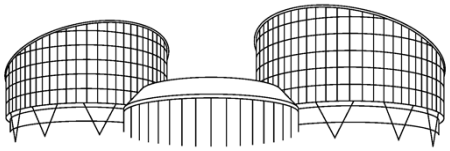

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF A.R. v. THE UNITED KINGDOM

(Application no. 6033/19)

JUDGMENT

Art 8 • Private life • Disclosure by the police, in the context of enhanced employment vetting, of information that the applicant had been charged with rape and acquitted at trial, with a description of the circumstances of the alleged offence • No statutory guidance to assist chief police officers when exercising their discretion • Applicant could not reasonably foresee impugned measure • Sensitivity of such disclosure required comprehensive general guidance indicating scope of discretion and manner of exercise • No guidance at the relevant time to assist employers in how to approach disclosed information of such nature • Applicant not afforded opportunity to make representations before impugned disclosure made • No possibility of independent review of disclosure • Excessively broad discretion for the authorities in application of statutory disclosure provisions in force at the relevant time • Insufficient safeguards to afford adequate legal protection against arbitrary exercise of that discretion • Impugned disclosure not in accordance with the law

Prepared by the Registry. Does not bind the Court.

STRASBOURG

1 July 2025

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of A.R. v. the United Kingdom,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Arnfinn Bårdsen*, President*,
Saadet Yüksel,
Tim Eicke,
Jovan Ilievski,
Gediminas Sagatys,
Stéphane Pisani,
Juha Lavapuro*, judges*,
and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the application (no. 6033/19) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr A.R. ("the applicant"), on 21 January 2019;

the decision to give notice of the application to the United Kingdom Government ("the Government");

the decision not to have the applicant's name disclosed;

the parties' observations;

Having deliberated in private on 10 June 2025,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns the 2011 and 2012 disclosure by the police, in the context of enhanced employment vetting, of information that the applicant had been charged with rape and had subsequently been acquitted at trial, and a description of the circumstances of the alleged offence.

THE FACTS

2. The applicant was born in 1978 and lives in Rochdale. He was granted legal aid and was represented by Mr M.J. Pemberton, a lawyer practising in Wigan.

3. The Government were represented by their Agent, Mr S. Linehan, of the Foreign, Commonwealth and Development Office.

4. The facts of the case may be summarised as follows.

I. BACKGROUND FACTS

5. The applicant has a teaching qualification but at the relevant time was working as a taxi driver. In March 2010 he was charged with the rape of a

17-year-old woman who had been a passenger in his taxi. His defence was that there had never been any sexual contact between him and the alleged victim. There was no forensic evidence linking him to her. On 21 January 2011 the applicant was acquitted of the charge at trial.

A. The 2011 ECRC

6. On 22 March 2011 an enhanced criminal record certificate ("ECRC") was issued by the Criminal Records Bureau ("CRB") in connection with the applicant's application for a job as a lecturer at a college. At the relevant time, an ECRC issued under section 113B of the Police Act 1997 ("the 1997 Act" – see paragraph 33 below) contained details of all previous convictions and cautions as well as "other relevant information disclosed at the Chief Police Officer's discretion" (sometimes called "soft intelligence"). The applicant had no criminal convictions or cautions. However, in the area of the applicant's ECRC reserved for other information, details of the applicant's charge for and subsequent acquittal of rape were disclosed in the following terms:

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

7. On 20 April 2011 the applicant objected to the disclosure, in the following terms:

> "There is no conviction. The jury rejected the complainant's evidence and the disclosure of the allegation is so prejudicial as to prevent me from being fairly considered for employment. Even if the disclosure of the allegation was possibly appropriate the disclosure fails to provide a full account of the evidence given and how the jury came to its conclusion. It is wrong, unfair and grossly prejudicial [that] I should have to defend myself every time I apply for employment after the jury have ruled I am an innocent man."

8. The decision to disclose the information was upheld.

9. On 2 June 2011 the applicant lodged an administrative appeal with the police force concerned, pointing out the impact that the disclosure would have on his future career as a qualified teacher. His appeal was rejected. The panel took account of a memorandum prepared in March 2012 by a reviewing officer and signed by the chief police officer's delegate, Inspector K., who had authorised the initial disclosure. The reviewing officer expressed the view that the information disclosed was relevant and that it ought to be included on an ECRC. In answer to a question as to the relevance of the

information, she noted that the position of lecturer would give the opportunity for the applicant to befriend vulnerable females of a similar age to "the victim", with the risk that he might use his role "to abuse his trust and authority and commit similar offences".

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

"I believe the information is of sufficient quality to pass the required test because:

- There was sufficient evidence for the CPS [Crown Prosecution Service] to authorise the applicant being charged with Rape, indicating that they believed there to be a realistic prospect of conviction. If the CPS had not believed the allegation, they would not have authorised the charge. This indicates that on the balance of probabilities the allegation was more likely to be true than false.
- Although the applicant was found not guilty by the jury, the test for criminal conviction is beyond all reasonable doubt, which is higher than that required for CRB disclosure purposes. Therefore the applicant's acquittal does not prove that he was innocent, or even that the jury thought he was innocent, just that he could not be proved guilty beyond all reasonable doubt.
- In the applicant's letter ... he states that another male's DNA was found on the victim's underwear ... The expert was clear that the presence of another male's sperm DNA on the victim's underwear did not evidence that she had had sex with someone else on the evening of the incident.
- The forensic evidence regarding the alleged sexual intercourse between the applicant and the victim was inconclusive, which was to be expected as the victim alleged the applicant had used a condom, thereby making the presence of forensic evidence less likely. Therefore, this does not support either the applicant or the victim, but cannot be used to cast doubt of the victim's account.
- The medical evidence revealed vaginal injuries consistent with penetration, which were up to three days old. This was consistent with the victim's account, and although not conclusive evidence, is in her favour.
- In the applicant's letter ... he claims that the judge stated there were many inconsistencies in the female's account. Having read the judge's summing up, he states that 'there has been legitimate criticism from the defence about some of the details of the accuracy of [the victim's] evidence', however he goes on to indicate that he believes these details are not important. 'I suggest that the big picture may be what matters'. The inaccuracies in the victim's evidence are not regarding the actual allegation, but regarding the circumstances leading up to the alleged incident, e.g. the time she got into the taxi, whose decision it was that she was not staying at her friend's house, and the precise conversation with the applicant. As the victim was intoxicated at the time (by her own admission and that of the applicant), it is entirely plausible that she may have forgotten some of the less important aspects of the evening, and therefore this does not necessarily cast doubt on her account.
- Although the victim was also unclear as to the duration of the alleged intercourse, as she states she was in shock, and she was intoxicated, this again does not make her account implausible.
- The court heard evidence of the victim's distress after the incident from a number of witnesses, which would seem to support her account.

- Although the applicant's account was consistent which is in his favour, the judge rightly states that this does not negate the possibility of him lying as 'of course a man may lie consistently'.
- There is no indication of the victim having any motive to make a false allegation, and it seems unlikely that she would wish to go through the emotional trauma of medical and forensic examinations, intimate questions about her sexual activity, and the court case, to make a malicious allegation without a strong motive for doing this.
- Although the ... review has raised that the acquittal indicates that the allegation might not be true, the legislation and guidance is clear that allegations that might not be true can be disclosed, as the test required for CRB disclosure purposes is lower than this.
- Due to the above, I believe that the information is more likely to be true than false and is not lacking in substance, and it is reasonable to believe that the information might be true, and therefore it passes the required test."

11. The reviewing officer concluded:

"I believe disclosure is both reasonable and proportionate because:

- In my opinion, as explained above, the information is clearly relevant and passes the required test.
- The alleged incident is relatively recent as it occurred in Nov 2009, less than 3 years ago.
- Although this is an isolated incident, it is very serious as it relates to an alleged rape using force, by a stranger. It is not a minor incident.
- If the applicant repeats this alleged behavior in the [position applied for], vulnerable people could be caused serious emotional and physical harm.
- Although disclosure of this incident will have an impact on the applicant's human rights as he may fail to gain employment in his chosen profession, this would not prevent the applicant from gaining employment in another profession which does not require an enhanced CRB check, and therefore it would not prevent him from gaining employment to support his family. Disclosure of this allegation will not prevent the applicant from gaining all forms of employment indefinitely.
- I believe that it is important that the [potential employer/registered body] are made aware of this allegation, in order that they can make an informed recruitment decision and act to safeguard vulnerable people.
- Due to the above, I believe the potential risk to vulnerable people outweighs the effect of disclosure on the applicant's human rights in this instance, and therefore the information ought to be disclosed."

12. The memorandum ended with a comment that the disclosure text was "accurate, balanced, and not excessive ... There is no intimation of the applicant's guilt or otherwise in the text".

B. The 2012 ECRC

13. On 28 March 2012 a further ECRC was issued by the CRB after the applicant applied for a licence to work as a private hire driver. The ECRC contained the same information as had been included on the ECRC issued in March 2011 (see paragraph 6 above). The same reviewing officer had considered the matter and had reached the same conclusion, for exactly the same reasons as were given in respect of the March 2011 ECRC. That review material had also been considered by a senior police officer who considered that disclosure was reasonable and proportionate for the following reasons:

> "... I consider that this is relevant to the post applied for as the applicant may present a risk of harm to the children/vulnerable adults with whom they may come into contact whilst again working as a private hire driver.
>
> In considering whether the information ought to be disclosed, I have taken into account the gravity of the material involved, the reliability of the information on which it is based, the relevance to the post applied for, the period of time elapsed since the events(s) occurred, together with the likely impact on the applicant of disclosing the material. I have also taken into account the details of the matters as reported to the police, together with the considerations of the Crown Prosecution Service ... I consider this is information that is relevant to the post applied for and ought to be disclosed to be considered by the registered body concerned. I believe this disclosure is factually correct, reasonable and proportionate, and that the wording is fair and reflective of the information held by [the police].
>
> Having considered the human rights of all relevant parties and the potential risks as outlined above with which I fully agree I believe the disclosure is necessary and therefore authorise this disclosure as approved information."

14. On 22 June 2012 the applicant objected to the disclosure in similar terms to his earlier letter (see paragraph 7 above). He complained that it would "affect the rest of my life and future as nobody will employ me to teach with this disclosed on my [ECRC]". The disclosure was confirmed by the CRB on 7 August 2012.

15. In December 2012, the Disclosure and Barring Service ("DBS") took over the functions of the CRB.

II. DOMESTIC PROCEEDINGS

A. The High Court

16. In December 2012, the applicant applied for permission to seek judicial review of the decision of the chief police officer to disclose the information concerning the charge and acquittal of rape, invoking his rights under Articles 6 § 2 and 8 of the Convention and relying in particular on, respectively, *Allen v. the United Kingdom* ([GC], no. 25424/09, ECHR 2013) and *M.M. v. the United Kingdom* (no. 24029/07, 13 November 2012). He was granted permission but on 5 September 2013 the High Court rejected his

claim. The judge considered that Article 8 was clearly engaged in the case but found that the disclosure was reasonable, proportionate and no more than necessary to secure the objective of protecting young and vulnerable persons. His reasons were, in so far as relevant, as follows:

> "40. ... a) Although the review proceeded on a false premise (namely that the decision to charge indicated that on the balance of probabilities the allegation was more likely to be true than false) it is clear on my reading of the transcript of the forensic evidence and summing up that the same were carefully considered in the review, and in my judgment the comments on the forensic and medical evidence, the complainant's inconsistencies and the consistency of the claimant were fair. The complainant's evidence derived some support from the medical evidence and her distress, and no criticism has been made of the comments regarding the lack of any indication of motive to make a false allegation and willingness to suffer emotional trauma.
>
> ...
>
> c) The fact of acquittal was recognised, and in my view it was right to comment that nothing could be assumed from the fact of acquittal other than that the jury was not satisfied beyond reasonable doubt of guilt.
>
> d) Whilst I do not consider that a firm or reliable conclusion as to whether the complainant's account is more likely to be true than false can be gathered from the transcript alone, I am quite satisfied that the Chief Constable was fully entitled to conclude that it was 'not lacking in substance, and that it [was] reasonable to believe that the information might be true'. In my judgment that is a sufficient basis for disclosure (subject to the issue of proportionality), given the other factors reasonably relied upon by the Chief Constable as justifying disclosure as stated in the review, such as the seriousness of the alleged offence, its relevance to the position applied for and its comparatively recent occurrence.
>
> e) I do not accept that the March 2012 disclosure decision is invalidated or rendered unlawful by any failure of procedure, or that the claimant has in the event suffered any injustice as a result of the failure to consult before making that decision. When making that decision, account was taken of his previous complaints regarding the March 2011 disclosure, there had been no legal challenge to that disclosure and the Chief Constable in my view was entitled to proceed upon the basis that the claimant's complaints were as previously stated. In the event it is plain that the police in the March 2012 review anticipated and considered the matters that the claimant later raised in his letter of 22 June 2012 and ... no suggestion has been made in these proceedings of any further substantive matters that the claimant would have wished to raise.
>
> f) Account was taken of the claimant's employment difficulties resulting from the ECRC, Inspector [K.] having taken into account the likely impact on the claimant of disclosing the material. In my judgment, the Chief Constable was justified in concluding that the potential risk to the vulnerable if the claimant obtained a private hire driver's licence and had acted as alleged by the complainant outweighed the detriments that would be caused to him by the disclosure and the interference with his article 8 rights and that disclosure were both justified and proportionate. I am satisfied that the disclosure in the March 2012 ECRC Certificate was no more than was necessary to meet the pressing social need for children and vulnerable adults to be protected and that the balance between that need and respect for the claimant's article 8 rights was struck in the right place."

17. The judge found it unnecessary to determine whether Article 6 § 2 was applicable to the issuing of an ECRC since in any event he considered that the disclosure did not breach the presumption of innocence.

B. The Court of Appeal

18. The applicant was granted permission to appeal. His appeal was dismissed on 10 June 2016.

19. In respect of his argument under Article 6 § 2, the court observed that the statement for onward transmission on the ECRC was extremely limited: there was no aspersion cast at all upon the correctness of the acquittal and it had not been suggested in the certificate that the applicant was guilty of the offence of which he had been acquitted. The court further noted that the issue in the case was whether to disclose the information as a measure of public protection; there was no procedural link at all to the previous criminal proceedings themselves. There was no suggestion that the jury had been wrong to acquit on the evidence and on the standard of proof which they had to apply. The court therefore considered that there was no "undermining" of the acquittal.

20. As to Article 8, the court found no breach of the right to respect for private life. The judge delivering the court's ruling summarised the justification for the disclosure advanced by the police as follows:

> "33. [Counsel for the police] argued that the allegations were recent, very serious and had been thought by the police to be reliable; these points had to be balanced by them with the fact of the jury acquittal. In carrying out the proportionality exercise, therefore, the police had to take into account that they were acting under a statute designed for the protection of the vulnerable; an evaluative judgment was required; it was highly relevant that the information related to an allegation made against the appellant as a taxi driver and he was seeking to take up that very same employment; risk to the vulnerable was acute; in deciding upon disclosure no single factor could dominate; it was not incumbent on the police to conduct a 'mini-trial' or to decide for themselves the question of whether the acts had been committed or not – that was not feasible; the acquittal was but one factor in the necessary evaluation."

21. Reviewing the first-instance decision, the judge said:

> "75. I do not find that [the first instance judge] made any error of principle in his judgment in this case, let alone any significant error. He had sufficient of the relevant authorities well in mind ... He proceeded to consider for himself the various factors material to the proportionality of the decision to disclose the information, recognising as he did the flaw in the reviewing officer's reasoning in placing some significant weight on the initial decision to prosecute. The judge recognised that a balance had to be struck between the potential risk to the vulnerable if the appellant obtained the post for which he was applying and the interference with his rights under Article 8 caused by the detriment that he would suffer by the disclosure. The judge saw that the balance was a difficult one to strike and correctly directed himself to the material considerations.
>
> 76. The points made by [counsel for the police], which I have summarised in paragraph 33 above, were to my mind valid elements of the decision which the [police]

had to take, but I must not be drawn into re-making that decision. However, it seems to me that those points were in essence the same as the ones that persuaded [the first-instance judge] that the [police's] decision was proportionate on the facts of this case. I can see no significant error of principle in that and can see no reason to disagree with the assessment of proportionality that he made."

C. The Supreme Court

22. The applicant applied to the Supreme Court for permission to appeal, reiterating his arguments under Articles 6 § 2 and 8 of the Convention. On 2 November 2016 permission was granted in respect of the Article 8 complaint only.

23. On 30 July 2018 the Supreme Court dismissed the appeal. Lord Carnwath, giving the judgment of the court, explained:

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

24. He set out the statutory framework for disclosure at the relevant time as follows:

"31. ... [T]he Mason review recommended a stricter test of relevance, but it contained no discussion of the test of reliability. It contained some discussion of the ECRC system, with examples, but no reference was made to the issue of disclosure following trial and acquittal.

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

"This will always be a matter of judgement, but the starting point will be to consider whether the information is from a credible source. ... In particular, allegations should not be included without taking reasonable steps *to ascertain whether they are more likely than not to be true*." (para 18, emphasis added)

The same wording appeared in a version available in some form in July 2012 ... It seems likely ... that [the ECRC's] use of the expression 'more likely to be true than not' reflected some equivalent guidance available at the time, but the actual source has not been identified.

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

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

'3. It should not include any unnecessary detail or information; only relay the relevant facts.

4. The disclosure text should be balanced and neutral in tone, offering no opinion, assumption or supposition ...'

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

35. [Counsel for the Secretary of State] referred us to a more recent document issued by the DBS: 'Quality Assurance Framework – an applicant's introduction to the decision-making process for Enhanced Disclosure and Barring Service checks' (March 2014). It discusses the 'three primary tests', described as tests of 'Relevance', 'Truth/Substantiation' and 'Proportionality'. Under the heading 'Substantiation' (p 9):

'The weight of evidence required is set at a reasonably low level. Some have argued that a higher test, one of a balance of probabilities should be used. Case law, however, asks for consideration of whether there are untoward circumstances that lead the decision-maker *to believe that it is unlikely that the information is true or that the information is so without substance as to make it unlikely to be true.*

A reasonable decision-maker would not disclose the existence of allegations without first taking reasonable steps *to ascertain whether they might be true* ...' (Emphasis added)

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

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

36. This document is also of interest since it contains what appears to be the only specific reference to disclosures following a 'not guilty' verdict in a criminal trial. Under the heading 'What kind of information can be considered for disclosure?', it

includes 'incidents for which individuals were found "Not Guilty" in a court of law (in certain circumstances)' ..."

25. Lord Carnwath next summarised the guidance for employers as follows:

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

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

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

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

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

'When dealing with allegations rather than convictions and cautions, a decision maker must not start with any assumptions about them. Allegations will have been disclosed because they reasonably might be true, not because they definitely are true. It is good practice for the decision makers, with the help of their legal adviser, to go through the contents of an enhanced disclosure certificate with an applicant/driver and see what

> they say about it. If, as sometimes happens in practice, admissions are made about the facts, that provides a firm basis for a decision.' (p 15)"

26. Lord Carnwath noted that there was no dispute that the disclosure had involved an interference with the applicant's Article 8 rights. The issue was, he said, "whether, in terms of article 8.2, it was 'necessary ... for the protection of the rights and freedoms of others' – in other words, whether it was 'proportionate'". He considered, first, the applicant's submission that the interference involved in the disclosure could not be justified unless the police officers (or the judge) were in a position to form a positive view of likely guilt, and that this could not be done without a full appraisal of the evidence in the trial. He said:

> "68. ... I cannot accept that, as a matter of domestic law or under article 8, it is necessary or appropriate for those responsible for an ECRC to conduct a 'detailed analysis' of the evidence at the trial ... That is the task of the judge and jury, who have the advantage of seeing and hearing the witnesses. Whether or not it would be compatible with article 6.2 for the chief officer to express a view on the merits of the case following an acquittal, it is not the proper function of an officer to attempt to replicate the role of the court, or ... to conduct a 'mini-trial'. Nor can that be read into the language of the statute. His task under section 113B is to identify and disclose relevant 'information', not to make a separate assessment of the evidence at trial ..."

27. He referred to examples where additional information might be available which justified treating the trial court's disposal as less than decisive, or provided a positive indication of innocence. However, in the absence of information of that kind, he said, it was not the job of the police to fill the gap. To the extent that the reviewing officer in the present case had seen it as part of her task to assess whether, in the light of the evidence at trial, the allegation was "more likely to be true than false", she had therefore been in error. However, Lord Carnwath continued:

> "69. The judge did not make the same error. He went no further than to accept, as he was entitled to do, the Chief Constable's view that the information was 'not lacking substance' and that the allegations 'might be true'. However, that in itself did not mean that disclosure was disproportionate. It was a matter for him to assess whether the information, albeit in the limited form contained in the ECRC, was of sufficient weight in the article 8 balance.
>
> 70. It is to be borne in mind that the information about the charge and acquittal was in no way secret. It was a matter of public record, and might have come to a potential employer's knowledge from other sources. If so, a reasonable employer would have been expected to want to ask further questions and make further inquiries before proceeding with an offer of employment. Its potential significance was as the judge found underlined by 'the seriousness of the alleged offence, its relevance to the position applied for, and its comparatively recent occurrence'... On the other side, the judge took full account of the possible employment difficulties for A.R., but regarded those as 'no more than necessary to meet the pressing social need' for which the ECRC process was enacted ..."

28. He concluded that the applicant had failed to identify any error in the judge's reasoning. He added the following postscript:

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

75. However, I am concerned at the lack of information about how an ECRC is likely to be treated by a potential employer in such a case. [Counsel for the police] was at pains to emphasise that the ECRC is only part of the information available, and will ... not necessarily lead to failure. On the other hand, Lord Neuberger [in *R (L) v. Commissioner of Police of the Metropolis*] assumed that an adverse ECRC would be a 'killer blow' for an application for a sensitive post ... That view was adopted without question by the Strasbourg court in *MM v United Kingdom* (2013) (Application No 24029/07), but it is not at all clear with respect that it was based on any objective information or empirical evidence of what happens in practice. We have been shown reports which emphasise the importance of not excluding the convicted from consideration for employment, but they say nothing about the acquitted, who surely deserve greater protection from unfair stigmatisation. Nor does there appear to be any guidance to employers as to how to handle such issues. Even if the ECRC is expressed in entirely neutral terms, there must be a danger that the employer will infer that the disclosure would not have been made unless the chief officer had formed a view of likely guilt.

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

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE POLICE ACT 1997

29. The Police Act 1997 provided at the relevant time for the disclosure of criminal record information in the context of employment vetting to be undertaken by the CRB.

A. The law in force at the relevant time

30. The following description of the relevant legislative framework concerns the law as in force at the relevant time, namely on 22 March 2011 and 28 March 2012 when the applicant's ECRCs were issued (see paragraphs 6 and 13 above).

31. The 1997 Act provided for three different types of certificate depending on the context in which criminal record information was sought. A criminal conviction certificate contained only unspent convictions. Any employer could ask for a basic CRB check.

32. A criminal record certificate ("CRC") issued pursuant to section 113A of the 1997 Act contained spent and unspent convictions and cautions. Only recruitment to certain positions could give rise to a request for a CRC. The positions concerned were set out in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and included, in so far as relevant to the present application, teaching positions involving persons under the age of 18. An application for a CRC had to be countersigned by a registered person (who was the employer, where the certificate was sought in the context of employment).

33. An ECRC issued pursuant to section 113B of the 1997 Act also contained spent and unspent convictions and cautions. However, in addition it included other information held by the police which in the opinion of the chief officer "might be relevant" to the purpose for which the ECRC was sought and "ought to be included in the certificate" (section 113B(4)). The employment positions which permitted a request for an ECRC were the same as those which entitled an employer to request a CRC (see paragraph 32 above). However, an ECRC could only be sought for a "prescribed purpose", as set out in regulation 5A of the Police Act 1997 (Criminal Records) Regulations 2002. Prescribed purposes included considering a person's suitability for working with children or vulnerable adults, assessing suitability for employment related to national security and, from 26 March 2012, suitability to obtain a taxi driver licence. An application for an ECRC also had to be countersigned by a registered person (see paragraph 32 above). Pursuant to section 113B(6), the ECRC was sent to both the applicant and the employer, as the registered person.

34. Section 122 required the Secretary of State to publish, and from time to time revise, a code of practice in connection with the use of information provided to, or the discharge of any function by, registered persons (see paragraph 50 below).

B. Subsequent relevant amendments to the law

35. On 10 September 2012 changes to these provisions of the 1997 Act entered into force. The test of "might be relevant" in section 113B(4) (see paragraph 33 above) was amended to cover information which the police officer "reasonably believes to be relevant".

36. A new section 113B(4A) was also introduced to give the Secretary of State the power to issue guidance to chief officers of police on providing information for disclosure in ECRCs (see paragraph 48 below).

37. A mechanism was introduced whereby a person could dispute the inclusion of information under section 113B(4) in an ECRC. Pursuant to new section 117A of the 1997 Act, if an ECRC includes information that an applicant believes is not relevant or ought not to be included in an ECRC, they may make an application to the independent monitor for a decision as to

whether the information is relevant and ought to be included. The independent monitor, who is appointed by the Secretary of State (section 119B), must ask the relevant chief officer to conduct a review of the disclosure decision. If, following this review, the independent monitor considers that the information is either not relevant or ought not to be included in the ECRC, a new ECRC that excludes the information is issued. In exercising their functions, the independent monitor must have regard to any guidance published by the Secretary of State.

38. Section 113B(6), which required a copy of the ECRC to be sent to the employer as the registered person (see paragraph 33 above), was subsequently repealed.

II. JUDICIAL CONSIDERATION OF THE DISCLOSURE OF INFORMATION UNDER SECTION 113B(4) OF THE 1997 ACT

A. Prior to the issue of the applicant's ECRCs

1. R (X) v. Chief Constable of the West Midlands Police [2004] EWCA Civ 1068

39. The compatibility of a disclosure of other information in an ECRC with Article 8 was considered in *R (X) v. Chief Constable of the West Midlands Police*. There, the applicant had applied for a job as a social worker. He had previously been charged with indecent exposure and the proceedings had been discontinued when the alleged victim had failed to identify him. An ECRC issued in connection with his job application contained details of the allegations of indecent exposure. The applicant's challenge to the disclosure was rejected by the Court of Appeal. The judge considered that the 1997 Act imposed on the Chief Constable a duty to disclose "if the information might be relevant, unless there was some good reason for not making such a disclosure". He inferred that, in the view of Parliament, it was important for the protection of children and vulnerable adults that information be disclosed "even if it only might be true". He concluded:

> "41. ... It follows also, that as long as the Chief Constable was entitled to form the opinion that the information disclosed might be relevant, then absent any untoward circumstance which is not present here, it is difficult to see that there can be any reason why the information that 'might be relevant', ought not to be included in the certificate. I accept that it is possible that there could be cases where the information should not be included in the certificate because it is disproportionate to do so; the information might be as to some trifling matter; it may be that the evidence made it so unlikely that the information was correct, that it again would be disproportionate to disclose it ..."

2. *R (S) v. Chief Constable of West Mercia Constabulary [2008] EWHC 2811 (Admin)*

40. In *R (S) v. Chief Constable of West Mercia Constabulary*, the High Court considered whether inclusion of information concerning an acquittal in an ECRC was justified. The judge said:

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

3. *R (L) v. Commissioner of Police of the Metropolis [2009] UKSC 3*

41. The claimant in *R (L) v. Commissioner of Police of the Metropolis* had been employed by an agency providing staff for schools. An ECRC had disclosed details about her child, who had been included on the child protection register on the ground of alleged inadequate parental supervision by her. It had also referred to allegations that she had refused to cooperate with social services. The agency had ended her employment. Her judicial review claim was dismissed by the Supreme Court. Accepting that Article 8 was engaged, Lord Hope continued:

> "42. So the issue is essentially one of proportionality. On the one hand there is a pressing social need that children and vulnerable adults should be protected against the risk of harm. On the other there is the applicant's right to respect for her private life. It is of the greatest importance that the balance between these two considerations is struck in the right place ... Increasing use of this procedure, and the effects of the release of sensitive information of this kind on the applicants' opportunities for employment or engaging in unpaid work in the community and their ability to establish and develop relations with others, is a cause of very real public concern ...."

42. He considered that the approach taken in *R (X)* (see paragraph 39 above) had tilted the balance against the applicant too far. He explained:

> "44. ... It has encouraged the idea that priority must be given to the social need to protect the vulnerable as against the right to respect for private life of the applicant. ... The words 'ought to be included' ... require to be given much greater attention. They must be read and given effect in a way that is compatible with the applicant's Convention right and that of any third party who may be affected by the disclosure ... But in my opinion there is no need for those words to be read down or for words to be added in that are not there. All that is needed is to give those words their full weight, so that proper consideration is given to the applicant's right to respect for her private life."

43. The correct approach was that neither consideration had precedence over the other: it should not be assumed that the presumption was for disclosure unless there was a good reason for not doing so. Lord Hope moreover explained:

> "46. In cases of doubt, especially where it is unclear whether the position for which the applicant is applying really does require the disclosure of sensitive information, where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true, chief constables should offer the applicant an opportunity of making representations before the information is released ... But it will not be necessary for this procedure to be undertaken in every case. It should only be resorted to where there is room for doubt as to whether there should be disclosure of information that is considered to be relevant ..."

44. As for the case under consideration, he said:

> "48. ... [T]here is no doubt that the facts that were narrated were true. It was also information that bore directly on the question whether she was a person who could safely be entrusted with the job of supervising children in a school canteen or in the playground. It was for the employer to decide what to make of this information, but it is not at all surprising that the decision was that her employment should be terminated."

45. In a concurring judgment, Lord Neuberger thought it realistic to assume that in the majority of cases an adverse ECRC was likely to represent "a killer blow" to the hopes of a person aspiring to a post within the scope of the section. He observed that disclosable soft intelligence "may frequently extend to allegations of matters which are disputed by the applicant, or even to mere suspicions or hints of matters which are disputed by the applicant" and that, taken on its own, the statutory test of relevance set too low a hurdle to satisfy Article 8. The qualifying requirement to consider whether it "ought to be included" provided "the requisite balancing exercise" necessary to avoid breach of Article 8. Examples of factors which could be relevant were the gravity of the material involved, the reliability of the information on which it is based, whether the applicant had had a chance to rebut the information, the relevance of the material to the particular job application, the period that had elapsed since the relevant events had occurred, and the impact on the applicant of including the material in the ECRC, both in terms of his or her prospects of obtaining the post in question and more generally.

B. After the issue of the applicant's ECRCs

46. The approach to disclosure of information under section 113B(4) of the 1997 Act was developed after the issue of the ECRCs about which the applicant complains in the present case in a number of further cases before the High Court and Court of Appeal. These cases addressed the proportionality of disclosure of a wide variety of different types of non-conviction information under section 113B(4), including acquittals (see *R (A) v. Chief Constable of Kent Constabulary* (2013) 135 BMLR; *R (BW) v. Independent Monitor* [2015] EWHC 4095 (Admin); and *R (LG) v. Independent Monitor* [2017] EWHC 3327 (Admin)).

47. The Supreme Court's judgment in *In re Gallagher and R (P, G & W) v. Secretary of State for the Home Department and others* ([2019] UKSC 3)

concerned disclosure of conviction information in an ECRC and the operation of filtering rules (see *M.C. v. the United Kingdom*, no. 51220/13, §§ 15-31, 30 March 2021). In the context of his discussion of the "legality" requirement under Article 8 § 2 of the Convention in the lead judgment, Lord Sumption said:

> "42. The rules governing the disclosure of criminal records ... are highly prescriptive. The categories of disclosable convictions and cautions are exactly defined, and disclosure in these categories is mandatory. Within any category, there is no discretion governing what is disclosable. There is no difficulty at all in assessing the proportionality of these measures because, subject to one reservation (see the following paragraph), their impact on those affected is wholly foreseeable.
>
> 43. The one reservation arises from a submission made to us that on an application for an enhanced criminal record certificate under section 113B of the Police Act, it would be open to a chief officer of police, if he thought that it 'ought to be included', to call for the inclusion in the certificate of a conviction or caution which was not a 'relevant matter' because it did not fall within any of the defined categories of disclosable conviction under section 113A(6). I assume (without deciding) that this course was open to the chief officer. But it would not deprive the legislation of the quality of law, because section 113B(4A) requires chief officers to exercise this function having regard to statutory guidance published by the Secretary of State. This provision was inserted by the Protection of Freedoms Act 2012, which was shortly followed by the publication of detailed guidance in July of that year. It is well established that guidance provided for by statute may constitute 'law' for the purpose of the Convention: *R (Purdy) v Director of Public Prosecutions* [2010] AC 345, para 47 (Lord Hope). The judgment of the chief officer is subjected to carefully drawn constraints that themselves have the quality of law."

III. STATUTORY GUIDANCE

A. Guidance to chief officers of police on disclosure under section 113B(4) of the 1997 Act

48. The Secretary of State issued guidance (*Statutory Disclosure Guidance*) to chief officers of police under section 113B(4A) of the 1997 Act on 10 September 2012 (after the issue of the impugned ECRCs – see paragraph 36 above). It contained eight principles designed to assist chief officers in making decisions about providing information from local police records, including acquittals, for inclusion in enhanced criminal record certificates. It reflected the decision of the Supreme Court in *R (L) v. Commissioner of Police of the Metropolis* (see paragraphs 41-45 above).

49. The guidance was subsequently updated, notably in November 2021 in light of the Supreme Court ruling in the applicant's case (see paragraphs 22-28 above). The current version of the guidance (February 2024) includes the principles that there should be no presumption either in favour of or against providing a specific item or category of information (principle 1); information must only be provided if the chief officer reasonably believes it to be relevant for the prescribed purpose (principle 2);

information should only be provided if, in the chief officer's opinion, it ought to be included in the certificate (principle 3); and the chief officer should consider whether the applicant should be afforded the opportunity to make representations (principle 4). It includes the following paragraphs concerning acquittals:

> "43. The disclosure of information relating to acquittals was the subject of the Supreme Court judgment in the case of *R (AR) v Chief Constable of Greater Manchester Police* [2018] UKSC 47. It is important, in light of that judgment, that Chief Officers consider the disclosure of allegations in light of the principles set out in this guidance.
>
> 44. An acquittal following trial indicates only that the jury or the court is not satisfied beyond reasonable doubt that an individual was guilty. In some cases, an acquittal might be directed because of particular issues relating to the evidence. Additional information may in some cases be available about the circumstances of the acquittal, including the court's own statements (such as a summing up, or a ruling) which may give reasons for treating the court's disposal as less than decisive. Alternatively, that additional information may provide support for treating the allegation which led to the acquittal with caution. In the absence of information of that kind, the Chief Officer is not required to re-investigate or to conduct a wholesale review of the evidence presented at the trial. Rather, the Chief Officer should consider disclosure against the statutory tests and the principles in this guidance, taking into consideration that the individual was acquitted at trial of the allegation concerned."

B. Guidance to employers on the use of information disclosed in ECRCs

50. The CRB Code of Practice for Registered Persons and Other Recipients of Disclosure Information, published under section 122 of the 1997 Act (see paragraph 34 above) and revised in April 2009, contained no express provisions concerning how to approach information regarding alleged offences of which the person concerned had been acquitted. In a section headed "Suitability Policy", the code of practice required registered bodies to have a written policy on the suitability of "ex-offenders", available upon request to potential applicants, and to discuss the content of the disclosure with an applicant before withdrawing any offer of employment. A "Revised Code of Practice for Disclosure and Barring Service Registered Persons" issued in November 2015 is, in so far as relevant to the present application, in similar terms.

IV. NON-STATUTORY GUIDANCE

A. Concerning disclosure of information under section 113B(4) of the 1997 Act

The Quality Assurance Framework

51. The Quality Assurance Framework ("QAF") is a non-statutory suite of documents and processes produced by the DBS and the Association of

Chief Police Officers (now the National Police Chiefs Council) which provides best practice guidance to chief officers taking decisions under section 113B(4) of the 1997 Act (see paragraph 33 above). The QAF, which is regularly updated, seeks to assist chief officers with establishing standard processes and audit trails. It includes specific documents concerning all aspects of the process. The Government provided a version of the QAF issued in March 2014. Neither party provided a copy of the QAF in force at the relevant time (see paragraph 23 above).

B. Concerning employment decisions

1. Nacro guidance

52. Nacro is a charity that works to achieve social justice. In 2015, in conjunction with the DBS and the Chartered Institute of Personnel and Development, it published a guide called "Recruiting Safely and Fairly: A Practical Guide to Employing Ex-Offenders". The guide is primarily directed at the employment of persons with criminal convictions although it also addresses disclosures on ECRCs. It emphasises the need for employers to seek information from applicants for employment and to assess each case on its particular facts before making recruitment decisions.

2. Local Government Association guidance

53. The Local Government Association has published detailed guidance in the "Taxi and PHV Licensing: Councillors' Handbook" for elected councillors who determine applications for taxi and private hire vehicle licences against the statutory "fit and proper person" test. It is not clear when this handbook was first published; the Government have provided a version of the handbook dated 20 July 2021. The handbook includes the following passages on the use of "soft intelligence":

> "It is important to remember that your decisions need not, and should not, be based solely on convictions. Licensing committees can consider soft intelligence provided by the police and other partners, as well as of the applicant's responses in the committee hearing. Crucially, the evidential threshold for licensing committees is not the 'beyond reasonable doubt' standard which is the criminal standard of proof for criminal trials.
>
> Anecdotal evidence suggests that some authorities have been reluctant to attach much weight to non-conviction information, and in some instances have even doubted the propriety of reporting it to members. However, there is no doubt that this information can and should be considered and may sometimes be the sole basis for a refusal, a suspension or revocation.
>
> When dealing with allegations rather than convictions and cautions, a decision maker must not start with any assumptions about them. Allegations will have been disclosed because they reasonably might be true, not because they definitely are true. It is good practice for the decision makers, with the help of their legal adviser, to go through the contents of an enhanced disclosure certificate with an applicant/driver and see what

> they say about it. If, as sometimes happens in practice, admissions are made about the facts, that provides a firm basis for a decision.
>
> It will not be possible to give a comprehensive list of points that will be considered as part of the fit and proper person test, but each council should set out in writing, preferably as part of its licensing statement, an outline of how the council intends to approach these decisions and what factors will carry the most weight."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

54. The applicant complained under Article 8 of the Convention that the disclosure in his ECRCs of the information concerning the charge of rape of which he was acquitted at trial was neither in accordance with the law nor necessary in a democratic society. Article 8 provides, in so far as relevant, as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

55. The Government did not dispute the admissibility of this complaint. In particular, they accepted that the disclosure of the impugned information in the 2011 and 2012 ECRCs amounted to an interference with the applicant's Article 8 rights. The Court is satisfied, taking into consideration its consistent case-law on this question (see, for example, *M.M. v. the United Kingdom*, no. 24029/07, §§ 187-90, 13 November 2012, and *M.C. v. the United Kingdom*, no. 51220/13, § 46, 30 March 2021), that Article 8 applies in the present case and that disclosure amounted to an interference. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Scope of the complaint

56. The applicant complained about the disclosure of the allegations in ECRCs issued on 22 March 2011 and 28 March 2012 (see paragraphs 6 and 13 above). He did not complain of any subsequent disclosure, nor did he complain of the risk of future disclosure. The Court's examination is therefore

limited to an assessment of whether the past disclosure, in identical terms in the 2011 and 2012 ECRCs, breached Article 8 of the Convention. In making its assessment, it must have regard to the law and guidance in place at that time.

2. Whether the disclosure was in accordance with the law

(a) The parties' submissions

57. The applicant argued that the disclosure of the information in his case was not in accordance with the law as the applicable legal provisions afforded inadequate protection against arbitrariness and there was no guidance as to when the disclosure of an acquittal would be proportionate or how such information should be used by a prospective employer or licensing body. In his view, the available guidance concerning other kinds of information which might be disclosed in an ECRC did not provide sufficient clarity regarding the scope of discretion conferred as regards acquittal information or the manner of its exercise. The statutory and non-statutory guidance to which the Government referred post-dated his case. The situation at the relevant time had been set out by the Supreme Court (see paragraph 23 above) and was that there was no statutory guidance specifically addressing the question of disclosure of criminal allegations following a trial and acquittal. In the applicant's view, the disclosure of acquittals following a full merits trial should be subject to particular scrutiny. The lack of any specific guidance as to when disclosure of an acquittal would be proportionate gave rise to a risk of arbitrariness. As a result, there were insufficient safeguards against abuse.

58. The Government contended that the domestic scheme in relation to the non-mandatory disclosure of non-conviction information was in accordance with the law. It was set out in section 113B of the 1997 Act (see paragraph 33 above) and supplemented by the *Statutory Disclosure Guidance*, which was readily accessible to the public, and by the QAF (see paragraphs 48 and 51 above). Moreover, the correct approach to disclosure of such information had been laid down by the Supreme Court in the case of *R(L)* (see paragraphs 41-45 above), and now in the applicant's own case (see paragraphs 22-28 above). That guidance had been further developed in subsequent cases before the High Court and Court of Appeal (see paragraph 46 above). The Government contended that the applicant's argument that the guidance documents did not specifically address acquittals as a separate category of information was correct but irrelevant: the principles set out in the law and the guidance were applicable to all forms of potentially disclosable information, from untested allegations to formal acquittals following a full trial. The application of the statutory tests to each piece of information was necessarily fact- and context-specific. The law was therefore both accessible and foreseeable.

59. The Government further argued that the scheme relating to the disclosure of non-conviction information had a number of built-in safeguards including that information would only be disclosed where the police reasonably believed that it was relevant to the certificate and ought to be included following consideration of each particular piece of information; that there existed a procedure for representations to be made by the individual prior to disclosure in some circumstances; and that there was a right to request a review by the independent monitor.

(b) The Court's assessment

60. The requirement that an interference must be in accordance with the law means that the impugned measure must have some basis in domestic law and be compatible with the rule of law. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must contain safeguards to afford adequate legal protection against arbitrariness and indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise (see *M.M. v. the United Kingdom*, cited above, § 193, and the authorities cited there, and §§ 206-07). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (*S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 96, ECHR 2008, and *Beghal v. the United Kingdom*, no. 4755/16, § 88, 28 February 2019).

61. The Court notes that the legal basis for the disclosure of the information concerning the allegations against the applicant and his acquittal was section 113B(4) of the 1997 Act (see paragraph 33 above). At the relevant time, information was to be disclosed where in the chief officer's opinion it "might be relevant" for the purpose for which the certificate was sought and "ought to be included" in the certificate (ibid.). As explained in paragraph 60 above, a law which confers a discretion must indicate the scope of that discretion. Where the discretion afforded in applying a measure interfering with Article 8 rights is excessively broad, there must be sufficient safeguards against the arbitrary exercise of that discretion so as to make its application reasonably foreseeable. The Court must therefore first examine whether section 113B(4) provided sufficient clarity as to the scope of discretion granted to the police and as to the manner of its exercise.

62. Turning to the terms of the statutory test itself, the Court observes that the only tangible qualification expressed in section 113B(4) was that of relevance. There was no indication in the law of the kinds of considerations that were pertinent to determining whether particular information might be "relevant" in any given circumstances. There was, at the time, no requirement

in section 113B(4) that the chief officer had to have a reasonable belief that the information was relevant: all that was required was an opinion that it "might be" relevant (compare paragraph 33 with paragraphs 35 and 59 above). The Court is of the view that, at the time the ECRCs were issued in the applicant's case, section 113B(4) conferred a very wide discretion on chief police officers to disclose information they held in respect of the applicant.

63. It is noteworthy that there was, at the relevant time, no statutory guidance to assist chief police officers when exercising their discretion. There was therefore no published advice to chief police officers as to the level of detail to be provided or the manner in which the disclosed information ought to be drafted and presented on the ECRC. In so far as the QAF that existed at the relevant time provided a degree of guidance to chief officers (see paragraph 51 above), it did not have statutory force and there is no suggestion that it was publicly available. It is true that some guidance on approaching disclosure under section 113B(4) could be gleaned from previous court judgments (see paragraphs 39-45 above). In particular, in *R(L)*, the Supreme Court made it clear that section 113B(4) had to accommodate human rights considerations (see paragraph 42 above). Lord Hope further explained that there should be an opportunity for an applicant to make representations in cases where the real relevance, the currency or the accuracy of the information was in some doubt (see paragraph 43 above). However, *R(L)* did not concern allegations which were disputed and had resulted in an acquittal at trial. The Court is not persuaded that the applicant could reasonably foresee that the circumstances underlying a charge of which he had been acquitted following a full trial would be disclosed in the context of an ECRC. The Government have argued that the principles in the law were applicable to all forms of non-conviction information (see paragraph 58 above). However, the Court is of the view that there are specific considerations that arise when considering the proportionality of disclosing allegations resulting in a charge of which a person has been acquitted, notably in respect of the reliability, credibility and relevance of the allegations and the importance of the presumption of innocence, that necessitate particular guidance in respect of them. Moreover, the sensitivity of disclosure to future employers by the police of information concerning unproved and disputed criminal allegations requires comprehensive and carefully considered general guidance which indicates with sufficient clarity the scope of the discretion afforded to chief officers under section 113B(4) of the 1997 Act and the manner in which it is to be exercised.

64. The Supreme Court in the applicant's case and in *R (L)* has highlighted the role of the employer in the context of the functioning of the disclosure system in place in the respondent State (see paragraphs 27-28 and 44-45 above). The system appears to be predicated on the assumption that employers can be trusted to give the appropriate weight to the information

disclosed in the specific context of the employment being sought. The legislation itself recognised the need for guidance in this respect by providing for the publication of a code of practice (see paragraph 34 above). Although a code of practice had been published by the time of the disclosures in the applicant's case, it did not contain any specific guidance on disclosures made pursuant to section 113B(4) of the 1997 Act (see paragraph 50 above). There was, in particular, no guidance at the relevant time to assist employers when faced with the task of deciding how to approach information concerning criminal allegations of which an individual had been acquitted which had been disclosed pursuant to section 113B(4). The Government have argued that the principles in the guidance were applicable to all forms of information (see paragraph 58 above). However, the only relevant provision in the code of practice appeared to concern the instruction to discuss the disclosure with the applicant before withdrawing an offer of employment (see paragraph 50 above). The Court does not find this an adequate safeguard against the wide discretion afforded to the police at the relevant time since it failed to address the specific issues that arose, notably as regards the reliability and relevance of a disputed allegation concerning a charge of which the applicant had been acquitted. It further failed to provide any advice on the significance to be attributed to the decision to include the information, with the level of detail provided and in the manner in which it was presented, in the ECRCs. There was no considered discussion in the code of practice of the different options available to the potential employers or licence granters faced with such a disclosure.

65. The Court recalls the concern it expressed in *M.M. v. the United Kingdom* (cited above, § 200), agreeing with Lord Neuberger in *R (L)* (see paragraph 45 above) that in the majority of cases an adverse criminal record certificate would represent something close to a "killer blow" to the hopes of a person who aspired to any post which falls within the scope of disclosure requirements. The Supreme Court in the applicant's case observed that there was an absence of evidence as to what happens in practice. However, it acknowledged "the danger" that an employer would infer that a disclosure would not have been made unless the chief officer had formed a view of likely guilt (see paragraph 28 above). In the Court's view, the problem goes further still: contested allegations are only relevant to a potential employer if they are true; if they are untrue, they have no bearing whatsoever on the suitability of a candidate for the job. There is a more obvious area for the exercise of discretion by a potential employer where uncontested facts have a contested impact on the suitability of a candidate to perform a particular role. However, the present case concerns what was at the time a recent allegation of rape which, if true, plainly made the applicant unsuitable for both types of employment for which he had applied. The only real discretion that the potential employer and the licensing body could exercise was in deciding whether to believe the allegations, despite the acquittal. There must be a real

question as to how employers might be expected to exercise such discretion and the extent to which this is a matter suitable for resolution by them. However, there is no need for the Court in the present case to take a view on whether it would be possible to formulate guidance which could genuinely assist an employer with the exercise of a discretion of this nature: even if such guidance could be devised, there is no doubt that what little guidance existed at the relevant time was wholly inadequate in this respect.

66. The Government relied on two additional safeguards which they said ensured that the scheme was in accordance with the law (see paragraph 59 above). First, they explained that a procedure existed for representations to be made by the individual prior to disclosure in some circumstances. They did not further explain the procedure to which they referred or identify where it was set out. The Court observes that the Supreme Court in *R(L)* referred to the chief police officer's duty to discuss a potential disclosure with an applicant in particular circumstances (see paragraph 43 above). The Court further notes that principle 4 of the *Statutory Disclosure Guidance*, which did not exist at the relevant time, refers to the need to consider whether the applicant should be afforded the opportunity to make representations (see paragraphs 48-49 above). Even if the right to make prior representations could be considered a safeguard in this context, it is plain from both of the documents cited that the possibility to make representations was not, and is not, universal. The circumstances in which prior representations would be sought were, at the relevant time, unclear: in view of the applicant's acquittal, there was indeed, as Lord Hope put it in *R(L)* (see paragraph 43 above), "room for doubt" as to whether the allegation of rape could be substantiated, but the applicant was not afforded any such opportunity before the impugned disclosures were made.

67. The Government relied, second, on the right to request a review of disclosure made under section 113B(4) in an ECRC by the independent monitor (see paragraph 59 above). The Court observes that even if this could be seen as a safeguard against the arbitrary exercise of discretion, the possibility to request review by the independent monitor was not available at the time of the 2011 and 2012 disclosures in the applicant's case (see paragraph 37 above).

68. The Court accordingly finds that the legal provisions in force at the relevant time, taken together with applicable guidance, left an excessively broad discretion for the competent authorities in the application of the disclosure provisions under section 113B(4) of the 1997 Act (see paragraph 33 above). There were insufficient safeguards to afford adequate legal protection against the arbitrary exercise of that discretion and, as a result, the disclosure was not in accordance with the law.

69. The Court observes that there have been legislative changes since the regime considered in the present application and that additional statutory and non-statutory guidance has been published for both chief officers and

employers (see paragraphs 35-38 above). Although the Court has referred to these developments, it has neither examined the subsequent guidance in detail nor had the opportunity to evaluate how the system now operates in practice. While these subsequent changes may lead to a different conclusion in a future case, they cannot affect the Court's finding that, at the relevant time in 2011 and 2012, the disclosure of information concerning allegations of which the applicant was acquitted was not in accordance with the law.

70. There has accordingly been a violation of Article 8 of the Convention. This conclusion dispenses the Court from ascertaining whether the interference with the applicant's Article 8 rights was "necessary in a democratic society" (see the applicant's complaint summarised in paragraph 54 above).

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

71. The applicant complained that the impugned disclosures violated his right to be presumed innocent as provided in Article 6 § 2 of the Convention. The Court considers that the substance of the applicant's complaint has already been examined in the context of the complaint under Article 8 of the Convention. It further observes that it has found a violation of the Convention in this respect. It concludes that it is therefore not necessary to examine the admissibility and merits of the applicant's complaint under Article 6 § 2.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

73. The applicant claimed 174,349 pounds sterling (GBP) in respect of pecuniary damage and GBP 10,000 in respect of non-pecuniary damage for the violation of Article 8 in his case. He contended that he had suffered a loss of opportunity arising from his inability to pursue his preferred careers as a lecturer or private hire taxi driver and had had to pursue alternative less well-compensated careers. The sum claimed was based on ten years' loss of earning and opportunity from 22 March 2011, when the first ECRC was issued by the CRB in connection with the applicant's application for a job as a lecturer at a college (see paragraph 6 above). As regards his claim for non-pecuniary damage, he alleged that he had suffered distress and anxiety as a result of the disclosure.

74. The Government argued that the finding of a violation constituted sufficient just satisfaction, particularly in view of the various changes to the statutory scheme and guidance documents since the applicant's ECRCs were issued. The Government further considered that the applicant had not properly or adequately evidenced that he had suffered distress and anxiety. As regards pecuniary damage, they did not accept that he was entitled to claim for loss of career opportunities and pointed out that no such claim had been advanced in domestic proceedings. They moreover considered that the claim was insufficiently substantiated and extremely large.

75. The Court observes that the applicant has made a substantial claim for pecuniary damages (see paragraph 73 above). He has set out his underlying calculations and provided some pay slips, handwritten notes and tax documents purporting to justify his claim for ten years' lost salary. However, the applicant did not complain about any disclosure subsequent to March 2012 (see paragraph 56 above). Having regard to the documentation provided, the Court considers that the applicant has not demonstrated the existence of causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. The Court further notes that the violation of Article 8 found was linked to the quality of the law in force at the relevant time (see paragraph 68 above). There have been subsequent changes to the legislative framework (see paragraph 69 above) and it will now be for the respondent State, in the exercise of its margin of appreciation and hand in hand with European supervision, to consider whether any further steps are required to ensure that the legal framework is compatible with Article 8 of the Convention. In these circumstances, the Court is satisfied that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant in the present case.

B. Costs and expenses

76. The applicant also claimed GBP 23,417.96 in costs he said he had already paid in respect of the domestic proceedings, as well as GBP 58,144.55 for the outstanding costs and expenses incurred before the domestic courts for which he claimed he was liable. He claimed a further GBP 32,261 for the costs incurred before this Court.

77. The Government argued that the costs claimed for the domestic proceedings were unwarranted since they were incurred under funding arrangements whereby the legal representatives were paid only if the domestic claim succeeded. Success before this Court did not change the unsuccessful outcome of the domestic proceedings. They further argued that the costs claimed both before the domestic courts and this Court were excessive.

78. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that

these were actually and necessarily incurred and are reasonable as to quantum. The applicant has provided invoices relating to legal fees during his judicial review proceedings in 2013-2015 (see paragraphs 16-28 above), upon which he relies to demonstrate costs actually incurred. These invoices show payments on account of GBP 17,200 used to settle the applicant's legal fees. He further explained that "under funding agreements", he had incurred liability for costs in domestic proceedings and for costs before this Court, which were outstanding. He relied on a number of further documents in this respect. He did not, however, provide a copy of the conditional fee arrangement concluded with his solicitors and counsel to enable the Court to ascertain to what extent and under what conditions he was liable to pay any additional costs incurred.

79. Regard being had to the documents in its possession and the criteria set out above, and taking into account the legal aid already awarded to the applicant (see paragraph 2 above), the Court considers it reasonable to award the sum of 25,000 euros (EUR), plus any tax that may be chargeable to the applicant, to cover costs under all heads.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 of the Convention admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 6 § 2 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 July 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar	Arnfinn Bårdsen President