Neutral Citation Number: [2011] EWCA Civ 403

Case No: C1/2010/1018

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
LEEDS DISTRICT REGISTRY
His Honour Judge LANGAN QC (Sitting as a Judge of the High Court)
[2010] EWHC 466 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 April 2011

Before :

LORD JUSTICE PILL
LORD JUSTICE HOOPER
and
LORD JUSTICE MUNBY

- -

Between :

H and L	**Appellants**
- and -	
A CITY COUNCIL	**Respondent**

- -
- -

Mr Stephen Cragg (instructed by Howells) for the Appellants
Mr Timothy Pitt-Payne QC (instructed by Director of Legal Services) for the Respondent

Hearing date : 25 March 2011

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Judgment

Lord Justice Munby :

1. This is an appeal from a judgment and order of His Honour Judge Langan QC sitting as a Judge of the High Court in the Administrative Court on 12 March 2010: [2010] EWHC 466 (Admin).

2. The dispute focuses on the important question of when and how it is proper for a local authority to make disclosure to someone's commercial contacts of the fact that he is a convicted sex offender.

Background

3. The claimants (appellants in this court) are H and L. H is a convicted sex offender. He also has a more recent conviction for dishonesty, in failing to disclose his earlier conviction when applying for a job. L is his partner. She has no convictions.

4. The background is described in some detail in Judge Langan's judgment. For present purposes I can do no better than to set out part of what he said (paras [6]-[8]):

> "H and L are both very severely disabled. They have been in a relationship since 1992 … Both H and L have been assessed as having substantial needs under the Fair Access to Care Services eligibility framework for adult social care. Both receive weekly direct payments, which they use to employ personal assistants. H has two male personal assistants, both of whom have been in his employment for several years: neither of these carers has children. L has a female personal assistant who is at present on maternity leave: the woman who is replacing that personal assistant over the leave period does not have children.
>
> H and L have for many years been active in the disability movement. I think that it can fairly be said that their involvement has had a twofold nature, being both philanthropic and economic. It is philanthropic in that they, or at any rate H, belong or have belonged to a number of representative or consultative bodies dealing with disability issues. It is economic, in that H and L run a company which has sought and obtained contracts from universities and other public bodies.
>
> In 1993 H was convicted of indecent assault on a seven-year old boy. The information which has been provided by [the local authority], and which is not disputed by H and L, is that the boy was blind, that he was a member of a family which H had befriended, and that the offence was a penetrative one which involved oral sex. H denied the charge, but was found guilty and was sentenced to two years imprisonment. He has maintained to this day that he was the victim of a miscarriage of justice, and L concurs in this view."

The facts

5. In late March 2009, the local authority received a letter from another local authority drawing attention to H's conviction in 1993 and saying that he was facing trial for a similar offence. The local authority's reaction was to convene a strategy meeting on 17 April 2009. Although he was not so described in the minutes, the effective chairman of the meeting was X, the service manager of the local authority's safeguarding children service. The strategy meeting was attended by two other officers of the local authority, two representatives of a local university, a representative of the NHS and two police officers from the local police public protection unit. According to the witness statement X subsequently prepared for these proceedings, the purpose of the meeting was to "develop a better understanding of H's activities … and develop an action plan for further investigation."

6. The meeting was told of H's pending prosecution and that the trial date had been set for 26 June 2009; in the event it did not take place until early 2010. X is recorded as saying that:

> "even if found not guilty by the court, we would still be required to make a judgement on the risk that [H] posed and mitigate any risk. His past offences would affect this decision greatly. He appears to have met his victims through work with their parents."

The meeting was told that H had associations with numerous organisations and featured on consultative bodies and various committees; he ran his own company with L and worked with disabled adults throughout the country; the university had placed four adult social workers with him over the last two years; he had placed numerous bids for research funding and was associated with various bodies (which were named); he had worked for different universities in relation to people with disabilities and was currently advocating for benefits and services for disabled asylum seekers. At the end of the meeting it was reconvened for 21 May 2009. In the event the next strategy meeting did not take place until 15 June 2009. By then the disclosures of which complaint is made had already taken place.

7. The minutes record the "Decisions" of the meeting of 17 April 2009 as follows:

> "• [The] University to provide details of all [H's] known contacts to [X] who will contact these organisations to make a disclosure and acquire further contacts if known.
>
> • [X] to contact General Social Care Council.
>
> • [The] University to cease their employment of [H] and his company.
>
> • [The] University to communicate their decision to [H] following seeking legal advice.
>
> • [The] University to feedback to [X].

> • Primary Care Trust not to use [H] or his company for any consultancy work.
>
> • PCT and Community Care (with legal advice) to talk with … about how to exclude [H] from their board.
>
> • PCT to inform other local NHS bodies of the concerns.
>
> • … to be informed of concerns.
>
> • Reconvened meeting to be arranged."

I draw attention to the word "all" in the first bullet-point. The minutes then continue:

> "[X] gave a clear recommendation that [H] be asked to stand down from all bodies and committees he is involved with immediately given that his level of denial of his serious offence makes him a highly untrustworthy individual. Should he refuse to stand down then legal advice to be sought and consideration be given to seeking an injunction.
>
> [X] highlighted the moral legal position and the obligation to fulfil a duty to safeguard children and the sharing of information was justified in protecting those children."

Again, I draw attention to the word "all" in the first paragraph.

8. What exactly took place following the meeting on 17 April 2009 is not entirely clear. Precise chronological detail is lacking, no doubt because, as X had to acknowledge in his witness statement, he did not keep notes of the telephone calls he made. That, I have to say, was a grave omission, given the seriousness of the matter and the crucial significance of what was being done – all of it, at this stage, behind H's back.

9. According to X's witness statement he made a number of telephone calls to various organisations. He says that there were nine in all who were informed: the local authority's disability service, the university, the PCT, the Refugee Council, the General Social Care Council and four other agencies in the voluntary or third sector. Precisely when these calls were made we do not know, though such exiguous documents from the period immediately following the meeting on 17 April 2009 as we have been provided with show that the process was under way by 23 April 2009. Indeed, on 27 April 2009 X followed up his telephone call to one of the agencies with a letter which, I note, said that:

> "As you know I have serious concerns about [H]'s involvement in a range of consultative and representative bodies as well as his commissioned work with his company … , which he runs with his partner [L]. [H] derives a status from his involvements and may serve to convince other people that he is a trustworthy individual. Furthermore he may as a result gain access to parents and ultimately their children."

10. By 18 May 2009 another of the agencies that X had telephoned was writing to the local authority to confirm their earlier conversation. The writer said "I understand that [H] is unaware of your work at the moment but will be informed later this week." That in fact did not happen. There was a meeting on 20 May 2009 between representatives of the local authority, H, L and H's solicitor to discuss the way ahead. It is common ground that they were not told that the disclosures which are now challenged had already been made.

11. On 29 May 2009 the local authority wrote to H's solicitor and, separately, to L. It explained what it proposed to do in the future and, in response to questions they had raised at the meting on 20 May 2009, explained the basis upon which it was entitled to share information with others. Neither letter disclosed the fact that the disclosures now being challenged had already been made (though the letter to H's solicitor referred to certain other disclosures) and each referred, tendentiously and misleadingly, to the right of the local authority "to disclose information in the way we intend."

12. In fact, H and L had by then discovered some of what had happened, having been told on 27 May 2009 by two service users that the local authority had given them details of H's conviction and of the pending criminal proceedings. This was followed by a letter to L dated 28 May 2009 from one of the agencies to which the local authority had made disclosure, revealing that fact – the first H and L knew about it – and stating that the agency had decided to withdraw from working with their company "with immediate effect." A similar letter from the university followed on 9 June 2009.

13. In his witness statement X explains his actions as follows:

> "In the process of convening and conducting the strategy meetings a number of organisations were informed of H's conviction. This was necessary to help clarify the extent of his work and enable them to make judgements in respect of their relationship with H …
>
> I was setting out to do two things. Firstly to clarify what role H had with the organisation and secondly, having done so, inform them of his 1993 conviction and alert them to the potential for further convictions …
>
> The notifications were by way of short exploratory telephone calls on the lines of "Do you have any information about H, who we are investigating at the moment"."

14. He explains the local authority's concerns in this way:

> "The primary cause of risk arises out of H sexual interest in at least one child who he abused and possibly others. He made the acquaintance of this child through his employment and contact with the child's parents. It would appear that the abuse occurred whilst he had care of the victim and the victim's brother and as such represents a severe breach of trust. He has

> maintained a strong denial of the offence despite the failure of his appeal against sentence …
>
> It is commonly held by all those that I have spoken to that H is an effective advocate on behalf of disabled people and I fully accept that he is good at the work he undertakes on behalf of others. This good reputation would lead most people to believe that he was a trusted individual who they could safely employ to work with families. So, whilst being a member of a consultative body may not provide direct access to families and children, it creates an aura of trust and respectability which is ill deserved. That trust and respectability may in turn enable H to win the confidence of parents, and thereby to obtain access to their children. It appears that H was able to commit his previous offence because the victim's parents trusted him, and gave him access to their child."

15. So far as concerns L, he pointed out that she, like H, was in denial about H's conviction. She "has either not recognised the risks he might pose to children or has been careless as to those risks." She "does not provide any protective factors and appears … at the very least not to acknowledge the safeguarding implications consequent to the conviction of her partner."

16. X's conclusion was that the local authority was discharging its duty to ensure that risk to children is effectively managed "by disclosure to and discussion with key partners, employing organisations and relevant individuals."

17. There is no explanation of why H and L were not told at the time of what was being done. And insofar as the purpose of the telephone calls was to obtain information which the local authority thought that it needed, X does not engage with why, at least in the first instance, the local authority did not simply seek the relevant information from H and L.

18. On 23 June 2009 solicitors acting for H and L wrote the local authority a judicial review pre-action protocol letter. The local authority replied on 15 July 2009.

19. Attempts to resolve matters at a 'without prejudice' meeting on 22 September 2009 were unsuccessful. On 21 October 2009 the local authority wrote a long letter setting out how it proposed to proceed for the future. I think in the circumstances that I should set most of it out.

20. The local authority re-stated its basic position as being that it "continues to view [H] as presenting a risk to children who are not accompanied by a responsible adult."

21. It then proceeded to set out its position in relation to the information it wished to share directly with the personal assistants employed by H and L:

> "In order to enable both [H] and [L] to continue to employ personal assistants using their respective Direct Payments, [the local authority] would need to be satisfied that all Personal Assistants are properly made aware that they must not allow

> their children, or indeed enable other children, to have unsupervised contact with [H]. This would include contact with such children within [H]'s own home or any social contact with the assistant's children outside the home.
>
> [The local authority] is of the view that it cannot accept assurances from [H] that he will comply with the conditions above. [H] has a conviction for dishonesty in 2000 and this leads [the local authority] to have doubts as to its ability to trust what [H] says. In addition, [the local authority] is not satisfied that adding a clause to the contract of employment, as suggested by [H] and [L], ensures that current and future staff are made sufficiently aware of the risks that [H] presents."

The local authority said that "the only way to ensure to its satisfaction that these risks are guarded against" was for the following requirements to be put into place:

> "1 All Personal Assistants employed by [H] and [L] are paid via a Managed Account. The terms of the Managed Account are that the element of [H] and [L]'s Direct Payment that is intended for the employment of Personal Assistants would still be paid to the employee but via a payroll provided by a company that would administer the Managed Account. [The local authority] would then require this company to inform it of all the names of staff on the payroll for both [H] and [L].
>
> The Managed Account will ensure that [the local authority], to a reasonable level, are aware of the names of each member of staff employed via the Direct Payment We consider that this strikes a reasonable balance between the need for protection, as assessed, and [H] and [L]'s desire for autonomy. It will still be for [H] and [L] to decide which PAs they employ. The purpose of this requirement is to provide an audit trail.
>
> 2 [The local authority] will require agreement from [H] and [L] to provide each employee in current or future employment with a signed letter, as prepared by [the local authority]. The letter will set out our view that employees should not take their children to work with them. Furthermore it will state that employees should not enable unsupervised contact with their children, or other children within a work or social context outside [H]'s home. Again, this provides an audit trail evidencing that each employee has sufficient information to make sensible personal decisions around the protection of their children, if any.
>
> The signed letter would satisfy us that all employees have seen the concerns rather than having possibly missed or not understood their importance which they might if reading a contract of employment.

> 3 [The local authority] would review the requirements set out above 1 year after commencement."

22. The letter then turned to consider the local authority's more general concerns about H's "potential to come into contact with children via or as a result of the work he undertakes":

> "We have yet to receive a list in which he and [L] set out the individuals and organisations with which they work and whether that brings them into contact with children. Without this list [the local authority] is of the view that [H] presents a risk to an unknown group and sound judgements about what should be shared with whom cannot be made.
>
> You are again invited to set this list out, in full detail, with a signed assurance from your client as to its veracity. Judgements will then be made on a case by case basis on to what information should be shared and with whom. In reaching such decisions [the local authority] would abide by the following principles:
>
> • Disclosure will not be automatic. It will be assessed on a case by case basis.
>
> • Disclosure will be more likely if the work is likely to bring [H] into direct contact with children or where the nature of the work is likely to build [H]'s credibility as a safe person to be around children.
>
> • Disclosure will be less likely where there is no direct contact with children.
>
> [The local authority] will, within 14 days of the date of this letter, reserve the right to notify persons or organisations as to the fact and nature of [H]'s criminal convictions as it deems necessary based on above criteria.
>
> For the avoidance of doubt, if you do seek formal leave to proceed to Judicial Review of this decision then notification would not take place during the course of the proceedings without leave of the court."

23. The contrast between the 'blanket' approach adopted at the meeting on 17 April 2009 and the more nuanced approach in this letter is striking. In his witness statement X said that the proposals set out in the decision letter were a proper response to the situation, and those relating to the personal assistants represented a proportionate approach.

24. To this narrative I need add only three things.

25. First, H's case, as deployed in the witness statement prepared by him for these proceedings, is that since his conviction in 1993 he has neither undertaken nor sought

any work (paid or voluntary) that would deliberately bring him into contact with children. His company has never bid for such work. Neither he nor L has any expertise in that area. The local authority accepted before us that, on the material available to it even now, in only one of the agencies with which H is involved has he had any contact, however indirect, with children.

26. Second, H and L assert that, unsurprisingly as it might be thought, they have lost much business as a result of the disclosures made by the local authority.

27. Third, the criminal proceedings to which I have referred concluded in February 2010. H was found not guilty.

The proceedings

28. H and L issued their claim for judicial review on 4 November 2009. Permission was given by His Honour Judge Behrens (sitting as a judge of the High Court) on 8 December 2009. The substantive hearing took place before His Honour Judge Langan QC on 12 February 2010. As before us, H and L were represented by Mr Stephen Cragg and the local authority by Mr Timothy Pitt-Payne (now QC). Judge Langan handed down his judgment on 12 March 2009.

29. On behalf of H and L, Mr Cragg made four complaints. The first arose out of the decision taken by the local authority at the meeting on 17 April 2009, the other three out of its decisions as set out in the letter of 21 October 2009. Mr Cragg submitted before Judge Langan, as he submitted before us, that:

    i) The disclosures which had taken place following the meeting on 17 April 2009 were unlawful, being in breach of the claimants' rights both at common law and under Article 8 of the Convention.

    ii) For essentially the same reasons the local authority's approach to future disclosures as set out in the letter of 21 October 2009 was unlawful.

    iii) In particular, the regime which the local authority proposed to enforce in relation to H and L's personal assistants was similarly unlawful.

    iv) The local authority's proposals in relation to the method of making direct payments to H and L by the mechanism of a managed account was unlawful not merely for the same reason but in any event as being *ultra vires* the local authority's powers under the relevant legislation.

    The claimants sought appropriate quashing orders, declaratory relief and, in relation to (i), damages in accordance with the Human Rights Act 1998.

30. Before Judge Langan, as before us, the essential thrust of Mr Cragg's case was that because H's work does not bring him into contact with children, there is no "pressing need" to disclose his past convictions to anybody and everybody with whom he does business; and that the disclosures made, or intended to be made, by the local authority are disproportionate inasmuch as they fail to reflect this crucial factor. Mr Cragg adds that, given the existence of what he calls a "comprehensive system" for disclosure and registration to protect the vulnerable, the court should be slow to find that any additional information should be disclosed.

31. Judge Langan found for the local authority on issues (i) and (ii) and for H and L on issues (iii) and (iv). He accordingly quashed the local authority's decisions in relation to (iii) and (iv) and dismissed the claims in relation to (i) and (ii).

The appeal

32. H and L filed their appellant's notice on 16 April 2010 challenging the judge's decisions on issues (i) and (ii). Permission to appeal was given by Arden LJ on 2 August 2010. The local authority filed a respondent's notice on 30 September 2010, cross-appealing against the judge's decisions on issues (iii) and (iv).

33. Both the claimants and the local authority applied to us for permission to adduce further evidence. To some of this material no objection was taken. To some of the material the claimants wished to adduce, objection was taken by the local authority. We looked at all the material *de bene esse*. In the event, none of it advances the case to any significant extent. I would therefore propose that both applications be dismissed.

The issues

34. It will be convenient to deal first with the issues relating to disclosure, that is, issues (i) to (iii), before turning to issue (iv), relating to the managed account.

Disclosure

35. Before addressing issues (i) to (iii) individually, there are a number of important matters of law that I need to consider.

Disclosure: the law

36. The first has to do with the respective functions of the local authority and the court and, in particular, the legal tests each had to apply. In relation to this Judge Langan fell into what I have to say was serious error.

37. The task for the local authority was, putting the matter shortly, to apply the principles to be found in *R v Chief Constable of the North Wales Police ex p Thorpe* [1999] QB 396 as adjusted by the re-calibration of the 'balancing exercise' undertaken in *R (L) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2009] UHSC 3, [2010] 1 AC 410. The latter case, although decided in relation to the statutory scheme under section 115 of the Police Act 1997, is, in my judgment, equally applicable in the present non-statutory context. As the authorities show, each case must be judged on its own facts. The issue is essentially one of proportionality. Information such as that with which we are here concerned is to be disclosed only if there is a "pressing need" for that disclosure. There is no difference in this context between the common law test and the approach mandated by Article 8. The outcome is the same under both.

38. In considering proportionality the general principles are, as Mr Cragg submits, those to be extracted from the well-known passage in the speech of Lord Bingham of Cornhill in *Huang v Secretary of State for the Home Department, Kashmiri v Same* [2007] UKHL 11, [2007] 2 AC 167, para [19]: (i) the legitimate aim in question must be sufficiently important to justify the interference, (ii) the measures taken to achieve

the legitimate aim must be rationally connected to it, (iii) the means used to impair the right must be no more than is necessary to accomplish the objective, and (iv) a fair balance must be struck between the rights of the individual and the interests of the community; this requires a careful assessment of the severity and consequences of the interference.

39. Prior to the decision of the Supreme Court in *L*, the effect of the decision of this court in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65, had been to tilt the balance in favour of disclosure. As Lord Hope of Craighead put it in *L* at para [38], the effect of the approach in *X* was to encourage disclosure of any information that might be relevant, and to give priority to the social need that favours disclosure over respect for the private life of those who may be affected by the disclosure. He said (para [44]) that the effect of this approach had been to tilt the balance too far against the person about whom disclosure was being made.

40. Explaining the proper approach, Lord Hope said (para [42]):

> "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."

He continued (para [45]):

> "The correct approach, as in other cases where competing Convention rights are in issue, is that neither consideration has precedence over the other … The [approach] should be restructured so that the precedence that is given to the risk that failure to disclose would cause to the vulnerable group is removed. It should indicate that careful consideration is required in all cases where the disruption to the private life of anyone is judged to be as great, or more so, as the risk of non-disclosure to the vulnerable group. The advice that, where careful consideration is required, the rationale for disclosure should make it very clear why the human rights infringement outweighs the risk posed to the vulnerable group also needs to be reworded. It should no longer be assumed that the presumption is for disclosure unless there is a good reason for not doing so."

41. That was the task the local authority had to undertake here. What was the task for the judge? His task was one of review, not decision on the merits. Judge Langan seems to have thought that the appropriate standard of review here was the *Wednesbury* test of irrationality. It was not. As Mr Cragg submitted, and Mr Pitt-Payne correctly conceded, what was required in this sensitive area of human rights was the more intense standard of review described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, para [27]. In a case such as this, proportionality will require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of

rational or reasonable decisions; this goes further than the traditional grounds of review inasmuch as it requires attention to be directed to the relative weight accorded to interests and considerations.

42. Judge Langan set out his approach (para [42]) in the following words:

> "[T]he court is faced with an application for judicial review, and not with anything in the nature of an appeal on the merits … The test of legality is the familiar one: whether relevant considerations were ignored, or irrelevant considerations were taken into account, or the decisions reached were ones at which no reasonable authority could have arrived (or, in Convention terms, were disproportionate)."

Any ambiguity in what he was there saying (and I can see none) is put beyond argument by what Judge Langan said a little later (para [49]):

> "The court can interfere with [the local authority's] conclusion only if it is such as no reasonable authority could have reached or, which is the same thing, amounts to a disproportionate interference with the right of H and L to respect for their private life."

The language twice used by Judge Langan – a decision such as "no reasonable authority" could have reached or arrived at – is, of course, the language of *Wednesbury*.

43. In my judgment, and there is no shirking the point, Judge Langan here fell into serious error. In fact, as a reading of his judgment as a whole shows, his error was three-fold. In the first place he equiperated proportionality with rationality; it is elementary that the two are fundamentally different. Second, he seems not to have distinguished clearly between the different functions of the local authority and the court and the different legal tests each had to apply. Third, he treated the applicable test for judicial review as *Wednesbury* irrationality; it is in fact the more intensive *Daly* test.

44. Mr Pitt-Payne strove mightily to save the judgment by pointing to other passages (for example, paras [38], [39] and [44]) where Judge Langan had, he said, correctly used the language of balancing, proportionality and pressing need. Even assuming in his favour that the judge was here correctly describing the approach which the local authority had to adopt (and I put the point in this way because there is no escaping the fact that the judge twice treated proportionality and rationality as being the same thing), Mr Pitt-Payne is still left with the difficulty that the judge was adopting *Wednesbury* as the criterion for judicial review. That error alone, in my judgment, must vitiate his conclusions.

45. In the circumstances we must exercise our own judgment and discretion in deciding whether or not, in relation to all these issues, the proper outcome was as Judge Langan concluded. We are in as good a position as he was to do so. Neither Mr Cragg nor Mr Pitt-Payne seeks to dissuade us from this course.

46. Before leaving the law there are two other matters to be considered.

47. Mr Cragg submitted to the judge, as he submitted to us, that his clients' Article 8 rights were here engaged. Mr Pitt-Payne submitted that this was not a case in which Article 8 was engaged. Judge Langan dealt with the point briskly (para [40]):

> "So far as the application of article 8 is concerned … , I agree with Mr Cragg. Mr Pitt-Payne's approach simply cannot stand with the decision of the Supreme Court in *R (L) v Commissioner of Police of the Metropolis*".

I agree with Judge Langan. I need not take up time analysing the point. It suffices to draw attention to what was said in *L* by Lord Hope of Craighead (paras [24]-[29]) and by Lord Neuberger of Abbotsbury MR (paras [68]-[71]). For all the reasons they give, it is clear, in my judgment, that Article 8 is engaged in this case just as it was in that. The factual and contextual differences between the two cases which Mr Pitt-Payne seeks to rely upon – the fact that the disclosure in *L* was to prospective employers of information kept on the Police National Computer, whereas the disclosure here was not, he says, to prospective employers but to particular bodies or organisations with which H had a connection and, moreover, was discretionary disclosure on a case-specific basis by a single local authority – are, in my judgment, far too marginal to have the effect for which Mr Pitt-Payne contends. Nor does *In re British Broadcasting Corporation, In re Attorney General's Reference (No 3 of 1999)* [2009] UKHL 34, [2010] 1 AC 145, upon which Mr Pitt-Payne placed some reliance, assist him. It was, after all, and unsurprisingly since both he and Lord Neuberger had been party to the earlier decision, an authority which Lord Hope had very much in mind when coming to his decision in *L*.

48. Although, as I have already noted, there is in this context no difference between the common law test and the approach mandated by Article 8, and the outcome is the same under both, Article 8 is potentially significant in two respects: first, because if Article 8 is engaged, section 8 of the Human Rights Act 1998 may provide a remedy in damages where, so it is said, there may be no such remedy at common law; second, because of the important *procedural* rights which Article 8 confers.

49. This leads me on to the other matter. Although it seems, surprisingly, to have played no part in the hearing below, it relates to what in my judgment was the profoundly unsatisfactory way – the profoundly unfair way – in which the local authority went about arriving at and then implementing the decision taken at the meeting on 17 April 2009. The local authority took and then implemented its decision behind H's back and without giving either H or L any opportunity to have their say before tardily confronting them with a *fait accompli*.

50. Such an approach is wholly inconsistent with the standards of procedural fairness mandated in circumstances such as this both by the common law and by Article 8. As to the former, in *R v Chief Constable of the North Wales Police ex p Thorpe* [1999] QB 396, page 428, Lord Woolf MR said that before deciding whether or not to disclose the information the police should have consulted the persons about whom disclosure was being contemplated, disclosing the gist of the relevant information to them and giving them an opportunity to comment.

51. Article 8 likewise has an important *procedural* component. Long-established Strasbourg jurisprudence, articulated by the court as long ago as 1988 (see *W v United*

Kingdom (1988) 10 EHRR 29, paras [63]–[64]), requires that, where Article 8 is engaged, the local authority's decision-making process must be such as to secure that the views and interests of those who will be adversely affected by its decision are made known to and duly taken into account by the local authority, and such as to enable them to exercise in due time any remedies available to them. The question, according to the court, is whether, having regard to the particular circumstances of the case and the serious nature of the decisions to be taken, those affected have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests.

52. In *L*, the Supreme Court, disapproving what Lord Woolf CJ had said in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65, para [37], pointed to the need to consult with the person whose information is to be disclosed and to give them an opportunity of making representations before the information is disclosed: see Lord Hope of Craighead (para [46]), Lord Brown of Eaton-under-Heywood (para [63]) and Lord Neuberger of Abbotsbury MR (paras [82], [84]). As Lord Neuberger said (para [84]), "the imposition of such a duty is a necessary ingredient of the process if it is to be fair and proportionate."

53. The significance of this will become apparent in due course.

54. I return to the specific issues in relation to disclosure.

Disclosure: issue (i)

55. The first issue relates to the disclosures made by the local authority following the meeting on 17 April 2009 and in accordance with the decisions recorded in the minutes – which Mr Pitt-Payne accepts is the document recording the relevant decisions of the local authority. Judge Langan expressed his conclusions as follows (para [44]):

> "Mr Cragg's essential criticism is that the disclosures were disproportionate and, having regard to the potential damage to the reputations and careers of H and L, were not properly thought through. I do not agree. The disclosures were not made to the public generally, but to nine selected organisations with which H was involved; and, on the basis of the evidence of X, the disclosures were made in a guarded fashion. It is not suggested that they were made in terms which were lurid or went beyond what was required for the purpose of making a measured communication. If one were to judge what happened by the 'pressing need' test, I would say that neither the decision to make disclosure nor the way in which that decision was implemented have been shown to have failed that test."

56. Now what is striking about this is that Judge Langan has simply not engaged with what might be thought the central problem with the local authority's decision.

57. His reference to a "pressing need" prompts the obvious question: A pressing need to do what? Mr Pitt-Payne's answer is, of course, A pressing need to protect children. Yet, as the judge recorded in the previous paragraph of his judgment, he had been

pressed by Mr Cragg, as we have been, with the point that there was no evidence that H's work brought him into contact with children (although there may have been chance contact with the children of one family through one of the agencies). Indeed, the judge remarked that he would not attempt to gainsay the point. But he never grappled with it, just as he never grappled with the fact that, as the minutes of the meeting on 17 April 2009 show, the local authority's stance at the time of these initial disclosures was that H should stand down from *all* the bodies and committees he was involved with and (a passage in the minutes that the judge at no stage referred to; cf his summary of the minutes in para [13]) that the local authority would make disclosure to *all* H's known contacts and, indeed, to any further contacts of which it became aware.

58. Mr Cragg criticises the local authority for the 'blanket' approach it adopted and for its failure to give any adequate consideration to the fact that L, who has no convictions, stands in a very different position from H. He complains that neither the local authority nor the judge engaged in any meaningful way, if indeed at all, with the critically important fact that H and L do not work with children. He points out that in what he calls the present climate the risk-averse approach of those who would otherwise do business with H or engage his services will lead them to sever their ties with him – as has in fact happened. The real issue, he says, is whether the disclosures were proportionate. He submits that they were not and that the local authority has given obvious and inappropriate precedence to disclosure over the rights of H and (especially) L. The balance, he says, has been tilted unlawfully against them.

59. Mr Pitt-Payne submits that Judge Langan was right, and essentially for the reasons he gave. He points out that the information in question related to convictions, not mere allegations or complaints. He stresses the seriousness of the offence for which H was convicted in 1993 and the circumstances in which it was committed – involving a serious breach of trust – and points to the risks that H may, through his work with adults, thereby gain access to their children. The local authority, he submits, was entitled to strike the balance as it did, fairly and appropriately. Judge Langan, he says, was right to reject the claimants' complaint.

60. In my judgment neither the decision of the local authority nor the decision of Judge Langan can stand. I agree with Mr Cragg. The point, at the end of the day, is short and simple. Neither the local authority nor the judge engaged with the critically important fact that H and L do not work with children. The local authority adopted a 'blanket' approach, its stance being that H should stand down from *all* the bodies and committees he was involved with and that it would make disclosure to *all* H's known contacts and, indeed, to any further contacts of which it became aware. This approach – in marked contrast with the approach the local authority adopted only six months later – was, in my judgment, neither fair nor balanced nor proportionate.

61. On this ground alone the claimants are, in my judgment, entitled to succeed on issue (i). This part of the judge's order must be set aside. The claimants are entitled in principle to a quashing order and appropriate declaratory relief.

62. This conclusion suffices to dispose of issue (i) on the only ground which was argued before us. I ought to add, however, that in my judgment the local authority's decision should in any event be quashed for procedural irregularity. The point is a short one. The entire process in April 2009 – both the meeting held on 17 April 2009 and the

implementation of the decisions taken at that meeting – took place behind H's back. H and L were given no opportunity of making representations. They were simply presented with a *fait accompli*. The process by which they were condemned, unheard, was unfair. It fell far short of what was required both by the common law and by Article 8. These serious – indeed egregious – procedural shortcomings vitiate the entire process.

Disclosure: issue (ii)

63. In relation to future disclosures, Judge Langan said that the local authority's policy as set out in its letter of 21 October 2009 "does not appear to me to raise any difficult question." He continued (para [46]):

> "Mr Cragg has understandably reiterated the risks, physical and economic, to which disclosure would expose H and L; and he has rehearsed what might be called the "merits points" which militate against disclosure. The flaw in his submissions seems to me to lie in this: that, if he is right, it is difficult to conceive of any circumstances (other than a further relevant conviction) in which disclosure could be justified. But there must be such circumstances: for example, if at some future time H and L engaged in work which in fact brought them into regular contact with children, there would be at least (as I think that H and L accept) a strong case for disclosure. In truth, by the decision letter [the local authority] is doing no more than reserving for the future its right to act in accordance with the law as it stands in whatever factual situation then obtains. There is nothing wrong about that".

64. Judge Langan then commented that there was no ground on which H or L could reasonably apprehend that there was a risk that the local authority would act in excess of its rights. Indeed, he said, "the fact that [the local authority] has been prepared to stay its hand on future disclosure pending the outcome of this litigation is evidence of the responsible manner in which it has approached the whole matter." That may be, though I have to say that one can understand H and L's concerns given the way in which the local authority had seen fit to act as recently as April 2009.

65. Judge Langan concluded (para [47]):

> "I would go so far as to say that the policy adumbrated in the decision letter represented the minimum permissible response to the situation with which [the local authority] was faced. Anything less would have been open to legitimate criticism as constituting a failure of the duty of [the local authority] towards children within the area."

66. Mr Cragg submits that Judge Langan should have granted, and that we should now grant, a declaration that "it is unlawful and incompatible with Article 8 for information about H's convictions to be disclosed to any organisation or individual with whom H or L work which does not involve any direct and regular or frequent contact with children." Mr Pitt-Payne submits that this formulation is too limited.

67. I agree with Mr Pitt-Payne that Mr Cragg's proposed formulation is inappropriate. There is no 'bright-line' test that will necessarily cover all future situations, for each proposed disclosure has to be considered on its own facts and on a case-by-case basis, applying the general principles laid down in the authorities to which I have referred. Whether or not there is direct contact with children is plainly a highly relevant consideration but, as Mr Pitt-Payne correctly says, it is not necessarily determinative in every case. Moreover, Mr Cragg's formulation has its own problems: What is "regular" and how frequent is "frequent"?

68. The fact is, as I have already observed, that the local authority's approach in the letter of 21 October 2009 is much more nuanced than the approach it adopted at the meeting on 17 April 2009. Its later decision is free of the vitiating feature which condemns the earlier. Despite Mr Cragg's endeavours to persuade us to the contrary, I agree with the general thrust of Judge Langan's analysis,

69. But that is not, as it seems to me, the end of the matter. The more important question to my mind is not so much the substance of what the local authority is proposing but whether the *procedure* it has in mind is adequate. In my judgment it is not. Mr Pitt-Payne submits that, even assuming Article 8 applies, the process envisaged by the local authority is Article 8 compliant. Mr Cragg does not agree. Nor do I. Mr Cragg submits that if the process is to be fair, if it is to meet the requirements of procedural fairness demanded both by the common law and by Article 8, the local authority must consult with H (and L) and give them a proper opportunity to make their objections to what is proposed, *after* the local authority has decided what disclosure to make, and to whom, and *before* it does so. I agree. But that is not any part of the process set out in the letter. The omission, in my judgment, is crucial. To that extent, therefore, the claimants are entitled to succeed.

Disclosure: issue (iii)

70. Judge Langan said (para [48]) that issue (iii) was less clear-cut. He observed that the factors which support the local authority's decision are obvious, being, in short, the same as those which provided support for the disclosures already (issue (i)) and the policy to be followed with other individuals and organisations in the future (issue (ii)). However, he continued (para [50]):

> "There are … matters which relate to the personal assistants, which are specific to this limited aspect of the case. (1) The action proposed in relation to the personal assistants has to do with activities largely (exclusively, if H and L are correct when they say that they do not socialise with their carers) within the home of H and L. (2) The action must, of its nature, threaten to disrupt relationships which are of significance to H and L. (3) The action ignores the evidence from H and L as to two of the three long-term carers not having children and as to the recent insertion of a "no children at work" provision in the relevant employment contracts. I appreciate that [the local authority] has reservations about the trustworthiness of H and L, but it does not follow that any evidence from them or any assurance they give as to their conduct should be wholly discounted. (4) The terms of the disclosure, which are perhaps inevitable, must

> raise in the minds of the carers suspicions as to their employers, which may (in the case of H) be more grave than his past conduct warrants and (in the case of L) be wholly unjustified."

The judge's conclusion (para [51]) was that the local authority had "arrived at the wrong result", indeed, as I read his earlier direction to himself (para [49]), that the local authority's decision was *Wednesbury* unreasonable.

71. I should elaborate a little on one of the points the judge made. Both H and L have incorporated into the written Particulars of their personal assistants' Terms and Conditions of Employment a provision on the third page, under the heading 'Maintaining a Professional Working Environment', which amongst other things states, after reciting that the insurance in place covers only staff employed by them, that "For these reasons, it is not appropriate for you to bring your friends, siblings, partners, parents children or anyone else to work with you." Each of the personal assistants has signed a declaration to the effect that they have read and accept the Terms and Conditions.

72. Mr Pitt-Payne submits that even if the more general disclosures engage Article 8 (as in my judgment they do) the proposed requirements in relation to the personal assistants do not, because there is no proposal that they be given details of H's convictions, indeed any specific information at all. Moreover, and in any event, he says, what is proposed by the local authority meets the "pressing need" test, is proportionate to that need and strikes a fair balance between the claimants' interests and wider social interests relating to child protection. He submits that the clause included in the personal assistants' Terms and Conditions of Employment does not suffice to meet the local authority's legitimate concerns, because a personal assistant reading the document might overlook the clause or not appreciate its meaning or importance. Given H's conviction for dishonestly concealing the circumstances of his earlier conviction, the local authority simply cannot leave it to H to ensure that personal assistants are aware of and understand the contractual clause. Mr Pitt-Payne accepts that L is not herself a risk to children; his point is simply that her personal assistants are in the nature of things likely to come into contact with H, which might in turn bring him into contact with their children.

73. Mr Cragg submits that Article 8 applies here, as elsewhere, and that Judge Langan came to the correct result for the reasons he gave. I agree.

74. I cannot accept that Article 8 does not apply. The argument that it does not apply because of the limited nature of the disclosure being made by the local authority is, with all respect to Mr Pitt-Payne, somewhat disingenuous. The local authority is, after all, proposing (I quote from its letter of 21 October 2009) that the personal assistants should be provided with a letter which "set[s] out our view that employees should not take their children to work with them [and] state[s] that employees should not enable unsupervised contact with their children, or other children within a work or social context outside [H]'s home." Such a letter is bound to prompt questions the answers to which will inevitably lead to disclosure of H's conviction.

75. Be that as it may, and in any event (for the local authority is in no better position at common law than under the Convention), Mr Pitt-Payne's submissions do not, in my judgment, meet the arguments deployed by Mr Cragg which Judge Langan correctly

accepted. Looking at everything in the round, and giving due weight to the clause which has been included in the Terms and Conditions of Employment, I agree both with Judge Langan's conclusion and with the reasons he gave.

The managed account

76. As Judge Langan correctly remarked (para [52]), the proposal to pay the personal assistants through a managed account was parasitic upon the proposal to make disclosure to such persons, so it must therefore, on common law and Convention grounds, fall with that proposal as to disclosures. Before us, Mr Pitt-Payne did not seek to argue otherwise. So, for the reasons I have already given in relation to issue (iii), the local authority's cross-appeal on this point must be dismissed.

77. There is, however, as I have mentioned, a quite separate ground upon which Mr Cragg challenges the lawfulness of the proposed managed account. It is an important point of general application, and involves a pure point of law, so, in common with Judge Langan I agree that we should deal with it.

78. The system of direct payments is provided for by section 57 of the Health and Social Care Act 2001 and, so far as is material for present purposes, the relevant provisions of The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, SI 2009/1887.[1]

79. For present purposes the key provision is regulation 7(1)(c) of the 2009 Regulations:

> "If the conditions in paragraph (2) are satisfied, a responsible authority … must, with that person's consent, make in respect of a prescribed person direct payments in respect of the prescribed person securing the provision of a relevant service."

Regulation 9(5) provides that:

> "The payment referred to in paragraph (1) [scil, a direct payment] may be made to –
>
> (a) the prescribed person; or
>
> (b) a person nominated by the prescribed person to receive their payment on his behalf."

There is no need for me to further into the statutory thicket. It is common ground that in relation to both H and L the conditions in regulation 7(2) are satisfied and that regulations 7(1)(a) and 7(1)(b) do not apply. And no-one has been nominated by them under regulation 9(5)(b).

80. Regulation 11 provides for the attachment of conditions in respect of direct payments. Regulations 11(1)-(3) do not apply. Regulations 11(4) and (5) provide as follows:

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[1] These are the Regulations which have been in force since 9 November 2009. The previous Regulations, in force on 21 October 2009, were The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762. So far as is material for present purposes they were to precisely the same effect, the corresponding provisions being regulations 4, 5 and 6 of the 2003 Regulations.

> "(4) A responsible authority may make a direct payment … subject to such other conditions (if any) as they think fit.
>
> (5) The conditions referred to in paragraph (4) may, in particular, require that the payee –
>
> (a) shall not secure the relevant service from a particular person; and
>
> (b) shall provide such information to the responsible authority as the authority consider necessary in connection with the direct payment."

81. Having rehearsed all this material, Judge Langan said this (para [56]):

> "the controversy which has to be decided at the end of the line is a short and finely-balanced one. Mr Pitt-Payne says that regulation 11(4) is sufficiently wide to enable [the local authority] to require payments to be made through a managed account. The imposition of a condition about a managed account would not affect the ability of H and L to decide whom they shall employ, at what rates of pay, for what hours and on what other terms. The condition is of a procedural kind which is not in fact destructive of the autonomy which the direct payments system is designed to achieve. I prefer, although by no great margin, Mr Cragg's submission to the contrary. This is focused on what Mr Cragg would say is of the very essence of a direct payment. It is a payment which passes from the responsible authority to the payee. A condition that the payment should go through an intermediate account is inconsistent with the nature of a direct payment, and such a condition could be justified only if there were (which there is not) specific statutory provision for it. There will undoubtedly be cases in which a degree of monitoring by the responsible authority will be needed, but this can be ensured by its requiring information under a condition of the kind envisaged in regulation 11(5)(b)."

82. I agree with Judge Langan, though not myself finding the point quite so evenly balanced as he did.

83. Mr Pitt-Payne submits that the condition sought to be imposed by the local authority can be challenged only on the basis that it is *Wednesbury* unreasonable. He says that the proposed condition is "procedural" in nature, intended only to ensure that there is a proper 'audit trail' in relation to the people working for H and L and the information provided to them, and that it is clearly a reasonable one.

84. However, as Mr Cragg makes clear, we are not here concerned with *Wednesbury* reasonableness but with *vires*. And his submission, based in particular on regulations 7(1)(c) and 9(5), is that the local authority simply has no power to do what it is proposing. Regulation 7(1)(c) provides that it "must" make the payment and

regulation 9(5) permits it to do so in only two ways, one of which is not in fact available to it here. So, he submits, the local authority is required by regulation 7(1)(c), read in conjunction with regulation 9(5)(a), to make the direct payments to H (or L as the case may be). Putting the same point the other way round, the local authority has, he says, no power to channel the payments via a managed account.

85. Mr Cragg seeks to bolster his submissions by pointing us to the Department of Health's 'Guidance on direct payments' issued in September 2009. Paragraph 2 describes direct payments as "monetary payments made by councils directly to individuals who have been assessed as having eligible needs for certain services". Paragraph 13 says that "Day-to-day control of the money and support package passes to the person who has the strongest incentive to ensure that it is properly spent on the care and support required, and who is best placed to judge how to use available resources to achieve the desired outcomes". Paragraph 21 explains that:

> "the service user should remain in control, and is accountable for the way in which the direct payments are used … People may ask carers or other people to help them manage direct payments, for example by helping them to secure the services to which the payments relate, or by actually receiving and handling the money. However, if the service recipient is able to consent to the making of the direct payments, then they should retain overall control and responsibility for the direct payments."

86. Mr Cragg also referred us to paragraph 92:

> "Councils may set reasonable conditions on the direct payments, but need to bear in mind when doing so that the aim of direct payments is to give people more choice and control over their support and how it is delivered. For example, individual choice and control would not be delivered were a condition to be set that someone who receives direct payments might only use certain providers. Conditions should be proportionate and no more extensive, in terms or number, than is reasonably necessary. Councils should also avoid setting up disproportionately intensive monitoring procedures. Financial payments should not begin until the recipient has agreed to any conditions that the council considers are necessary in connection with the direct payments. In order to avoid delays for people requiring support, councils should take all reasonable steps to resolve issues about conditions in a timely manner."

87. I agree with Mr Cragg, and do so on the simple basis that this is the correct meaning and effect of the Regulations. To accept the local authority's approach would impermissibly permit the attachment of a mere "condition" to destroy the very essence of the right. That would be neither principled nor consistent with the statutory scheme. There is, in my judgment, no need to look to the Departmental Guidance to elucidate the meaning of the Regulations, but the passages to which Mr Cragg has directed our attention undoubtedly support this view of the Regulations.

Conclusion

88. I propose, therefore, that the appeal be allowed on issue (i) and to the extent I have indicated on issue (ii). The local authority's cross-appeal on issues (iii) and (iv) should be dismissed. I have read the judgment of Pill LJ in draft. I agree with it.

Lord Justice Hooper :

89. I agree with both judgments.

Lord Justice Pill :

90. I agree with the conclusions and reasoning of Munby LJ on each of the issues raised. I add two short points on issue (ii).

91. The first is in relation to the contents of the local authority's letter of 21 October 2009, considered by Munby LJ at paragraphs 19 to 23. I agree that the more nuanced approach in the letter is strikingly different from the approach adopted by the local authority earlier in the year. I also agree that, subject to it being implemented by a satisfactory procedure, the approach to disclosure is an appropriate one.

92. An approach on a case by case basis with disclosure less likely where there is no direct contact with children and more likely if the work is likely to bring H into direct contact with children, as proposed in the letter, is appropriate. The introduction in the letter of the further consideration, which is whether "the nature of the work is likely to build H's credibility as a safe person to be around children", is more controversial and difficult to apply. It reflects the witness statement of X, cited by Munby LJ at paragraph 14:

> "… I fully accept that he [H] is good at the work he undertakes on behalf of others. This good reputation would lead most people to believe that he was a trusted individual who they could safely employ to work with families."

93. Any contract involving work on behalf of disabled people successfully performed by H is likely to enhance his reputation and credibility. Applied broadly, the further criterion could justify disclosure of the conviction to any potential contractor and prevent him doing any responsible work at all.

94. Such a broad approach would not, in my judgment, be justified. There must be a real possibility that the contract would lead on to contact with children if disclosure of the conviction is to be justified.

95. The second point is in relation to the position of L. She is not a risk to children; it is her partnership with H that creates the need for protection and for disclosure in appropriate cases. At the hearing, counsel stated that there was no formal business partnership between H and L and that in practice she alone was involved in some of the contracts.

96. I was not reassured by those statements. The informality of the business relationship between H and L is such, on the limited evidence available, that contracts in which either or both of them are, on the face of it, involved should be given the same

treatment. For L to receive more favourable treatment, there would need to be a more formal demarcation between contracts, or potential contracts, in which she alone would be involved, and other contracts in which H is, or may be, involved.