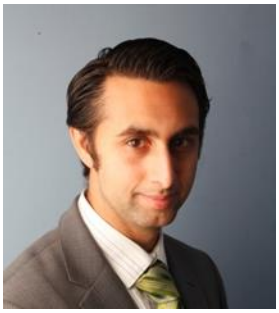

Luke Cowles is a Solicitor in the Actions Against Police team and advises clients on all aspects of Actions Against Police including claims for assault, trespass, wrongful arrest/false imprisonment, malicious prosecution, misfeasance in a public office, judicial review, breaches against human rights and data protection claims. He also assists clients in making complaints to the police and assists in drafting appeals to the IPCC.

Call Luke and the AVP team on 020 8 492 2290

How do I challenge my DBS certificate?

DBS Certificates and Disclosure Notes

There are three types of checks that can be carried out:

1. Standard check

A Standard check for spent and unspent convictions, cautions, reprimands and final warnings.

2. Enhanced check

An enhanced check; which in addition to the standard check information includes extra information held by local policing. This could include additional information that is reasonably considered relevant to the role being applied for.

It is this check which has caused a lot of the problems that individuals have challenged.

The extra information is sometimes coined as so-called 'soft intelligence' – which effectively amounts to 'an allegation'. Whether this allegation is actually finally included on your Enhanced certificate is determined by a statutory scheme as well as the 'jurisprudence' or theories of application developed by case law.

3. Mechanism – DBS (Disclosure and Barring Service)

Your possible employer applies to the DBS for a check. They will liaise with the police force potentially depending on the type of check being requested. For these purposes we'll deal with enhanced checks which means that DBS will liaise with the local police force to obtain any local records which the Chief Officer thinks are either **relevant** or **ought to be included**.

The individual can then challenge this to the police force. If the individual is still unhappy they can challenge this further to the independent monitor of the home office (Independent Monitor).

It works much the same as making an internal complaint to a police force and then later appealing the complaint decision to the IPCC. The only difference is the statutory schemes and matters to be considered in the key question of 'to disclose or not to disclose'.

The IM's review power is set out in s117A Police Act 1997 which sets out a right of review to the Independent Monitor

The IM asks the Chief Officer if they:

(a) Reasonably believe the info to be relevant.
(b) It ought to be included in the certificate.

IM then considers the same.

If agrees it is <u>not</u> relevant or ought <u>not</u> to be included – then informs the DBS.

The DBS will then issue a new certificate.

That is, at a very basic level, the framework. But of course it doesn't assist in necessarily determining *how* a conclusion one way or another should be made, or rather what factors should be considered in the melting pot before the Independent Monitor should come to a view.

For today we are looking primarily one of the most recent cases; along with an older case that provided a base and platform for the balancing act in disclosure decisions.

<u>Cases</u>

The platform case that sets out the landscape of how decisions are made is the case of 'L' v COPOTM. It is a Supreme Court decision from 2009, which is interesting because it is actually before the current statutory amendments that led to the current procedures. Nevertheless the case expressed some key points which were even referenced in the more recent 2016 case. Points the 'L' case raised were that:

<u>**PLATFORM CASE -** R (oao L) v COPOTM (2009) – Supreme Court</u>

Facts –
L, the appellant, is the mother of X. X had been leaving with his father when a child protection conference was held in early 2002. X was placed on the child protection register under the category of neglect. It was deemed the L had little control of X's behaviour, including poor attendance at school and poor behaviour at school. Concerns were also raised as to X's exposure to drugs, which largely stemmed from X spending time with his older sister.

In early 2003 X was convicted and sentenced for robbery, and detained in a YOI.

L had been employed as a midday assistant at a school in early 2004. She applied for a police check as part of the role which showed no convictions, but mentioned details of the early child protection conference under the box titled "other relevant information".

The result was the agency she was contracted with informed her they no longer required her services.

- Appeal was dismissed. 2 statutory questions regarding 1) relevance 2) whether it ought to be included. Held clearly relevant, and no sense that it's inclusion was gratuitous.
- Art 8 engaged in virtually all cases of disclosure decisions because of the potential impact on the person's employment prospects if disclosure reveals detrimental disclosure.
- Disclosure decisions must be proportionate:
    - No more than necessary to achieve a legitimate aim.
    - 'fair balance' between the completing rights of the individual and the wider public interest.
- With the competing interests – neither is to be given preference over the other. This includes possible safeguarding concerns.

- Two important factors to include in the 'melting pot' of the decision making process are the **gravity** and **reliability** of the information.

RECENT CASE: R(oao MS) v Independent Monitor & COPOTM (IP) 2016

- MS applied to restart work as a licensed hackney carriage taxi driver. This followed his licence being revoked in 2001.

- Applied for a ECRC (enhanced criminal record bureau certificate). Administered by the DBS who sought assistance from the MPS.

- MPS response included 5 historical allegations. Only 1 had actually resulted in a charge, which in any event was dropped by the CPS before trial.

- MS challenged the MPS who made minor alterations only.

- Challenged further to the IM (Independent Monitor of the Home Office). Further minor alterations but MS still dissatisfied.

    - Balance between Article 8 rights of MS given the age of the allegations, none were substantiated and all were strongly denied. (VERUS)
    - Rights of vulnerable people using taxis to be protected by those with the duty to determine the suitability of persons to obtain licences.

- Decision itself referenced the 'L' case at para 81 whereby Lord Neuberger wrote about the balancing exercise looking at the **gravity** of the material and the **reliability** of the material.

- Considered the review criteria set out in S117A Police Act 1997 (as amended).

- IM's review decision took just one week upholding the MPS' proposed disclosure of information.

- IM's review appears very much to have gone down the lines of 'no smoke without fire'.

    - This 'no smoke without fire' is a genuine concerns for a number of people because of the potential effect it has. Both in terms of career and social stigma depending on the allegation.
    - In this instance MS would almost certainly not have been granted his licence if the allegations had stood.

HELD by HHJ Blair QC

- The Court agreed that it was not the IM's role begin an investigation from the start in the context of MS' grievances about the credibility and reliability of the allegations at hand.

    - Nevertheless the IM was still required to scrutinise to a high degree of forensic care the information incriminating MS.

- However, given the review took just one week – the Court concluded that the IM had not undertaken the independent reviewed required by statue.

- The Court also commented about the forcefulness in the IM's views about the allegations which were disputed. Held the analysis couldn't stand the Wednesbury test of 'reasonableness'.

- Ultimately the IM was ordered to conduct a second review.

Other cases:

Nurses:

R(J) v CC of Devon & Cornwall – 2012
R(A) v CC of Kent – 2013

Both of them are similar cases with nurses having historical allegations that are being challenged in regards to whether they should be disclosed.

R(J) v CC of Devon & Cornwall – 2012

In J, two allegations existed against elderly residents. The first had been withdrawn and the second had stemmed from residents with advanced dementia so that they were unable to give the police reliable information.

Again, in the current climate of abuse in care homes – it is quite natural to consider the 'no smoke without fire'. However the nature of the law is to be that balance between protecting vulnerable individuals and also considering the individual Article 8 private life rights of the individual. This is especially in cases when allegations don't necessarily have foundation and can essentially ruin someone's reputation or career.

In J the decision was the disclosure was disproportionate and unlawful because:

- Allegation 1 was insufficiently serious and;
- Allegation 2 was insufficient reliable.

R(A) v CC of Kent – 2013

I won't go through all the detailed facts but here a disclosure decision against a nurse showed an allegation made by staff at a previous care home. A felt that the allegations had been malicious, and indeed one of the staff had used a racist slur in one of the complaints against A.

Criminal proceedings had occurred but been discontinued.

Held in A's favour.

Criticism included bias in the decision making process to disclose.
Additionally – primacy given to the risk to vulnerable adults ahead of the risk of unfairness in a false accusation (contrary to 2009's decision in 'L' to give equal weighting between the competing rights).

Teachers:

R (RK) v Chief Constable of South Yorkshire Police and the DBS [2013] EWHC 1555 (Admin)

- Teacher case – unreliability issues of student allegations.
- DBS decision quashed.