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# *Necessary Intrusion or Criminalising the Innocent? An Exploration of Modern Criminal Vetting*

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**Abstract** This article considers the processes of criminal vetting and outlines the legislative framework allowing such disclosures and subsequent judicial interpretation of that framework. The focus is on disclosure of non-conviction (so-called 'soft') materials on 'enhanced' certificates and subsequent challenges to those disclosures at judicial review. Key cases are analysed, including *R (on the application of X) v Chief Constable of West Midlands Police* (2004) and *R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis (Respondent)* (2009). The proportionality test in *R (L)* is noted and its subsequent application in the recent decisions of *R (on the application of C) v Chief Constable of Greater Manchester; Secretary of State for the Home Department* (2011) and *R (on the application of B) v Chief Constable of Derbyshire Constabulary* (2011) is scrutinised. The article also highlights interference in Article 8 of the European Convention on Human Rights (right to privacy) and questions whether interference can be justified, and whether the present judicial focus on right of representations in such cases is misplaced.

**Keywords** Criminal Records Bureau; Vetting; Disclosure; Enhanced certificates; Privacy

The UK has a long history of vetting potential employees with regard to criminal convictions. This culminated in the establishment of the Criminal Records Bureau (CRB) in 2002. The CRB has the authority to issue either 'standard disclosure certificates' or 'enhanced disclosure certificates' per Part V of the Police Act 1997. Enhanced certificates allow for chief police officers, at their discretion, to disclose non-conviction material as well as ordinary conviction information. This discretion has been used widely and, among the few commentators focusing on this issue, such usage has proven extremely controversial.

Judicial interpretation of the legislative power has ranged from the ordinarily subordinate to the occasionally bellicose. In 2009, the Supreme Court passed a landmark judgment in *R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis (Respondent)*<sup>1</sup> which created a new test for the disclosure of so-called 'soft materials' for those persons whose employment required that an enhanced certificate be obtained. This test was intended to replace the old test laid down by the Court of Appeal in *R (on the application of X) v Chief Constable of the*

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<sup>1</sup> [2009] UKSC 3, [2010] AC 410.

*West Midlands Police*.<sup>2</sup> The central tenet of the judgment in *R (L)* was that there should be no longer a presumption in favour of disclosure, but rather a new test founded upon that most pernicious judicial chestnut, 'proportionality'. In electing to declare that there now existed in all cases a need to balance the protection of vulnerable people against the rights of those damaged by enhanced disclosure, the court swept away the *R (X)* presumption that information should be disclosed 'if it might be true'.

It is now two years since the passing of a judgment which some predicted would prove the high-water mark of vetting.<sup>3</sup> This is a multi-faceted area of law which carries much social and legal significance in spite of a relatively low level of academic or public scrutiny. This article will attempt to consolidate and evaluate the judicial interpretation of the legislative framework of the CRB and disclosure certificates; first, by outlining that framework and, indeed, the remit of the CRB itself; secondly, through an extrapolation of the tests, and their application, which have governed the disclosure of so-called soft material and, finally, by examining the subsequent application of the *R (L)* test in decided cases to determine whether those predictions made in the immediate aftermath of *R (L)* have proven accurate.

## Background

It is clear that we must have effective measures for sharing information about potentially dangerous individuals. However, those measures must be proportionate and allow for representations to be made before information is disclosed. Unless the procedures are changed, the careers of many individuals will be ruined for no substantiated reasons. And the people who will suffer will be the very children and vulnerable adults that the Bichard Report<sup>4</sup> intended to help.<sup>5</sup>

It has long been accepted, in the UK and many other EU countries,<sup>6</sup> that employers have the right to make background checks against prospective and incumbent staff to verify their suitability for employment.<sup>7</sup> In England, this right may be traced to Henry Fielding, who in the 1740s instituted the post of 'Register Clerk', whose responsibility it was to record both any crimes reported and the names of those suspected of involvement and/or convicted. Fielding's register was, in 1749, to form the basis of the Universal Register Office, 'a labour exchange where

2 [2004] EWCA Civ 1068, [2005] 1 WLR 65.

3 For example, T. Pitt-Payne, 'Employment—The Shadow of the Past' (2009) 159 NLJ 1530.

4 *The Bichard Inquiry Report*, HC653 (2004), available at <http://www.bichardinquiry.org.uk/10663/report.pdf>, accessed 20 February 2012. This report was the result of a public inquiry into the circumstances of Ian Huntley finding himself employed in a position from which he could commit the Soham murders of Holly Wells and Jessica Chapman.

5 A. Mazzola, 'Tainted Records' *Law Society Gazette*, 19 August 2010, 6 at 7.

6 N. Loucks, O. Lyner and T. Sullivan, 'The Employment of People with Criminal Records in the European Union' (1998) *European Journal on Criminal Policy and Research* at 195.

7 T. Thomas, 'Employment Screening and the Criminal Records Bureau' (2002) 31 *Industrial Law Journal* 55.

employers might examine prospective servants and study their character references'.<sup>8</sup>

In the two-and-a-half centuries which followed, extensive mechanisms were developed for the control and administration of criminal record checks which were, by the 1990s, rather piecemeal and unsatisfactory.<sup>9</sup> In 1993 a government consultation document was drafted and issued to review the system of police disclosures<sup>10</sup> to general public indifference.<sup>11</sup> The resultant findings were duly published in 1996.<sup>12</sup> The subsequent White Paper proposed a legislative framework for all disclosures, the widening of disclosures to all employers and employees, including vetting for voluntary positions, and the abolition of cost-free disclosures in favour of a fee-paying system.<sup>13</sup> Additionally, the administration of disclosures was to be taken from local police forces and placed into the hands of a single, central administrative body.<sup>14</sup> One of the last acts of the outgoing Conservative Government in 1997 was the introduction and implementation of the Police Act 1997 which contained, in Part V, statutory footing for these recommendations almost in their entirety.

## **The Criminal Records Bureau**

The Criminal Records Bureau (CRB) was established in March 2002 to administer, on behalf of the Secretary of State,<sup>15</sup> requests from employers for background checks against applicants for jobs and those already employed by them.<sup>16</sup> Based in Liverpool, the CRB is run as a public-private partnership with Capita Group plc.<sup>17</sup> Prior to its inception, the Labour Government demonstrated a relish for vetting which mirrored that of its predecessor, exemplified by some typically bombastic public declarations:

It is especially important that employers and voluntary organisations should be able to access information about criminal convictions when checking the suitability of those who will be working with children, young people and vulnerable adults. Access to this information will provide an important additional safeguard.<sup>18</sup>

All applications for background checks must now be made directly to the CRB. A disclosure cannot be made unless the named person subject to

8 See Bichard, above n. 4 at 56.

9 For a comprehensive examination of these developments, see Thomas, above n. 7 at 55–67.

10 Home Office, *Disclosure of Criminal Records for Employment Vetting Purposes*, Cm 2319 (1993).

11 See Bichard, above n. 4 at 63.

12 Home Office, *On the Record: The Government's Proposals for Access to Criminal Records for Employment and Related Purposes in England and Wales*, Cm 3308 (1996).

13 See Thomas, above n. 7 at 60.

14 *Ibid.*

15 *R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis (Respondent)* [2009] UKSC 3 at [4].

16 H. Hart, 'Checking Up' (2008) 158 *NLJ* 237.

17 *Ibid.*

18 Charles Clarke MP, Home Office, *Criminal Record Checks to Protect Children and Vulnerable Adults on the Way*, Press Release, 3 August 2000.

the application consents.<sup>19</sup> This is evidenced by signature on the prescribed form. Upon receipt of a request for a check made in the prescribed manner and accompanied by the requisite fee,<sup>20</sup> the CRB make individual requests to relevant police forces to peruse the Police National Computer (PNC)<sup>21</sup> and refer any findings directly to the CRB so that a disclosure certificate can be drafted and released back to the applicant.

## **Disclosure certificates**

There are two types of certificate:

The first is a *Standard Criminal Records Bureau Certificate*, generally referred to as either a 'standard CRB' or the 'standard certificate'.<sup>22</sup> This will provide details of any warnings, reprimands, cautions or convictions recorded on the PNC against the applicant.<sup>23</sup> No distinction is made between convictions which are 'spent' or 'unspent',<sup>24</sup> both are disclosed.<sup>25</sup>

The second disclosure is an *Enhanced Criminal Records Bureau Certificate*—the so-called 'enhanced CRB' or 'enhanced certificate'. An employer or organisation wishing to carry out these enhanced background checks must apply to the Criminal Records Bureau to be granted the status of a 'registered body'. Enhanced certificates are not issued generally; they may only be made in the exceptional circumstances as prescribed by statute.<sup>26</sup> Such circumstances generally arise only where the staff of an organisation might have regular access to children or 'vulnerable adults', such as schools, hospitals, colleges and various voluntary and charitable organisations.<sup>27</sup>

The enhanced certificate is double-sided. The face of the certificate contains all of the materials disclosed on a 'standard' certificate, as well as relevant information from the controversial Vetting and Barring Scheme (VBS) as administered by the Independent Safeguarding Authority.<sup>28</sup> The reverse of the enhanced certificate, however, allows for the chief officer of any police force to disclose any material which he or she feels *might be relevant* to the application.<sup>29</sup> The discretion for determining whether or not material may be relevant lies solely with the

19 Police Act 1997, s. 115 (when fully in force s. 163 of the Serious Organised Crime and Police Act 2005 repeals ss 113 and 115 of the 1997 Act and inserts ss 113A–113F (Criminal Record Certificates)).

20 Ibid.

21 See Hart, above n. 14 at para. 2.

22 Police Act 1997, s. 113.

23 Police Act 1997, Part V, extrapolated by S. Mason, *A Common Sense Approach—A Review of the Criminal Records Regime in England and Wales* (Home Office: London, 2011) 13, available at <http://www.homeoffice.gov.uk/publications/crime/criminal-records-review-phase1/common-sense-approach?view=Binary>, accessed 20 February 2012.

24 As determined by the Rehabilitation of Offenders Act 1974.

25 Ibid.

26 Police Act 1997, s. 115(2).

27 See Mason, above n. 23 at 5.

28 The VBS replaced the Protection of Children Act List, the Protection of Vulnerable Adults List and the infamous List 99 of persons barred by the executive from working with children. These changes were implemented with the inception of the Safeguarding Vulnerable Groups Act 2006.

29 Police Act 1997, s. 115(7) (Police Act 1997, s. 113B(4), when in force).

chief officer and 'responding to this request may not be a finite factual matter, but could, and very often would, require an exercise of judgement by the chief officer'.<sup>30</sup> Whilst guidance and counter-guidance has been issued since the inception of the enhanced disclosure certificate,<sup>31</sup> there is no absolute rule applicable to the discretionary disclosure and applicants usually have no way of knowing what will be disclosed, if anything, until the certificate is issued.<sup>32</sup> Previous discretionary disclosures have included unsubstantiated claims which resulted in the suspect being released without charge,<sup>33</sup> details of an applicant's non-criminal family history,<sup>34</sup> the association of individuals with persons convicted of an offence (though the applicant himself was never suspected of any offence)<sup>35</sup> and details of cases which proceeded to court but resulted in an acquittal.<sup>36</sup> Such disclosed, non-conviction material is generally referred to as *soft material* or a *soft disclosure*.<sup>37</sup>

## The issues

Soft disclosures on enhanced certificates are not an inconsequential side issue. In 2007/08, the total number of enhanced certificates was 215,640; of these, around 8 per cent (17,560) contained discretionary, soft disclosures. The total number of enhanced certificates issued increased in 2008/09 to 274,877; again, around 8 per cent (21,045) of these contained soft disclosures.<sup>38</sup>

Certificate disclosure is made simultaneously to both applicant and the employer. The process of simultaneous disclosure was designed to prevent tampering or altering of a certificate and to improve the speed and efficiency of the recruitment process.<sup>39</sup> However, simultaneous disclosure brings considerable disadvantages. In *R (on the application of S) v Chief Constable for West Mercia Constabulary*,<sup>40</sup> the court recognised that:

Firstly, it incorrectly assumes the employer can make a decision immediately on receipt of the certificate when, in reality, the disclosure forms

30 *Desmond v Chief Constable of Nottingham Police* [2011] EWCA Civ 3 at [4], per Williams J.

31 See, e.g., Home Office Circular, *Criminal Records Bureau: Local Checks by Police Forces for the purposes of Enhanced Disclosure*, 5/2005, available at <http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2005/005-2005/>, accessed 20 February 2012.

32 Mason, above n. 23 at 24.

33 *R (on the application of John Pinnington) v Chief Constable of Thames Valley Police* [2008] EWHC 1442 (Admin).

34 *R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis (Respondent)* [2009] UKSC 3.

35 *R (on the application of SL) v Commissioner of Police of the Metropolis* [2008] EWHC 1442 (Admin).

36 *R (on the application of S) v Chief Constable for West Mercia Constabulary* [2008] EWHC 2811 (Admin).

37 See, e.g., Pitt-Payne, above n. 3 at para. 2.

38 *R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis (Respondent)* [2009] UKSC 3 at [42].

39 See Mason, above n. 23 at 24.

40 [2008] EWHC 2811 (Admin).

only a part of the recruitment process. Secondly, there is no opportunity for the applicant to challenge any of the information contained on the certificate before it is seen by the employer.<sup>41</sup>

The result of a soft disclosure against an applicant is often ‘devastating’.<sup>42</sup> In *R (L)*, the Supreme Court accepted that such disclosure will have a ‘highly significant impact on the applicant’.<sup>43</sup> This is because, more often than not, the applicant will be ‘effectively shut off forever from all employment opportunities in a large number of different fields’.<sup>44</sup> The result is that any opportunity for work which might involve supervisory responsibility for children or vulnerable adults will almost certainly be lost entirely to the applicant, who may have undergone considerable training and education to excel in a certain field, only to find then that he or she is now barred from that field for life. It is also true that ‘the present culture, at least in its historical sense, can be said to be unusually risk-averse and judgemental’<sup>45</sup> and so an employer will usually treat a prospective employee with a ‘non-clean’ certificate as too much of a risk to make his or her employment viable. A soft disclosure, so far as the applicant is concerned, is usually ‘a killer blow’.<sup>46</sup>

The damaging effect of a soft disclosure is not confined merely to the position of employment which is the subject to the disclosure; there also exists damage to the private life of the applicant. Where a person is denied access to his or her chosen field of employment, this will adversely affect his or her ability to develop social relationships with others.<sup>47</sup> Being barred from employment will naturally create unpleasant financial repercussions which too will affect a person’s ability to enjoyment of his or her private life.<sup>48</sup> Moreover, a soft disclosure may have a negative impact on the reputation of an applicant. Mud sticks. If a person is excluded from employment, this is likely to ‘get about’<sup>49</sup> and this can cause a ‘significant stigma’<sup>50</sup> to that individual.

The justification for such draconian interference into an applicant’s privacy, however, is that the public, and especially children and vulnerable adults, have the right to be protected from those who may cause them harm. Concurrently, the state has an equal obligation to do whatever it deems necessary to protect these vulnerable members of society. Indeed, and perhaps understandably, the protection of these

41 Above n. 40 at [24]–[25].

42 Ibid.

43 [2008] EWHC 2811 (Admin) at [68], *per* Lord Neuberger.

44 Ibid.

45 *R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis (Respondent)* [2009] UKSC 3 at [75].

46 Ibid.

47 In *R (on the application of Wright) v Secretary of State for Health* [2009] UKHL 3 at [30], *per* Baroness Hale.

48 Ibid at [31].

49 *R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis (Respondent)* [2009] UKSC 3 at [24].

50 Ibid.

groups has been described as both ‘a pressing social need’<sup>51</sup> and ‘a laudable exercise’.<sup>52</sup>

Applicants faced with a damaging, discretionary disclosure may challenge that disclosure in two ways. They may either utilise the executive procedure for challenge built into the operation mechanism of the CRB, or, as a last resort, may issue proceedings in judicial review. The former allows a challenge on factual grounds—that is to say that an error of fact has been made on the certificate. This, naturally, leaves little scope for challenge against a soft disclosure, which is discretionary by nature and therefore can rarely be said to be, in strict terms, factually erroneous. The latter, however, have largely focused upon the apparent contradiction between the provisions of the Police Act 1997 and the qualified right to privacy enshrined in Article 8 of the European Convention on Human Rights.

### **The application of *R (X)*: the high-water mark**

The first notable challenge against soft disclosure came in *R (on the application of X) v Chief Constable of West Midlands Police*.<sup>53</sup> X applied for an enhanced certificate at the request of his employers, an agency dealing with social care, for whom he had worked without incident since 1990. X had no convictions of any kind and was a man of good character. This was reflected on the face of his enhanced certificate. However, the Deputy Chief Constable of West Midlands Police elected to make the following discretionary disclosure against the applicant:

It is alleged that on 11 December 2001 [the claimant] indecently exposed himself to a female petrol station attendant. It is further alleged that this was repeated on 7 May 2002. [The claimant] was arrested and interviewed whereby he stated that he did not think he had committed the offence but that he was suffering from stress and anxiety at the time. [The claimant], who was employed by a child care company at the time of the alleged offences, was charged with two counts of indecent exposure, however the alleged victim failed to identify the suspect during a covert identification parade, and the case was subsequently discontinued.<sup>54</sup>

Upon receipt of this disclosure in 2002, X was dismissed by the agency from his employment. X immediately sought judicial review, primarily on the grounds that Article 8(1) was engaged and that, so engaged, the disclosure did not satisfy the requirements of Article 8(2). X also argued that, prior to the implementation of the 1997 Act, the common law presumption was against disclosure.<sup>55</sup>

51 *R (on the application of X) v Chief Constable of West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65 at [37].

52 *R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis (Respondent)* [2009] UKSC 3, [2010] AC 410 at [84].

53 [2004] EWCA Civ 1068, [2005] 1 WLR 65.

54 *Ibid.* at [21].

55 Albeit that the presumption was demonstrated previously in family law cases (see *Re C (A Minor) (Care Proceedings: Disclosure)* [1996] 2 FLR 725).



At the High Court, Wall J found in favour of X. This decision was appealed to the Court of Appeal by the Chief Constable of West Midlands Police where, unfortunately for X, he found the Lord Chief Justice in an unsympathetic mood. Refuting the applicant's arguments, Lord Woolf CJ declared that the information disclosed was such that 'a reasonable employer in this field would want to know'<sup>56</sup> and that X was, in effect, 'seeking to prevent that information being available'.<sup>57</sup> The Article 8 submissions were dealt with equally as dismissively, with the court decreeing that the Secretary of State, acting within his role under the Police Act, cannot possibly be in breach of Article 8(1) when the Act itself is enough to satisfy the qualification of Article 8(2).<sup>58</sup> As to the presumption against disclosure, Lord Woolf CJ declared baldly that 'there is no presumption against disclosure';<sup>59</sup> indeed, the court felt that the Police Act created a position which would, if anything, be more in favour of disclosure than against.<sup>60</sup> The only question left to answer was as to when a soft disclosure should be made:

This was obviously required by Parliament because it was important (for the protection of children and vulnerable adults) that *the information should be disclosed even if it only might be true*. If it might be true, the person who was proposing to employ the claimant should be entitled to take it into account before the decision was made as to whether or not to employ the claimant. This was the policy of the legislation in order to serve a pressing social need.<sup>61</sup>

For these reasons, the court unanimously found in favour of the appellant. Seven years after the judgment, several comments can be made. The first is that the applicant X was certainly a cruel victim of circumstance. The judgment in *R (X)* came barely six months after Ian Huntley was convicted at the Old Bailey of the infamous Soham murders of schoolchildren Holly Wells and Jessica Chapman. At his trial, it emerged that Huntley, a school caretaker, was known to the police, but that information which might have prevented his being employed, if disclosed, was not so released. This case exposed, into the full glare of the public, the flaws inherent in the vetting system and the horrific, if rare, consequences of those flaws. That Lord Woolf CJ felt the legislation served a 'pressing social need' is perhaps unsurprising when that backdrop is factored into the judgment. Secondly, it was immediately apparent that, when weighing a balance between the right of the applicant to privacy and this 'pressing social need', the court strongly believed that the latter outweighed the former by an immeasurable degree. The disadvantage suffered by the applicant registered barely a murmur of sympathy from the court.

56 *R (on the application of X) v Chief Constable of West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65 at [44].

57 *Ibid.*

58 *Ibid.* at [41].

59 *Ibid.* at [36].

60 *Ibid.*

61 *Ibid.* at [47] (emphasis added).

No longer would it be that a person is innocent until proven guilty; rather a person may be innocent in law, but if something accused of him only might be true, it should be disclosed regardless. Two elements ought to be considered here. First, the threshold for disclosure in *R (X)* was staggeringly low. This *might be true* test may naturally be contrasted with the traditional *beyond all reasonable doubt* standard of proof ordinarily applied to matters which are of a criminal nature, and the two appear to exist at very opposite ends of the spectrum. The second important issue is that the arbiter of this test is a chief police officer. That decision would be made in private and subjectively, without any opportunity for the applicant to make a representation prior to disclosure. This smacks of a mechanical, rigid system which would likely cause significant damage to many thousands of unfortunate individuals with little or no chance of successfully raising a legal challenge against these disclosures. Moreover, justifying such a damaging interference into the private life of an innocent applicant with the notion of 'a reasonable employer wanting to know' such information was, it is submitted, thoroughly spurious; that someone *wants* to know a piece of private information cannot be so simply equated with that same person having the *right* to know of it!

The decision in *R (X)*, and in particular the *disclose if material might be true* test, were subjected to considerable critical analysis<sup>62</sup> and time has palpably failed to dim the deep dissatisfaction generated by this remarkable, roundabout attack on the presumption of innocence in English law.

### **The high-water mark: subsequent application of *R (X)***

Presented with a legal yardstick which was both extremely subjective and almost uniquely low, the police unsurprisingly proceeded to disclose soft material with something approaching impunity. As predicted, applicants disadvantaged by the new test found challenges to their enhanced certificates generally given a short shrift. In the immediate aftermath, the only (and rather vague) challenge to the new test came in *R (on the application of B) v Secretary of State for the Home Department*,<sup>63</sup> the result of which was an immediate approval and application of the *R (X)* test, with Munby J acceding to a damaging soft disclosure on the ground that 'it cannot be said that the evidence of possible wrongdoing [in the immediate case] was so weak, so unreliable or so trifling that it cannot be true'.<sup>64</sup>

The next notable application for judicial review of a soft disclosure came in *R (on the application of John Pinnington) v Chief Constable of Thames Valley Police*.<sup>65</sup> Pinnington, so incensed at his disclosure that he waived

62 See, e.g., Pitt-Payne, above n. 3.

63 [2006] EWHC 579.

64 Citing the judgment of Bean J at first instance [2005] EWHC 3212.

65 [2008] EWHC 1870.

his right to anonymity and embarked upon a media campaign to highlight awareness to his plight,<sup>66</sup> had been a long-serving deputy principal of a college for autistic young adults in Oxford. As part of a working reshuffle, Pinnington was required to apply for an enhanced CRB certificate. He was a man of good character and no convictions were recorded on the certificate issued in September 2005. However, on the reverse of the certificate, the Assistant Chief Constable of Thames Valley Police elected to make a discretionary disclosure relating to three separate allegations of sexual abuse by the applicant reported between 2002–05. The evidence demonstrated that the applicant was interviewed in respect of one of these allegations and denied any wrongdoing at all times. No charges were raised in respect of any of the allegations and the matters were all dropped. As a result of the disclosure, Pinnington was dismissed from his employment.<sup>67</sup>

Pinnington's legal representatives evidently believed the *R (X)* test so deeply entrenched that they elected simply not to challenge the certificate on that ground,<sup>68</sup> instead attempting to persuade the court that the decision to issue an enhanced certificate was flawed on the facts of the unfounded allegations which, they submitted, could not possibly be true.<sup>69</sup> The court was unmoved. Rejecting what it purported to be, albeit obliquely, 'an attempt to impose a higher threshold than the relatively low threshold inherent in the question whether the information might be true',<sup>70</sup> Richards LJ confirmed that the only other ground of challenge against the decision to disclose be 'a straightforward *Wednesbury* test, to which no gloss needs to be or should be applied'.<sup>71</sup> As a result, the application for judicial review was dismissed; whilst accepting that 'none of the allegations could be substantiated in a court of law'<sup>72</sup> the low threshold test in *R (X)* means that the decision to disclose could not be unreasonable.<sup>73</sup>

## The softening process?

*Pinnington* demonstrated once more the sheer scale of difficulty faced by applicants as the courts continued to acquiesce to the notion that an applicant be 'guilty until proven innocent'.<sup>74</sup> However, in spite of the strict application of *R (X)* preferred by the Court of Appeal in *Pinnington*, Richards LJ took the time to make some pertinent observations:

66 See, e.g., 'John Pinnington sacked after CRB check reveals unsubstantiated abuse allegations', *Daily Telegraph*, 29 June 2008, and also 'Presumed Guilty; the loving stepfather devoted to helping autistic youngsters now fighting to clear his name', *Daily Mail*, 27 August 2008.

67 *R (on the application of John Pinnington) v Chief Constable of Thames Valley Police* [2008] EWHC 1870 at [1].

68 *Ibid.* at [45].

69 *Ibid.* at [2]–[3].

70 *Ibid.* at [47].

71 *Ibid.*

72 *Ibid.* at [55].

73 *Ibid.* at [47].

74 [2008] IDS Emp L Brief 862/2.

I recognise how painful such disclosure must be for the claimant, and how damaging its consequences may be . . . I am troubled by the fact that the claimant's new employer in this case apparently operated a blanket policy of insisting on a 'clean' certificate, so that the disclosure of the three allegations led inevitably to the claimant's dismissal on the transfer of his employment to that employer on a reorganisation at work. The legislation imposes a relatively low threshold for disclosure in the certificate in order to enable an employer to make a properly informed decision. But it is important that employers understand how low that threshold is and the responsibility that it places in practice upon them. A properly informed decision requires consideration not only of the information disclosed in the certificate but also of any additional information or explanation that the employee may provide. The operation of a blanket policy of insisting on a 'clean' certificate leaves no room for taking into account what the employee may have to say. That is a matter of particular concern.<sup>75</sup>

This was a welcome diversion from the attitude in *R (X)*, where almost no heed was paid to the damaging nature of the disclosure to the applicant. Not before time, the court had come to recognise the anguish that invariably results from soft disclosure.

Interestingly, decisions soon followed *Pinnington* which demonstrated that, though strictly applied, the test in *R (X)* was not insurmountable. In *R (on the application of S) v Chief Constable of West Mercia Constabulary*,<sup>76</sup> S, a 49-year-old man who had played and coached rugby union for most of his adult life, was required to apply for an enhanced certificate to ensure re-election to the coaching staff of his local rugby club. Some three years earlier, and unbeknown to the rugby club, S had been arrested and charged with two counts of indecent exposure for which he was eventually brought to summary trial. Alibi evidence at that trial proved conclusively that S could not have been the individual who had exposed himself and he was duly acquitted. This entire episode was revealed to the rugby club by means of a soft disclosure on the applicant's enhanced certificate.

The application for judicial review was upheld. Whilst accepting that 'the claimant has had to surmount a high hurdle'<sup>77</sup> in order for the application to succeed, the court nonetheless decided that 'in this case, however, he has done so'<sup>78</sup> and so affirmed that the decision to disclose was *Wednesbury* unreasonable. However, in so doing, the court expressed in firm terms that the decision was very much based upon the individual facts of the case,<sup>79</sup> rather than a discrete attempt to relax the *R (X)* test. It was also stressed that a simple acquittal would not suffice to render a soft disclosure unreasonable; rather the circumstances of the acquittal should be considered the decisive factor,<sup>80</sup> with a distinction to be drawn between an acquittal which arises as the result of a reasonable

<sup>75</sup> *R (on the application of John Pinnington) v Chief Constable of Thames Valley Police* [2008] EWHC 1870 at [58]–[59].

<sup>76</sup> [2008] EWHC 2811 (Admin).

<sup>77</sup> *Ibid.* at [69].

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* at [70].

<sup>80</sup> Above n. 76.

doubt in the mind of the arbiter of the alleged offender and those circumstances where it is 'very unlikely' that the accused has committed the offences.<sup>81</sup> In the former, a decision to disclose will likely be reasonable, whilst in the latter it may not.<sup>82</sup> Quite how such a distinction be determined was not made clear, though the processes of the court in *R (S)* seem to indicate that the application for judicial review will, in these circumstances, involve a reappraisal of the original case facts by the court to determine the state of mind of the original arbiter. This seemed to add yet another unwelcome subjective element to a process already unduly laden.

Almost simultaneous to the decision in *R (S)* was the decision in *R (on the application of SL) v Commissioner of Police for the Metropolis*.<sup>83</sup> SL, a 52-year-old homosexual male of good character, had been in a long-term relationship with a man named Irvin. Irvin had previously been questioned by police after a small trailer in a substantial video cache of otherwise legal pornography was found to contain men under the legal age applicable to such material. Irvin's explanation, that he had no idea about the trailer, satisfied investigating police officers and the investigation was concluded with no charges brought. At no stage was SL involved in this investigation or indeed questioned in relation to any offence. Yet when he was required to obtain an enhanced certificate for employment purposes, the police officer chose to disclose his relationship to Irvin and details of the pornography investigation.<sup>84</sup>

The application for judicial review was again upheld. Once more, the court conducted what might best be described as a reappraisal of the facts before insisting that 'it is central to the proper exercise of the functions given by the Police Act that an ECRC be particularised, accurate and go no further than is strictly justified'.<sup>85</sup> The court clearly felt that, in this case, the certificate fell short of those standards and should not have been issued in the form that was eventually disclosed.<sup>86</sup>

The decisions in both *R (S)* and *R (SL)* give rise to some interesting observations. The first is that the lower courts made plain their clear subservience to the *R (X)* test. On neither occasion did either bench entertain any proposal which might in some way dilute that test; preferring instead to rely upon means of interpretation to reach their respective decisions. The second observation is that, in spite of this subservience, the willingness of the court to scrutinise, in such minute detail, the subjective decision of senior police officers in the face of the low-threshold test in *R (X)* marked a subtle, yet critical, shift from the somewhat laissez-faire approach adopted by Lord Woolf CJ in *R (X)*. In declaring both subjective decisions unreasonable, the courts demonstrated that the mood of the judiciary had begun to change. No longer would *any* decision to disclose be accepted without consideration of the

81 Ibid.

82 Ibid.

83 [2008] EWHC 1442 (Admin).

84 Ibid. at [1]–[2].

85 Ibid. at [24].

86 Ibid. at [25].

repercussions to the applicant; justifications were now being sought. In light of what followed, it is evident that these decisions demonstrated a judicial ‘softening’ towards applicants as evidence of the damaging effect that soft disclosures were having on the legally innocent began to percolate the legal system.

### **The tipping point? The decision in *R (L)***

Just four years after the landmark decision in *R (X)*, the Supreme Court elected to hear an appeal against a soft disclosure in *R (on the application of L) (FC) v Commissioner of Police of the Metropolis*.<sup>87</sup> In *R (L)*, L was the mother of a child, referred to as X. Both L and X had come to the attention of both the police and social services on account of the delinquent behaviour of X. A child protection conference took place in 2002, a time when X was living with his father, rather than L. Concerns were expressed that X might be exposed to illicit drugs and was involved in numerous criminal acts. X was also excluded from school at that time for assaulting a member of staff. As a result, X was placed on the child protection register. In 2003, X was convicted of robbery and sentenced to three years’ detention in a young offender institution and was released in February 2004.<sup>88</sup> In 2004, L was employed as a midday assistant at a secondary school. She shared her responsibilities with four other staff.<sup>89</sup> As part of her continuing employment, L was required to obtain an enhanced certificate. This was issued on 16 December 2004. The certificate confirmed that L had no criminal convictions, but the reverse of the certificate contained a detailed exposition of the problems caused by her son, X. This had been disclosed discretionarily by the chief police officer. As a result, the employment agency employing L summarily dismissed her from her position of employment.<sup>90</sup> Her response was to make an application for judicial review.

The judgment of the Supreme Court was handed down on 29 October 2009. By a 4:1 majority, the Supreme Court elected to revise the decision of the Court of Appeal in *R (X)*. A number of key issues were raised. First, the court considered whether or not the disclosure of soft material engaged the right to privacy enshrined in Article 8(1). Lord Hope here accepted that two elements were at play. The first of these saw the *ratio* of Baroness Hale in *R (on the application of Wright) v Secretary of State for Health*<sup>91</sup> cited approvingly, namely that ‘excluding a person from her chosen field is liable to affect her ability to develop relationships with others and have repercussions as regards earning a living’.<sup>92</sup> Secondly, an analysis of European decisions relating to the storing and release of information on police computer systems was undertaken, noting that whilst some criminal information (relating to convictions) might be in

87 [2009] UKSC 3, [2010] AC 410.

88 *Ibid.* at [13].

89 *Ibid.* at [14].

90 *Ibid.* at [15].

91 [2009] UKHL 3, [2009] 2 WLR 267.

92 *R (on the application of L) (FC) v Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] AC 410 at [24].

the public domain, much information is private and the revival into the public domain of information which has become stale through time should also be considered as having an impact on a person's private life.<sup>93</sup> The conclusion drawn was that disclosure of information in enhanced certificates did engage Article 8(1) and that such disclosures would have an adverse impact on the applicant's family life 'in virtually every case'<sup>94</sup> and submissions refuting that Article 8(1) was so engaged were rejected.

The next issue for consideration was whether or not that interference in the Article 8(1) right was justified. Lord Hope considered the process by which the chief officer of police had come to his conclusion to disclose.<sup>95</sup> A rating table had been used<sup>96</sup> which indicated that information should be disclosed in accordance to a risk/consequence formula. It was noted that this formula provided that an affirmative decision on disclosure of soft materials would occur any time that the risk posed by the applicant, in the opinion of the chief officer of police, was 'severe', irrespective of the damage caused to the applicant by that disclosure.<sup>97</sup> A disclosure would also be made in all cases where the risk was moderate unless the consequence of disclosure were to be considered 'severe'<sup>98</sup>. The court recognised that form MP9 was clear evidence that 'the human rights issue has been closely modelled on what Lord Woolf CJ said in *R (X)*'.<sup>99</sup>

After a recital of the facts and the decision in *R (X)*, Lord Hope turned to whether or not the test in *R (X)* had struck the right balance between the damage caused by the Article 8(1) interference and the need to protect vulnerable groups.<sup>100</sup> He sensibly conceded that 'the effect [of *R (X)*] is to encourage disclosure . . . and to give priority to the social need'.<sup>101</sup> According to the Police Act 1997, soft disclosure should be made if the material is relevant *and* it ought be disclosed. This is a two-part test and the latter implies a proper consideration of the impact on the applicant of disclosure. Lord Hope declared 'that in every case he [the chief police officer] must consider whether there is likely to be an interference with the applicant's private life, and if so whether that interference can be justified'.<sup>102</sup> It is the proper consideration of this issue which effectively legitimises the legislation via Article 8(2).<sup>103</sup> This is (rightly) an essential requirement; indeed, if the latter is not given due weight 'there would be too many cases where the inclusion [of soft materials] would represent an unwarranted invasion of the applicant's article 8 rights for the statutory provisions to survive an incompatibility

93 Above n. 92 at [27].

94 *Ibid.* at [29].

95 *Ibid.* at [30]–[34].

96 Referred to throughout as 'MP9'.

97 *R (on the application of L) (FC) v Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] AC 410 at [32].

98 *Ibid.*

99 *Ibid.* at [34].

100 *Ibid.* at [41].

101 *Ibid.* at [38].

102 *Ibid.* at [40].

103 *Ibid.* at [38].

assault'.<sup>104</sup> The fact that the applicant endorses the disclosure by signature is, and has always been, a deeply unsatisfactory mechanism for defending the damage caused by disclosure; a point forcibly raised through intervention by Liberty and endorsed by Lord Hope, who suggested that 'they consent to the application, but only on the basis that their right to private life is respected'.<sup>105</sup> This approach was expounded upon by Lord Brown, who explained that 'applicants are consenting to the disclosure of relevant information to the extent that this is proportionate to the damage this will cause . . . this is plainly right'.<sup>106</sup> In a dissenting judgment, Lord Scott took issue with this rebuttal, claiming that 'it is necessary to remember that it was she who applied for the certificate'<sup>107</sup> and that Lord Hope's position was 'an impossible one'.<sup>108</sup> It is submitted that the former position is far more agreeable than the latter. The decision made by the applicant is, in almost every case, no freely made decision at all; failure to apply for an enhanced certificate would act ordinarily as a bar to the profession if such a disclosure is requested. To suggest otherwise may be legally accurate, but it is a nonsense in the practical reality of disclosure applications. Lord Hope's rebuttal of such claims is both welcome and long overdue, and it is submitted that Lord Neuberger's forceful and insightful consideration of the matter, that the legislature cannot circumvent Convention rights by including a 'statutory fetter' and then forcing a person to accept that fetter in an attempt to avoid Convention obligations,<sup>109</sup> should draw a line under such arguments for good.

The issue, then, is one of proportionality.<sup>110</sup> On the one hand, there exists a very real risk to vulnerable members of society and the need for the state to offer suitable protection. On the other hand, however, is the right of individuals to have their private life respected and not to be unduly damaged. This balancing act is 'of the greatest importance'<sup>111</sup> and 'it is imperative in every case to ensure that the public interest in safeguarding children really does justify the relevant disclosure'.<sup>112</sup> The test in *R (X)* was fatally attacked, with Lord Hope providing that 'the approach that was taken to this issue in *R (X)* has been to tilt the balance against the applicant too far. It has encouraged the idea that priority must be given to the social need to protect the vulnerable as against the right to respect for private life of the applicant'.<sup>113</sup> This did not give enough weight to the essential provision of s. 115(7)(b) of the Police Act 1997. Therefore, 'the balance struck by the Court of Appeal in *R (X)* . . . needs to be re-struck less favourably to the prospective employer'.<sup>114</sup>

104 Above n. 97 at [78].

105 *Ibid.* at [43].

106 *Ibid.* at [64].

107 *Ibid.* at [58].

108 *Ibid.* at [59].

109 *Ibid.* at [73].

110 *Ibid.* at [42].

111 *Ibid.*

112 *Ibid.* at [63], *per* Lord Brown.

113 *Ibid.* at [44].

114 *Ibid.* at [63].



Two recommendations for this ‘re-striking’ were made; first, proper weight should be given to whether or not information ‘ought to be included’ per s. 115(7)(b) of the Police Act 1997. It should no longer be presumed that if material is relevant, the presumption is in favour of disclosure. Secondly, in borderline cases, the applicant should be offered the opportunity to make representations to the chief officer of police. In *R (X)*, Lord Woolf CJ had strongly rejected this idea as ‘imposing too heavy a burden’<sup>115</sup> on the chief officer of police. This approach was rejected, with the view taken that, whilst not necessary in all cases, in instances when there is room for doubt ‘the risks in such cases of causing disproportionate harm to the applicant outweigh the inconvenience to the chief constable’.<sup>116</sup>

The decision in *R (L)* was greeted with warm enthusiasm, described rightly as ‘significant and timely’<sup>117</sup> for it is ‘essential to ensure that a policy which affects millions of people is compliant with human rights’.<sup>118</sup> Indeed, it was suggested in the immediate aftermath that, by its decision, ‘the Supreme Court has thankfully brought some wisdom and balance to the current frenzy around employment vetting . . . this judgment strikes a welcome note of caution and fairness’.<sup>119</sup> These are sentiments with which this author entirely agrees. The test in *R (X)*, which had led to a veritable plethora of soft material disclosures, had been mercifully scrapped after only four years of operation in which time untold damage had been done to some tens of thousands of innocent people. A proper consideration of the damage to the applicant was now a necessity, rather than the afterthought wrongly preferred in *R (X)*. In cases where the decision to disclose is marginal or where disclosure would be especially damaging, the chief officer of police now had an obligation to seek representations from the applicant, rather than simply erring on the side of caution and disclosing in almost all cases.

For *L*, however, the victory was to prove largely pyrrhic. In spite of this new test, the Supreme Court still felt that soft disclosure was proportionate; that the case was sufficiently clear cut not to require representations to have been made and so upheld the disclosure decision nonetheless.

### **A half-turned tide? The decisions in *R (C)* and *R (B)***

It was suggested that the decision in *R (L)* would lead to a short-term, immediate increase in judicial review challenges to soft disclosure in enhanced certificates.<sup>120</sup> The most notable challenge arose in *R (on the application of C) v Chief Constable of Greater Manchester; Secretary of State for*

115 *R (on the application of X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65 at [37].

116 *R (on the application of L) (FC) v Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] AC 410 at [46].

117 Pitt-Payne, above n. 3.

118 K. Hughes, ‘Proportionality Not Presumption’ (2010) 69 Camb LJ 4 at 6.

119 A. Fairclough, ‘Supreme Court Rebalances Law on Enhanced CRB Disclosure’, Liberty Press Release, 29 October 2009.

120 Hughes, above n. 118.

*the Home Department*.<sup>121</sup> C was a skilled welder who had applied for a position as a lecturer in a sixth-form college. As part of his registration to the Protocol National Database,<sup>122</sup> C was required to obtain an enhanced certificate. The certificate, issued in 2008, indicated that no criminal convictions were recorded against the applicant.<sup>123</sup> However, on the reverse of the certificate a discretionary disclosure of soft intelligence had been made. This indicated that an allegation of abuse had been made by C's stepdaughter. That allegation was initially made in 1994, but was retracted by the child at her mother's coercion.<sup>124</sup> The same allegations were made again, by the same female (by then an adult), in 2006. C was arrested and interviewed, where he denied the allegations. The file was passed to the CPS, who decided that, although there was no reason to disbelieve the accuser, there was insufficient evidence to charge C and the case was discontinued. Upon receipt of this disclosure C sought first to have it removed through negotiation. When this failed, he sought judicial review.<sup>125</sup>

Initially, the judgment of the court seemed a relatively straightforward one. It was immediately apparent that the decision taken by the police to disclose had been so done based upon the interpretation of the legislative framework outlined in *R (X)* and so, in light of the decision in *R (L)*, 'the decision made . . . cannot stand as a lawful decision'.<sup>126</sup> This alone was sufficient to uphold the application for judicial review as the disclosure decision was founded upon flawed guidance.<sup>127</sup>

Having so found, Langstaff J then responded to the Chief Constable's assertion that disclosure would take place even if the *R (L)* test had been applied with a remarkable rebuttal. In a lengthy extrapolation as to whether or not such a disclosure would be proportionate, in accordance to the new, *R (L)*, test, the judge systematically reviewed the circumstances in the most minute detail. It was accepted by all parties that the allegation against C might be true,<sup>128</sup> however, this no longer being the principal indicator of disclosure, such acceptance was not decisive. The court considered that the allegation, though made twice, related to a 'single offence' and no other allegations against C had ever been made.<sup>129</sup> The good character of the claimant was also recognised.<sup>130</sup> By contrast, it was noted that the accuser had herself become known to the

121 [2010] EWHC 1601 (Admin).

122 Described by Langstaff J as a organisation to which any college lecturer must register if he or she is to have any practical possibility of being employed in that sector.

123 *R (on the application of C) v Chief Constable of Greater Manchester, Secretary of State for the Home Department* [2010] EWHC 1601 (Admin) at [22].

124 It is important to note that, as papers submitted in evidence showed, the girl admitted to both social services and the police that she 'made up the allegation as a means of seeking attention' ([2010] EWHC 1601 at [29]). This was *not* noted in the certificate.

125 *R (on the application of C) v Chief Constable of Greater Manchester, Secretary of State for the Home Department* [2010] EWHC 1601 (Admin) at [23]–[24].

126 *Ibid.* at [33].

127 *Ibid.*

128 *Ibid.* at [47].

129 *Ibid.* at [48].

130 *Ibid.*

police and had convictions for, among offences, theft and assault.<sup>131</sup> These would likely affect the credibility of the accuser (in contrast to the certificate which provided that 'there is no reason to disbelieve the female') if any of these convictions had stemmed from a trial in which the accuser's evidence under oath had been disbelieved.<sup>132</sup> No record of that issue had been made by the police.<sup>133</sup> Finally, and decisively, the court considered that the accusation related to an allegation of abuse against a very young child in the privacy of the family home. The position applied to by C was one in which he would only come into contact with minors of at least 16 years of age<sup>134</sup> and very few, if any, vulnerable adults<sup>135</sup> in working conditions which were broadly public in nature. The conclusion of the judge was that whilst the risk posed was 'either low or very low',<sup>136</sup> the damage caused by the disclosure was high<sup>137</sup> with the result that 'I cannot see that a decision which would inevitably have the consequence that C would not secure any work at all in his chosen profession would be proportional to a risk which, though existing, would be low. It follows that I cannot say that the decision is plainly and obviously right'.<sup>138</sup> To ensure that the Chief Constable did not elect to re-disclose against C, the court concluded by awarding declaratory and injunctive relief to prevent any future disclosure of the matter referred to in the certificate.

This level of scrutiny of both the decision-making process *and* the decision itself saw the judge depart markedly from those before him. Here was a judgment that did not merely *talk* about proportionality in general, vague terms; instead it was precisely the sort of extensive exposition of proportionality that the statutory framework surely demanded. It might have been hoped that the balancing act advocated so lucidly in *C* should provide much-needed guidance into precisely what sort of processes a reasonable chief officer of police might undertake in the performance of his duties under s. 113 of the Police Act 1997.

Alas, those hopes were not to last for long. The Chief Constable was somewhat less than impressed with having his decision overturned, and with having been enjoined from ever re-disclosing against C, and so duly appealed. The judgment of the Court of Appeal was handed down on 19 January 2011.<sup>139</sup> The broad arguments on both sides remained the same, and the Court of Appeal took a three-fold approach. First, both the appellant and the court accepted that the original decision had been founded upon a procedural irregularity,<sup>140</sup> but the appellant maintained that no injustice had been done as the correct decision would have been

131 Above n. 125 at [39].

132 *Ibid.*

133 *Ibid.*

134 *Ibid.* at [36].

135 *Ibid.* at [48].

136 *Ibid.* at [47].

137 The court accepted that a disclosure would bar the applicant from his chosen profession entirely (*ibid.* at [51]).

138 *Ibid.*

139 *R (on the application of C) v Chief Constable of Greater Manchester Police* [2011] EWCA Civ 175.

140 *Ibid.* at [8].

to disclose the soft intelligence in any event.<sup>141</sup> The court, infuriatingly, refused to be drawn on the merits of the disclosure, stating baldly that ‘all that is for the chief constable’<sup>142</sup> and instead focused upon the refusal of the Chief Constable to allow representations to be made. It was said that ‘it would be unwise to gloss, or add, to the *R (L)* test [regarding when representations should be invited by the chief officer of police]. The question is ultimately fact specific’.<sup>143</sup> To these particular facts, Toulson LJ asked himself a rhetorical question: ‘Was it obvious that nothing that he [the applicant] could have said could rationally or sensibly have influenced the mind of the Chief Constable?’.<sup>144</sup> In this present case, his Lordship could not agree that the answer was an ‘obvious yes’.<sup>145</sup> In the circumstances, representations should have been invited, though these need not necessarily be in the form of an oral hearing; they can be made in ‘a much simpler form than that’.<sup>146</sup> The court then considered that the chief officer of police might feel initially that no representations need be made, but a pre-action letter should state the grounds upon which an applicant feels aggrieved. Unless these reasons do not merit any consideration at all, then the chief officer of police should at that stage give consideration to them to prevent unnecessary expense and to relieve the courts from being ‘burdened with judicial review applications based upon a failure of an opportunity to make representations’.<sup>147</sup>

The result of these analyses was that the judge at first instance was right to quash the original certificate.<sup>148</sup> However, the court then moved to consider the declaratory relief and injunction. The court felt that Langstaff J had jumped too far by declaring a decision ‘not plainly and obviously right’ to one that was ‘thus plainly and obviously wrong’.<sup>149</sup> That error was compounded by a second error in drafting an injunction which forbade the chief officer of police from disclosing whenever the applicant sought a certificate ‘in relation to a position as an instructor, lecturer or teacher of children over the age of 16 in an educational setting’.<sup>150</sup> This injunction would bind the chief officer of police in the event of new material coming to light which might favour disclosure, and so was both too wide and unsatisfactory,<sup>151</sup> resulting in the declaratory relief and the injunction being set aside.<sup>152</sup>

After the refreshing decisiveness of the judgment at first instance, the appellate court had delivered a judgment of infuriating contrast. Whilst the decision to uphold Langstaff J’s order to quash the original certificate was satisfactory, the procedural irregularity upon which that decision

141 Above n. 139

142 *Ibid.* at [28].

143 *Ibid.* at [11].

144 *Ibid.* at [12].

145 *Ibid.*

146 *Ibid.*

147 *Ibid.* at [13].

148 *Ibid.* at [15].

149 *Ibid.* at [18].

150 *Ibid.* at [19].

151 *Ibid.* at [20].

152 *Ibid.* at [21].

was founded made that little more than a formality. Pleasingly, having declared its unwillingness to 'add to or gloss' upon the principle in *R (L)*, the court seemed to have done precisely that by intimating that representations should be requested more often than not, that the time and effort involved for the chief officer of police is not relevant and that even a pre-action letter should trigger, in most circumstances, the consideration of an applicant's concerns. This guidance, which adds to the original provided in *R (L)*, is certainly welcome.

However, one must wonder why the court has decided to focus on the representations issue at all. It seems that the principal motive for doing so was a concern over the wasting of court time and the wasting of money. Whilst these are certainly acceptable motives, it is unlikely that the applicant C would describe these as pressing issues in the instant case. Although it was true that C had raised the issue of representations as an issue at first instance, that issue had been rendered superfluous by the measured scrutiny provided in that judgment. The ultimate issue for determination was proportionality, not whether or not representations should be made, and the latter must surely become irrelevant where the chief officer of police, as here, argued vociferously that his decision to disclose would remain the same even had representations been made. Having been afforded a wonderful opportunity to provide an illustration of the *R (L)* principle, the Court of Appeal instead decided to absolve itself of the responsibility and focus on a side issue.

It is not certain quite where this all leaves the applicant C. His application for judicial review was initiated in order to overturn and prevent a decision to make a soft disclosure. Such disclosure was a bar to his chosen profession. That disclosure was declared by a judge as disproportionate and so enjoined. His case won almost entirely, he now finds that his disclosure certificate has been quashed, certainly, but not on grounds of proportionality—on procedural grounds instead. The effect of this is that the decision has now gone back to the chief officer of police, who has made clear in two court hearings that he wants to disclose as he thinks it proportionate. He must, as the Court of Appeal makes clear, allow C to make representations and give those his consideration, but one can only presume that these will fall on deaf ears; the entire basis of the chief officer's case has been that no injustice had been done by disclosure. If the information is again disclosed, it would be a considerable surprise if C does not once more raise litigation:<sup>153</sup> after all, he already has one judgment supporting his belief that disclosure is disproportionate and the supporting *obiter* of another.<sup>154</sup> The process would then begin again, on largely the same evidence and on the same

153 Though the fresh decision is for the chief officer of police, that decision remains judicially reviewable (above n. 139 at [31]).

154 At the Court of Appeal in *R (C)*, Lord Neuberger MR, who sat on both *R (L)* and *R (C)*, also took the time to emphasise that the differences in facts between those in *R (L)* and those in the instant case were 'very different' and that the information relating to C is 'arguably not relevant . . . for the reasons given by the judge' (at [31]). Promising for C though these words may be, the decision was still referred back to the chief officer of police.

arguments, with precisely the kind of waste of money and time that the Court of Appeal seemed so keen to avoid.

It may be that C considers that the Court of Appeal have missed both the point and an opportunity. It is hard to disagree.

In the later case of *R (on the application of B) v Chief Constable of Derbyshire Constabulary*,<sup>155</sup> the chief officer of police had elected to disclose information relating to B, a consultant in a mental health trust.<sup>156</sup> B had been arrested in February 2010 after an allegation was made that he had stabbed a man, who was known to B, at B's own home in December 2009. It was noted that no visible injury was evidenced at the time of the arrest. It was also alleged that B had threatened the man's two children (aged 14 and 16) with a samurai sword and had damaged his own property with the same sword. When the police searched B's home, they found a number of swords, firearms and ammunition. These were lawfully owned, but were seized as they were not properly stored.<sup>157</sup> After his arrest, B made no comment during interview,<sup>158</sup> but ultimately the CPS dropped the case, in spite of pressure from the police.<sup>159</sup> However, when B applied for an enhanced certificate in February 2010, the decision was made to disclose all of this soft material. The certificate was issued on 11 May 2010.<sup>160</sup> B instructed his solicitor to write to the police and demand an unprecedented amount of documentary disclosure. The police refused, but invited B to make written representations to the chief officer of police. By response, B instructed counsel and issued proceedings.<sup>161</sup>

A variety of grounds were offered in an imaginative submission by B's counsel,<sup>162</sup> but the Divisional Court found none to be persuasive. The court dismissed submissions requesting wide-ranging documentary disclosure by police prior to the issue of the certificate as inconsistent with the type of right to representations alluded to in both *R (L)* and *R (C)*; such wide-ranging disclosure would 'not be the norm . . . It will surely only be in a very unusual case, if at all, that anything approaching the general disclosure sought here by the claimant could ever be appropriate'.<sup>163</sup> An equally ambitious attempt to seek a *declaration of incompatibility* was also emphatically struck down with *R (L)* cited as definitive evidence that such a submission was 'hopeless'.<sup>164</sup> The issue, again, was one of proportionality. Although the court accepted that an opportunity to make representations should have been made prior to disclosure, that

155 [2011] EWHC 2362 (Admin).

156 *Ibid.* at [1].

157 *Ibid.* at [3].

158 *Ibid.* at [10].

159 *Ibid.* at [15]–[20].

160 *Ibid.* at [26].

161 *Ibid.* at [27].

162 Including various submissions relating to Article 6 of the European Convention on Human Rights which were given a short shrift by the court as a result of the recent decision of the Supreme Court in *R (on the application of G) v Governors of X School* [2011] UKSC 30, which unfortunately for B, was decided in the interim period between the issue of proceedings and the judgment being handed down.

163 [2011] EWHC 2362 (Admin) at [61].

164 *Ibid.* at [64].

was not decisive, as every representation which might have been made has been so made during the course of the litigation<sup>165</sup> and in any event 'this really is a very plain case'.<sup>166</sup> The court viewed with approval what must justly be described as a comprehensive documentary review of proportionality, referred to as 'AT3', provided by the chief officer of police prior to disclosure, which noted the importance of the decision in *R (L)* and provided a suitable extrapolation of the balance between the need for disclosure and the likely damage caused to B in the event of disclosure.<sup>167</sup> In light of this, the court felt disinclined to interfere with the chief officer's decision; the applicable test of review was 'an assessment of the balance which the decision maker has struck'<sup>168</sup> and the court, where there is a *reasons challenge*, 'must not be astute to find failings'.<sup>169</sup> As a result, the decision of the chief officer of police was upheld and the application for judicial review was rejected.

What, then, may be drawn from these applications of the new test? Two salient points may be made. It is interesting that the right to make representations seems to be something that will apply to most, if not all cases; in both *R (C)* and *R (B)* the court felt that the decision to disclose would be sufficiently damaging as to warrant an opportunity to make representations. This is certainly a marked departure from the position in *R (X)*, where it may be recalled that such a procedure would effectively represent little more than an inexpedient waste of police time, and a gratifying interpretation of the judgment in *R (L)*. Additionally, it is pleasing to note that the comprehensive scrutiny of the chief officer of police prior to disclosure in *R (B)*. Document AT3, with over 200 pages of attachments, demonstrates a welcome improvement from the piecemeal, and often frankly desultory, consideration of proportionality previously offered by chief officers. The lessons of *R (C)* seem to have been learned.

On the other hand, the court's continued deference to the chief officer of police remains a source of frustration. Whilst the Divisional Court in *R (B)* at least found the time to address the issue of actual *review* of the chief officer's decision (unlike in *R (C)* where the Court of Appeal elected to ignore that point and hope that no one would notice), the fact remains that the courts appear thoroughly reluctant to interfere in a decision that, under the literal interpretation of the Police Act 1997, ultimately falls to the chief officer of police. That is perhaps understandable where the decision is as comprehensive as that in *R (B)*, with facts which perhaps might favour disclosure, but there remains, it is

165 A point which the Court of Appeal seemed palpably to fail to grasp in *R (C)*.

166 *R (on the application of B) v Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin) at [86].

167 Reproduced *ibid.* at [25].

168 *Ibid.* at [65], citing with approval the *ratio* in *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26.

169 *R (on the application of B) v Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin) at [66].

submitted, a requirement for definitive guidance. In the absence of parliamentary interference, that responsibility surely lies with the judiciary.

## **Conclusion**

Employers have long had the right to vet potential employees. This is now the exclusive remit of the Criminal Records Bureau. The present legislative framework allows for the disclosure of non-conviction material on enhanced Criminal Records Bureau certificates. Such a disclosure is an obvious interference with the right to privacy enshrined in Article 8 of the European Convention on Human Rights. It is also a blatant and direct challenge to the 'golden thread' of English law that is the presumption of innocence. The former is justified by the qualification of Article 8(2) which allows interference into the privacy right in accordance with the law. The latter has yet to be addressed, let alone justified, though notions of 'public protection' arise sufficiently often in judicial interpretation as to perhaps answer that unanswered question.

The protection of children and vulnerable adults is an undeniably essential function of the state. Where the state fails in that obligation, as it did in the circumstances of the Soham murders, the results can be catastrophic. Such results, however, are noteworthy because such crimes are extremely rare. It is universally recognised that the vast majority of abuse takes place in the home, not the workplace. Those high-profile, and mercifully infrequent, public instances like that which occurred at Soham should not be used as justification for the effective criminalisation and marginalisation of citizens who have not been convicted of a criminal offence.

It must be questioned whether or not the state can possibly justify at all such a wanton intrusion into the privacy of an individual as that demonstrated in decided cases. It is not merely those suspected of an offence who are 'at risk'. It is remarkable that an applicant can be subjected to a soft disclosure relating to the activities of other individuals. This is a form of *guilt by association* which should, frankly, be an unacceptable form of vetting in any circumstance. Equally, if a disclosure can be made against an applicant who has been acquitted by a criminal or appellate court, the natural question to ask is whether or not that applicant has gained *anything at all*, save perhaps an escape from criminal sanction, from that acquittal? The information would be disclosed if he or she had been convicted, and will be disclosed regardless of the acquittal. That both categories of soft disclosure are deemed desirable, by the public, the executive and by the judiciary, is a troubling marker of the risk-averse society in which we live.

There may be certain circumstances where a person is, despite a lack of criminal convictions, such an obvious danger to society that soft disclosure of the sort permitted on the enhanced certificate is justified. These circumstances, however, must surely be the exception, rather than the rule. It is barely credible to imagine that these circumstances



arise in near 20,000 instances every year. The state is using the weightiest of the proverbial sledgehammers to crack the smallest nut.

The judicial position regarding enhanced certificates has shifted noticeably in a very short space of time, from the inexcusably low-threshold test in *R (X)* to the more balanced, proportionate consideration offered in *R (L)*. That is to be welcomed, as is the recent examination of the chief officer's decision-making process in *R (B)*, which demonstrated a gratifying acknowledgement of the proportionality issue on the part of the police. Yet the bald statistics show that, of the three applicants to suffer damaging soft disclosure under the new *R (L)* test, two found their judicial review applications dismissed entirely and the third, C, was returned to the discretion of a chief officer of police who wanted to disclose. It is too soon to state for certain whether or not the pendulum has swung decisively, but the evidence thus far is less than promising. There remain those who insist that such intervention can be justified, that public policy somehow entitles the law to devastate the lives of tens of thousands of people for the sake of preventing a tiny handful of some of the rarest crimes. This author respectfully, but vehemently, disagrees. By our Parliament, the police and the judiciary, we are criminalising the innocent.