PROPORTIONALITY NOT PRESUMPTION

IN *R. (On the Application of L) (FC)* v. *Commissioner of Police of the Metropolis* [2009] UKSC 3, [2009] 3 W.L.R. 1056 L was the mother of a delinquent 12-year-old boy who was placed on the child protection register. The register recorded the fact that L was generally unaware of her son's whereabouts, that she could not control him and that she had refused to co-operate with social services. L subsequently sought employment at a secondary school. Her primary role was to ensure that the children did not leave school and that they did not get up to mischief. For an increasing number of positions, an Enhanced Criminal Record Certificate ("ECRC") is required. L's ECRC disclosed the neglect of her son, her employer decided that she was not suitable and she lost her job.

L challenged the ECRC on the basis that it violated Article 8 ECHR, the right to respect for private life. Her application was dismissed at first instance and by the Court of Appeal. The Supreme Court agreed that the disclosure was justified. However, it also provided crucial guidance on the correct approach to disclosure.

The first issue that the Justices had to consider was whether Article 8 was engaged. Four of the Justices held that it was. Two reasons were given: (i) Article 8 includes a right to establish and develop relationships and excluding a person from employment is likely to affect this; and (ii) disclosing information held on police files engages Article 8. Both reasons are supported by Strasbourg jurisprudence.

The second issue was whether the interference with Article 8 was justified. Prior to issuing an ECRC the Secretary of State must ask the chief police officer to provide any information, which in his opinion (a) might be relevant for the purpose described in the statement and (b) ought to be included in the statement. This requirement was set out in section 115(7) of the Police Act 1997, see now Police Act 1997, S. 113B. In *R. (X)* v. *Constable of West Midlands Police* [2004] EWCA Civ 1068; [2005] 1 W.L.R. 65, Lord Woolf held that s. 115(7) imposes a duty to disclose information *unless* there is a good reason for not disclosing it. In *R. (L)* the applicant argued that this violates Article 8 as it goes further than is necessary for the legitimate aim of protecting children. Four of the Justices held that *R. (X)* was incompatible with Article 8, but that the legislation itself was not irreconcilable because s. 115(7)(b) (whether the information "ought to be disclosed") obliges the chief police officer to consider whether the interference with Article 8 is justified. Thus there is no presumption in favour of disclosure. Moreover, if the chief police officer is unsure whether disclosure is necessary, the majority thought that the applicant should have an opportunity to make representations *prior* to disclosure. This recalibration was essential as *R. (X)* clearly did not satisfy Article 8.

https://doi.org/10.1017/S0008197310000024 Published online by Cambridge University Press

One criticism of the majority's approach is that some aspects of the Justices' analysis were inconsistent. At times the Justices referred to the protection of children as a legitimate aim or societal interest (*i.e.* a limitation on Article 8) and sometimes they referred to these interests as a competing right (although they never identified what that right was). There is an important distinction. Where there are two competing rights, the court will need to strike a balance giving equal weight to the two rights. The analytical framework for societal interests is different: they are an exception to Convention rights, which need to be narrowly construed. Strasbourg jurisprudence is often similarly vague at this stage of analysis and this is equally undesirable.

Lord Scott took a different approach. For him, the crux of the matter was that the applicant had applied for the ECRC. Thus, having requested disclosure she could not complain that the police had violated Article 8. He realised that the applicant had no choice if she wanted to pursue certain types of employment, but he did not regard this as significant. Moreover, he rejected Lord Hope's suggestion that applicants consent on the condition that their private lives are respected. Lord Scott argued that, as the purpose of an ECRC is to disclose private information, it would be nonsensical to allow applicants to argue that no private information should be included. With respect, Lord Scott misses Lord Hope's point here, which was not that *no* private information should be provided but that the right to private life should be respected by releasing private information *only* if disclosure was proportionate to a legitimate aim. Rights-based analysis and proportionality underpinned the judgments of the majority. However, there were no signs of this in Lord Scott's judgment. He held that "if the private information is relevant and the decision that it ought to be included in the ECRC is a reasonable one, having regard to the reason why the certificate is being sought, [then] there is … no objection to its inclusion", at [59]. Ultimately, he endorsed *R.(X)*, accepting that it prioritised social needs over Convention rights. This flies in the face of Article 8. Moreover, acceptance of Lord Scott's assertion that individuals waive their rights by applying for an ECRC, would have serious implications for human rights generally, as they would be worthless if they could be eroded by such clandestine means. Thus Lord Neuberger and Lord Brown were right to reject this argument.

Despite these differences, all five Justices agreed that disclosure was justified: the information was true and it related directly to the applicant's job. This was clearly correct and in that sense it was a fairly straightforward case. Nevertheless, other cases will not be so clear-cut, and the decision-making process will be crucial. Of course it is essential that there is a thorough procedure for vetting individuals who will be working with children, the new Independent Safeguarding Authority

https://doi.org/10.1017/S0008197310000024 Published online by Cambridge University Press

and the Vetting and Barring Scheme have been designed for that purpose (following the Soham murders by the school caretaker Ian Huntley), and it remains to be seen how they will operate. However, *R.(X)* went further than was necessary. An increasing number of jobs require an ECRC and the release of information (including allegations which have not been tested at trial or led to conviction) effectively closes off entire sectors of employment and voluntary work. It is therefore essential that information is not disclosed without appropriate justification. The opportunity to make representations *prior to disclosure* is also crucial. Hansard records a pertinent example of the detriment caused by inappropriate disclosure: a student nurse was suspended when her ECRC revealed that she was on bail for suspected fraud, but she had in fact been the victim of identity theft, HL Deb. vol. 713, col. 664 (20 October 2009). Unfortunately, she lost her university place as a result of the ECRC, but if she had been given the opportunity to make representations then this may not have occurred. The police are attempting to follow correct procedure and they have clearly designed their policy to follow the guidance that was issued in *R.(X)*. Unfortunately that guidance was seriously flawed. *R.(L)* was therefore essential to ensure that a policy that affects millions of people is compliant with human rights.

KIRSTY HUGHES

## OUT-OF-COURT (OUT OF SIGHT) DISPOSALS

ON 14 December 2009 the Lord Chancellor, the Home Secretary, and the Attorney-General published the terms of reference for a review of the use of out-of-court disposals by criminal justice agencies, to be carried out by the Office of Criminal Justice Reform. Announcing the terms of reference, they said that they are concerned by reports of these disposals being used for apparently serious offences, including violent assaults, by the apparent variation between areas in the number of crimes brought to justice through the use of out-of-court disposals, by reports of the repeated use of such disposals even for low-level offences and by the "robustness" of their enforcement.

Recent case law illustrates some of the problems. In *Gore and Maher* [2009] EWCA Crim 1424, [2009] 1 W.L.R. 2454 the two appellants unsuccessfully appealed their convictions for inflicting grievous bodily harm. An assault (recorded on CCTV) took place in Liverpool city centre in the early hours of 28 October 2007, and police officers were alerted by the CCTV operators. Both Gore and Maher were given Fixed Penalty Notices ("FPNs"), one for being involved in an altercation in a public place when drunk, the other for behaviour likely to

https://doi.org/10.1017/S0008197310000024 Published online by Cambridge University Press