on a child, sexual activity with a child and indecent assault arising out of an alleged sexual relationship with a female complainant between August 2008 and November 2010. During that period, the complainant was aged between 12 and 14 years and the appellant was aged between

17 and 19 years. He was unanimously acquitted of all charges at Belfast Crown Court on 25 April 2013.

[3] Part V of the Police Act 1997 ("the 1997 Act") provides a legislative framework for the disclosure of an ECRC in respect of those participating in organised activities involving engagement with and supervision of children. Section 113(B) of the 1997 Act provides that before the Department of Justice ("the Department") can issue an ECRC it must request any relevant chief officer, in this case the Chief Constable of the PSNI, to provide any information which-

(a) the chief officer reasonably believes to be relevant for the purpose described in the statement under subsection (2), and

(b) in the chief officer's opinion, ought to be included in the certificate.

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

[4] Maguire J set out in some detail between paragraphs [16]-[47] of his judgment the decision-making process adopted by the PSNI in making the impugned proposed disclosure. The process began in March/April 2014 and an Assistant Chief Constable ("ACC") was the decision maker. He was provided with the investigating officer's case summary and the trial papers including the PACE interviews with the appellant and a sketch of the appellant's mother's house made by the complainant. The file did not contain any substantial information about the trial or why the appellant was acquitted. Information was requested from the Public Prosecution Service ("PPS") but none was provided.

[5] The ACC decided to proceed despite the absence of evidence about the trial and the reasons for the acquittal and directed that the appellant should be offered the opportunity to make representations in respect of the following proposed disclosure:

> "The information held by police is that the applicant was reported for an alleged rape and other sexual offences in 2011. It was alleged that he had been involved in a relationship with a 12 year old female in which 'sexual stuff had happened' and that 'he had shown her what to do.' This included digital penetration, oral sex and full intercourse. The applicant's account was shown to be contradictory and often inconsistent. He was acquitted at Belfast Crown Court on 25/4/2013."

[6] The judge considered that the formulation was an unnecessarily graphic description, potentially misleading in that it gave the impression that it was at trial that the appellant's account was shown to be contradictory and often inconsistent and offered no view about the complainant's evidence thereby suggesting that the

complainant's evidence did not suffer from those flaws. He considered that the disclosure was, at least arguably, unbalanced. The appellant issued a pre-action protocol letter and the PSNI gave an undertaking not to make the disclosure while the decision-making process was ongoing.

[7] Responsibility for the disclosure was then taken over by a Superintendent. He decided that he should review the papers and make a fresh independent decision. He contacted the investigating officer who provided him with information which was in part helpful to the prosecution and in a limited way to the appellant. The judge concluded that the Superintendent should have been cautious given the source of the information and could and probably should have made an effort to obtain at least the judge's charge to the jury which he could have asked to be transcribed.

[8] Maguire J also expressed concerns about the rationale which the Superintendent expressed for the decision to disclose which was recorded on 19 September 2014. He considered that it tended to suggest a predilection in favour of accepting the complainant's account, a failure to subject the complainant's account to the detailed examination to which he subjected the appellant's account and no substantial consideration of the very important point that the appellant had been acquitted unanimously by a jury which had heard both the appellant's and the complainant's accounts.

[9] The appellant's solicitor responded on 3 October 2014 arguing that it was inappropriate for the facts which underlay the charges to be included. Letters of support from the community organisation and the principal of the school where the appellant had been working were submitted. The principal also stated that the absence of a clear security report from the vetting body would make it impossible for the appellant to apply for any formal employment with the school or indeed any other school.

[10] The Superintendent took legal advice and on 26 November 2014 revised the disclosure further as follows: –

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

[11] In further correspondence, the appellant's solicitor noted that there was a failure to refer to the unanimous verdict of the jury as well as some other matters. By further correspondence of 9 February 2015, the solicitors asserted that there should be no disclosure. On 2 March 2015, the PSNI responded stating that the

decision maker made an informed assessment of the risk that the appellant may pose to children. The fact that the appellant was acquitted was given due consideration. The decision maker noted the differing thresholds applicable in the context of criminal proceedings and public protection. He formed the reasonable belief that the applicant posed a threat to children.

[12] On 16 April 2015, the proceedings were initiated and the appellant swore an affidavit exhibiting the judge's charge to the jury. In his charge, the judge noted a number of inconsistencies in the complainant's evidence. She gave contradictory accounts of whether the first sexual intercourse took place before or after she went into hospital in November 2008. The appellant claimed that she was having problems with an individual called Corry but the complainant told the police that she did not know anyone of that name. In fact, she had a next-door neighbour of that name and the name was on her mobile phone. In her disclosure to her sister, she denied that she had had sex. She maintained that she was in daily contact with the appellant by telephone and by text but when she gave police the phone she had deleted the entire message history and call logs. There was an inconsistency between her and her friend in relation to an incident in the middle of August 2010. There was also an inconsistency in respect of a complaint she made to her friend about sex in a hotel car park.

[13] Maguire J noted that there had been no reliance on the judge's charge in the earlier representations and no indication as to how long it had been in the possession of the appellant. It was submitted on behalf of the appellant that the judge was in some way imposing a burden of proof on the appellant. We do not accept that characterisation. The provision of the proposed disclosures by the PSNI to the appellant was designed to enable the appellant to make representations as he saw fit. The judge was entitled to take the view that the appellant initially proceeded on the basis that the acquittal spoke for itself and that it was only at the stage of issuing proceedings that it was considered appropriate to identify the nature of the inconsistencies in the evidence of the complainant. That does not suggest the imposition of any burden on the appellant.

The judge's conclusion

[14] The judge decided that the critical question was whether there was lawful consideration of the proposed ECRC having regard to the requirements of fairness and whether or not the decision arrived at was a proportionate decision. The judge indicated that even if there had been failures in the decision-making process a decision may nonetheless be proportionate and lawful.

[15] He was critical of the decision-making process. He considered that the decision maker was largely if not completely in the dark as to the reasons why the appellant was unanimously acquitted. All reasonable avenues should have been exhausted in pursuit of this information. The PPS should have been pursued with vigour and in the absence of notes of the hearing from the PPS, a transcript of the summing up by

the judge should have been obtained. As a result of the disclosure of the judge's charge, it was evident that the complainant's evidence at trial "sustained some serious damage." That was not acknowledged in the Superintendent's affidavit where the new information was "batted off somewhat peremptorily."

[16] Despite the failures in the decision-making process, the judge concluded that the key issue was whether the decision was proportionate. He accepted that the court must approach the question applying a high intensity of review. He considered that the most significant issue related to the reliability of the information upon which the proposed disclosure was based. He noted that the police decision-maker concluded that the totality of the evidence left him with the reasonable belief that the allegations were accurate. Accordingly, there was a risk to children with whom the applicant may come into contact. That led to a need for disclosure. If the court accepted that assessment, there was little reason to question substantially what the decision-maker viewed as the consequences flowing from it, being the disclosure.

[17] In assessing reliability, the judge looked first at the complainant's allegations. He noted that during the ABE interview she gave a detailed account but that inconsistencies and discrepancies appeared in her evidence. Some of these were substantial and it was not difficult to see that they may have been influential in the outcome of the trial. The unanimous acquittal of the appellant was a significant outcome and should not be neglected. It had to be borne in mind, however, that the judge did not withdraw the case from the jury. Maguire J concluded that what should be taken out of the acquittal is at least that the jury was not satisfied, probably by reason of the quality of the complainant's evidence, that the case against the applicant was proved beyond reasonable doubt.

[18] He considered, therefore, that it was necessary also to evaluate the appellant's account. He noted that the decision-maker was dissatisfied with a range of inconsistencies and discrepancies in interview. Some of these were significant. The first was the allegation that the complainant had sex with the appellant at his mother's house on a number of occasions when his mother was away. The judge noted that when the appellant was first asked whether he had brought the complainant to his mother's house he denied it. When pressed, he changed his account and said that on one occasion she had been in his car with others when the car was stopped outside the house while he went in for a short time. He was clear that she did not enter the house and stayed in the car. That position changed still further as the interviews progressed and it was put to him that the complainant had been able to identify and map out the interior of the mother's house. When confronted with this, he altered his position by accepting that in fact she had once stayed the night in the appellant's mother's house although he said that he did not stay in the house that night.

[19] The second matter related to allegations by the complainant that she had sexual intercourse with the appellant in the back of his car. She maintained that after

intercourse he had cleaned his penis using a polishing cloth or an item of clothing like a sock. The appellant denied at interview having intercourse and also denied the specific allegation about the manner in which he cleaned himself afterwards. Following his arrest, his car was searched and in the back of the car two socks were found. These were subsequently examined forensically. Traces of semen were found on one of the socks. It was not possible to establish a DNA match. When confronted with this in interview, the appellant refused to comment. In a subsequent interview, it was suggested by him that the sock had become contaminated in the washing machine.

[20] Maguire J noted that the Superintendent arrived at the view which he described as his reasonable belief that the allegations were accurate. He noted that the appellant's account during interviews suffered from significant frailties. Although appreciating the importance of the not guilty finding, he considered that the view arrived at by the decision-maker was proportionate. In those circumstances, he considered that a direction to engage in a fresh decision-making process would lead to the same conclusion. He suggested modest alterations to the latest text which the PSNI have agreed.

The Appeal

[21] The appellant essentially relied on three points in the appeal: –

(1) The judge erred in finding that the proposed disclosure would be proportionate in its interference with the appellant's rights under Article 8 ECHR. The implications for the appellant's private life are such that he would be denied the chance to pursue his chosen career even though he was unanimously acquitted of all charges against him. On the facts of the case such an outcome was disproportionate and substantially unfair;

(2) The judge erred in finding that procedural failings could not, in and of themselves, amount to a violation of Article 8 ECHR. The leading case law on ECRCs has established that the right under Article 8 ECHR includes a pronounced procedural dimension and that a remedy can issue where there have been procedural failings on the part of the decision-maker. The absence of a remedy in this case has rendered the protection of the procedural dimension to the appellant's Article 8 right "illusory" rather than "real".

(3) In the alternative, the judge erred in the weight that he gave to the views of the primary decision-maker in holding that he should not interfere with the respondent's proposed form of words. The procedural failings in this case were such that they had resulted in an imbalance in the proposed form of words and the judge should have either (a) required the decision-making process to start afresh or (b)

been more prescriptive as to the form of words that was required in order for the disclosure to be compliant with Article 8 ECHR.

Case Law

[22] The leading case on the principles applicable to the making of a disclosure under section 113 (B) of the 1997 Act is *R (L) v Commissioner of Police for the Metropolis* [2010] 1 AC 410. That was a case in which the police disclosed non-conviction material concerning an allegation of neglect by a parent in the care of her son. Maguire J extracted the relevant legal principles from that case which were not disputed by the parties and which we are happy to adopt:

> "(i) The scope of the rights protected by Article 8 included the ability to establish and develop relations with others, not to be excluded from employment in a chosen field, protection of good name and reputation and retention of personal information for the purposes of disclosure to third parties. Accordingly, decisions on whether or not to make disclosure of personal details of an individual's past, fell within the scope of Article 8(1) rights in every case [Lord Hope at [24]-[28]].
>
> (ii) The actual disclosure of information on the certificate to the prospective employer was likely to amount to an interference with Article 8(1) rights in "virtually every case", thus requiring justification [Lord Hope at [29] and [40]].
>
> (iii) Decisions are made under statute and hence 'in accordance with law'. They also pursue the legitimate aim of protecting the rights and freedoms of others. When determining whether or not disclosure did or would amount to a violation of Article 8, the issue is 'essentially one of proportionality' [Lord Hope at [42]].
>
> (iv) In deciding whether the proposed disclosure might be relevant for the purpose of the certificate '… it is for the Chief Constable or his delegate to form an opinion on that issue. Informing his opinion on relevance, the officer must ask himself whether the information might be true, and if it might be true he must consider the degree of connection between the information and the purpose described …' [Lord Hope at [39]].

(v) In deciding whether the information 'ought to be disclosed' police must consider the impact of disclosure upon the private life of the individual. They must determine whether there will be an interference and, if so, whether it can be justified. The correct approach is to carry out a balancing exercise in which police balance the need to protect children and vulnerable adults against the impact which disclosure is likely to have upon the private life of the individual. In approaching that task, there should be no presumption in favour or against disclosure [Lord Hope at [40, [44] and [45]].

(vi) In cases of doubt '… 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"…the correct approach is to offer the individual an opportunity to make representations before the disclosure is made [Lord Hope at [46]].

(vii) Lord Neuberger gave some guidance as to the factors which might be taken into account in deciding whether information 'ought to be disclosed'. These were:

- The gravity of the information involved;
- The reliability of the information upon 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 of time which has elapsed since the events occurred;
- The impact of disclosure upon the applicant's job prospects (for example, might it be a 'killer blow') [at [75]]."

[23] The Supreme Court concluded that the decision maker had given insufficient weight to the appellant's right to respect for her private life giving priority to the social need to protect the vulnerable. The court went on to conclude that the facts

were directly relevant to the question of whether the person could safely be entrusted with the job of supervising children, the school canteen or the playground and concluded that the outcome was such that the risk to children had to outweigh the prejudicial effect to which that disclosure gave rise.

[24] After Maguire J had given his judgment, the Supreme Court returned to this issue in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079. The appellant was a man of good character and a qualified teacher who was working at the time as a taxi driver. On 4 November 2009, it was alleged that he had raped a 17 year old woman who was a passenger in a taxi driven by him. He denied that there had been sexual contact and on 21 January 2011 he was acquitted after a trial at which he and the complainant gave evidence and were cross examined. There was no scientific evidence to support or undermine the allegation.

[25] Following his acquittal, he applied for an ECRC in connection with an application for a job as a lecturer. A certificate was issued containing further information referring to the charge and acquittal. He made representations which were rejected. On 28 March 2012, a second ECRC was issued in connection with an application by him for a licence to work as a private hire driver. The certificate contained the same information in respect of his charge and acquittal.

[26] The appellant complained that he had not been consulted in respect of the second certificate. The court was satisfied that the officers were fully aware from the evidence at trial of the nature of his defence and his personal circumstances and were aware and took account of the potential impact on his employment prospects. There was no indication of any further information he would have wished to advance and that challenge was rejected.

[27] It was submitted that the judge was required to conduct a detailed analysis of the evidence at the trial as part of the proportionality assessment. The Supreme Court rejected that submission. It was not the role of the court to conduct a mini trial. The task under the statute was to identify and disclose relevant information, not to make a separate assessment of the evidence at trial. Additional information may in some cases be available about the circumstances of the acquittal which may give reasons for treating the court disposal as less than decisive. By contrast, the available information may provide a positive indication of innocence. In the absence of information of that kind, it was not the officer's job to fill the gap.

[28] The officer in this case saw it as part of her task to assess whether in light of the evidence at trial the allegation was more likely to be true than false. Such an approach was erroneous. The judge was correct to conclude that the information was not lacking substance and that the allegations might be true. It was then a matter for him to assess whether the information was of sufficient weight in the Article 8 balance.

[29] The Supreme Court also noted that it had to be borne in mind that the information about the charge and acquittal was not secret. It was a matter of public record and might have come to a potential employer's knowledge from other sources. A reasonable employer would have been expected to want to ask further questions and make further enquiries before proceeding with an offer of employment. In that case, its potential significance was underlined by the seriousness of the alleged offence, its relevance to the position applied for and its comparatively recent occurrence. The judge had taken full account of the possible employment difficulties for the appellant but regarded those as no more than necessary to meet the pressing social need. The court accordingly dismissed the appeal.

Role of the appellate court

[30] In *R (R) v Chief Constable of Greater Manchester Police*, the Supreme Court also looked at the role of the appellate court where the issue is proportionality. Order 59 Rule 3 of the Rules of the Court of Judicature provide that every appeal to the Court of Appeal shall be by way of rehearing. The rehearing is based on the record of the evidence at trial and there are limited circumstances in which new evidence can be introduced. The form of the hearing is by submissions from the parties and questions from the Bench.

[31] The judge is required to give reasons for the decision. The task of the Court of Appeal is to decide whether there was any error in the first instance decision. The appellate court should not interfere with any discretionary judgment which was properly within the ambit of the discretion available to the trial judge.

[32] In *R (R)*, the Supreme Court reviewed the approach of the appellate court when dealing with proportionality beginning at paragraph [53] and concluded as follows at paragraph [64]:

> "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" … it is not enough that the appellate court might have arrived at

a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [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 …""

Consideration

[33] The starting point is to recognise how the statutory scheme is intended to work. The Chief Constable is required to provide information which he reasonably believes to be relevant to the protection of children and ought to be included in the ECRC. Of course, the Chief Constable will have only the most general sense of the requirements of the particular post at issue and the arrangements in place at the particular school or other location where employment or position is sought.

[34] Once provided with the information, it is the responsibility of the employer to determine its impact. Unlike the Chief Constable, the employer will know precisely the nature of the employment and the policies, practices and governance arrangements in place to ensure the safety of children.

[35] When faced with information such as that in this ECRC, the employer will need to make a decision about the extent of any enquiry it considers appropriate. That may include seeking and obtaining documentation in respect of the trial such as the judge's charge and taking into account such information as is provided by the applicant for the post.

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

[37] As should be clear from this review of the statutory purpose of this legislation, the Chief Constable has a role in initiating the information but is not in a position to make a detailed assessment of the risk issue. It is also clear that the assumption that the provision of the information amounts to a "killer blow" in respect of the application for employment may well be indicative of a misunderstanding of the statutory scheme which could unfairly adversely affect an applicant for employment in this situation.

[38] There is some evidence in the papers that the purpose of the statutory scheme has been misunderstood by the principal of the school. At paragraph 7 of his grounding affidavit, the appellant indicated that he had provided the principal with full knowledge of the fact that he had previously been charged with and acquitted of sexual offences when he had first applied for a position with the school. He has exhibited an email from the principal stating that the loss of the appellant's skills and contribution to the children's learning would leave a gap in provision not easily filled.

[39] Although it appears that the principal was supportive of the appellant taking up a post in full knowledge of his involvement in the criminal trial, the appellant also indicates that it was made clear to him by the principal that in the absence of a clean certificate the school would no longer be able to retain him in its employment. Since it seems unlikely that the principal could have withheld this information from the school governors, there appears to be an implication that the disclosure of the information by way of an ECRC is itself a determination of unsuitability. That is quite wrong. It is plainly quite contrary to the statutory scheme and such a conclusion is undoubtedly unfair to the appellant. It may be that some consideration needs to be given to the ECRC notice incorporating an express indication that it is for the recipient of the notice to explore the information and make a decision about its effect based on the particular circumstances of their own organisation.

[40] Having thus analysed the statutory background, Lord Carnwath then indicated at paragraph [68] that it was neither necessary nor appropriate for those responsible for providing an ECRC to conduct a detailed analysis of the evidence at the trial and at paragraph [69] that it was sufficient to be satisfied that the information was not lacking in substance and that the allegations might be true. That threshold is the trigger for the careful analysis to be carried out by the employer or other body.

[41] In light of our analysis of the statutory context, we can deal with the issues on appeal relatively briefly. The first submission was that the provision of the information affected the appellant's private life as he would be denied the chance to pursue his chosen career even though he was unanimously acquitted of all charges against him. The effect on his chosen career will depend upon the analysis carried out by his prospective employer but we accept that the appellant's private life has been affected.

[42] One of the submissions made to us was that there was a significant public interest in the rehabilitation and reintegration of offenders in society. This is an individual who has been acquitted in respect of the charges against him and his exclusion from his chosen profession would require the most careful consideration.

[43] We accept that submission but it does not render the disclosure of the information disproportionate or unfair. This was an allegation of a serious offence which was relevant to the positions applied for and had allegedly occurred relatively

recently. The trial itself had been in a public court house and the acquittal was not secret. The judge gave substantial weight to the potential effect on the appellant's employment. We detect no error in effecting the balance in favour of disclosure.

[44] We accept that the judge identified procedural failings in the process leading up to the decision. The appellant had, however, an opportunity to make representations and indeed by his participation in these proceedings added to those representations. Maguire J had to make his own determination of proportionality and he did so recognising the earlier procedural failings but taking into account the subsequent representations. His conclusion that the disclosure of the information was necessary to meet the pressing social need to protect children was entirely within his area of discretionary judgement.

[45] The final point in relation to the wording of the disclosure is in our view without merit. The suggestions made by the learned trial judge were accepted by the Chief Constable and there is nothing in the words used to indicate how they would offend Article 8 ECHR.

Conclusion

[46] For the reasons given, the appeal is dismissed but we would emphasise the obligation on the prospective employer to apply the statutory scheme as it was intended.