Neutral Citation Number: [2024] EWHC 1678 (Admin)

Case No: AC-2022-LON-002868

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2024

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

THE KING ON THE APPLICATION OF O	**Claimant**
- and -	
CHIEF CONSTABLE OF KENT POLICE	**Defendant**

- -
- -

Rory Dunlop KC and Tiki Emezie (Solicitor-Advocate)
(instructed by **Chipatiso Associates LLP**) for the **Claimant**

Stephen Hockman KC and Natasha Hausdorff
(instructed by **Force Solicitor**) for the **Defendant**

Hearing date: 28 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Mr Justice Julian Knowles:

Introduction

1. In this judgment I have anonymised the Claimant's identity (C), and that of his young son, whom I will call X. The reasons why will become obvious, but in summary the judgment contains intimate details about X's private life including his toilet training. Also, at one stage X was wrongly believed by the Defendant's (D) officers to have been the victim of a sexual offence committed by C. D was neutral on the anonymity application.

2. In considering C's application I bear the principle of open justice firmly in mind. Having done so, I am satisfied that this inroad into it is proper because I consider that anonymisation is necessary to secure the proper administration of justice and in order to protect the interests of C and X, given the sensitive subject matter: CPR r 39.2(4). C's (and X's) surname is uncommon and it is necessary to anonymise C to protect X's interests. X is C's only child, and so identifying C would identify X.

3. This is a claim for judicial review with the permission of Charles Bagot KC sitting as a Deputy High Court judge granted on 23 February 2023.

4. The essence of C's claim is that he says D has violated his rights under the common law, Article 8 of the European Convention on Human Rights (ECHR) as given effect to in the Human Rights Act 1998 (HRA 1998), and the Data Protection Act 2018 (DPA 1998) by taking decisions to record and retain, for at least 10 years, a Crime Report to the effect that C had committed a crime of violence against X (common assault, by smacking). At the relevant time X was five years old.

5. This case has evolved over time and has had a number of complicating factors which has made resolving it not straightforward and has required time. C's and D's cases have undergone amendment and re-amendment and there have been two previous hearings. D has described the history of the case as 'unusual and intricate' (Further Detailed Grounds of Resistance, 11 July 2023). In writing this judgment I have consulted the audio recordings of the hearing as necessary, as well as my detailed notes.

Background

6. C lives in Kent with his family, namely his wife and X. They have no other children. He has no criminal record and had no history with the police prior to the events in this claim. He is a software programmer.

7. In 2022, X, then five years old, was having problems including wetting the bed and urinating on the bathroom floor. C and his wife helped X with his toilet training.

8. On 16 March 2022, X said something to his teachers at school to the effect that C touched his 'pee pee' at night. The teachers called the police and told them of this. On the same day, PC Mullooly and PC Smith visited X's school and spoke to X. X confirmed that C touched his 'pee pee' at night. PC Smith recorded this in her notes.

There was no mention by X of smacking. PC Smith recorded that X said he became angry when C touched his 'pee pee'.

9. That afternoon, C was arrested by PC Smith on suspicion of the sexual assault of X, taken to a police station; and interviewed. He explained that he had never sexually assaulted his son but had been helping his son with toilet training including by teaching him how to urinate standing up.

10. C's wife was also questioned (as a witness) and gave the same account.

11. After interview C was released on police bail. He was not permitted to return home as one of his bail conditions.

12. Arrangements were made for X to attend a police station and be interviewed by DS Crombie who had been trained specifically in speaking to children without an intermediary. As Mr Hockman KC said, she is very highly trained. On 25 March 2022, X attended the police station and was interviewed (or, in D's preferred phrase, 'assessed') by DS Crombie. X attended the police station with his mother, but she was not allowed to sit in on the assessment. X confirmed C's account to DS Crombie, namely, that C touched his penis only to help with toilet training.

13. X's assessment was not recorded. The only contemporaneous record of the assessment are some hand-written notes taken by PC Mullooly, who was listening to the assessment and watching it from another room. These were not disclosed to C until 19 May 2023. PC Mullooly has made a witness statement dated 14 July 2023 and exhibited her notes.

14. The first question was, 'Who lives at home?'. X's reply was 'My Mummy + Daddy My Sister – Sian'. X does not have a sister.

15. The notes go on:

> "What don't you like @ home?
> My Daddy smack ~~Touch~~ my bum bum all the time
> What day is it today?
> He didn't smack my bum bum Saturday
> I don't want to watch scary things anymore.
> Where is your bum bum? Points to bottom"

16. In the notes the word 'touch' was crossed out and 'smack' written instead. In her statement PC Mullooly said at [7] that she could not recall why the word 'touch' was crossed out. She said it was likely as the result of clarification being sought by DS Crombie, 'but I cannot be confident this was the case'.

17. Mr Dunlop KC postulated 'touch' may have been replaced by 'smack' as a result of a leading question to X, eg: 'You say touch, do you mean smack ?' However, he accepted that the reason for the change could not now be determined.

18. As to the line after 'What day is it today ?', it is unclear, to me at least, whether:

    a. X was saying, 'He didn't smack my bum bum *on* Saturday'; or

b. whether ‘Saturday’ was X’s answer to the question immediately before, ‘What day is it today ?’ (I note that 25 March 2022, the day of the assessment, was a Friday). If this was correct, it would appear that X was contradicting or correcting what he had said earlier and was saying, in effect, ‘He didn’t smack my bum bum.’

19. Mr Dunlop strongly suggested that the latter was more likely, because otherwise the question about what day it was would have been the only unanswered question in the notes. He pointed out there was no evidence from either DS Crombie or PC Mullooly on the point. He said, at a minimum, the notes are ambiguous.

20. DS Crombie said in her witness statement of 21 July 2023 that she could not remember the exact words X had used (perhaps unsurprisingly), but he had said that he did not like his daddy smacking his bottom.

21. Later in the notes, PC Mullooly recorded X as saying, ‘Daddy holds my pee pee @ the morning @ the night when daddy was helping me in the bathroom.’ He was asked, ‘What was he helping you with ?’ and replied, ‘the bathroom I was pee peeing’,

22. DS Crombie said in her statement that at the end of the assessment, after a discussion with PC Mullooly, they were able to agree that C’s account of helping his son to toilet train was more likely than any sexual offence having taken place.

23. A point on PC Mullooly’s notes made by Mr Dunlop is that there was no mention anywhere of anyone being ‘angry’. This will become significant later.

24. On 29 March 2022, PC Fordham took the decision to close the case. He noted that C, his wife and X had all given the same account, that C only touched X’s penis as part of toilet training. PC Fordham concluded this was a case of a father toilet training his son, not sexual assault. PC Fordham did not, in his closing rationale, suggest that there was any suspicion of any other offence, eg common assault due to C smacking X.

25. The same day PC Smith told C that he was no longer on bail and did not need to report to the police station anymore as the case was closed. C called PC Smith. She wrote a record of that telephone conversation which is on the Crime Report. According to her, C told PC Smith that he was traumatised and worried that this arrest and investigation would ruin his life. C asked how to clear his name and delete records of the arrest. PC Smith suggested that records of his arrest would show up on an enhanced DBS check.

26. D updated Kent County Council Social Services of his officers’ conclusions. The update said that X had ‘confirmed to police what he had told his teacher and that it was making him angry’ but it was ‘decided this was a case of a father helping him with this toilet regime and there will be NFA’. The update made no mention of any allegation that C smacked X, a point emphasized orally by Mr Dunlop. Social services closed the case finding the concerns were not substantiated and the relevant threshold was not met.

27. Jumping ahead, as I shall explain, D’s Crime Report ended up containing a record alleging that C assaulted his son by smacking him in anger. Under the relevant police policies for retention of data, this is liable to be retained by D for at least 10 years, or

perhaps longer, and could be disclosed should C ever be subject to an Enhanced Criminal Record Certificate check (see s 113B, Police Act 1997). Mr Dunlop made the forensic point that that position was hardly consistent with the allegation never having been considered important enough for D's officers to report it to Kent Social Services.

28. On 1 April 2022, C wrote to the police requesting that his personal data be deleted from 'police records'. This request was not specific to national police records. In the attached application form, C pointed out that there was potential prejudice to him because of the risk of future disclosure.

29. On 6 May 2022, the Criminal Records Office (ACRO) wrote, on behalf of D, to C refusing his request for record deletion on the grounds that Kent Police had told them that 'there has been no Additional Verifiable Information obtained to confirm that a crime did not take place" and further under the public interest consideration, "the grounds for retention outweigh those in favour of deletion'.

30. C appealed this decision.

31. On 18 August 2022, no decision on the appeal having been taken C's legal representatives sent a pre-action protocol letter. They wrote:

> "11. The Claimant asserts that the defendant's decision is wrong in law because the evidence shows that the case was based on a false allegation. The arresting police officers in charge (PC Chloe Smith and PC Nikki) did confirm that they were not trained and specialist enough to question a 5-year-old child to build the context on the incident and what the child was saying. A specialist trained officer who investigated the matter, subsequently, confirmed that it was a case of 'father helping his son with his toilet regime'. Accordingly, it is arguable that the Police have the evidence establishing that the allegation was false and without foundation.
>
> 12. The Claimant contends that the Defendant was wrong to conclude on the facts and/or the evidence that 'there has been no Additional Verifiable Information obtained to confirm that a crime did not take place'. The conclusion is irrational in all the circumstances of the case. The evidence points to a false allegation culminating in the Claimant's wrongful arrest and detention by the Defendant. There can be no public interest in retaining the Claimant's record on the Police National Computer. This is a case where on the evidence, no crime was committed, and the record must be deleted in the interests of justice, equity, and fairness.
>
> 13. Further, or in the alternative, the Claimant contends that there has been an unreasonable delay and/or failure in

determining his appeal against the decision dated 6 May 2022."

32. D responded to the letter of claim on 7 September 2022. Paragraphs 10-13 stated (emphasis added):

> "10. For the avoidance of doubt, there was no allegation made against the claimant. His arrest followed safeguarding concerns raised by the school arising from its dealings with the claimant's son in terms of his conduct in the toilet. It follows that a suspicion of sexual offending on the part of the claimant arose on reasonable grounds given what his son told his teacher. There was a duty to investigate under both common law and section 47 of the Children Act 1989. It is strongly denied that the claimant's arrest and subsequent detention were unlawful and any claim on such grounds will be robustly defended.
>
> 11. It is conceded that the claimant has not received a response to his appeal after some four months. I apologise to the claimant accordingly on behalf of the Chief Constable. The outcome of the appeal follows.
>
> 12. Irrespective of how the crime report is recorded as being disposed in Kent Police's local records, this matter must be considered on its specific facts. It follows that the context of the discussion between the claimant's son and his teacher must be considered. However reasonable the grounds to suspect sexual offending by the claimant at that point, the further account obtained from the claimant's son by the specially trained officer, which tallied with the account of the claimant during interview under caution while detained, led to the conclusion that this was a case of toilet training *and no suspicion of offending on the part of the claimant remains*. Accordingly, Kent Police will respond to ACRO allowing this appeal which will lead to the deletion of the record of arrest from the Police National Computer. I can confirm that the claimant's custody image has already been deleted from Kent Police's local records system.
>
> 13. For the avoidance of doubt, both the crime report and the record of arrest will remain in Kent Police's local records for the purpose of the prevention or detection of crime. While it is the case that such non-conviction information may in theory be disclosed in an enhanced criminal record certificate, in practice such disclosure would only be lawful having proper regard to the claimant's rights under Article 8 of the European Convention on Human Rights. Provided the claimant does

> not come to adverse notice of the police in the future, the remaining local records cannot be lawfully disclosed in an enhanced criminal record certificate."

33. D lays particular emphasis on [13] as providing reassurance for C about future disclosure. As I observed during the hearing, I am not sure this is a correct statement of the law. As things then stood (and at the date of this letter the Crime Report had not been cancelled), the allegation could be disclosed as part of an enhanced criminal record check. Added to that, as Mr Dunlop said, it is ambiguous what 'adverse notice' means.

34. On 13 September 2022, ACRO wrote to C that his appeal had been allowed and that 'the deletion of his [PNC] arrest record and deletion of his custody image is now supported' but 'on the basis that a record of the incident remains on the local system'.

35. On 20 September 2022 DI Davies reviewed the matter for a possible 'crime cancellation' having been asked to do so because of C's representations. Mr Dunlop described this as a 'secret review process' which C was entirely unaware was going to take place, and did not learn about until several months afterwards.

36. DI Davies wrote on the Crime Report:

> "**DI REVIEW FOR CONSIDERATION OF CRIME CANCELLATION 2**
>
> I carefully assess whether on balance there is information to consider that an offence has taken place – I do not believe an offence to have taken place. The touching s in an area of the body that would usually be considered a sexual part of the body, however, touching of this kind occurs in many scenarios that are sexual. Assisting a child develop for the purposes of potty training is wholly normal. I understand that an offence was initially created, rightly – the police crime and investigate, not investigate and then create a crime. However, the most appropriate full account given by V with one of only a few officers trained to get a comprehensive account, has established that the touching was in the bathroom as part of the potty training. This is key and new information since the initial report. I have had this referred to me for considering the 'cancellation' and believe it should be cancelled in accordance with HOCR general rules 2022 outcome C2: Cancelled: additional verifiable information determines that no notifiable crime occurred – AVI (additional verifiable information) is now available that determines that no notifiable offence has occurred and therefore the crime may be removed."

37. It was at this point that, from C's point of view, things took a turn for the worse.

38. On 4 October 2022, Ms O'Keefe, a civilian employee of D's, rejected DI Davies's recommendation. She is what is called a Dedicated Decision Maker. Her role includes

ensuring compliance with the Home Office Counting Rules (HOCR), the National Crime Recording Standards (NCRS) and working practices. I will come to the HOCR later.

39. She rejected DI Davies' view that the Crime Report should be cancelled. She decided instead to reclassify the Crime Report as 'common assault'. Her reasoning for this reclassification decision as recorded on the Crime Report was as follows:

> "However, the victim has also stated that the suspect smacks his bum when he is angry. This requires an assault report regardless of if it is deemed as lawful chastisement, the report is still required. Therefore, I will reclassify the report."

40. What this meant was that from then on, D held on its local systems a Crime Report to the effect that C had assaulted his son in anger.

41. The Crime Report was classified as 'Assault without injury – Common assault and battery' The 'Investigation Summary' in the Crime Report stated:

> "Victim has alleged to school staff that the suspect (his father) touches his penis when he uses the bathroom and is sleeping. This has been confirmed to be his father helping him go to the toilet at these times. The victim has also alleged that the suspect smacks his bum when he is angry."

42. As I said earlier, X never said anything about C smacking him when he (C) was angry and there is nothing in PC Mullooly's notes to that effect.

43. Later I will have to analyse Ms O'Keefe's reasoning. For now, on its face, what she wrote was internally contradictory. If what C did was lawful chastisement, then it was not a crime, because in England it is still the law that a parent may lawfully inflict reasonable punishment on their child provided that it does not amount to one of the offences in s 58(2) of the Children Act 2004 (and common assault is not such an offence). Furthermore, she was wrong to say that C had acted in anger.

44. Contrary to DI Davies' recommendation, the outcome on the Crime Report was recorded as:

> 'Outcome 16 – Named Suspect Identified: Evidential Difficulties Prevent Further Action: Victim Does Not Support (Or Has Withdrawn Support From) Police Action'.

45. D did not inform C of Ms O'Keefe's decision at the time.

46. On 13 October 2022 C filed a claim for judicial review. The decision said to be reviewed was D's decision dated 13 September 2022 'to retain the crime report and

record of arrest relating to the Claimant.' That date was the date of the ACRO letter I referred to earlier.

47. On 11 November 2022 D filed an Acknowledgment of Service and Summary Grounds of Resistance (SGR). The SGR asserted, at [18], that there had been no request by C to delete the record from D's local records and 'it follows that there has been no decision by Kent Police to refuse such a request'. No mention was made of Ms O'Keefe's 4 October 2022 decision.

48. On 6 December 2022, Timothy Corner KC, sitting as a Deputy High Court judge, refused permission on the papers. In his reasons he wrote:

> "1. The Claimant was investigated by Kent Police in relation to a possible offence, but no charges were brought.
>
> 2. The Claimant applied for deletion of the records of the investigation from the Police National Computer ("PNC").
>
> 3. His application was refused, but on 13th September 2022 his appeal was allowed by ACRO, which confirmed that the Claimant's arrest record and custody image would be deleted from the PNC "on the basis that a record of the incident remains on the local system."
>
> 4. His application for judicial review now challenges the retention of the record of the incident on the local system.
>
> 5. However, the Claimant does not appear to have formally requested Kent Police to delete the record from the local system before bringing this claim. Therefore, there is no substantive decision by the Kent Police (refusing the deletion) for him to challenge. Although the Defendant's Summary Grounds give reasons for submitting that retention would be lawful, there is no evidence that Kent Police themselves have reached a decision in the light of the factors set out in the Summary Grounds.
>
> 6. In my view if the Claimant wishes to secure deletion of the record from the local system, he needs to request deletion so that Kent Police can make a formal decision. If the decision goes against him and he considers the decision unlawful, for example by failing to take account of relevant guidance, taking account of irrelevant considerations or reaching an legally irrational conclusion, it will be open to him to challenge it by applying for permission to seek judicial review."

49. On 14 December 2022, C renewed his application for permission to be heard at an oral

hearing.

50. On 31 January 2023 C through his solicitors made a formal request to D to delete the relevant records from D's local system:

> "Without prejudice to the Claimant's contention on that he had formally requested Kent Police to delete the record from the local system prior to the commencement of this claim, the Claimant hereby makes a further request that the record be deleted from the local system for the reasons set out in his grounds of application for permission to apply for judicial review."

51. D replied on 2 February 2023. After referring to the General Data Protection Regulation ((EU) 2016/679) (EU GDPR) and the retained version of the EU GDPR as it forms part of the law of the UK by virtue of s 3 of the European Union (Withdrawal) Act 2018 and as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (SI 2019/419) (the UK GDPR), and various provisions thereof, D's letter said this:

> "You have requested the deletion of:
>
> Local records held in relation to the offence 'Sexual Assault on a male under 13 years'
>
> This has been interpreted as a request for both the incident report, and custody record to be deleted.
>
> For your information, the Right to erasure ('right to be forgotten') is UK GDPR Article 17, accompanied by Recitals 65 - 66. The right to erasure is not an absolute right, and only applies in certain limited circumstances:
>
> …
>
> In respect of your custody record, detention recording is governed by the Police and Criminal Evidence Act 1984 (PACE) Code C. PACE Code C paragraph 2.1 deals specifically when a custody record is created and what needs to be recorded. Information about the circumstances and reasons for the arrest is recorded in accordance with paragraph 4.3 of PACE Code G.
>
> I have reviewed the records held by Kent Police and I can confirm that they are appropriately recorded according to PACE.
>
> I note that the relevant incident (46/49202/22) was initially recorded as 'Sexual activity with a child family member'. On the 20th September 2022, considering the Additional

Verifiable Information (AVI) provided by your wife and son, the report was submitted to the Force Crime and Incident Registrar for consideration of cancellation of the crime. The Registrar agreed that the AVI negated the recorded offence. However, the victim had also disclosed smacking, which amounts to assault. This requires that a report is retained with the offence changed to 'Assault without Injury - Common assault and battery', and this was actioned on the 4th October 2022.

Guidance on which crimes to record is issued by the Home Office, and Home Office Counting Rules state:

"An incident will be recorded as a crime (notifiable offence)

For offences against an identified victim if, on the balance of probability:

The circumstances as reported amount to a crime defined by law (the police will determine this, based on their knowledge of the law and counting rules), and

There is no credible evidence to the contrary."

Because the rules place an obligation on the police to accept what the victim says unless there is 'credible evidence to the contrary', the following reasons are insufficient to justify not recording a crime:

· the victim declines to provide personal details;

· the victim does not want to take the matter further; or

· the allegation cannot be proven.

You can find out more detail here:

https://www.justiceinspectorates.gov.uk/hmic/our-work/crime-data-integrity/crime-recording-process/

I can confirm that the record held by Kent Police is appropriately recorded according to the Home Office Counting Rules (HOCR), and no evidence has been presented to suggest that deletion is required.

Kent Police processes personal data in respect of crime recording for 'Law Enforcement Purposes' which include:

> · The prevention, investigation, detection or prosecution of criminal offences
>
> · The execution of criminal penalties, including the safeguarding against and the prevention of threats to public security
>
> · The policing purpose defined by the statutory Code of Practice on the Management of Police Information 2005 as 'protecting life and property, preserving order, preventing the commission of offences, bringing offenders to justice, and any duty or responsibility of the police arising from common or statute law.'
>
> Kent Police process your personal data for Law Enforcement Purposes under Common Law Policing Powers where the processing is necessary for the performance of a task carried out for Law Enforcement Purposes (Data Protection Act 2018 (DPA '18) Part 3 S.31).
>
> Taking account of the above, your data is being lawfully processed by Kent Police and your request for deletion of your data is not required by the Data Protection Act (DPA '18). For this reason, your request to have your personal data deleted from Kent Police systems, and under the delegated authority of the Chief Constable of Kent Police, is refused."

52. In fact, the UK GDPR does not apply to data processing for law enforcement purposes: see Article 2(2)(b). The relevant provisions are in Part 3 of the DPA 2018. This letter's legal analysis therefore proceeded on a wrong basis.

53. However, the letter went on to say that D considered offences involving violence to be serious, and retains reports relating to violent offences to enable effective investigation, detection and prosecution of such incidents, and retention is therefore required. It said that data is retained in accordance with the guidance issued by the College of Policing. As I shall explain later, that guidance specifies three levels of retention. In respect of the allegation of smacking by C (common assault), this falls into Group 2. According to the guidance, after every 10-year year period, these records have to be reviewed and a risk-based decision made whether they should be disposed or retained. This group includes any information related to people convicted, acquitted, charged, arrested, questioned or implicated with an offence within this group.

54. The letter went on:

> "It should be noted that the offence you are seeking to be deleted would fall under MOPI2. This requires a 10 year clear period during which no other offences are committed. As such, Kent Police would welcome an

> application from you for deletion of these records on the 16/3/32, or 30 days before to ensure this application is processed in a manner that ensures the appropriate review, and potential deletion can take place on the required date."

.

55. This was the first time C was made aware that D had made a record of an alleged crime of assault constituted by him allegedly smacking X.

56. On 10 February 2023 C applied to amend his claim form to challenge the decision of 2 February 2023. Paragraphs 18 and 19 of the Amended Claim Form pleaded:

> "18. In relation to the decision dated 2 February 2023, the Claimant contends that there is no evidential basis for the Defendant's assertion or conclusion that 'the victim had also disclosed smacking, which amounts to assault" as neither the Claimant's son nor the wife had disclosed or alleged smacking. Accordingly, the Additional Verifiable Information (AVI) is questionable and thus the decision flowing from it is susceptible to judicial review in the Claimant's respectful submission. Even if there was AVI as alleged, there was 'credible evidence to the contrary' as the Defendant had accepted the Claimant's account following interview and investigation.
>
> 19. The Claimant contends that the decision dated 2nd February 2023 is irrational and unlawful in that the allegation of smacking was never brought to the attention of the Claimant until he received the decision letter dated 2nd February 2023. The Claimant was never arrested, interviewed, or investigated for smacking; it was never a case that was put to him during or after the interview or investigation. It is trite law that a criminal allegation must be put to the accused to enable him to answer to the allegation or charges. It is contended that no recordable crime has occurred in the instant case."

57. The amended grounds sought an order under s 167 of the Data Protection Act 2018 (DPA 2018) to secure compliance with data protection legislation.

58. In a Skeleton Argument dated 16 February 2023, C addressed arguments on alternative remedies. It was argued at [33]:

> "33. Regarding the issue of alternative remedy, it is accepted that that judicial review will generally not be available when an alternative remedy by way of 'a statutory appeal' has not been exhausted. However, the Claimant respectfully submits that a complaint to the Information Commissioner is not an alternative remedy as contended by the Defendant. The complaint to the Commissioner is not a statutory right of appeal and the

> Commissioner lacks the powers that this Court has in relation to enforcement. Further, the Office of the Commissioner states on its website:
>
> > 'We can take regulatory action, but this is only in the most serious cases. We do not normally take regulatory action for individual complaints as we want organisations to comply with the law without us using our formal powers. It is therefore unlikely we will take regulatory action as a result of your complaint. However, even if we don't take action, we will keep a record of the complaint to help us to build up a picture of how well an organisation is following the law.'"

59. On 20 February 2023 D made submissions inviting the court to maintain the refusal of permission.

60. The matter came on for hearing before Mr Bagot on 23 February 2023. D did not attend but relied on his written submissions.

61. Mr Bagot granted permission. In his judgment at [9] he commented:

> "It is regrettable the defendant has not engaged with the central issue which is the claimant's concern that the smacking point, which seems to be the sole reason given for the decision to retain the data locally, has no evidential foundation, and might even be mistaken entirely. But if there is an evidential foundation it is not one that has been declared to the claimant, whether in his original interview – the allegation was not put to him- or since. That allegation is not identified in the summary of the interview with the child nor with the claimant's wife, and so I can have some sympathy with the concern that this may be a complete red herring, or a mistaken position, or if there is evidence, that a fair and rational process has not been followed because the claimant has not had an opportunity to answer that allegation. It has not been put to him and the rules of natural justice may not have been followed."

62. Mr Bagot's order required D to file and serve detailed grounds of defence (DGD) and any written evidence by 4 April 2023. D did not comply with this deadline. On 13 April 2023 D applied for an extension of time to file its DGD and witness evidence to 24 April 2023. On 23 April 2023 D filed and served the DGD and witness statements from Lucy Power and Charlie O'Keefe, two of D's civilian employees.

63. As I said earlier, Ms O'Keefe took the decision to record an assault on 4 October 2022. She said at [3]-[5] of her statement:

> "3. From recollection of my involvement and recent review of crime report 46/49202/22, exhibited as CO/2, a decision was made to record a crime of sexual activity with a child family member following the disclosure that the suspect had been touching the victim's penis whilst at home and when he was sleeping. This initial decision follows the direction of the HOCR to have a victim focused approach to crime recording. The rules state that the belief of a victim, or person acting on their behalf, that a crime has occurred is usually sufficient to justify the recording of a crime. The decision to create the report at this time was justified and had this not been recorded as such, the force would have fallen short of compliance with the HOCR/NCRS.
>
> 4. Further investigation ascertained that the touching was completely lawful and that it related to the victim's father toilet training his son. This was supported by further contact by the police with the victim and his mother. The decision to file the report under Outcome 16 was made in March 2022. The application of this outcome is incorrect as it refers to victim not supporting police action. It had been identified by the Officer in the Case ("OIC") and Closing Supervisor that the sexual offence had not taken place. At this point, rather than filing under victim declines to support, a cancellation request should have been raised.
>
> 5. The cancellation of a crime report provides an outcome that indicates one of the following: the report was transferred to another force where the crime took place (CI); no crime occurred based on additional verifiable information ('AVI') (C2); there was a duplicate report (C3); the crime was recorded in error (C4); or it related to a statutory self-defence (only ABH or below) (C5). HOCR outlines for C2 AVI cancellations to be considered, the AVI available must determine that no notifiable offence occurred. AVI needs to reach a very high threshold to cancel a crime. In some cases, and for the most serious of crime types, that threshold is described as absolute certainty that an offence did not occur."

64. She went on:

> "6. The report was reopened in September 2022 by Detective Inspector Davies for a review to be completed for cancellation. It was reviewed by an Assistant DDM and passed for DDM review. This is due to our processes within Kent Police that only the DDMs will cancel serious sexual offences and indictable only offences. As a DDM, I

am not authorised to cancel or reclassify homicide or rape offences; this is something only an accredited Force Crime Registrar ("FCR") can do.

7. When reviewing the cancellation rationale presented to me, I was content that there was adequate justification to conclude, with sufficient certainty, that the sexual offence did not occur. The AVI provided in this matter was from the victim's interview with triangle trained officers. It was clarified with the victim carefully and several times how his father touches his penis and that it was in the bathroom 'helping me go pee pee'. This is supported by the victim's mother's account as well. A sexual offence was confirmed not to have taken place.

8. However, I made the decision to reject the cancellation request, and instead reclassified the report to common assault. This is due to the initial allegations and subsequent contact with the victim that his father smacks him on the bottom. I discussed my decision at the time with my DDM colleague PSE Waghorne, who is also an accredited FCR (since April 2022).

9. Within my justification I mention that lawful chastisement does not negate the requirement for a crime report and therefore common assault is recorded. The defence of lawful chastisement, as retained under section 58 of the Children Act 2004, is just that, a defence, and is only relevant following a suspect being charged with the offence not specified under that section such as common assault.

10. Having reviewed the report again, I am content that my decision to reclassify and not cancel the report is within the rules and standards set out in the HOCR/NCRS. Even if I had cancelled the report and not re-classified it, the record would still have remained on the local records system as a ‘cancelled crime’, under the relevant cancellation code (C1-C5). It would not be deleted from the system. The terminology used in the HOCR of records being ‘removed’ does not mean deleted from the system. It means that the classification of the crime is being removed by applying the criteria C1-C5. There is no expectation in the HOCR that when cancelling the report it is deleted from the system. The force’s cancellation decisions are inspected by His Majesty’s Inspector of Constabulary and Fire & Rescue Services and the issue of deleting a report has never been raised as a requirement.”

65. Exhibited to Ms O'Keefe's was the Crime Report. This was the first time D had disclosed it. The Crime Report records several entries from PC Mullooly, dated 25 March 2022 including:

> "[X] again told of how his father touches his PP and he makes him angry when he smacks his bum. [X] was very difficult to engage with as he was distracted by where he was and it is believed he may be on the spectrum. DS Crombie asked X the following questions – What do you not like at home? Daddy he smacks my bum bum."

66. I set out Ms O'Keefe's entry for 4 October 2022 earlier, but will set it out again for convenience:

> "IMU DDM - I note the rationale provided behind the cancellation request and agree that the victim has clarified what the suspect is alleged to be doing. I agree that this does not amount to sexual assault and he is helping him go to the toilet. However, the victim has also stated that the suspect smacks his bum when he is angry. This requires an assault report regardless of if it is deemed as lawful chastisement, the report is still required. Therefore I will reclassify the report."

67. As I explained earlier, there was nothing in PC Mullooly's notes about anger. It would appear Ms O'Keefe took what she wrote from an entry made on the Crime Report by PC Mullooly (dated 25 March 2022 and timed at 12:34):

> "[X] has attended the station today and spoken to DS Crombie in a triangle review and interview.
>
> [X] again told of how his father touches his PP and he makes him angry when he smacks his bum. [X] was very difficult to engage with as he was distracted by where he was and it is believed that he may be on the spectrum. DS CROMBIE asked [X] the following questions ..."

68. What seems to have happened, as Mr Dunlop explained and I think is clear, was that X made a comment at school to the officers when they first attended on 16 March 2022 about being angry when C touched his penis (as PC Mullooly said in her statement at [26] and as PC Smith recorded in her contemporaneous note), which then somehow transmuted into this inaccurate entry by PC Mullooly that X's anger was about being smacked.

69. What then happened, and as Ms O'Keefe accepts, was that she misread PC Mullooly's entry. It was *not* saying that X said C smacked him when he (C) was angry; it was saying (wrongly) that X was saying he (X) got angry when C smacked him.

70. The 'Outcome' recorded was as follows:

> "Type 16 - Named Suspect Identified:
>
> Evidential Difficulties Prevent Further Action: Victim Does Not Support (Or Has Withdrawn Support From) Police Action"

71. A central point made by Mr Dunlop on behalf of C is that Ms O'Keefe took her decision because of her misreading of the Crime Report and without consulting with the investigating officers. I will return to this later.

72. Ms Power is Kent Police's Data Protection Officer. Among other things, she said in her statement that 'an appropriately recorded crime, in accordance with the Home Office Counting Rules, will only be deleted once the MoPI retention clear period is reached' ([9]) and that even cancelled crime reports are retained ([12]). She wrote at [9]-[10]:

> "9. An appropriately recorded crime, in accordance with the Home Office Counting Rules, will only be deleted once the MoPI retention clear period is reached. The clear period ensures that patterns of behaviour can be identified and recorded. If an individual has an offence that requires a six-year clear period, but offends again within that period, the clear period is reset. This ensures that the full offending behaviour of an individual is maintained as long as they engage in criminal behaviour and the offender can be managed accordingly. The clear period applies to all nominal records, including suspects, offenders, victims, witnesses, and other involved parties. The policing purpose includes prevention of crime and safeguarding.
>
> 10. Continued retention of data associated to individuals who are not suspects or offenders contributes in the following ways:
>
> - Identification of vulnerable individuals who would benefit from safeguarding support through the local authority or similar organisations;
>
> - Involved parties who appear regularly in offences of a similar nature may indicate more active involvement in a specific crime type; and
>
> - Witnesses may prove crucial when an investigation is reopened.
>
> 10. It is for this reason that early deletion of records is extremely rare. Even when a criminal investigation results in a 'No Further Action' ('NFA') outcome, the crime report is retained for the minimum period dictated by MoPI. Reasons for NFA outcomes are many and varied. Sometimes the decision is made by the police, and at other times by the Crown Prosecution Service. It may be that it

> is not in the public interest to progress an investigation or prosecution, while at other times the evidential test is not met. On occasion there may be a legitimate defence, which would make prosecution unlikely to succeed. Prevention and detection of crime relies on policing having access to as much information as possible to make a fully informed risk-based decision. Individual incidents may in themselves appear inconsequential, but when considered with other offences may indicate a wider issue. Although the standard of evidence for a charging decision may never be reached for a single offence taken in isolation, a pattern might trigger other safeguarding concerns, identify lines of enquiry, and inform the approach to future investigations."

73. At [12] she said:

> "Even where additional verifiable information results in the cancellation of a crime report, a record of the crime would still be retained. This ensures that Kent Police can demonstrate compliance with the National Crime Recording Standards while evidencing the cancellation rationale, with MoPI providing a minimum retention period."

74. As Mr Dunlop pointed out, in the second line, it would have been more accurate for Ms Power to have written 'a record of the *alleged* crime would still be retained', given the premise of this paragraph is that additional verifiable information had shown that no crime had actually been committed.

75. On 9 May 2023, C's solicitors asked D for a copy of the audio recording of X's interview and all documents in their possession relating to the allegation of smacking. On 19 May 2023, D's solicitors replied there was no recording of the interview and the only record was PC Mullooly's notes, which D disclosed for the first time.

76. C provided a witness statement dated 26 May 2023. He confirmed that X was an only child. He had no sister. He queried why the allegation of smacking had not been brought to his attention before and he had only just found out about it.

77. C's wife has also provided a witness statement dated 7 June 2023. She also confirmed X was an only child and she had explained to police from the start that X was being toilet trained 'both by me and my husband'.

78. On 16 June 2023, C applied for (a) anonymity; (b) permission to re-amend his Claim Form; and (c) permission to rely on two further witness statements. D also made applications, including relief from sanctions for its late service of its DGD and evidence.

79. The matter came on for hearing before Mr CMG Ockleton sitting as a Deputy High Court judge on 20 June 2023. Among other things, he granted C's application of 16

June to re-amend his Claim Form and serve further evidence. He granted D relief from sanctions. He adjourned the application for anonymity. In his ruling he said:

> "Realistically what has happened is this, I think: the claimant started off with a general application for the deletion of material in police records. That has been refined in various ways. It was refined, first of all, by the ready acknowledgement that the national records needed to have the record deleted. It was then made apparent that the claimant was also concerned with what was held locally by the police. As a result of disclosure, partly by means of a late response to the directions made by Mr Bagot in granting permission for amendment of the grounds, further issues have arisen which show that the claimant's target in order to see what he sees as justice to him and his family has moved again. I do not criticise either side for putting it in that way. It is no doubt clear to the defendant exactly what procedures they adopt at various stages; it was unclear to the claimant, but I do not think that was any fault of the claimant or those representing him. The truth of the matter is this: there is now a great deal of material about decisions made at various stages and of various natures. The case made by the claimant becomes different and more complicated by the disclosure of the material in the witness statements submitted by the defendant out of time, but the defendant's position as a defendant also becomes more complicated by that material, which the defendant has now or seeks to adduce."

80. Pursuant to Mr Ockleton's order, the Re-Amended Grounds said at [1], [9]-[10]:

> "1. This is an application for permission to apply for Judicial Review of the decisions of the Defendant dated 13 September 2022, 4 October 2022 and 2 Februarv 2023 to retain the Claimant's personal data on the local system and, in particular. not to delete or cancel crime report 46/49202/22 (the Crime Report).
>
> …
>
> 9. On 9 September 2022, the Defendant responded to the letter of claim and on 13 September 2022, the Claimant's appeal was determined and allowed but 'on the basis that a record of the incident remains on the local system'.
>
> 10. On 4 October 2022 Mr O'Keefe, on behalf of the Defendant, decided not to cancel the Crime Report but instead to reclassify it as a crime of common assault. In summary grounds of resistance. dated 10 November 2023,

> the Defendant misleadingly suggested no such decision had been taken. The decision and reasons for it were onlv disclosed on 23 April 2023."

81. In fact, I do not think [10] is quite accurate. D's recording of the allegation of smacking had been disclosed in his letter of 2 February 2023, although how and why it had come about were only disclosed when Ms O'Keefe's witness statement was served on 23 April 2023.

82. Also pursuant to Mr Ockelton's direction (as amended), D filed Amended Detailed Grounds of Defence (ADGD) and further evidence. Most of that further evidence was not before the decision-maker and (says Mr Dunlop for C) was *ex post facto* rationalisation.

83. Ms O'Keefe made a second statement, dated 10 July 2023. In essence, she admitted that she had made an error in her entry on 4 October 2022 by misreading the Crime Report as suggesting that C smacked X when C was angry, when in fact it was X who became angry. She said at [1]-[2]:

> "1. In my update to crime report 46/49202/22 dated 04/10/2022, I acknowledge the error in reference to who was angry when the victim said his father smacks his bum. Having re-read the report entries again, I do believe that it is a mistake on my part and I had initially read the anger being attributed to the suspect but I note that it makes X angry. That said, the subsequent entry of "X again told of how his father touches his PP and he makes him angry when he smacks his bum" is still enough for common assault to be recorded. This is further supported by another Action Log recorded which states the following: "What do you not like at home? Daddy HE SMACKS MY BUM BUM". The mood of the suspect, or indeed the victim, has no bearing on whether offence should be recorded or not. This would not affect, and still does not affect, my decision to reclassify to common assault.
>
> 2. When reclassifying a report, I will ensure that my rationale is recorded (as per my Decision Log entry), the classification is amended, the summary updated and any further relevant information added. From looking at 46/49202/22, it appears that I have done just that. Whilst I cannot say with 100% certainty that the crime report has not been amended since I had my only interaction with it on 04/10/2022, the summary appears to be as I completed it."

84. A version of the Crime Report updated on 11 July 2023 was exhibited to the statement of Gavin Griffith, D's Force Crime Registrar. This contained a new 'Outcome' namely:

> "Type 10 - Formal Action Against Offender is not in the Public Interest (Police)')."

85. Mr Griffith made the following entry:

> "Outcome 10 now applied to this report. It is not in the public interest to revisit this investigation many months after it was first investigated. The victim mentions he is smacked by his father. It would not be in the public interest to re-interview a 5/6yr old child and potentially re-interview the father for this offence."

86. This version of the Crime Report still contained Ms O'Keefe's entry of 4 October 2022 based on her misunderstanding of what X had said about anger, which she had admitted to in her witness statement the day before (10 July 2023). It was therefore still inaccurate.

87. In his statement Mr Griffith sought to justify Ms O'Keefe's decision. He explained the original outcome had been wrongly recorded and there had been an oversight which had failed to correct it. He said that when the matter came to be reviewed in September 2022 and the suggestion of assault had come to the surface, it was not further investigated. He speculates that it probably would not have been felt to be proportionate to re-interview X. He says it would also have required a re-interview of C, however he does not suggest that would not have been possible. In relation to cancellation, he said at [24] that

> "24. … Cancellation of a crime does not mean that a record is expunged from the crime recording system. The record remains upon the recording system. However, it is no longer identified as a crime. Such records are clearly identifiable as 'cancelled - no crime' and for this reason would not form part of future disclosure upon the individuals detailed within the reports."

88. D later served a statement from PC Smith. She responded to various things C had said in his witness statement. I do not think it is necessary to go into these. Many of the matters are disputed, but I do not think the outcome of this case turns on them.

The legal framework

89. A statutory Code of Practice on the Management of Police Information (MOPI) was issued by the Secretary of State in July 2005 under ss 39 and 39A of the Police Act 1996 and ss 28, 28A, 73 and 73A of the Police Act 1997. (There is a new version, but this is the one in force at the time I am concerned with).

90. Paragraph 4.3.3 MOPI requires police information to be 'assessed for reliability in accordance with guidance to be issued under this Code'.

91. Paragraph 4.6 is headed 'Retention and deletion of police information' and provides:

> "4.6.1 On each occasion when it is reviewed, information originally recorded for police purposes should be considered for retention or deletion in accordance with criteria set out in guidance under this code.
>
> 4.6.2 Guidance will acknowledge that there are certain public protection matters which are of such importance that information should only be deleted if:
>
> (a) the information has been shown to be inaccurate, in ways which cannot be dealt with by amending the record; or
>
> (b) it is no longer considered that the information is necessary for police purposes."

92. The HOCR provide guidance on how the police are to process reports of alleged offences. They are central to this claim.

93. Paragraph [2.2] provides:

> "An incident will be recorded as a crime (notifiable offence) for 'victim related offences' if, on the balance of probabilities:
>
> (a) the circumstances of the victim's report amount to a crime defined by law (the police will determine this, based on their knowledge of the law and counting rules); and
>
> (b) there is no credible evidence to the contrary immediately available."

94. Paragraph [3.2] states that the test to be applied when a report is made is the balance of probabilities – 'is the incident more likely than not the result of a criminal act'. I will consider this and other HOCR later.

95. Section C is headed 'Removing Crime Records'. Under the heading 'When to Classify' it is stated:

> "There are five criteria when crimes which are already recorded may either: be cancelled from local records or transferred to a force that it has already been established owns the crime. Removing records appropriately ensures both that locally reported crime and national crime data are accurate and promote the trust and confidence of victims and the public."

96. Cancellation reason C2 is as follows:

> "Cancelled: additional verifiable information that determines that no notifiable crime occurred becomes available.
>
> Where following the report and recording of a crime additional verifiable information (AVI) is available that determines that no notifiable offence has occurred the crime may be removed."

97. Cancellation reason C4 is:

> "Cancelled: crime recorded in error
>
> Crimes which have been recorded in error or by mistake as a notifiable crime should be cancelled to ensure accuracy or statistical records."

98. Cancellation reason C5 is:

> "Cancelled: self-defence (for specific recorded assault)
>
> Where the recorded crime is one of assault within classification 8N (section 47 ABH only) or classification 104 or 105A and evidence shows an offender has acted in self-defence a crime record may be cancelled."

99. Classification 105A is the Home Office classification of 'assault without injury' (including common assault).

100. Given Ms O'Keefe's rationale for recording an assault in C's case, namely that lawful chastisement in her view only becomes relevant once a person has been charged, I find this cancellation reason somewhat anomalous, as the same might be said of self-defence, which only becomes an issue at trial where it is raised by the evidence. I will return to this later.

101. If a crime is not cancelled it must be given an 'Outcome'. These are specified in the HOCR. As I explained earlier, the Outcome originally but wrongly in this case was Outcome Type 16 ('Evidential difficulties victim based – named suspect identified – the victim does not support (or has withdrawn support) police action.'). This was later corrected to Outcome Type 10 ('Formal Action Against Offender is not in the Public Interest (Police)').

102. The HOCR also allow for re-classification of a recorded offence. The relevant part provides:

> "If further substantive information comes to light after a crime is recorded or if the original classification is discovered to be in error, it may be re-classified if it is appropriate to do so.

> When considering re-classification, the police will apply their knowledge of the law and Home Office Counting Rules to the information or evidence obtained since the original classification was made. If having regard to the new information or evidence the original classification is no longer deemed to be accurate the offence will be re-classified or dealt with under rule C2 if appropriate. Justification for re-classification must be recorded within the crime record in an auditable form.
>
> Only a [Force Crime Registrar] or a [Dedicated Decision Maker] can authorise the re-classification of a recorded crime."

103. So far as retention is concerned, Guidance on MOPI was provided by the College of Policing (the Guidance). Page 4 of the Guidance has a section entitled 'Crime recording' which states that:

> "An incident is recorded as a crime (notifiable offence) if – on the balance of probability – the circumstances as reported amount to a crime defined by law, and there is no credible evidence to the contrary"

104. As mentioned earlier, the Guidance identifies three groups of offences and specifies the relevant retention period:

    a. Group 1 is the most serious. Information relating to subjects in this group may be retained until they reach 100 years of age.

    b. Group 2 is 'other sexual, violent or serious offences.' The Guidance says that information relating to such offences 'can be retained only for as long as the offender or suspected offender continues to be assessed as posing a risk of harm, using the NRAC [National Retention Assessment Criteria]. After every 10-year clear period, these records should be reviewed and a risk-based decision should be made on whether they should be disposed of or retained.

    c. Group 3: Records relating to people who are convicted, acquitted, charged, arrested, questioned or implicated for offending behaviour that does not fall within group 1 or group 2 are dealt with in group 3. Group 3 offences may be deleted without manual review, after a six-year clear period, if certain criteria are met.

105. Hence, the allegation about C smacking X falls into Group 2.

The issues

106. The parties helpfully agreed the following issues as now arising on this claim:

107. First, was D's decision of 4 October 2022 unlawful with regard to:

    a. The common law;

b. Article 8 of the ECHR; and/or

c. Data protection legislation?

108. Second, was the D's decision of 2 February 2023 unlawful with regard to:

a. The common law;

b. Article 8 of the ECHR; and/or

c. Data protection legislation?

109. Third, do ss 51 and/or 167 of the DPA 2018 provide an adequate alternative remedy for each of the claims set out above ?

110. Fourth, if the answer to the third issue is 'Yes', should this Court:

a. Exercise its discretion to hear the claim in any event;

b. Reconstitute itself as the High Court in a s 167 DPA 2018 claim; or

c. Refuse to adjudicate on the claims or grant relief.

111. Fifth, is it open to D to argue, at this stage, that the challenge to the decision of 4 October 2022 is out of time, even though Mr Ockleton gave C permission to re-amend his grounds to bring that challenge?

112. Sixth, if the answer to the fifth issue is 'Yes', should the court extend time for bringing that challenge?

Submissions

C's submissions

113. On behalf of C, Mr Dunlop submitted as follows.

114. Mr Dunlop said that notwithstanding the history, and the refusal of permission by Mr Corner, the focus of the claim as now presented is upon D's decisions of 4 October 2022 and 2 February 2023, ie, the decisions:

a. on 4 October 2022 to refuse to delete or cancel the Crime Report but instead reclassify the crime as common assault; and

b. on 2 February 2023 to retain the Crime Report of assault for at least 10 years and then review at 10 year intervals.

115. Mr Dunlop said these decisions were unlawful at common law and breached C's rights under the Human Rights Act 1998 (HRA 1998)/ECHR and the DPA 2018.

116. As to the common law, he argued that the 4 October 2022 decision was vitiated by procedural unfairness because the allegation of common assault had never been put to C for his response. The decision to record that offence under the HOCR potentially had serious consequences for him given the retention period and he should have been asked about it. He said Ms O'Keefe had misapplied the HOCR and could not properly have been satisfied on a balance of probabilities that what X had said about been smacked amounted to a crime. She had failed to carry out reasonable enquiries (in accordance with her *Tameside* duty) and had failed to take into account the officers' views that no crime had been committed. She had simply relied on the hearsay account in the Crime Report entered by PC Mullooly. She had made a mistake in that she thought X had said that C smacked him in anger, when it was X who became angry. Overall, her decision had been irrational. The unlawful 4 October 2022 decision infected the 2 February 2023 decision because that relied on the earlier decision.

117. In relation to Article 8 of the ECHR, he said it was plainly engaged by the retention of C's data by the police. This amounts to an interference with C's rights under Article 8(1). Because the interference was unlawful under domestic law, it was *per se* in violation of Article 8(1). He further said the domestic law in question did not have the quality of 'law' in the Convention sense. The interference was not proportionate.

118. Thirdly, in relation to the DPA 2018 claim, there were breaches of the first and fourth data protection principles in Part 3 of the DPA 2018.

Submissions on behalf of D

119. On behalf of the Defendant, Mr Hockman submitted as follows.

120. D's Skeleton Argument refers to Claim I, Claim II and Claim III. Claim I was the original judicial review claim lodged in October 2022 following C's request for deletion. Claim II is the Amended Claim Form from February 2023. Claim III is the Re-Amended Claim Form from June 2023.

121. Mr Hockman said that the case for D is that by his officers and employees he acted in accordance with the HOCR and other relevant rules and that the complaints against him in these proceedings are unfounded. None of the grounds of challenge can be sustained. Even if matters which come to the police's attention are not formally investigated it is important that a record of any such allegation should ordinarily be compiled and retained. It is likewise important to appreciate that the making and retention of such records is distinct from the question whether such records should be disclosed to anyone outside the police, such as a person who is mentioned in the relevant record.

122. There are also what D calls 'jurisdictional obstacles' (namely, time and alternative remedies) to the claim on which, contrary to the C's argument, this Court has yet to rule.

123. Under the HOCR, cancellation, deletion and re-classification are all different. Cancellation can occur when a particular view is taken with regard to a document containing a report or record of a crime. The separate process of deletion involves the removal or deletion of the document from police systems, so that there would be no remaining record whatsoever. The third concept is reclassification which may occur

when a different view is taken with regard to the crime which has been reported or recorded. Reclassification will not necessarily lead to either cancellation or removal/deletion. While the C's applications have been for the 'deletion' of his records, the reference in these proceedings to 'cancellation' is to an internal assessment process in accordance with the HOCR**.**

124. In her statement, Lucy Power explains that an appropriately recorded crime, in accordance with the HOCR, will only be deleted once the MOPI retention clear period is reached. The clear period ensures that patterns of behaviour can be identified and recorded. This ensures that the full offending behaviour of an individual is maintained as long as they engage in criminal behaviour and the offender can be managed accordingly. The policing purpose includes prevention of crime and safeguard.

125. In response to C's common law claim, Mr Hockman said there was no duty on the police 'to consult affected persons before deciding how to handle their records, and in particular a crime report' (Skeleton Argument, [76]). Complaints of unlawful behaviour, especially within a family, often need to be treated in confidence. Ms O'Keefe properly applied the balance of probabilities test and was satisfied X had made an allegation of being smacked by C. D's Skeleton Argument at [77] argues: 'The requirement in the HOCR however is not, and could not be, that a record cannot be maintained unless what would amount to a civil trial is conducted so that a balance of probabilities test in that sense could be applied.' Ms O'Keefe's approach was consistent with Home Office guidance to Force Crime Registrars in relation to reasonable chastisement. Failure to consult or take into account the views of other officers did not take matters further; they were concerned with the sexual assault and had 'overlooked' the assault. As to the *Tameside* point, no further inquiries were necessary. It was a matter for the discretion of the police whether to conduct a fuller, or any, investigation. As to the 'misunderstanding' point, even if this had not happened, it would not have led to the cancellation or deletion of the record. In summary, it was neither necessary nor appropriate for the Claimant to be interviewed; and the investigating officers may not have applied their minds to the allegation of assault, but that does not undermine the approach which the D took.

126. In relation to Article 8, D said the interference was in accordance with the law. There is no substance to C's criticisms that the domestic provisions do not have the quality of law because of uncertainty. Turning to the question of proportionality, the central point made here is once again that the crime report was inaccurate, which D rejects. The error in 'Outcome' reason had been corrected. As to future disclosure there are statutory provisions dealing with this, and Home Office Guidance. Paragraph 13 of D's letter of 7 September 2022 (set out earlier) provides reassurance for C. The retention period of 10 years for MOPI Group 2 is entirely rational.

127. As to the alleged breach of data protection legislation, Mr Hockman said it was to be noted that C himself contends that the facts can and do constitute a breach of that legislation. As to this D made no admissions, but if it is the case then D said it reinforces the argument as to alternative remedy.

128. Turning to what D calls the 'jurisdiction issues', he said these had yet to be determined.

129. As to time, he said the 'new claim' advanced by C on 16 June 2023 concerned a decision taken on 4 October 2022. D says C knew of the Crime Report at least from 17 October 2022.

130. C knew of the 4 October 2022 decision on 2 February 2023, and waited until 9 May 2023 to request disclosure in relation to the issues concerning reclassification. D provided disclosure on 19 May 2023. C then waited over another month before bringing this Claim III on 16 June 2023. C had not provided a good reason why time should be extended.

131. As to alternative remedies, Mr Bagot did not hear argument on this in the absence of D. He says it is trite that judicial review is a remedy of last resort. C has remedies under s 51 of the DPA 2018 (application to the Information Commissioner) and/or s 167 of the DPA 2018 (application to the High Court for relief under the DPA 2018). These are statutory remedies which Parliament has created. Alternative remedies were pointed out in correspondence. C's Article 8 challenge could be litigated as part of a statutory DPA 2018 claim.

Discussion

132. I begin with C's common law challenge. I am satisfied that on the facts of this case – and I emphasise those words - the way in which the decision was taken on 4 October 2022 to record that C had committed the offence of common assault, and to re-classify the Crime Report to record that offence, was unfair to C. It was therefore unlawful at common law.

133. I observe that what fairness requires is always context dependent: see eg *Archie v Law Society of Trinidad and Tobago* [2018] UKPC 25, [39] ('… the standards of fairness required vary enormously according to the type of decision in question …). There are no rigid rules as to what procedural fairness requires. That said, the question of whether what a decision maker did was fair is always a hard-edged one for the Court. In other words, it does not matter whether what the decision-maker thought they did was fair: the question is: *was* it fair ?

134. In relation to context, as Mr Dunlop submitted, rightly in my view, the potential consequences for C of the decision in this case are serious. If things stand as they are, the police will have, for at least 10 years, recorded against C's name, a report saying that he assaulted his young son in anger. That in and of itself is an interference with his rights under Article 8 of the ECHR: see *R (Catt) v Commissioner of Police of the Metropolis and another* [2015] AC 1065, [6] (…. the state's systematic collection and storage in retrievable form even of public information about an individual is an interference with private life.) Furthermore, that information could be disclosed to employers on an Enhanced Criminal Record Certificate, or otherwise relied on by the police against him. That context points to a heightened need for procedural fairness.

135. The second important contextual matter is that C had been arrested for an extremely serious offence as a consequence of misunderstanding or misinterpretation of something that X had said at school which, on further investigation, turned out to be wholly innocent. C had been excluded from his home for a number of days as a consequence. That should have caused D to act with caution before taking action adverse to C on the basis of other things X – a five year old child - was supposed to

have said seven months earlier, and especially because there was only a note-form abbreviated record (in some respects ambiguous, as I have said) of X's report. Also, X having invented a sister who did not exist, there were reasons to question the veracity of what he was saying. I agree with Mr Dunlop this case 'cried out' (his words) for X's allegation to be put to C for his response.

136. Third, D told C in the letter of 7 September 2022 that 'no suspicion of offending on the part of [C] remains'.

137. It is a basic principle of fairness that a person should have criminal matters alleged against them put to them for them to be given an opportunity to comment upon them. That is why those arrested for criminal offences must be interviewed, in accordance with the Codes of Practice issued under the Police and Criminal Evidence Act 1984. There are many such cases establishing the principle. For example in *O'Reilly v Mackman* [1983] 2 AC 237, 279 F-G, Lord Diplock said that a person's right 'to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it', is one of the fundamental rights accorded by the common law rules of natural justice. I could also cite Lord Mustill in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 560D-G:

> "Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification, or both."

138. There is no reason in this case why D's officers could not have re-interviewed C in light of X's allegation about smacking and asked for his response to it. That response may have persuaded them that no crime had been committed, just as they had concluded in relation to the initial sexual assault allegation which turned out to be unfounded.

139. I am reinforced in this by the Guidance which I cited earlier, which states at p4 that an incident should be recorded as a crime (notifiable offence) if, on the balance of probability, the circumstances as reported amount to a crime defined by law 'and there is no credible evidence to the contrary'. In the present case, the requirement to take into account evidence to the contrary should have resulted in X's allegation being put to C. If he had said, for example, that he only administered the lightest of smacks to X when he thought he was doing something dangerous, then that would have had a vital bearing on the question of whether the smack was lawful chastisement, as I shall explain later on.

140. I do not accept D's argument that some duty of confidentiality arose in relation to X's allegation of smacking. C had already been arrested and interviewed in relation to a much more serious matter. Confidentiality might arise as an issue in some cases, but it did not do so in this case. This is all the more so because X's mother attended the assessment with him (although was not in the room with him), and PC Mullooly spoke to C immediately after the assessment.

141. I am not to be taken as saying there is an inflexible rule that allegations in crime reports must always be put to the person concerned. As I said earlier, there are no

rigid rules in this area. I am merely saying that what happened to C in this case was unfair. Having been told that the case was closed, it was unfair months later for some other crime to be recorded against him without him being asked about it, and then not to tell him about it until months later when he had commenced these proceedings. And was all the more so because Ms O'Keefe's decision only came about because C was trying to have the sexual assault allegation deleted from D's records.

142. Mr Dunlop's second point under his common law heading is that Ms O'Keefe misapplied the HOCR and the balance of probabilities test in the context of parental chastisement. Again, I think he is on sound ground. Indeed, in my judgment, this is the fundamental reason where D went wrong in this case.

143. Paragraphs [3.2] of the HOCR state:

> "2.2 An incident will be recorded as a crime (notifiable offence) for 'victim related offences' if, on the balance of probability:
>
> a. The circumstances of the victim's report amount to a crime defined by law (the police will determine this, based on their knowledge of the law)
>
> b. There is no credible evidence to the contrary.
>
> …
>
> 3.2 Balance of probability test When examining a report or an incident involving identified victims, the test to be applied in respect of recording a crime is that of the balance of probabilities: that is to say, 'is the incident more likely than not the result of a criminal act'. A belief by the victim, or person reasonably assumed to be acting on behalf of the victim, that a crime has occurred is usually sufficient to justify its recording as a crime. A victim focussed approach is the standard to be applied based on a presumption that the victim should be believed.
>
> …
>
> 3.12 Reasonable enquiries: In all cases where criminal activity is apparent, ie, suspected damage to property is reported by a witness or found by police but a crime is not initially recorded in keeping with NCRS principles the police would be expected to carry out reasonable enquiries to confirm whether a crime has been committed through seeking confirmation, on the balance of probability, from the victim, a person reasonably believed to be acting on behalf of the victim or in the victim's best interests, witnesses, or other supporting evidence. Where this cannot be confirmed, the incident report should be endorsed with the enquiries made and why a crime was not recorded."

144. Ms O'Keefe approached the matter on the basis, as she explained, that to smack a child is, of itself a crime, and because in her opinion that is what X had said, it had to be recorded as a crime, and that lawful chastisement was a 'defence' which was not

relevant. I think she erred in her approach, for the following reasons.

145. Mr Dunlop's submissions focused on whether Ms O'Keefe had erred in concluding that X had indeed reported being smacked, given the ambiguities in PC Mullooly's notes. I am prepared to assume (for the purposes of this section of my analysis only) that she did not err, and was entitled to conclude on a balance of probabilities that X had reported being smacked on his 'bum bum'. But that was not the end of the inquiry. What Ms O'Keefe was then required to do was to make an assessment whether that report, on the balance of probabilities, amounted to an offence. I did not detect in Mr Hockman's submissions any disagreement with this approach.

146. Ms O'Keefe did not carry out this second analytical stage. She therefore erred. My reasoning is as follows.

147. Firstly, her entry on the Crime Report was contradictory, as I remarked earlier. She wrote: 'This requires an assault report regardless of if it is deemed as lawful chastisement, the report is still required.' But if the smack was lawful chastisement it was, indeed, lawful and so not an assault (and hence not a crime). So on the basis of this, she did not properly apply the HOCR balance of probabilities test because, on her view, she would have recorded the 'crime' even if that test came down in favour of there having been no crime when all the circumstances were assessed. That is sufficient to invalidate her decision.

148. But second and further, I consider her [9] in her witness statement displays a misunderstanding of the law – albeit one that was understandable.

149. She said:

> "The defence of lawful chastisement, as retained under section 58 of the Children Act 2004, is just that, a defence, and is only relevant following a suspect being charged with the offence not specified under that section such as common assault."

150. Section 58 states:

> "(1) In relation to any offence specified in subsection (2), battery of a child taking place in England cannot be justified on the ground that it constituted reasonable punishment.
>
> (2)The offences referred to in subsection (1) are -
>
> (a) an offence under section 18 or 20 of the Offences against the Person Act 1861 (c. 100) (wounding and causing grievous bodily harm);
>
> (b) an offence under section 47 of that Act (assault occasioning actual bodily harm) …"

151. Mr Hockman showed me internal Home Office guidance to the same effect as the view Ms O'Keefe took. He said it was not the 'high point' of his case, but he placed heavy weight upon it. It is produced as an Exhibit SW1 to the witness statement of Stephen

Waghorne, a colleague of Ms O'Keefe's, who agreed with her view (and with whom she consulted before re-classifying C's alleged offence).

152. There are mechanisms available to Force Crime Registrars to seek guidance from the Home Office as to how they should treat certain incidents for HOCR purposes. One example in Ex SW1 which was put to the Home Office for advice is this:

> "The victim's father has attended the Police Station and states that on Saturday 01/09/12 his 11 year old son went to his mother's address and used her mobile phone and ran a bill up of about £165, as a result of downloading games. The mother had then slapped him on his arm as a result of this. The son went to his father's house screaming and crying. I did see any injuries on xxxx when he attended. However, xxxx did say that his mother was angry when he downloaded the games." (incident states THERE WERE NO INJURIES NOTED ON THE CHILD)."

153. The Home Office's advice was:

> "If the child has been physically assaulted then regardless of whether it appears to be lawful chastisement an assault has still been committed and the HOCR set out that a notifiable offence under the relevant category should be recorded.
>
> Section 58 of the Children Act 2004 abolished the right of a parent to lawfully chastise his or her children. The defence of 'Lawful Chastisement' is only available following a charge for common assault. Section 58 says that, in relation to a number of specified offences, battery of a child cannot be justified on the grounds that it constituted reasonable punishment. Those offences include: section 18 or 20 of the Offences against the person Act 1861 (wounding and causing grievous bodily harm), and section 47 of that act (assault occasioning actual bodily harm).
>
> In respect of common assault, it remains a good defence that the battery was merely the correcting of a child by its parents, provided that the correction is moderate in its manner and quantity.
>
> Under the Home Office Counting Rules, the fact that there is a defence in law does not mean that a crime has not been committed. There is no case under General Rules section C to allow a 'no crime' in these circumstances. None of the provisions apply."

154. For the following reasons, I respectfully disagree with the Home Office's view (and hence with Ms O'Keefe's conclusion.)

155. Firstly, some of the Home Office guidance which Mr Hockman showed me was obviously wrong, which throws doubt on its views as a whole in this area. One of the examples they had been asked to advise on was this:

> "Suspect (father) assaulted complainant (son) after an argument over a calculator. It is alleged that the suspect took hold of complainants face causing bruise to chin and reddening to either cheek.
>
> Offender is also alleged to have pinned victim up against a wall and slapped the left side of the victim's face
> In tape recorded interview the offender admitted grabbing the cp by the chin and causing bruise and marks.
> Police record section 47 assault.
>
> *Police interpretation of the counting rules*
>
> Police wish to no crime the assault stating – action taken by offender amounts to lawful chastisement.
>
> FCR queries whether or not no criming (*sic*) is appropriate in this instance."

156. Because of the bruise, this was obviously an allegation of assault occasioning actual bodily harm contrary to s 47. The right answer, therefore, should have been that parental chastisement could not arise because s 47 is one of the offences specified in s 58(2) of the Children Act 2004, to which parental chastisement does not apply.

157. However, the Home Office's answer was this, which I consider was wrong (or at least, substantially inaccurate):

> "Lawful Chastisement of a child is a defence in law to a charge of assault, the assault has still been committed and a notifiable offence under the relevant category should be recorded."

158. I begin my substantive analysis by making clear that I am not concerned with any debate about the appropriateness, in 2024, of parents lawfully being able to inflict physical pain on their children by way of punishment. That is for the UK's respective Parliaments to decide. In Scotland and Wales, unlike in England, reasonable chastisement has been abolished completely as a lawful justification for any sort of assault, in the former by an Act of the Scottish Parliament, the Children (Equal Protection from Assault) (Scotland) Act 2019, and in the latter by an Act of the *Senedd Cymru*, namely the Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020. I am therefore only concerned with the law in England as it presently is.

159. Although lawful chastisement is sometimes referred to as a 'defence' (see eg, *Smith, Ormerod and Hogan's* Criminal Law (16th Edn), 16.2.2.1; the Welsh Act referred to earlier; and below), I think that term is apt to mislead, in as much as it implies some sort of burden on the defendant to raise it, so that any parental smack, no matter how

light or inconsequential, is a common assault, unless the parent is charged and proves it was lawful and reasonable chastisement.

160. At common law, reasonable chastisement of children by parents or others *in loco parentis* is lawful: *Halliwell v Counsell* (1878) 38 LT 176; *Cleary v Booth* [1893] 1 QB 465; *Mackie* (1973) 57 Cr App R 453; *H* [2002] 1 Cr App R 7.

161. In *Hopley*, Cockburn CJ said at p206:

> "By the law of England, a parent or a schoolmaster (who for this purpose represents the parent and has the parental authority delegated to him), may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life or limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter."

162. In *Cleary*, the direct question for the Court was whether a headmaster *in loco parentis* was entitled to cane a pupil for misdeeds done outside the school's premises. The Court held that he was, and the case was sent back to the justices to decide if the punishment had been excessive. In his judgment Collins J said:

> 'It is clear law that a father has the right to inflict reasonable personal chastisement on his son.'

163. In *Mackie* a child died after falling whilst fleeing from a parent from whom he feared punishment. The defendant was convicted of manslaughter. The Court of Appeal's decision makes clear that it is for the prosecution to prove that what the defendant had done (or was going to do) was excessive (and so not reasonable chastisement), and not for the defendant to prove. The Court said at p460 (inverted commas as in the original):

> "This defendant was in the position of a parent. which may have entitled him to 'assault' the child by smacking or threatening him without breaking the Law, and it was not every act which might be expected to cause slight harm to the boy that would be unlawful for a man in his parental position …"

164. At p461 the Court quoted the judge's summing-up (which it later said had been correct):

> "Let us consider what the prosecution must prove before you can convict him of manslaughter … Fifthly. they must prove that the defendant's conduct in that respect. or conduct which caused the fear. was unlawful. that is to say that he was either using violence beyond that which is permitted to a parent … At the end of the summing-up the judge came back to these questions in suggesting what the vital points might be: First. was the boy in fear of Mackie? Secondly. did that cause him to try to escape? Thirdly. if he was in fear. was that fear well-founded? If it was well-founded. was it caused by the unlawful conduct of the accused. that is, by conduct for which there was no lawful excuse even on the part of a man in the position of a father, and I adopt and repeat to you the very useful expression which Mr Back used to you in his final speech when he said: 'Had the defendant passed from lawful chastisement to unlawful violence?' That really puts the matter in a nutshell."

165. The decision in *H* considered the impact of decisions of the European Court of Human Rights in relation to physical punishment, including *A v United Kingdom* (1999) 27 EHRR 611, which I will return to. It said at [31] that the jury should be directed:

> "… when they are considering the reasonableness or otherwise of the chastisement, they must consider the nature and context of the defendant's behaviour, its duration, its physical and mental consequences in relation to the child, the age and personal characteristics of the child and the reasons given by the defendant for administering punishment."

166. In *A v United Kingdom*, the applicant, a child, was severely beaten by his stepfather with a garden cane. At trial, the stepfather pleaded 'reasonable chastisement' and was acquitted of assault occasioning actual bodily harm contrary to s 47 of the Offences Against the Person Act 1861. Relying, *inter alia*, on Articles 3 and 8 of the Convention, the applicant complained that the UK had failed to protect him from ill-treatment by his stepfather. The Court found for the applicant.

167. At [10] the Court recorded the judge's direction to the jury:

> "In summing-up, the judge advised the jury on the law as follows:
>
> > '… What is it the prosecution must prove? If a man deliberately and unjustifiably hits another and causes some bodily injury, bruising or swelling will do, he is guilty of actual bodily harm. What does unjustifiably mean in the context of this case? It is a perfectly good defence that the alleged assault was merely the correcting of a child by its parent, in this

> case the stepfather, provided that the correction be moderate in the manner, the instrument and the quantity of it. Or, put another way, reasonable. It is not for the defendant to prove it was lawful correction. It is for the prosecution to prove it was not.
>
> This case is not about whether you should punish a very difficult boy. It is about whether what was done here was reasonable or not and you must judge that …'"

168. The Court summarized English law as follows at [14]:

> "14. In criminal proceedings for the assault of a child, the burden of proof is on the prosecution to satisfy the jury, beyond a reasonable doubt, *inter alia* that the assault did not constitute lawful punishment.
>
> Parents or other persons *in loco pare\ntis* are protected by the law if they administer punishment which is moderate and reasonable in the circumstances. The concept of 'reasonableness' permits the courts to apply standards prevailing in contemporary society with regard to the physical punishment of children."

169. From these authorities I consider that Ms O'Keefe misapplied the relevant HOCR. It was the wrong approach simply to conclude that because X had reported being smacked, a crime of assault had been committed by C on a balance of probabilities, which then had to be recorded, and that lawful chastisement was irrelevant. I do not consider it to be the law of England that the gentlest of smacks administered by a parent to their child is the recordable crime of common assault until the parent is charged and proves otherwise at trial.

170. In my judgment, at the second stage (see [129] above) Ms O'Keefe was required by the HOCR to make a qualitative assessment of what X had reported by reference to the factors in *H* and to determine if it was reasonable punishment, on a balance of probabilities. In other words, the question she should have asked herself was whether, on the balance of probabilities, by reference to those factors, what X had reported amounted to something which was more than moderate and reasonable punishment, and thus unlawful. Unless she could answer that question affirmatively, then (in the language of HOCR, [2.2(a)], the circumstances of X's report did not amount to a crime defined by law. Ms O'Keefe did not ask herself that question, and she therefore erred in law.

171. The reason I say she had to make a qualitative assessment is because whether parental chastisement is unreasonable – and hence a crime - depends upon an evaluation of all the circumstances. It is not like some other crimes. For example, if someone grabs my mobile phone on the street and runs off with it, they have committed the crime of theft, and the where, when, why or how they did it does not matter. If I report it to the police, it will rightly be recorded as a theft. An alleged assault arising from parental chastisement is different. Suppose, for example, a child complains to the police that

their father lightly slapped them on the leg with his hand for stealing sweets and told them not to do it again. The child also says it did not hurt, but they did not like it. Here, the where, when, how and why *do* matter on whether the smack was a crime, and there can only be one rational answer, applying *H*: this is reasonable (and so lawful) parental chastisement. But on Ms O'Keefe's approach, the child's report would be a recordable crime of common assault, liable to be retained by the police for 10 years at a minimum and potentially disclosable.

172. That, plainly, would be an absurd consequence. It would mean that every day in England, hundreds if not thousands of parents are committing crimes which, if they came to the police's attention, would be recorded and held for at least 10 years. In my judgment this is not a result which the proper application of the HOCR in this context compels.

173. Allied to this error, I think, is Ms O'Keefe's misunderstanding of what X had reported, in terms of who was angry. This is not an irrelevant consideration, as she thought it was. Although she did not do so, if she *had* asked herself the right question, then the question of C's motivation for smacking X and, in her misjudgment, C's anger, would have been relevant. As Cockburn CJ said in *Hopley*, if violence 'be administered for the gratification of passion or of rage' then it is unlawful. Thus, even if Ms O'Keefe had asked herself the right question and come to the conclusion that on the balance of probabilities it was not reasonable chastisement because it had been done in anger by C, then she almost certainly would have gone wrong by reason of her misunderstanding. But she did not ask herself the right question.

174. At this point I need to return to cancellation. I remarked earlier that it seems anomalous that C5 allows cancellation of an offence on the grounds of self-defence where the offence is common assault or assault occasioning actual bodily harm contrary to s 47 of the Offences Against the Person Act 1861. Another case put up to the Home Office for a response drew this initial answer:

> "If the child has been physically assaulted then regardless of whether it appears to be lawful chastisement an assault has still been committed and the HOCR set out that a notifiable offence under the relevant category should be recorded
>
> …
>
> Under the Home Office Counting Rules, the fact that there is a defence in law does not mean that a crime has not been committed. There is no case under General Rules section C to allow a 'no crime' in these circumstances. None of the provisions apply.
>
> However given that a provision to no crime assaults where self defence is made out is included in HOCR there may be an argument that a similar provision be made for lawful chastisement. We will remit this question to the NCRSG [National Crime Reporting Steering Group].
>
> *D Additional Comments from Home Office*

> " As stated in the original reply this enquiry was reviewed by the NCRSSG on 2 July 2013. The SSG supported the response already given and agreed that reported cases of assault should be recorded wherever the NCRS test is met and that "lawful chastisement" was not a reason to no crime such a case. The SSG would not currently support a rule change to incorporate lawful chastisement as a permitted no crime exemption alongside self-defence."

175. There is a later comment:

> "The group agreed that whilst it could be viewed that there is a lack of consistency with the rule for self-defence no change should be made at the current time and that in all cases where a report is received of such an assault and the NCRS test is met then a crime should be recorded."

176. If Ms O'Keefe had asked herself the right question then the only rational answer on the material before her was that no crime was disclosed on a balance of probabilities. X simply said that C smacked his 'bum bum'. The fact that the original word used was 'touched', and then crossed out, is perhaps significant. There is nothing in X's report which begins to suggest that what C was alleged to have done was not reasonable chastisement, and thus unlawful.

177. Taking the *H* factors in turn: there was nothing about the nature and context of C's alleged behaviour (eg, there was no suggestion that some implement had been used); nothing about its duration; nothing about its physical and mental consequences in relation to X (apart from the fact it made him 'angry'; there was certainly no suggestion of any injury); X's age was known, but little about his personal characteristics; and, of course, nothing about reasons given by C for smacking C because the matter had, unfairly, never been put to him for his account.

178. I am reinforced in that conclusion by the fact that until Ms O'Keefe became involved, none of the police officers involved in the investigation considered that any offence had been committed. There is no indication that Ms O'Keefe took this into account. D's case is that these officers – including a senior Detective Inspector - simply 'overlooked' common assault. There is no evidence to that effect and I regard it as an implausible suggestion. These officers' views should, at least, have given Ms O'Keefe pause for thought. D's letter of 7 September 2022 said, in terms, 'no suspicion of offending on the part of [C] remains'. DI Davies conducted a careful review of the evidence and concluded, 'I do not believe an offence to have taken place'. Ms O'Keefe gave no reason for disagreeing with all of these assessments and does not appear to have taken them into account.

179. Whilst not a point taken by Mr Dunlop for C, I do query whether this case fell within the criteria for re-classification in the HOCR at all. I set these out earlier. This was not a case of new information coming to light, or the original classification having been an error. It was simply that Ms O'Keefe took a different view from the investigating officers. I question the wisdom of a policy which apparently allows officers to arrest a suspect for crime A; investigate it; interview the suspect; and decide that crime A had never been committed at all; but then allows a Dedicated Decision Maker, on the basis of no new evidence, or even an examination of the existing

evidence, or any consultation with the officers, to say that in their view Crime B has been committed, and to record that crime, even though it had never occurred to anyone previously that Crime B had been committed and the suspect had never been questioned about it. However, as I did not hear argument on this, I make no finding about it.

180. The next point made by Mr Dunlop is that D failed in his duty, under S*ecretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065, to make reasonable enquiries. In that case, Lord Diplock said:

> "The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

181. The *Tameside* principles were summarized by Haddon-Cave J (as he then was) in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [99]-[100]:

> "(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> (2) Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (*R(Khatun) v Newham LBC* [2005] QB 37 at paragraph [35], per Laws LJ).
>
> (3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*per* Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC* (1990) 22 HLR 406).
>
> (4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (*per* Schiemann J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301; cited with approval by Laws LJ in (*R(Khatun) v Newham LBC (supra)* at paragraph [35]).
>
> (5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to

> inform himself as to arrive at a rational conclusion (*per* Laws LJ in *(R (London Borough of Southwark) v Secretary of State for Education (supra)* at page 323D).
> (6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it *(R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G)."

182. It appears from her witness statement that Ms O'Keefe took her decision of 4 October 2022 on the Crime Report alone, a point stressed by Mr Dunlop orally. I do not think she could have reasonably been satisfied that she had sufficient information from only that document to make a proper assessment of criminality for the purposes of applying the HOCR (principle (3) in *Plantagenet*, above). Hence, *if* she was not minded to conclude on the information she had, no crime had been committed (which, as I have said, I think was the only rational conclusion based on the Crime Report), then she was under a duty to enquire further. As I have said, the Guidance required her to take into account evidence to the contrary that a crime may not have been committed, which obliged her to look for such evidence.

183. She obviously did not speak to X or, it would appear, look at PC Mullooly's contemporaneous notes. At a minimum she should have done the latter, because it was the best evidence as to what X had said. If she had done so, then she would have seen the ambiguities and uncertainties in it about smacking/Saturday (see above) – as well as the outright misstatement by X that he had a sister (which PC Mullooly had not put on the Crime Report). As Mr Dunlop said, this alone should have set alarm bells ringing about X's reliability. As already noted, she did not apparently consult investigating officers, or (again as I have said) cause C to be re-interviewed in light of this allegation. Re-interviewing X would not, I accept, have been an attractive or probably even realistic option given his age, but re-interviewing C certainly was possible. Instead, as Mr Dunlop said, she relied entirely on a hearsay entry in the Crime Report which she misunderstood. I consider that further undermines her conclusion.

184. For all of these reasons Ms O'Keefe's decision of 4 October 2022 not to cancel the Crime Report and to report an offence of assault was unlawful and cannot stand.

185. Finally, I consider that Mr Dunlop was right to submit the legally flawed decision infected the 2 February 2023 decision because that relied on the 4 October 2022 decision.

186. I turn to C's Article 8 challenge.

187. Article 8 provides:

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

> crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

188. As I said earlier, *Catt*, [6] establishes that the systematic collection and storage in retrievable form even of public information about an individual is an interference with private life.

189. Even before one gets to questions of proportionality, etc, under Article 8, the interference must be lawful under domestic law. This follows from the requirement in Article 8(2) that any interference must be 'in accordance with the law'.

190. Hence, the fact that the interference in this case was unlawful under domestic law leads to the conclusion that there was a violation of C's Article 8 rights: see eg *Cemalettin Canli v Turkey*, (Application no. 22427/04) (failure by police to comply with regulations concerning criminal records meant that interference not 'in accordance with law' and so Article 8 had been violated).

191. C is therefore entitled to a declaration that his rights under Article 8 were violated in this case.

192. This conclusion makes it unnecessary to consider Mr Dunlop's other arguments under Article 8. As to this, suffice it to say I think that *Catt* may have posed a number of obstacles for C's case. Another difficulty in considering at least some of C's broader challenges to the HOCR on the grounds of incompatibility with Article 8 is that they are the Home Office's policies, and the Home Office would therefore be entitled to be heard, but they are not an Interested Party to this claim.

193. Turning to C's challenge under the DPA 2018, it seems to me this that this is made out in the following respects. The relevant provisions are to be found in Part 3 of the DPA 2018, which deals with the processing of data for law enforcement purposes.

194. Chapter 2 of Part 3 sets out six data protection principles which data controllers have to comply with:

    a. section 35(1) sets out the first data protection principle (requirement that processing be lawful and fair);

    b. section 36(1) sets out the second data protection principle (requirement that purposes of processing be specified, explicit and legitimate);

    c. section 37 sets out the third data protection principle (requirement that personal data be adequate, relevant and not excessive);

    d. section 38(1) sets out the fourth data protection principle (requirement that personal data be accurate and kept up to date);

    e. section 39(1) sets out the fifth data protection principle (requirement that personal data be kept for no longer than is necessary);

    f. section 40 sets out the sixth data protection principle (requirement that personal data be processed in a secure manner).

195. It follows from my earlier conclusions that I consider that there was, in C's case, a breach of a number of these principles.

196. As to the first data protection principle, s 35 provides:

> "(1) The first data protection principle is that the processing of personal data for any of the law enforcement purposes must be lawful and fair.
>
> (2) The processing of personal data for any of the law enforcement purposes is lawful only if and to the extent that it is based on law and either -
>
> (a) the data subject has given consent to the processing for that purpose, or
>
> (b) the processing is necessary for the performance of a task carried out for that purpose by a competent authority."

197. Because the recording of the common assault allegation was unlawful, D failed to comply with the first data protection principle as to lawfulness. Further, because the processing was done in a way which was unfair to C, the fairness criterion was also infringed.

198. Next, so far as accuracy and the fourth data protection principle is concerned, the personal data recorded in the Crime Report was and is not accurate: it inaccurately suggests C has committed a crime of common assault when no proper assessment had taken place; and it inaccurately suggests that X alleged C smacked him 'when angry'. Further, until it was amended on 11 July 2023, it contained a wrong outcome namely that X did not support a prosecution. D failed to verify the quality of the personal data (in particular the quality of the evidence that C smacked X) before editing the Crime Report to state that a crime of assault took place (see s 38(5)(a)). Also (per s 38(5)(b)) it failed to include 'the necessary information enabling the recipient to assess the degree of accuracy, completeness and reliability of the data and the extent to which it is up to date', eg, it did not include an accurate summary of what PC Mullooly's notebook recorded X as saying; and the fact that C was never asked whether he smacked X.

199. I now turn to D's arguments about alternative remedies and timeliness. As Mr Dunlop showed me, these were both 'on the table' at the time of the application to re-amend before Mr Ockleton in June 2023, and alternative remedies had also been raised before Mr Bagot in February 2023.

200. D argues, in [55]-[60] of his ADGD, that there are adequate alternative remedies to judicial review, ie a complaint to the Information Commissioner, or the Court, under s 51 or s 167 of the DPA 2018 respectively, and so this Court should decline to consider the merits of the claim. Paragraph 57 of his Skeleton Argument argues, 'Where the alternative remedy is statutory, the Defendant submits that permission to bring a claim for judicial review ought to have been refused.'

201. I am not persuaded that I should refuse relief on the grounds of alternative remedies. That is for the following reasons.

202. By way of introduction, the question of appropriate remedy is, at bottom, always fact and issue specific. In *R (Grace Bay Holdings SARL and others) v The Pensions Regulator* [2017] EWHC 7 (Admin), Whipple J considered the authorities in this area. She referred at [53] to the *dictum* of Moore-Bick LJ in *R (Willford) v Financial Services Authority* [2013] EWCA Civ 677, [36]:

> "Ultimately, of course, the court retains a discretion to entertain a claim for judicial review but whether it will do so in any given case depends on the nature of the dispute and the particular circumstances in which it arises."

203. Mr Hockman showed me *R (Strain) v Chief Constable of Greater Manchester* [2023] EWCA Civ 240, where the Court of Appeal refused permission on the grounds of alternative remedies. However, given the issue is always fact and issue specific, this case is therefore not a binding obstacle in the way of C.

204. Firstly, as to [57] of D's Skeleton Argument, the fact is that permission was granted, and by CPR r 54.13, D cannot apply to set it aside. In that sense, therefore, it is now perhaps too late for D to raise this issue. D chose not to attend the permission hearing before Mr Bagot, and so if its case on alternative remedies was not articulated then, he only has himself to blame (as is acknowledged in [46] of his Skeleton Argument where it is accepted that his non-attendance was an 'error'). Mr Bagot had submissions about alternative remedies. The cases cited in Fordham, *Judicial Review Handbook* (7th Edn), at [36.3.12], show that the question of whether there is an adequate alternative should generally be dealt with at the permission stage.

205. Although D labels his alternative remedies as one of 'jurisdiction' (Skeleton Argument, [51] et seq) I do not think this is correct, as the passage from *Wilford* I cited earlier shows. This Court always has jurisdiction to consider challenges to decisions of public authority. However, the Court has a *discretion* not to exercise that jurisdiction where there is an adequate alternative remedy. One reason for exercising that discretion is that the Administrative Court has a busy workload and needs to keep court time free to deal with urgent cases where there is no alternative remedy.

206. C is therefore right to say that that consideration has less force after permission has been granted. This case having reached the stage it has, including two interlocutory oral hearings (one contested) and an *inter partes* substantive hearing, it would not be in the interests of justice or an efficient use of the court's resources to waste that allocated court time, make no decision on the issues, and instead require C to begin new proceedings. In *R (Wilkinson) v Chief Constable of West Yorkshire* [2002] EWHC 2353 (Admin) at [40-43]), Davis J (as he then was) said:

> "40. The first point that arises is whether it is now open to Mr [Robert] Fordham QC to pursue this particular point in this way at all. The fact is that this point was, on precisely the same materials, raised and fully argued at an inter partes hearing before Stanley Burnton J. It is to be borne in mind that the question, in truth, is not one of jurisdiction in the strict sense of the word. The authorities make clear that the court does have jurisdiction, in the sense of legal power, to grant judicial review even where

alternative remedies are available. The principle is that the power to grant judicial review would ordinarily not be exercised where there are alternative remedies open unless there are exceptional circumstances. Stanley Burnton J considered those circumstances and exercised his discretion to, exceptionally, grant permission. It was common ground between counsel before me that the rules do not permit an appeal from the decision of Stanley Burnton J in so ruling in granting permission. In substance, however, as it seems to me, Mr Fordham QC is effectively inviting me to sit as though by way of being an appellate or review court on a decision of a judge of coordinate jurisdiction, which decision was designed to be dispositive of the point in issue.

41. Mr Fordham QC submitted that a judge hearing a substantive judicial review application is in no way fettered by the reasons of the judge granting permission. That may, in the ordinary way, be true but that is because, in the ordinary way, the judge granting permission is doing no more than indicating that a point is arguable. In so indicating, the judge granting permission sometimes makes certain observations. The trial judge will have such regard to those observations as he thinks fit, but the issues at that stage remain open to be argued de novo. But there are clear limitations to this. For example, on an application for permission a point may arise as to whether permission should be refused on the ground of delay. If the judge in granting permission rules that delay does not preclude the grant of permission, and that, if necessary, an extension of time should be granted, that is intended to be dispositive of the point and, in the ordinary way at least, it cannot then be argued before the judge hearing the substantive application that permission should not have been granted and that an extension of time should have been refused. Of course at that stage the trial judge can still have regard to the question of delay in deciding what remedy, if any, to grant, but that is another point altogether.

42. When pressed upon this Mr Fordham QC eventually said that it was plain commonsense that I should be entitled to revisit Stanley Burnton J's decision in this respect and decline to accept jurisdiction. I am afraid that Mr Fordham QC will have formed the view that this invocation of commonsense did not have the impact upon me that he evidently hoped. This is for two reasons: first, Mr Fordham QC cited no rule of court or legal precedent to support his submission and, on the contrary, there remains, to me at least, the very real problem of this whole approach amounting to a collateral challenge on the

correctness of the decision of a judge of coordinate jurisdiction; second, if Mr Fordham QC is right, it seems to me to be contrary to the approach of the court in alternative remedy cases. Thus, in *R v Falmouth and Truro Port Health Authority, ex parte South West Water Ltd* [2000] 3 WLR 1464 Simon Brown LJ said this, at page 1490:

> "The lesson to be learnt is, I suggest, this. The critical decision in an alternative remedy case, certainly one which requires a stay, is that taken at the grant of permission stage. If the applicant has a statutory right of appeal, permission should only exceptionally be given; rarer still will permission be appropriate in a case concerning public safety. The judge should, however, have regard to all relevant circumstances which typically will include, besides any public health consideration, the comparative speed, expense and finality of the alternative processes, the need and scope for fact finding, the desirability of an authoritative ruling on any point of law arising and (perhaps) the apparent strength of the applicant's substantive challenge."

Mr Fordham QC submitted, rightly, that these were obiter comments. Moreover, they were comments made in the context of a case involving a decision under the Public Health Act 1936 and where, moreover, the question of the grant of a stay had featured large. Nevertheless, these were considered observations contained in a reserved judgment and were clearly designed to be of general application. They must and do carry the greatest possible force. Furthermore, in Mr Michael Fordham's widely consulted Judicial Review Handbook (3ed) there is, at paragraph 36.3.5, a paragraph entitled "Alternative remedy issue is for the permission stage". The text goes on to state that the permission stage is critical with copious citation of authority. But, if Mr Fordham QC is right, then such a decision at the permission stage may not be critical at all. On the contrary, the respondent has, as it were, simply had a dry run and can argue the point all over again at the final hearing. Accordingly, I am not persuaded that it could now be appropriate for me to decline to accept jurisdiction as Mr Fordham QC invites me to do.

43. In saying that, I do not mean to say that a grant of permission in an alternative remedy case after an inter partes hearing is necessarily and invariably inviolate. The court has always had power to recall and reopen orders and decisions in cases of fraud and mistake, and recent decisions confirm that the courts can, albeit exceptionally,

> recall orders, even when they have been drawn up, for further argument. Inadvertent oversight of a seemingly conclusive statutory provision or legal authority, for example, might be such a case. If such circumstances do arise, I would venture to suggest that the correct procedure normally would be to apply to the judge who made the original order granting permission, with a view to inviting him to recall his original decision and order. I would also add that, even where permission has been granted in an alternative remedy case, the alternative remedy argument may possibly, albeit perhaps exceptionally, and provided the circumstances are appropriate, still be available to be deployed at a substantive hearing on any discussion as to the appropriateness of relief, if any, to be granted.

207. I acknowledge that a grant of permission is not an *absolute* bar to the court refusing to grant relief on the substantive hearing: see eg *R (Glencore Energy Ltd) v HMRC* [2017] 4 WLR 213, [71]. As I hope I have made clear, ultimately, the matter is always one of discretion. However, it is relevant in this cases so far as I am aware, that Mr Bagot did not reserve any question of alternative remedies to the substantive hearing, as sometimes happens: see eg *R (Fisher) v Durham County Council* [2020] EWHC 1277 (Admin), [86].

208. Second, I am not persuaded that the statutory provisions in ss 51 and 167 of the DPA 2018 represent adequate alternative remedies to judicial review in this case, given the breadth of the challenges brought by C. Sections 51 and 167 of the DPA 2018 only relate to data protection legislation. C's principal complaints are more extensive, namely, that D made common law public law errors in his decision making and breached C's rights under Article 8.

209. Paragraph 58 of D's ADGD asserts that there is no reason why the Article 8 issue cannot just as well be litigated under the DPA 2018. That may be so. The first data protection principle in Part 3 of the DPA 2018 in relation to law enforcement processing requires the processing to be lawful, which means *any* domestic illegality (including under the HRA 1998) would result in a breach of the DPA 2018. But that does not mean that Article 8 challenges or non-DPA 2018 based challenges to legality always *have* to be brought pursuant to the statutory remedies. If that were the case, there would be no judicial review challenges in data protection matters; they would all be shut down on the grounds of alternative remedies. But, as C observes, Mr Catt and the other claimants in *Catt* pursued similar complaints to C by way of judicial review about the police's retention of records breaching Article 8. Their claims were considered by the Administrative Court, the Court of Appeal and the Supreme Court and none of those courts suggested that there was an adequate alternative remedy to judicial review such that the claims should not be entertained.

210. Third**,** even if the 167 route were a better or more suitable remedy, this court can exercise the s 167 jurisdiction. The amended grounds of challenge, for which Mr Bagot gave permission, expressly relied on s 167.

211. Fourth, I do not think it would be appropriate to reject C's claim, at this stage, if it is otherwise well-founded, on the basis of an alternative remedy, given the complex and

protracted history of this case (a point acknowledged by D, as I mentioned at the beginning of this judgment). In short, we are where we are. Mr Ockelton granted permission to amend the claim as late as June 2023 and made directions for a substantive hearing where the claims could be 'properly ventilated'. He said (transcript, p44):

> "I could put it another way altogether, which is that I cannot quite understand why, with all this information that is disclosed, there is any good reason why it should not be properly ventilated, if the whole issue should not be properly ventilated, which would involve looking rather carefully at how it is that an officer came to think that this little boy had said that his father smacks him when he is angry, with the serious consequences that resulted in."

212. I therefore reject D's alternative remedies argument.

213. In relation to timeliness, I would not refuse relief on this ground either. That is for the following reasons.

214. Firstly, this claim began on 13 October 2022, within days of the decision being made that is now its real target, even though C was then unaware of it, and remained so because of a lack of disclosure by D until February 2023. The claim was therefore initially brought in time. This is not decisive, of course, because the claim was amended and, as Mr Dunlop accepted, where a claimant seeks to amend a claim with permission the court must consider arguability and timeliness and other matters in deciding whether to grant it. Nonetheless, I think it is a factor in C's favour.

215. Second, even assuming that the claim as now presented is out of time, D does not complain of any prejudice, hardship or detriment. None was pleaded in the Skeleton Argument for the hearing before Mr Ockleton in June 2023, and none was pleaded in the Skeleton Argument before me, nor is there any evidence to that effect. This is not necessarily a good reason *of itself* to extend time (see *R (Ford) v Press Complaints Commission* [2001] EWHC 683, [46]), but it is 'highly relevant': *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] 1 WLR 983, [38].

216. Third, I think D's position is not aided by the process by which Ms O'Keefe's decision and her reasons came to be disclosed to C. Although C knew of a Crime Report early on (and it was referred to in his initial Claim Form in October 2022) he did not know until D's letter of 2 February 2023 that common assault had been recorded against him. That was over four months after the decision had been taken. In between times, D had lodged SGD on 11 November 2022 which made no mention of the decision. In accordance with its duty of candour, it should have done. Once he did find out, C acted promptly to apply to amend his Claim Form on 10 February 2023 in light of the new information. It was not until 23 April 2023 when D filed his DGD and witness evidence (out of time) that he disclosed for the first time the Crime Report and the full reasons for Ms O'Keefe's decision. Until those reasons were disclosed, it would have been difficult for C to have formulated his claim in the terms which, broadly, I have upheld. Mr Ockleton referred at p43 of the transcript to a lack of frankness by D. He also said at p44:

> "But from the point of view of the police justifying the decisions they are taking, to the extent that they are required to justify them, it does not seem to work at all. It leaves, as one might say, a bad taste in the mouth. To generalise, a person wanting to make a claim like this might run the risk, if you are right, of never being able to make the claim because they never quite know what decision they are challenging until they have disclosure arising from the claim. I just find that very difficult."

217. Fourth, notwithstanding D's position, Mr Ockleton granted C's application to re-amend his Claim Form in June 2023. That came on the back of D serving its evidence and DGD out of time, for which the judge granted relief from sanctions. That, again, does not aid D in his argument that I should now shut out C on the grounds of delay. The judge said (ruling, p51):

> "The case made by the claimant becomes different and more complicated by the disclosure of the material in the witness statements submitted by the defendant out of time, but the defendant's position as a defendant also becomes more complicated by that material, which the defendant has now or seeks to adduce. Mr Dunlop's position is that the application to further amend the grounds of challenge and to introduce further evidence is to an extent dependent upon the admission of the material from the police. I have some sympathy with that submission. However, it seems that, given what has now happened, it would be wrong to exclude from either side's consideration the late material. It is right to say, working through the Denton and Hall(?) requirements, that the delay is substantial, comparing an original time limit of 35 days with the eventual time of submission of the detailed grounds of defence and evidence, and there is very little explanation for it. But nevertheless, looking at other circumstances, the other circumstances are that the detailed material running to, altogether, getting on to 200 pages is necessary in order to understand both sides, both the complaint and the defence. I will, therefore, grant the defendant's application for an extension of time and it follows that the detailed grounds of defence and the evidence accompanying them fall to be admitted.
>
> The result of their admission and consideration has been that the claimant seeks to re-amend his claim in order to encompass various stages of the decision making which have led to the result which he complains about. I put it in that rather general phrase because I think it is the case that the mechanisms of the gathering and retention of police records are, and are likely for good reasons, to remain not wholly available to public sight. Nevertheless, there is

> further material which the claimant, it seems to me, in the course of the general claim which he originally made and has been refining is entitled to challenge. I will, therefore, also grant the claimant's application to further amend his grounds of claim and to adduce the evidence which accompanied that application."

218. If D's time point had substance, Mr Ockleton would likely have refused permission to amend.

219. Fifth, C has permission and so far as I am aware Mr Bagot did not, as I read it, reserve any issue about time to the substantive hearing (as sometimes happens, just like with alternative remedies).

220. Sixth, I consider this case raises some issues of principle, and issues which are of very great importance to C, which ought to be decided and that C should have the relief to which he is entitled.

221. Overall, therefore, if I need to, I extend time because there are good reasons in the interests of justice to do so. I will not refuse relief on the grounds of supposed delay.

Remedies

222. Mr Dunlop said that the primary remedies C seeks are a quashing order of Ms O'Keefe's decision of 4 October 2022, and a declaration that C's rights under Article 8 have been infringed.

223. The effect of my decision is that:

    a. Ms O'Keefe's decision to re-classify the Crime Report to record an offence of common assault is quashed. This must result in the amendment of the Crime Report to remove all references to common assault, so that the Crime Report stands as cancelled in respect of the offence of sexual assault for cancellation reason C2 for the reasons given by DI Davies on 20 September 2022 (which Ms O'Keefe agreed with). According to the evidence, in particular from Mr Griffith, and as Mr Dunlop submitted (Skeleton Argument, [72]), that will be sufficient for C to be sure that the wrongful allegation of sexual assault will not be disclosed to a future employer should he ever be subject to an enhanced background DBS check (eg, in connection with a future job application). If necessary, I can (and will) make a mandatory order to that effect, as Mr Dunlop submitted. As I understood him, Mr Hockman said on instructions the Crime Report would be amended in light of my judgment.

    b. C is entitled to the declaration he seeks, as I have already said.

224. Section 167 of the DPA 2018 provides:

> "(1) This section applies if, on an application by a data subject, a court is satisfied that there has been an infringement of the data subject's rights under the data protection legislation in contravention of that legislation.

> (2) A court may make an order for the purposes of securing compliance with the data protection legislation which requires the controller in respect of the processing, or a processor acting on behalf of that controller -
>
> (a) to take steps specified in the order, or
>
> (b) to refrain from taking steps specified in the order."

225. Notwithstanding what I have said in [207(a)] above, if and to the extent necessary, I make an order, pursuant to s 167, that the reference to common assault be deleted in its entirety from the Crime Report and that it solely record that the offence of sexual assault previously recorded is cancelled for the reasons DI Davies gave, namely, no crime had been committed. Deletion (or erasure) is required for the data relating to common assault by reason of s 47 of the DPA 2018, which requires erasure where there has been a breach of s 35 in relation to the relevant data. I have so found.

226. This claim is accordingly allowed on that basis. For completeness, I reject Mr Hockman's reliance in his oral submissions on s 31(2A) of the Senior Courts Act 1981. If Ms O'Keefe had approached matters in the way I found she should have done, on the material available to her, she would have been bound to conclude that X's report did not amount to the offence of common assault on the balance of probabilities.

227. I invite the parties to draw up an order reflecting the terms of this judgment.