

# Unravelling the paradox of guilty-innocence

**Richard Easton** considers whether the presumption of innocence in criminal proceedings, enshrined in article 6.2, extends to protect individuals facing subsequent employment vetting



Richard Easton is a solicitor at Sonn Macmillan Walker @SMW\_Law www.criminalsolicitor.co.uk

**W**hat is the value of an acquittal? Is it an endorsement of innocence or a lucky escape that leaves a stigma of suspicion of guilt? On 10 June the Court of Appeal sought to unravel the paradox of guilty-innocence in *The Queen (on the application of AR) v Chief Constable of Greater Manchester* [2016] EWCA Civ 490.

The appellant (AR) had, in January 2011, been found not guilty of raping a 17-year-old girl whom he had picked up as a fare when driving a taxi in 2009.

Two months after his acquittal, AR applied for a teaching post. Recorded on his enhanced criminal records certificate (ECRC) were the facts of the rape allegation. AR remonstrated that the disclosure effectively required him to defend himself 'every time [he] appl[ie]d for employment' despite the fact that he was 'an innocent man'.

The police, however, equated the decision to prosecute AR with a finding that, on the

balance of probabilities, the rape allegation was true. In any event, an acquittal, the police reasoned, did not prove innocence: 'not guilty' meant just that – it had simply not been proven beyond reasonable doubt that AR had raped his passenger. The evidential test for the disclosure was merely that the allegation might be true, far lower than either the civil or criminal standard of proof.

A year after he applied for a teaching position, AR attempted to return to taxi driving. The police again disclosed the rape allegation on an ECRC issued in 2012, despite AR's protestations of innocence.

AR's judicial review claim failed in 2013. And he fared no better before the Court of Appeal last month.

But despite the dismissal of his appeal, AR's case raised a novel point of law: does the presumption of innocence in criminal proceedings, enshrined in article 6.2, extend to protect individuals facing subsequent employment vetting?

Disclosure of unproven allegations on ECRCs has hitherto been challenged on grounds relating to individuals' article 8 privacy rights: see, for instance, *R (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3.

AR in his appeal, however, deftly introduced article 6.2 to argue that the presumption of innocence had also been violated by the police's decision to include the rape allegation on an ECRC.

AR argued that the disclosure questioned the correctness of his acquittal as the allegation could only conceivably be relevant to his fitness to drive a taxi or to teach if he was believed to be guilty.

Lord Justice McCombe, giving the court's decision, was first tasked with explicating the knotty law on article 6.2's applicability outside criminal proceedings. Article 6.2's principal function is to regulate criminal trials, but presumptive innocence can, in certain circumstances, stray beyond criminal fora. Exactly when article 6.2 can be invoked in non-criminal proceedings is unclear: the Supreme Court and Strasbourg court have, for instance, in recent years clashed over whether innocence should be presumed in compensation proceedings arising out of miscarriages of justice (see *R (on the application of Adams) v Secretary of State for Justice* [2011] UKSC 18 and *Allen v United Kingdom* (25424/09)).

McCombe LJ eventually held that the disclosure did not amount to a violation of article 6.2. Public officials must not treat individuals as if they were guilty of a criminal charge they had been acquitted of, but AR had come too close to saying that the facts underlying an acquittal ought never to appear on an ECRC. The focus, according to McCombe LJ, ought to be on the context of the disclosure and the existence of a link between the criminal proceedings that resulted in

acquittal and the subsequent proceedings.

There had, in fact, been no 'consideration of whether the facts that underlay the allegations might or might not be true' and consequently 'there was no procedural link at all to the criminal proceedings themselves.' 'Some unfortunate language' had been used by the police when giving reasons for the disclosure, especially the conclusion that a decision to prosecute was effectively a finding that the allegations were, on the balance of probabilities, true. However, 'there was no suggestion that the jury had been wrong to acquit': AR's acquittal, based as it was on the more exacting criminal standard of proof, had not, therefore, been undermined.

Furthermore, the Strasbourg court had only previously applied article 6.2 'in a "post-criminal proceedings" context to the public statements of state organs and not to documents, such as the reviewing officer's reasons [...], which are not in the general public domain'.

Domestic courts should, McCombe LJ concluded, be wary of enlarging article 6.2's scope to Disclosure and Barring Service screening as the Strasbourg court had yet to consider this area.

Article 6.2's relationship with employment vetting schemes (and paradoxical guilty-innocence) might, therefore, have to wait for a future pronouncement from Strasbourg. **SJ**