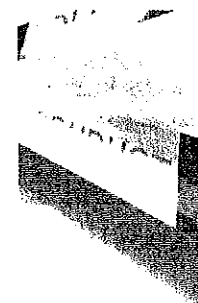


- 5 See the explanation on the Home Office website, note 2 above.
- 6 Available at: www.legalservices.gov.uk/Simple_cautions_for_foreign_national_offenders_pilot_-_policy_statement.pdf.
- 7 Available at: www.lawsociety.org.uk/productsandservices/practicenotes/fnodocfraud/4806. article. Note that this version, issued on 21 January 2011, replaces an earlier version issued on 9 December 2010.
- 8 Issued on 20 January 2011 and available at: www.lawsociety.org.uk/productsandservices/practicenotes/signlanguage/4786. article.

Police misconduct and the law - Part 1



Stephen Cragg, Tony Murphy and Heather Williams QC continue their six-monthly review of important developments in the law relating to police misconduct. This article focuses on new legislation and on recent case-law relevant to private law tort claims against the police. Part 2 of the article, which will appear in May 2011 *Legal Action*, examines recent public law challenges and procedural developments.

POLICY AND LEGISLATION

Equality Act 2010

New equality duty

The main provisions of the Equality Act (EqA) 2010 concerning civil claims against the police, which were brought into force on 1 October 2010, were summarised in October 2010 *Legal Action* 15.

On 6 April 2011, the new public sector equality duty contained in EqA s149 will come into force. The duty, which is enforceable by judicial review proceedings, requires a public authority to have 'due regard' to specified matters relating to equality and diversity, when exercising its functions. Unlike the old equality duties, which were limited to race, sex and disability, the new duty also covers the protected characteristics of age, gender reassignment, pregnancy and maternity, religion or belief and sexual orientation. The duty applies to those public authorities listed in EqA Sch 19. From a policing perspective, only police authorities are currently listed. However, the Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011, which is before parliament at the time of writing, extends the list to include chief officers of police and the Independent Police Complaints Commission. The equality duty also applies to a person who is not a public authority but who exercises public functions, as regards the exercise of those functions.

EqA s153 imposes specific equality duties on the public authorities listed in Schedule 19 for the better performance of the section 149 general duty. At the time of writing, the Equality Act 2010 (Statutory Duties) Regulations 2011, which set out the detail of the new specific duties, were due to be laid before parliament for approval.

Transitional provisions

The Equality Act 2010 (Commencement No 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 SI No 2317, published since the last article, sets out the transitional arrangements between the old and new legislation. If the act complained of occurred wholly before 1 October 2010, the earlier legislation still governs the claim. If the act complained of occurred entirely on 1 October 2010 or thereafter, the new EqA provisions apply. If the act in question began before 1 October 2010 but continued on or after that date, proceedings are brought under the EqA, but the claimant will need to show that the act was unlawful under both the old and the new provisions to establish full recovery.

CASE-LAW

Negligence: duty of care

■ **Desmond v Chief Constable of Nottinghamshire Police**

[2011] EWCA Civ 3,
12 January 2011

The Court of Appeal allowed the chief constable's appeal in this case, holding that neither he nor his subordinate officers owed any duty of care in negligence when responding to a request from the secretary of state under Police Act 1997 s115(7) to provide information for the purposes of an enhanced criminal record certificate (ECRC).

The claimant sought an ECRC to facilitate his application for teaching posts. He had earlier been arrested for sexual assault, but exonerated by CCTV that showed he was elsewhere at the time of the offence. However, due to insufficient enquiries being made, the basis for deciding not to charge him was not discovered when the Nottinghamshire Police Force responded to the s115(7) request. Accordingly, the



Ed Cape is Professor of Criminal Law and Practice at the University of the West of England and the author of *Defending Suspects at Police Stations*, 5th edition, LAG, 2006.

sexual assault allegation was disclosed in the response, along with the potentially misleading indication that the claimant had not been charged as there was insufficient evidence to proceed, but that the specific reasons for the same were unknown. Two years later, the claimant obtained an amended ECRC which did not refer to the sexual assault allegation. He claimed compensation for consequential psychiatric loss and for two years' loss of earnings due to the inaccurate certificate preventing him from working as a teacher in the interim.

The Court of Appeal accepted that it was arguable that providing information in relation to an ECRC was not a part of the core operational police activities where public policy considerations generally preclude a duty of care from arising (as discussed in the line of authorities reviewed by the House of Lords in *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, 30 July 2008; [2009] 1 AC 225). Nonetheless, the statutory context in which the police were required to operate in relation to ECRCs was highly significant. The statutory purpose was to provide protection for vulnerable young people and the police simply acted pursuant to that statutory regime, which did not envisage a common law duty of care towards the subject of the certificate. If such a duty of care existed, there would be potential for conflict between that obligation and the statutory duty on the police under section 115. In any event potential claims lay under the Human Rights Act (HRA) 1998 for breach of article 8 of the European Convention on Human Rights ('the convention') if the disclosure was disproportionate in the circumstances.

Comment: The Court of Appeal gave some guidance about the factors to be considered where it was contended that a common law duty of care existed when the relationship between the claimant and the defendant arose from a statutory context. A statutory duty did not of itself generate a common law duty of care. The statute had to be examined to see if the policy of the legislation was to confer a right of compensation for its breach. If the statute did not create a private law right of action, it would be unusual for the mere existence of the statutory duty to give rise to a duty of care; compelling special circumstances would be required. Furthermore, the common law should not impose a concurrent duty which is inconsistent with, or which may be in conflict with, the statutory framework. The extent to which other remedies were available was also relevant.

False Imprisonment

■ **TTM (by his litigation friend TM) v (1) Hackney LBC (2) East London NHS Foundation Trust (3) Secretary of State for Health**

[2011] EWCA Civ 4,
14 January 2011

The claimant sought compensation for unlawful detention under the Mental Health Act (MHA) 1983. In earlier habeas corpus proceedings, the court had ordered the claimant's release after finding that he had been detained in breach of MHA s11(4)(a), as the application for admission for treatment had been made by the approved mental health professional (AMHP) on the incorrect basis that the claimant's nearest relative did not object to the application. However, it was also found in those proceedings that the AMHP had acted in good faith, unaware of the objection at the time when she made the application.

MHA s6(3) precluded a claim for false imprisonment against the hospital trust which had detained the claimant. Rejecting the first defendant's submission, the Court of Appeal held that this feature did not preclude a claim for false imprisonment against the AMHP; there may be a false imprisonment by A, although it was B who took the claimant into custody and acted lawfully, if A had directly caused B's act and A's act was done without lawful justification: see the Court of Appeal's decision in *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597. The court observed that it would be difficult to imagine a more obvious case of one person wrongfully causing another to be detained than an AMHP making an unlawful application to a hospital trust for the claimant's admission under the MHA. Furthermore, although she acted in good faith, the AMHP had no lawful justification for her action. On ordinary common law principles a claim for false imprisonment was thus made out. For similar reasons, the claimant's right guaranteed by article 5(1) of the convention not to be unlawfully detained had been infringed by the AMHP.

Furthermore, MHA s139(1) did not preclude the claim, despite providing that no civil liability would arise for an act purportedly done under the MHA unless that act was undertaken in bad faith or without reasonable care (which could not be shown on the facts of this case). As article 5(5) of the convention provided an enforceable right to compensation for infringements of article 5, the wording of MHA s139(1) had to be read down, using HRA s3, so as to give effect to the convention right to compensation.

Comment: This case illustrates that the *Davidson* principle is not confined to its

context of arrests, but is applicable to any situation where a third party has directly and without lawful foundation brought about the detention of the claimant.

The other significance for practitioners involved in claims against the police is the Court of Appeal's approach to MHA s139(1). Although the leading judgment of Toulson LJ does not specify in terms how that provision is to be read down to achieve compliance with article 5(5) of the convention, his reasoning suggests that any detention which infringes article 5(1) is to be treated as an exception to the general prohibition on civil claims arising from acts under the MHA.

■ **Shields v Chief Constable of Merseyside Police**

[2010] EWCA Civ 1281,
17 November 2010

In this case the Court of Appeal had to consider powers of arrest that had arisen in a confusing domestic situation attended by police officers. A first officer found himself at a house where he claimed (and the court at first instance found) that he had been assaulted by the appellant. Further officers arrived and the first officer told a second officer that the appellant was under arrest for assaulting the police (the first officer had not, in fact, arrested the appellant). The second officer took hold of the appellant and told him that he was under arrest for assaulting the police. The appellant's case was that the arrest by the second officer was unlawful. The argument, as explained by the court, was as follows:

- The power of arrest under Police and Criminal Evidence Act 1984 (PACE) s24 involves the exercise of a discretion.
- No discretion can be validly exercised if the person exercising it is not conscious that s/he is in fact exercising a discretion.
- The second officer believed himself to be assisting in detaining someone who had already been told that he was under arrest. He could not therefore be exercising the discretion to arrest given to him by PACE s24.

The court rejected the argument, stating that:

It fails properly to recognise the nature of the present statutory code. [The second officer] reasonably suspected that the appellant was guilty of assaulting [the first officer] and reasonably believed that it was necessary to arrest the appellant to prevent him from causing further physical harm to officers and to ensure the prompt and effective investigation of the offence. Having the power of arrest and reasonably believing it to be necessary, he was not required to go through any further mental process before detaining the appellant. The fact that he

erroneously believed that [the first officer] had begun the process of arrest was immaterial to the lawfulness of the arrest made by him (para 30).

Comment: The case contains some detailed analysis of the various powers of arrest contained in PACE as presently amended. The court seemed reluctant in general to accept very technical arguments about the exercise of the power of arrest, especially where it occurred in the heat of the moment. The court also considered, of its own motion, the power of arrest in PACE s24(3) of a person who has committed an offence (rather than simply being suspected on reasonable grounds of committing an offence). The court suggested, without deciding, that if the civil court found, as it had in this case, that the appellant had assaulted the first officer, then the second officer did not need to show that he had had reasonable grounds to suspect the appellant, because an additional power of arrest could be established under section 24(3). It is not unlikely that this is an argument that will surface in future cases.

Malicious prosecution

■ **Moulton v Chief Constable of the West Midlands**

[2010] EWCA Civ 524,
13 May 2010

The claimant was arrested by West Midlands police officers for offences of rape and assault occasioning actual bodily harm. He denied the offences. He was subsequently charged, but the prosecution was discontinued after further evidence came to light. The claimant accepted that the officers involved in the investigation subjectively believed that he was guilty as charged, but he contended that due to deficiencies in the investigation and the weakness of the evidence, objectively viewed, the prosecution lacked reasonable and probable cause and the officers had acted maliciously.

His claim failed at trial and the Court of Appeal rejected his appeal, finding that there was no evidence of malice. The noteworthy feature of the case is that in so doing, the court rejected his submission that the current burden on a claimant to prove malice in a malicious prosecution claim was unduly onerous and amounted to an infringement of article 5(1) and (5) of the convention.

Comment: As the Court of Appeal observed, were it possible to sue the police for negligent investigation, the claimant might well have been able to recover damages in this instance. Reference was made to the recent jurisprudence of the Canadian Supreme Court, determining that the police did owe a duty of care to a suspect in relation to the

negligent conduct of an investigation: *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41, 3 SCR 129. However, there is little prospect of that approach being followed in this jurisdiction in the near future, in light of the well established line of authorities to the contrary (see *Van Colle* above, and the cases discussed therein).

Assault

■ **Adorin v Commissioner of Police for the Metropolis**

[2010] All ER (D) 272 (Nov),
25 November 2010

The claimant had been found guilty of an imprisonable offence. During the arrest he had sustained serious injuries. On bringing civil proceedings the defendant sought to strike out the claim on the basis that the claimant had not made an application under Criminal Justice Act (CJA) 2003 s329 for permission to bring civil proceedings arising out of the same set of facts for which he had been convicted ('the Tony Martin provision'). Section 329 provides that a court may only grant leave to bring civil proceedings in those circumstances if there is evidence either that 'grossly disproportionate' force was used; or the defendant did not have a reasonable belief at the relevant time that the claimant was committing the offence.

The Court of Appeal ruled (see [2009] EWCA Civ 18, 23 January 2009; April 2009 *Legal Action* 33) that a failure by the claimant to make an application was not fatal to the claim. It however refused to rule on whether the requirement that the force used was 'grossly disproportionate' should be interpreted in accordance with HRA s3. In order not to afford state officials an unjustified degree of protection. This was primarily because there was prima facie evidence that the claimant's injuries had been caused by grossly disproportionate force so that the HRA argument was academic.

At the substantive civil trial the claimant (acting by this time as litigant in person) claimed assault on the basis of excessive force. O'Brien J ruled that, while it was clear that there had been a deplorable lack of care by the officers, there was no evidence that they had used excessive force. There was expert evidence that the claimant had resisted his arrest, justifying a higher degree of force. Causation of the injuries could not be established and the force used was in any event not grossly disproportionate such that the defendant could rely on the statutory defence under section 329(4)(b).

Comment: There is no transcript of this judgment; however it appears to be an underwhelming finale to the two useful prior decisions on this case. It underlines the

importance of clear expert evidence when claiming excessive force, not least where section 329 applies.

Harassment

■ **Dowson and others v Chief Constable of Northumbria Police**

[2010] EWHC 2612 (QB),
20 October 2010

Six police officers brought an unsuccessful claim against the Chief Constable of Northumbria Police under the Protection from Harassment Act (PHA) 1997. The primary allegations centred on the behaviour of a detective chief inspector amid concerns that his treatment of the claimant officers amounted to harassment for which the chief constable was vicariously liable. The court was asked to determine whether the acts complained of amounted to harassment for the purpose of the Act.

Simon J provided a useful summary of what must be proved as a matter of law in order to be successful in a claim for harassment and referred to the decision in *Majrowski v Guy's and St Thomas's NHS Trust* [2005] EWCA Civ 251, 16 March 2005; [2005] QB 848 to confirm that the possibility of unmeritorious harassment claims by aggrieved employees was not a sufficient reason to establish a general exemption for vicarious liability against all employers.

Also of interest are Simon J's obiter comments on when acts pursued for the purpose of preventing or detecting crime could not amount to harassment under the section 1(3)(a) exemption in the Act. He confirmed that this exemption does not apply unless the defendant can establish that the conduct at the heart of the alleged harassment was 'necessary' for the purpose of crime prevention.

The court noted that there were occasions when the detective chief inspector acted in a manner that could be described as insensitive, belittling and overbearing; however this did not amount to harassment as it was not calculated to cause distress and was not oppressive. For conduct to amount to the civil tort of harassment it must be of an order which would sustain criminal liability.

Comment: The absence of a blanket exemption in harassment claims for operational decisions relating to crime prevention is obviously relevant for claims taken by members of the public, including criminal suspects.

Stephen Cragg and Heather Williams QC are barristers at Doughty Street Chambers, London. Tony Murphy is a partner with Bhatt Murphy solicitors, London.

that it showed a propensity to commit offences of the kind charged. In evidence, O denied possession of the knife leading to the caution and stated that 'he had signed the admission and accepted a caution as he had been told that, if he did so, he would not have to go into a cell, he would not need a solicitor and he could be on his way' (para 57). The prosecution did not call evidence to contradict his account. The judge directed the jury that it had to be sure that O had committed the offence in 2006 before it could consider whether the offence showed a propensity to possess a knife in a public place.

The Court of Appeal held that it was clear, as a matter of principle, that O could challenge evidence of the commission of the previous offence: amendments to the Criminal Procedure Act 1865 and PACE enable a defendant to adduce evidence to show s/he was not guilty of an offence for which s/he had been convicted, and this must also apply to a caution. In the instant case, evidence of admission of possession of the knife was relevant and admissible on the basis that it showed a tendency to possess a knife in a public place. O was able to give evidence about why he had accepted the

caution, but the jury should have been directed by the judge about how to approach its task; in particular, that if it accepted O's account about how the caution came to be given then he should be treated as being of good character. However, despite faults with the jury directions, the conviction was not unsafe.

Comment: This case is primarily about the treatment at trial of character evidence, but is included here because it serves as an important reminder of the potential implications of a caution and the need for defence lawyers at the police station to give clear advice about the possible adverse consequences of accepting a caution. The court noted that there is a very considerable difference between an admission contained in a caution given where the suspect has not had legal advice and one where legal advice was given. In the latter case it was clear the court expected that the suspect would have been advised that 'the caution would be maintained on his [Police National Computer] record for very many years and that it would be used against his interests in certain circumstances' (para 72).

- 1 Quoted in "'Parochial' Scots defend interrogation of suspects without legal representation', SJ 2 November 2010.
- 2 See Ed Cape, *Defending Suspects at Police Stations*, 5th edition, LAG, 2006, p8.
- 3 See note 2, p492.



Ed Cape is Professor of Criminal Law and Practice at the University of the West of England and the author of *Defending Suspects at Police Stations*, 5th edition, LAG, 2006.

in the case and would have entailed the witness disputing the correctness of his own conviction by the criminal courts.

Comment: The Court of Appeal's judgment is an illustration of the application of the principles identified by the House of Lords in *O'Brien*, albeit the outcome turned on the specific facts of the case, in particular, that the strength of the proposed evidence was relatively weak, given that the witness had a criminal conviction in respect of the incident and the fact that the trial was in front of a jury, where avoidance of a multiplicity of issues is much more of a pressing concern than in a judge-alone trial. As defendants continue to argue, post *O'Brien*, for a high degree of comparable circumstances to exist for the similar fact evidence admissibility test of relevance to be satisfied, it is noteworthy that the Court of Appeal considered that this first stage test may well have been met, even though the two alleged assaults involving the same officer occurred in differing situations.

Independent Police Complaints Commission

R (Pewter) v Commissioner of Police of the Metropolis (2010) 3 December QBD (Admin), unreported
The claimant was serving a sentence for rape. Before his release on licence, a report was prepared under the Multi-Agency Public Protection Arrangements (MAPPA), which stated that his behaviour in prison had been

Stephen Cragg, Tony Murphy and Heather Williams QC continue their six-monthly review of important developments in the law relating to police misconduct. This article focuses on recent case-law relevant to public law challenges and procedural developments. **Part 1**, which was published in April 2011 *Legal Action* 17, examined new legislation and case-law relevant to private law tort claims against the police.

CASE-LAW

Similar fact evidence

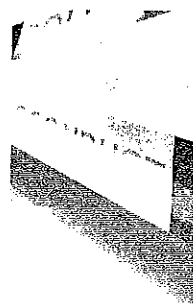
Mahboob v Chief Constable of West Midlands Constabulary

[2010] EWCA Civ 1509, 22 November 2010

The claimant's civil claim included allegations of assault by his arresting officers. He appealed unsuccessfully against the trial judge's refusal to permit him to call a witness to give similar fact evidence of a separate incident when the witness said that one of the officers had assaulted him. The Court of

Appeal concluded that the trial judge had found correctly that the evidence should not be admitted, applying the test laid down by the House of Lords in *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26, 28 April 2005; [2005] 2 AC 534.

The court held that although the trial judge may have erred in holding that the other alleged assault was not sufficiently probative to pass the admissibility test of relevance, he had ruled correctly that it should be excluded in the exercise of his case management discretion, given that it would have led to a lengthy distraction from the main issues



generally positive. One of the defendant's officers then sent a letter to the claimant's estranged wife without the consent of MAPPA stating that the claimant had intimidated staff and inmates while in prison. The claimant lodged a police complaint that was not upheld by the defendant's force. The claimant did not appeal that outcome to the Independent Police Complaints Commission (IPCC) as he did not have confidence in the appeals process and required sight of the MAPPA report in order to formulate any appeal. The defendant refused to disclose a redacted copy of the report to the claimant on the basis that it was protected by public interest immunity (PII). The claimant sought judicial review.

The court held that the officer had wrongfully disclosed certain information; however, the inadvertent disclosure of information subject to PII cannot affect the status of the source material as immune from disclosure in line with *Rogers v Secretary of State for the Home Department* [1973] AC 388. Before coming to court, the claimant should also have appealed the defendant's decision to the IPCC. The fact that the claimant had not had sight of the report and did not have confidence in the appeals process was not reason enough to short-circuit the regime.

Comment: This decision underlines the importance of exhausting the right of appeal to the IPCC in local and supervised police complaint investigations, notwithstanding the low success rate for those appeals. However, the relevance of any such appeal to the outcome of this case is questionable in view of Wilkie J's ruling on PII. One might also have reasonably expected the officer to have been censured in some way given that he was not authorised to refer to the MAPPA report.

■ **Zapello v Chief Constable of Sussex Police**

[2010] EWCA Civ 1417,
12 November 2010

The appellant was unsuccessful at trial acting as a litigant in person with the assistance of pro bono counsel. He sought permission to appeal a costs order made in his absence by the trial judge that he should pay the respondent's costs of defending the claim, in the region of £25,000.

Sedley LJ, delivering the lead judgment for the Court of Appeal, granted permission to appeal and substituted the trial judge's costs order with no order as to costs. He was influenced by the fact that the appellant had had insufficient notice that costs were to be resolved at the relevant hearing; and by the respondent's marked failure properly to engage with a parallel investigation by the IPCC, which had he done so, might have

avoided the cost of trial. The court was unimpressed with the respondent's explanation that his civil claims department was unaware of the activities of his police complaints department.

Comment: Both Sedley LJ and Leveson LJ were careful to limit this striking decision to the particular facts, which included that the appellant was a litigant in person with mental health issues. However, the following comment by Sedley LJ was offered by way of general application and should be heeded by chief officers:

... neither in law nor in practice is it acceptable for a public authority to fall back on the plea that its left hand does not know what its right hand is doing. We have to look at the defendant's establishment and functions as a single entity ... (para 18).

Leveson LJ tempered this as follows: 'The regime surrounding the investigation of complaints against the police is not the same as the investigation of civil liability and damages and it would be an error to assume that one necessarily impacts upon the other' (para 23).

■ **R (Coker) v Independent Police Complaints Commission**

[2010] EWHC 3625 (Admin),
16 November 2010

The claimant challenged the decision of the IPCC to change its recommendation about the sanction to be imposed on an officer. The case involved a man who had died by ingesting a large amount of cocaine before arriving at a police station. An officer was found to have been rude to the deceased's partner, and as a result may have failed to ascertain what he had ingested. The IPCC informed the deceased's family that the officer should receive a written warning. The officer refused to accept it, the effect of which, under the relevant regulations, was that a written warning could not be issued. Guidance suggested that in such circumstances the next step should be a referral for a disciplinary hearing. However, following legal advice that such proceedings would be unlikely to be successful, the IPCC agreed with the police that the officer should instead be issued with formal advice.

The claimant (a relative of the deceased) argued that the IPCC did not have the power to alter its view in this way and that its original decision was final. Reliance was placed on *R (Dennis) v IPCC* [2008] EWHC 1158 (Admin), 6 May 2008, where the court decided that the IPCC's decision not to uphold a complaint was final.

The court held that, although extremely disappointing to the deceased's family, the

decision on whether or not to proceed with disciplinary proceedings was one that the IPCC and the police were permitted to keep under review and to alter if the circumstances merited it. The decision was not otherwise irrational, especially as the deceased's partner was unlikely to be viewed as a reliable witness at any disciplinary hearing because of the various accounts she had provided.

Comment: The case confirms that a complainant has a right to be provided with information about the action taken by the police after a complaint is upheld; however, a complainant will find it difficult to challenge decisions taken by the police and the IPCC in relation to misconduct. This can be especially galling in relation to written warnings given that they can only be issued with the officer's consent.

Data management

■ **R (C) v Secretary of State for the Home Department and another**

[2011] EWCA Civ 175,
19 January 2011

The Supreme Court's decision in *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, 29 October 2009; [2010] AC 410; April 2010 *Legal Action* 34 changed the approach to be taken by the police when deciding whether or not to disclose information for the purposes of inclusion on an enhanced criminal record certificate (ECRC), often required by employees proposing to work with children or vulnerable adults. Section 113B(4)(a) of the Police Act 1997 provides that the police must disclose information for the purpose of an ECRC that they consider 'might be relevant' to an employer. This can include 'non-conviction' information held by the police that might relate to arrests which did not lead to any charge, or otherwise unfounded allegations. However, section 113B(4)(b) provides that the police must also consider whether or not the relevant information 'ought to be included' before disclosing it for the purpose of an ECRC. In *R (L)*, the Supreme Court found that in reaching this decision the police had to carry out a balancing exercise which may include providing a person with the right to make representations, in order to decide whether or not disclosure was proportionate. This was on the basis that such disclosure would almost always interfere with a person's right to respect for his/her private life under article 8 of the European Convention on Human Rights (the convention). The case at hand was the first in which the Court of Appeal considered the approach recommended in *R (L)* in practice.

The appellant challenged the decision of the chief constable to disclose information

allegations of child sexual abuse to a further education college where he had applied to teach over 16 year olds. At first instance, Langstaff J struck down the decision to disclose and granted an injunction against further disclosure. He found that the chief constable had not properly assessed the risk posed by the appellant and it was not sufficient simply to say that the chief constable considered disclosure to be proportionate. The exercise of deciding whether or not disclosure was proportionate required a close attention to detail by the chief constable that was lacking in this case.

The Court of Appeal upheld the decision that disclosure was unlawful. It also confirmed that the opportunity to make representations would often be appropriate, while making clear that this would often mean the opportunity to make representations in writing. However, the Court of Appeal was critical of the declarations and injunctions granted at first instance, which essentially prevented any future disclosure by the police. It warned that the primary decision-maker was the chief officer, not the court, and that there was always the possibility that new information would be available to the police in the event that future applications were made for an ECRC.

Comment: The Court of Appeal rejected the police argument that the application of the *R (L)* approach was simply too onerous for the police and confirmed the importance placed by the courts of late on informational privacy. Readers should also note: *R (A) v B* [2010] EWHC 2361 (Admin), 21 July 2010, where Langstaff J held that disclosure of information held by the police to an employer about the claimant's obsessive (but probably not unlawful) sexual habits was not proportionate for the purposes of article 8(2), especially when based on the perception of one officer. (See also *Desmond v Chief Constable of Nottinghamshire Police* [2011] EWCA Civ 3, 12 January 2011; April 2011 *Legal Action* 17.)

In a written statement to parliament on 22 October 2010, the government announced the terms of reference for the upcoming review of the criminal records regime. These set out the following general ambit as follows:

The criminal records review will examine whether the criminal records regime strikes the right balance between respecting civil liberties and protecting the public. It is expected to make proposals to scale back the use of systems involving criminal records to common-sense levels (Hansard HC Written Ministerial Statement col 78WS, 22 October 2010).

■ Chief Constable of South Yorkshire Police v Information Commissioner

[2011] EWHC 44 (Admin),
21 January 2011

The chief constable responded to a journalist's request for information under the Freedom of Information Act 2000 in relation to illegal firearms. The chief constable made only partial disclosure, claiming that in preparing the material the 18 hours' limit under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 SI No 3244 had been reached. In calculating this period the chief constable took into account not only time spent responding to the application and extracting the relevant information, but also redacting the documents post-extraction.

The Information Commissioner decided that the regulations could not be interpreted in that way and that the time spent redacting could not be taken into account. The High Court agreed, in dismissing the chief constable's appeal.

Comment: The case turns on a narrow point of statutory interpretation, the upshot of which is that the police (and other public bodies) cannot rely on redaction time in limiting disclosure.

Cautions

■ R (Cordell) v Chief Constable of Nottinghamshire Police

[2010] EWHC 3326 (Admin),
9 November 2010

The claimant asked the chief constable to review a caution administered to him following his arrest after an altercation with a neighbour. During his police interview, the claimant had said repeatedly that he had been acting in self-defence; however, he then said that when things had calmed down he had punched the neighbour in the face after the neighbour had insulted the claimant's wife. Guidance on the issue of cautions makes clear that a caution should not be offered if the person has presented a defence to the alleged offence.

The chief constable decided that the caution had been issued in line with police force policy and that it would not be removed. The claimant brought unsuccessful judicial review proceedings in relation to the initial administration of the caution. The current proceedings were brought largely on the basis that the chief constable had failed to have a written procedure for the review of cautions, and that he had breached Home Office Circular 19/2005, which required there to be a written policy for dealing with complaints about a 'direction and control matter'.

Beatson J decided that the police force did have a lawful local policy for dealing with

reviews of cautions, albeit that it had not been put in writing. The claimant's complaint had involved allegations of individual conduct, such that the circular about 'direction and control' complaints was not applicable. The court also held that it was not *Wednesbury* unreasonable for the police to conclude that the caution procedure was appropriate, as self-defence had only been raised by the claimant in respect of the earlier part of the incident; no defence had been raised in relation to the latter part.

Comment: The case turns largely on its own facts, but explores some of the possibilities when considering judicial review of a caution and the cautioning process.



Stephen Cragg and Heather Williams QC are barristers at Doughty Street Chambers, London. Tony Murphy is a partner with Bhatt Murphy solicitors, London.