Neutral Citation Number: [2025] EWCA Civ 912

**Appeal No: CA-2023-002474**
**Case No: AC-2022-LON-001807**

**IN THE COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**Mr Justice Swift [2024] EWCA Civ 665**

**Permission was granted by the Court of Appeal ([2024] EWCA Civ 665), and the Claimant's application for Judicial Review was retained in that Court under CPR Part 52.8(6)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/25

**Before:**

**SIR GEOFFREY VOS, MASTER OF THE ROLLS**
**LORD JUSTICE UNDERHILL**
**(Vice-President of the Court of Appeal (Civil Division))**
and
**LADY JUSTICE NICOLA DAVIES**

BETWEEN:

| | |
|---|---|
| **THE KING (on the application of KATIE THOMAS)** | Claimant/Appellant |
| - v - | |
| **JUDICIAL APPOINTMENTS COMMISSION** | Defendant/Respondent |
| - v - | |
| **4A LAW LIMITED** | Intervener |

**Ben Collins KC** and **Nicola Newbegin** (instructed by **RRM Law Limited**) for the **Claimant/Appellant** (the claimant)

**Sir James Eadie KC**, **Robert Moretto** and **Natasha Simonsen** (instructed by **the Government Legal Department**) for the **Defendant/Respondent** (the JAC)

**Arfan Khan** and **Tahir Ashraf** (instructed by **4A Law Limited**) for the **Intervener** (the Intervener)

Hearing dates: 2 and 3 July 2025

# JUDGMENTS

**SIR GEOFFREY VOS, MASTER OF THE ROLLS:**

Introduction

1. In these Judicial Review proceedings, District Judge Katie Thomas (the claimant) challenges the fairness of the process of consultation used by the JAC in undertaking selection exercises for judicial appointments. Her concern relates to the use that the Selection and Character Committee (the SCC) of the JAC made of material concerning the claimant that was provided to the JAC in response to the consultation request it made to the Deputy Senior Presiding Judge (the DSPJ or the Consultee).

2. The JAC's evidence explains that the selection panels which had interviewed the claimant on 26 November 2021 (the panel or panels) recommended to the SCC, in its proposal paper (the proposal paper), that the claimant should be found to be selectable in both the criminal and civil jurisdictions. At the SCC meeting, however, on 10 March 2022 (the SCC meeting), the SCC decided that the claimant was not appointable in either jurisdiction because the SCC reduced the claimant's grade for "Working and Communicating with Others" from C (sufficient evidence) to D (insufficient evidence).

3. The minutes of the SCC meeting at which this decision was made record the following:

> The SCC noted that [the claimant] had received [redacted material, which apparently summarised negative material received from the Consultee]. The SCC also noted that the selection panel had identified similar issues, although it had assessed her as selectable (C) for each of the Family [meaning Civil] and Crime jurisdictions. Taking all evidence into account, the SCC decided to amend her grade for Working and Communicating with Others to insufficient (D) and her overall band to not presently selectable (D).

4. The JAC's evidence explained that the Consultee was told, in guidance, that consultees might "turn to others with a deeper or more recent or more developed knowledge of a candidate". In fact, the Consultee said in his consultation response that "he had sought the views of relevant leadership judges including the Presiding and Family Division Liaison Judges on all Circuits, … and other Regional Leadership Judges". It is likely that the negative material produced by the Consultee about the claimant emanated from one or more third-party sub-consultees. It is not clear precisely who provided that material.

5. In the course of the hearing of this application, the claimant applied for an order that the redacted material received from the Consultee (i.e. the negative comments contained in that consultation response) should be disclosed. We refused that application and said that we would give reasons for that refusal in this judgment. The reason for the refusal was, in summary, that the application had been made far too late. Had the disclosure been ordered, further evidence would undoubtedly have been required on both sides, and a lengthy adjournment would have been inevitable. The claimant had argued the case on generic issues before the Administrative Court (described by Swift J at [8] in his detailed judgment as an "in-principle challenge"). The claimant had had plenty of time to make such an application and could not justify it being made so late.

6. Against that background, the claimant's essential contentions are that: (i) a statutory consultee is not, as a matter of both law and fairness, at liberty to provide the JAC with comments about candidates from a broad and unlimited class of sub-consultees, and (ii) where negative comments are provided, they should not be relied upon by the JAC unless it has sought and obtained the consultee's consent to disclose them to the candidate so that their response can be taken into account.

7. The first step in resolving the sustainability of these contentions turns on the proper meaning of three crucial legislative provisions. They are sections 88 and 139 of the Constitutional Reform Act 2005 (section 88 and section 139 respectively) and regulation 30 of the Judicial Appointment Regulations 2013/2192 (regulation 30).

8. Section 88(1) is headed "Selection process" and provides "On receiving a request the [JAC] must – (a) determine the selection process to be applied, (b) apply the selection process, and (c) make a selection accordingly".

9. Section 139 provides as follows:

> (1) A person who obtains confidential information, or to whom confidential information is provided, under or for the purposes of a relevant provision must not disclose it except with lawful authority.
>
> (2) These are the relevant provisions—
>
> (a) sections 26 and 27 and regulations under section 27A;
>
> (b) Part 4;
>
> (c) regulations and rules under Part 4.
>
> (3) Information is confidential if it relates to an identified or identifiable individual (a "subject").
>
> (4) Confidential information is disclosed with lawful authority only if and to the extent that any of the following applies—
>
> (a) the disclosure is with the consent of each person who is a subject of the information (but this is subject to subsection (5));
>
> (b) the disclosure is for (and is necessary for) the exercise by any person of functions under a relevant provision;
>
> (c) the disclosure is for (and is necessary for) the exercise of functions under section 11(3A) of the [Senior Courts Act 1981] or a decision whether to exercise them;
>
> (d) the disclosure is for (and is necessary for) the exercise of powers to which section 108 applies or a decision whether to exercise them;
>
> (e) the disclosure is required, under rules of court or a court order, for the purposes of legal proceedings of any description.
>
> (5) An opinion or other information given by one identified or identifiable individual (A) about another (B)—

(a) is information that relates to both;

(b) must not be disclosed to B without A's consent. …

Part 4 of the Act, referred to in section 139(2), relates to the functions of the JAC. Sections 26-27A relate to the appointment of Justices of the UK Supreme Court (in which the JAC has no role).

10. Regulation 30 provides as follows:

(1) As part of the selection process under section 88 the [JAC] must, unless paragraph (4) applies, consult—

(a) where the selection relates to the office of puisne judge of the High Court, the Lord Chief Justice;

(b) in all other cases, a person (other than the Lord Chief Justice or Senior President of Tribunals where he or she is the appropriate authority) who has held the office for which a selection is to be made or has other relevant experience.

(2) The Commission may consult another person (apart from the appropriate authority) who has held the office for which selection is to be made or has other relevant experience with the agreement of the persons mentioned in paragraph (3).

(3) The persons referred to in paragraph (2) are—

(a) where the appropriate authority is the Senior President of Tribunals, the Senior President of Tribunals and the chairman of the [JAC];

(b) in all other cases, the Lord Chief Justice and the chairman of the [JAC]. …

11. The claimant contends that regulation 30 does not allow the person consulted (the DSPJ in this case, but the Lady Chief Justice in other cases) to seek or utilise information obtained from sub-consultees. The words used in regulation 30(1)(b) are "a person". The JAC submits that it is obviously to be implied that the person consulted can ask others who have experience of the candidates' work. Moreover, a question was raised in the hearing as to whether the consultation contemplated by regulation 30 is as to who precisely is most suitable for the particular appointment in question, rather than a general wide-ranging consultation about the personal characteristics of individual candidates.

12. Ultimately, however, the central dispute related to the fairness of the way the JAC customarily deals with negative responses received from consultees about candidates. The fairness issues resolved into two areas. First, an issue as to how the JAC ought, in fairness, to deal with negative material produced by consultees. Secondly, an issue as to what candidates ought, again in fairness, to be told as to the consultation process.

13. As to the first issue (dealing with negative material), the JAC's witness, Ms Brie Stevens-Hoare KC, a professional barrister member of the JAC, described that practice as follows: "I also understand that the Claimant considers that the JAC should seek consent from the consultees in this case to disclose the content of the statutory consultation, or a gist of it, to her. I understand the JAC's practice in this regard is not

to seek such consent, absent some exceptional set of circumstances". The JAC changed its position somewhat in the course of argument (whilst continuing to defend the approach it adopted in this case), acknowledging that, in each case of negative consultation material, it had, in effect, at least some of the following discretionary choices : (i) disregarding the negative material, (ii) seeking to explore the negative material at interview without making the candidate aware of it or making any direct reference to it (the practice adopted by the JAC in this case), (iii) putting the gist of the negative material to the candidate, whilst preserving the confidentiality of the consultee and sub-consultees, (iv) seeking the consent of the consultee to disclose the negative material for the candidate's comments and then doing so, if consent were granted, (v) even if such consent were refused, deciding to put the negative material to the candidate under section 139(4)(b). I shall refer to these five options as "the five options". The JAC's change of position reflected its acceptance, for the first time in oral argument, that section 139(5) was not, as it had previously argued, a free-standing provision requiring consent to disclosure in every case.

14. As to the second issue (informing candidates as to the consultation process), Ms Stevens-Hoare exhibited the "relevant parts of the information pack provided for candidates as part of the 2021/2022 Circuit Judge exercise". That document included the following information about statutory consultation:

> As required by the Judicial Appointments Regulations 2013, the JAC is required to consult a person (other than the Appropriate Authority [the Lord Chief Justice]) who has held the office we are selecting for, or who has other relevant experience. In this exercise we will consult with the [DSPJ]. The information provided by the statutory consultee will be used to inform selection decisions.

15. This formulation was followed by a link to "Information on statutory consultation", which was not originally in evidence, but was provided by the JAC after the hearing. The information provided recited the substance of regulation 30 in greater detail, but, crucially, did not mention that sub-consultees would be asked about candidates, nor did it identify who those sub-consultees might be.

16. Ms Stevens-Hoare explained in her evidence that, at the time of this competition, the JAC had commissioned The Work Psychology Group (the WPG) to conduct an independent review of its statutory consultation process. The WPG reported on 1 March 2022, and the JAC "committed to introduce a revised approach to statutory consultation" from September 2022. New more detailed guidance was published in 2023 emphasising the need for objective evidence-based comments from both consultees and sub-consultees. The JAC submitted in oral argument that, as part of this process, the information given to candidates about statutory consultation had changed in 2023. It turned out, however, that the nature of that change was not apparent from the JAC's original evidence. The evidence that the JAC filed after the hearing before us demonstrated the changes that had been made to the materials provided to candidates. The JAC added the following words to those I have set out at [14] above:

> … The information provided by the statutory consultee must be objective, evidence-based and provide examples. Mere assertion or speculation will not be taken into account. Relevant statutory consultation material will inform the overall assessment of the candidate against the merit-based selection

> criteria, when it is considered alongside the candidate's self-assessment, independent assessment and performance at selection day.

Again, it will be noted that candidates were **not** expressly told that there would be sub-consultees. Nonetheless, the JAC argues that it should have been obvious to the claimant and other candidates that the DSPJ would have to ask her leadership judges for their views. I shall return to that argument. The new formulation had two links below the passages I have cited: one titled "Information on statutory consultation" and one titled "Guidance provided to the statutory consultee". The first does not mention sub-consultees, but the second provides a copy of the guidance provided to the consultee, which includes details about how that person is to approach the task of seeking comments from sub-consultees. The latest version of the candidate pack is not formally in issue before us, but I would simply note at this stage that it is not obvious that a candidate could be expected to click on a link entitled "Guidance provided to the statutory consultee".

17. The second issue that I have described, therefore, turns, against that background, on whether it was fair or appropriate for the JAC not to explain the process of sub-consultation that it actually used to candidates including the claimant. The claimant argues that that was unfair, because "[t]he website and guidance material did not mention any other person or reveal that despite naming [the DSPJ] alone, and despite the regulations referring to Statutory Consultation as being from "a person", how widely such comments would be in fact be sought or the procedure for doing so". She understood that her application would be confidential. She said that: "Public statements by the [JAC] have in fact given the impression that candidates can be assured by the fact that the Statutory Consultation is limited in scope to those named in the relevant competition as consultees". The JAC, on the other hand, argues, as I have said, that it must have been obvious that leadership judges would be sub-consulted. Ultimately, however, I understood the JAC, in oral argument, to accept that transparency about its processes was, at least, desirable. It regarded its recent information to candidates, following the WPG report, as an improvement on what candidates had been told at the time of the claimant's competition.

18. In summary, therefore, it seems to me that, in order to resolve the claimant's application, the court has to answer the following questions:

    i) Does section 88 or regulation 30 require, as argued by the claimant, that the statutory consultee provide comments without reference to any sub-consultees or other third parties?

    ii) Was it unlawful for the JAC to place some reliance on statutory consultation provided by sub-consultees?

    iii) On the proper construction of the confidentiality provisions of section 139, what uses of consultation material are available to the JAC?

    iv) Were the JAC's policy or practices as to the use of consultation material unlawful or unfair?

v) Was the JAC's use of negative consultation material concerning the claimant unlawful or unfair or in violation of the claimant's rights under article 8 (article 8) of the European Convention on Human Rights (the ECHR)?

vi) Was the JAC's failure to inform the claimant that comments would be sought by the Consultee from sub-consultees unlawful or unfair or in violation of the claimant's rights under article 8?

vii) What, if any, relief should be granted to the claimant?

19. I have decided, for the reasons which follow, that the answers to these issues are as follows:

i) Regulation 30 does not specify whether the consultation it contemplates can come from sub-consultees providing comments to the consultee. Accordingly, it does not prevent it. There is, however, serious doubt about whether the consultation contemplated by regulation 30 is the kind of statutory consultation undertaken by the JAC. It does not, however, matter because the kind of consultation and sub-consultation undertaken by the JAC is lawful under section 88(1).

ii) It was not, therefore, unlawful for the JAC to place some reliance on statutory consultation provided by sub-consultees.

iii) On the proper construction of the confidentiality provisions of section 139, the JAC can, if it is necessary to do so, put negative material to a candidate for their comments under section 139(4)(b) without seeking or obtaining the consent of the consultee. Each of the five options is lawfully available to the JAC.

iv) The JAC's practice never to put negative material to a candidate save in "an exceptional set of circumstances" places an inappropriate fetter on its discretion. It should consider, in each case of negative material, how it should proceed, based on all the circumstances of the case, as between the five options.

v) The court is not in a position to decide whether the JAC's use of negative consultation material concerning the claimant was unlawful, unfair or in violation of her article 8 rights, without seeing the material in question. It does appear, however, from the transcript of the claimant's interview that the use made of it by the JAC may well have been entirely appropriate.

vi) The JAC ought, in fairness, to inform candidates in advance that comments will be sought about them from the Consultee **and** from sub-consultees.

vii) The claimant is entitled to declarations to the above effect, but the decision that she was not selectable in the 2021/2022 competition will not be set aside.

20. I shall deal in this judgment with the essential factual background, the law on fairness and article 8 and then the questions I have identified in sequence.

<u>Essential factual background</u>

21. This summary of the facts is taken in part from my judgment on the application for permission to apply for Judicial Review. It does not repeat the facts that I have already stated.

22. The claimant practised in crime at the self-employed Bar and as in-house counsel for a firm of solicitors. In 2018 she was appointed as a salaried District Judge. She sat in Walsall County Court.

23. In early 2019, the claimant was upset by the workplace conduct of a more senior male judge (the Judge) at her court. The details do not matter, but in July 2019, the claimant made a formal complaint of bullying against the Judge under the applicable protocol. The claimant's complaint was sent to the senior Presiding Judge of the Circuit. The claimant described the events that followed in this way:

> My complaint culminated in a meeting with [the junior Presiding Judge] who persuaded me to not pursue it as [the Judge] was retiring and, being pragmatic, I agreed.
>
> Unfortunately, some weeks later he started sitting at my Court in a part time capacity. It was at this stage I understand that [His Majesty's Courts and Tribunals Service (HMCTS)] made an informal request that he sit elsewhere, and I have not encountered him since.
>
> Regrettably, I subsequently became aware that the fact that I had made a complaint was common knowledge among staff and Judges at other Courts and had been the subject of 'gossip'. Hence a wide range of people know about the issues but may or may not have an accurate account or perception of them.

24. After these events (which I shall call the "bullying incident"), the claimant applied in May 2021 to the JAC to become a Circuit Judge in both crime and civil. She provided all the documentation required from her and was supported by two independent assessors. She was invited for interview at the JAC's selection day. Three interviews were held. Two were scenario-based, and the third was a competency-based panel interview. The civil panel carried out the civil scenario-based interview and the competency-based interview. The panels had before them evidence from the Consultee, Haddon-Cave LJ. Although the claimant did not recall being asked anything of a negative nature, it appears from the transcript of the interview that she was actually asked some detailed questions under the heading of the "Working and Communication with Others" competency. The claimant's interviews took place on 26 November 2021. The Chair of the panel started that section of the interview by saying that she was interested in the claimant's ability to work and communicate with others, asking her to speak about a time when she had had to assert her authority in a work environment. She described an incident prior to the Covid pandemic lockdown, when she had received confidential information from a senior coroner about the likelihood of mass fatalities, which the coroner had obtained from a government body on which he sat. On the day of lockdown, the claimant, as the only resident judge present at her court, decided to adopt the precautionary procedures recommended to her, such as chair spacing in court and opening empty courts. Senior management in HMCTS complained to her that she had no authority to make those changes and said that they should be reversed. The claimant explained her dilemma to the panel on the basis that she could not tell HMCTS how she knew the precautions were needed. She said that she told HMCTS that they

should "refer it up the line, but for the time being this is what we're doing with my court". The HMCTS representative was not happy. The Chair asked the claimant whether she could "[h]elp [the panel] to understand how upset she was, and what . . . what she said to you and what you said to her?" The claimant then explained that the HMCTS person had "gone mad", but the claimant had stood her ground firmly and insisted on continuing with the measures she had implemented. The claimant had ended by saying: "I am doing this, and I will take responsibility for it".

25. Later in the interview, the Chair returned to what might be referred to as the "Covid incident" and asked: "Was that ever escalated?". The claimant said it had not been escalated beyond an email saying she had no authority to take the steps she had, but reiterated that it was an extreme situation and she stood by what she had done.

26. After the interviews, the panels submitted their proposal paper to the SCC. It included the following passages that are particularly relevant to this application:

> [The Consultee] was consulted on 27 September 2021 about the 132 candidates invited to interview. This request was made in advance of selection days in order that it could be considered by the interviewing panels. [The Consultee] sought further consultation from the Presiding and Family Division Liaison Judges on all Circuits, the Chief Magistrate, the Senior Master of The Queen's Bench Division, relevant First-tier and Upper Tribunal Presidents and the President of the Employment Tribunal. Local leadership judges, namely Resident, Designated Civil, Designated Family and Business and Property Court Judges were also consulted. A copy of the responses for candidates being recommended is at Annex E [which we have not seen, but makes clear that the negative comments about the claimant were from the Midland Circuit's Presiding Judges].
>
> In considering the statutory consultation responses, the following candidates we are recommending received mixed comments and were identified by [the Consultee] and the Selection Exercise Team. The mixed statutory consultation comments for these candidates have been considered carefully by the panel and it is the JAC's view that the mixed comments are not sufficient enough to warrant a revision of the grading. The Assigned Commissioner [Ms Stevens-Hoare] has had sight of these comments and is content that the candidates are selectable and should proceed. …
>
> [the Claimant] [redacted] [T]he panel tested those assertions during the selection day activities. [redacted] The panel also probed the concerns [redacted] and were content that sufficient evidence had been shown [redacted.] The interviewing panels graded the candidate as selectable (C) for the Family [meaning Civil] jurisdiction and selectable (C) for the Crime jurisdiction.

Annexes F1 and F2 to the proposal paper showed the claimant at number 24 in the merit list for crime (for 30 vacancies) and number 15 in the merit list for civil (for 9 vacancies) with a "C" for "Working and Communicating with Others" and as an overall band. She was recommended for crime. The panels' candidate assessment of the claimant in the proposal paper included the following:

> *In relation to the situational questions (crime):*
> The candidate provided strong evidence of Assimilating and Clarifying Information. … Her answers were particularly clear and effective in relation to the

anonymity application and the analysis of the Boy A application, where the decisions were focussed and evidence based. However, she did not appear to have worked through the implications of the absence of the [16-year-old] defendant, and her decisions, in relation to the juror, were limited with no reference to any action in relation to the employer by any party. However, her sentencing exercise was effective. … Overall, the panel concluded that her performance was strong under this competency.
The candidate provided sufficient evidence of Working and Communicating with Others. She had a calm and appropriately authoritative style of communicating to the panel and to parties and the jury. With the exceptions identified above, her answers to the questions were clear and concise without missing important details. However, she showed limited sensitivity in dealing with the juror's employment dilemma, offering insufficient practical support. Her sentencing remarks were clear and comprehensive, and she appropriately adapted her communication to recognise the different ages and circumstances of each defendant. Each would have been left in no doubt as to the outcome of the hearing. However, the panel concluded that the sentencing exercise did not sufficiently enhance and increase the overall grading of the situational questions.

*In relation to the competency based interview:*
The candidate provided sufficient evidence of Working and Communicating with Others. She was able to explain how she had been able to assert her authority during the early stages of the pandemic. She had been given confidential information from a Senior Coroner who sat on the worst-case scenario panel for the Covid pandemic. She had told the candidate there would be a lockdown in a few weeks and had explained the distancing measures that would be implemented. The candidate explained that with this advanced knowledge she thought it wise to implement some of those measures at court, but [HMCTS] complained and insisted she reversed the changes she had made. She described how she had resisted their orders despite not being able to give a full explanation of why she felt compelled to make the changes as she felt court users' health to be of primary importance. This was a strong example. In a further example she tried to explain the difference between "strikeout" and "dismissal" using a horse racing analogy. She explained that dismissal was when your horse did not win the race but strike out was when it did not start the race. Whilst the panel thought the analogy useful and sufficient, they thought the candidate had not explained why strikeout was necessary and that her analogy was therefore a little lacking. Overall, when balancing the two examples, the panel decided that sufficient evidence had been provided.

*In relation to the "Overall summary (civil)":*
The candidate provided sufficient evidence of Exercising Judgement and Possessing and Building Knowledge in both exercises on selection day. There was insufficient evidence of Assimilating and Clarifying Information and Working and Communicating with Others in the situational questions but sufficient evidence was identified in the interview. Elsewhere there was sufficient evidence of Managing Work efficiently in the situational questions but strong Evidence of this competence was noted in the interview.

The panel were assisted by the supportive Independent Assessments and the candidate's helpful Self Assessment.

> The panel also considered the Statutory Consultation comments and noted they were not fully supportive of the candidate's application. [Redacted.] The panel tested those assertions during the selection day activities. Whilst they found the candidate had an assertive style, they found no evidence of [redacted] and overall they considered the candidate's ability under Working and Communicating with Others to have been sufficiently evidenced. They did note that she made an odd decision when deciding on the evidence provided that the claimant had not been fundamentally dishonest. Whilst it was a decision that many had not made it was also a decision that was open to her to make and one that she did adequately justify with reasons.
>
> Overall, considering the panel were persuaded that despite the Consultee's comments this candidate had provided sufficient evidence of her ability to Exercise Judgement. They were persuaded by the supportive Independent Assessment comments and her self assessment in tandem with her selection day performance, that there was overall strong evidence of Assimilating and Clarifying Information and sufficient evidence of Possessing and Building Knowledge and Managing Work Efficiently.
>
> Overall, the panel concluded that the candidate is selectable.

27. Ms Stevens-Hoare's evidence described the selection process affecting the claimant in detail. She said that, when she read the proposal paper concluding that the claimant had provided sufficient evidence in the crime interview for "Working and Communicating with Others", she thought that the "report itself made it clear that the evidence provided included negative evidence in one incidence (with a juror) and the evidence from the sentencing element of the exercise was not sufficient to redress that negative evidence". She was, therefore, "concerned the evidence provided in the report did not support the conclusion reached". The claimant complains that this evidence is at odds with Ms Stevens-Hoare's approval of the proposal paper itself. This is not a dispute that, in my view, either can or needs to be resolved. Ms Stevens-Hoare plainly had and raised concerns at the SCC. The point at which those concerns arose is immaterial.

28. So far as the report in the proposal paper in relation to the civil interview was concerned, Ms Stevens-Hoare said that she thought that "whilst [there was] positive evidence related to important elements of "Working and Communicating with Others", it did nothing to redress the failings evidenced by the negative evidence".

29. Ms Stevens-Hoare's evidence about the Covid incident was as follows:

> … the Claimant had given evidence of how she had asserted her authority. [description of the Covid incident]. That was an example where on the Claimant's own account she had not asserted her authority, she had rather acted, albeit for good reasons, without authority. The report did not indicate any evidence that the Claimant had an understanding before acting that she was exceeding her authority or had made any attempt to find a way to achieve her desired outcome by collaboration or persuasion. The panel report described this example as "a strong example". I believed that characterisation was unjustified. In my view the example was negative evidence given the absence of any attempt by the Claimant to achieve

the desired outcome in a manner involved working with anyone else with authority or affected.

30. Ms Stevens-Hoare described the process she went through in relation to the Consultee's comments as follows:

> notwithstanding that the statutory consultation response included comments which raised concerns falling into the "Working and Communicating with Others" competence and to some extent chimed with the negative evidence from the Claimant's selection day, they concluded that overall the Claimant's ability had been sufficiently evidenced in that competence and therefore assessed her as a "C". When I read that I naturally looked at the statutory consultation comments to see if there was any evidence which might allay the concerns I had. I did not find any evidence in the statutory consultation that mitigated my concerns having read the panel report relating to the Claimant.

31. Ms Stevens-Hoare described in her evidence the way in which the SCC made its decision about the claimant. She said that she had noted, when reading the material before the SCC, that "negative evidence noted by the panels at the assessment day had parallels in the statutory consultation material - that is that the [panels] had identified similar issues under that competence to those identified in the statutory consultation response". When she went back to the material before the SCC, she "concluded that there was insufficient evidence from the panel in their report to support the assessment of C because there was negative evidence which was not sufficiently addressed or countered by a volume of good or positive evidence". Ms Stevens-Hoare then decided to "express those concerns and ask the other Commissioners present to consider the proposed recommendation of the Claimant", which is what she did. The other Commissioners (11, in total, were present at the SCC meeting) agreed with her concern about the panel's assessment of the claimant as a "C" grade for "Working and Communicating with Others". The main focus of that discussion was not the statutory consultation. The discussion focused on (i) the sufficiency of the evidence identified by the panel, (ii) the negative evidence identified by the panel in the proposal paper, and (iii) the failure of the evidence as a whole to amount to sufficient good evidence to justify a "C" grade for the "Working and Communicating with Others" competence. On that basis, the SCC assessed the claimant as a "D" grade (insufficient evidence) for that competence.

32. Ms Stevens-Hoare's evidence was that "[t]he most important factor in that assessment was … the negative evidence observed by the panel at selection day". She also confirmed that she had no knowledge at the time of the selection process of the complaint made by the claimant against the Judge, and that complaint was "not mentioned by anyone in the course of the SCC discussions".

33. Ms Stevens-Hoare explained that 29 candidates were selected for crime in respect of 45 vacancies. Had the claimant not been downgraded, she would, therefore, have been recommended for appointment in crime. She would not have been recommended in civil, because she was 15th in the merit order and there were only 9 vacancies. I have already set out the relevant minutes of the SCC meeting recording its decision about the claimant at [3] above.

34. On 4 April 2022, the JAC informed the appellant that she had not been successful in the competition. She sought and received feedback in relation to her application in the civil jurisdiction in a letter from the JAC dated 6 May 2022 (the first feedback letter). The first feedback letter quoted extensively from the proposal paper. The quotation concluded with "Overall, the panel concluded that the candidate is selectable". The first feedback letter then continued by saying that: "[u]nfortunately, due to the strength of the competition, with other candidates providing stronger evidence against the competencies, you were not selected for this role. In summary, the panel concluded that the evidence you provided against the competencies was not as strong as that of other candidates, in what was a very competitive field".

35. Shortly after the 6 May 2022 letter, the appellant received a memorandum from the Circuit Presiders encouraging people to apply for Circuit Judge appointments due to the limited number recruited. Since this conflicted with her feedback, the appellant sought clarification from the JAC.

36. On 24 May 2022 the JAC sent a second feedback letter which encompassed crime, civil and the competencies (the second feedback letter). Again, the second feedback letter quoted extensively from the proposal paper, giving mixed impressions about whether the claimant had satisfied the panels as to the "Working and Communicating with Others" competency. It is not necessary to analyse the second feedback letter in detail. Unhelpfully, however, considering the conclusions to which the second feedback letter came, it included: (i) an overall summary (crime), which concluded by saying that "[the claimant] was awarded sufficient grades for all competencies", (ii) a commentary on the "situational questions (civil)", which appeared to pass the claimant on the "Working and Communicating with Others" competency, apart from a criticism about the use of the inaccessible word "henceforth", (iii) under the heading "competency based interview", a description of the Covid incident as a "strong example" of "Working and Communicating with Others", and (iv) under the same heading, a passage explaining that: "overall, the panel decided that sufficient evidence had been provided" in relation to that competency. It was only when the second feedback letter reached the heading "overall summary (civil)" that the reasons for her non-selection emerged. I am bound to say, however, that even at that stage the letter lacked necessary clarity, as follows:

> The candidate provided sufficient evidence of Exercising Judgement and Possessing and Building Knowledge in both exercises on selection day. The panel agreed that the strong situational questions evidence for Assimilating and Clarifying Information outweighed the sufficient interview evidence. **Whilst there was strong evidence in the situational questions for Working and Communicating with Others, this did not outweigh the sufficient interview evidence.** When considering the sufficient situational questions evidence for Managing Work Efficiently against the strong interview evidence, the panel agreed there was sufficient evidence overall. **Overall, the panel considered the candidate had provided** strong evidence of Assimilating and Clarifying Information and **sufficient evidence of** Exercising Judgement, Possessing and Building Knowledge, **Working and Communicating with Others** and Managing Work Efficiently.
>
> **Overall, at the final decision making stage the Selection and Character Committee concluded that the candidate is not presently selectable taking into account all of the information from their application, self-assessment,**

**statutory consultation comments, selection day performance and independent assessments**.

Overall, you were assessed as a candidate who is not presently selectable for this office. [Emphasis added.]

37. In response to the claimant's first email query about the second feedback letter, the JAC said this on 25 May 2022:

> Please disregard the [first feedback letter], which relates to an earlier stage in the selection process. I apologise for this error and understand the confusion it has caused - sorry.
>
> The [second feedback letter] is correct and confirms that it was at the final decision-making stage where the [SCC] concluded that you are not presently selectable for the office, based on all the evidence available to them.
>
> Once again, I apologise for any confusion. We will improve our processes to help ensure this does not happen again.

38. The claimant responded quickly on 25 May 2022 pointing out the confusion that the two feedback letters had caused. I include a significant extract from the claimant's email because her confusion is both palpable and entirely justified. She said first that the starting point was that feedback was "designed to assist a candidate who is not successful to reflect on where they went wrong and adjust their approach in the future". She then recited the inconsistent information from the first and second feedback letters, and continued:

> I sought clarification as it is unclear why I can be selectable and pipped at the post and then not selectable at all, to which your response was that at the final stage the selection committee decided I was not selectable.
>
> With respect this is not sufficient and fails to assist me in any way in considering whether I apply again and what approach to take.
>
> It is clear that my performance in civil (and it would also seem crime) plus the competencies was sufficient to make me selectable but that some 'other thing' was factored in at the final stage – I'd like to know what that was. There is a gulf between being selectable but pipped at the post and not selectable at all, a gulf made all the wider when it would seem that some undisclosed factor was in play. A factor which I cannot address in future.
>
> The JAC says it is committed to a fair, open and impartial approach yet my feedback does not reflect this as at best it is contradictory and non explanatory.
>
> I am very surprised that I am being invited to simply 'ignore' the earlier letter – please remember that an application of this nature is not a lightweight affair. Applying takes time, care and a lot of work and emotional involvement and the outcome can have considerable personal consequences.
>
> Am I to ignore the reference for example to future applications being welcomed?

> I am sorry but in this occasion I am not simply being a sore loser, but rather I am uneasy about what has occurred and I am not satisfied with the responses I have received. I would like a fuller, considered and transparent response which sets out precisely how I went from being selectable to not selectable at all.

39. A week later, on 31 May 2022, the claimant emailed the JAC again to say that that she had become aware that "the JAC have utilised 'soundings' during the course of this selection exercise. If so, then there are clearly questions that arise in relation to fairness, equality and transparency".

40. On 8 June 2022, the JAC wrote to the claimant offering "sincere apologies" for the level of service that the claimant had received, and seeking to explain what had actually occurred. The thrust of the claimant's initial complaint concerned the use that had been made of the statutory consultation, and the claimant's suspicion that it concerned the bullying incident. It only became apparent that the negative material in the statutory consultation did **not** concern the bullying incident, when Ms Stevens-Hoare's evidence was produced after this court had granted the claimant permission to apply for judicial review.

41. On 13 June 2022, the claimant's solicitors sent a letter before action to the JAC, to which the JAC responded. These proceedings followed on 1 July 2022.

42. On 30 March 2023, Lang J refused permission to apply for Judicial Review on the basis that the claimant's claims were unarguable. On 6 December 2023, after a day-long oral hearing, Swift J refused permission to apply for Judicial Review on the basis that none of the grounds put forward was arguable. He did, however, describe the JAC's treatment of the claimant as "very unfortunate indeed", a summation with which I entirely agree.

43. On 13 June 2024, the same constitution of the Court of Appeal as has heard the substantive application granted the claimant permission to bring Judicial Review proceedings against the JAC in respect of its decision not to recommend her for appointment as a circuit judge. We ordered that the claim should be retained in the Court of Appeal under CPR Part 52.8(6), that the appellant should file, by 27 June 2024, final complete re-amended grounds of challenge and details of the remedies sought, and that once the JAC had filed detailed grounds of defence and evidence, that the appellant should file evidence in reply within 21 days. These procedural orders were relevant to the application that the claimant made at the hearing for disclosure of the statutory consultation. It must have been obvious to her after those orders were made that she had to marshal all the evidence she needed within strict time limits.

44. Finally, in the chronology, the JAC's response to the WPG report (which related, it will be recalled, to the JAC's practices in relation to statutory consultation) included in 2023 the following relevant commitments:

> (iii) To publish the guidance the JAC gives to statutory consultees on how to provide statutory consultation
>
> The Commission agrees that that it will be important to provide specific guidance and communication to candidates on how evidence is collated, weighted, and used in the process, where statutory consultation is retained. The Commission also

> acknowledges WPG's finding that there are areas for further improvement in the objectivity and evidence-base of statutory consultation feedback across exercises. The Commission will revise, strengthen and publish the guidance the JAC gives to statutory consultees on how to provide statutory consultation responses. …
>
> In all cases, the published information page for an exercise will clearly explain the process which will be used – whether statutory consultation will be used or has been waived – as well as the exercise specific templates and guidance if statutory consultation is to be used and the weighting that will be given to statutory consultation comments as an additional source of evidence to support the selection panel when assessing the candidates.

45. I have recited the history of the JAC's dealings with the claimant after the competition in detail. That treatment does not, in the result, underpin the claimant's substantive claims. It does, however, explain how the claimant came to believe, genuinely I think, that the negative consultation material concerned the bullying incident, when it probably did not. All that could, so easily, have been explained to the claimant long before Ms Stevens-Hoare's evidence was filed. It may be hoped, however, that the JAC will be able, in future, to ensure that feedback given to candidates is accurate and complete, and not, as it was in this case, confused and misleading.

Unfairness

46. In *Reg. v. Home Secretary, Ex p. Doody* [1994] 1 AC 531 (*Doody*), Lord Mustill considered what fairness demanded in relation to a scheme for the review of the period which a prisoner would serve by way of a mandatory life sentence. The House of Lords decided that, in fairness, the Secretary of State had, not only to allow the prisoner to make representations, but also had first to inform him of the period recommended by the judiciary. Lord Mustill said this at pages 560-561:

> What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which **the courts have explained what is essentially an intuitive judgment**. They are far too well known. From them, I derive that (1) **where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances**. (2) **The standards of fairness are not immutable**. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. **What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects**. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) **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. (6) **Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer**.
>
> My Lords, the Secretary of State properly accepts that whatever the position may have been in the past these principles apply in their generality to prisoners,

> including persons serving life sentences for murder, although their particular situation and the particular statutory regime under which they are detained may require the principles to be applied in a special way. **Conversely, the respondents acknowledge that it is not enough for them to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair**. **The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made**. [Emphasis added.]

47. In my judgment, this passage still encapsulates the principles that this court should apply. I have highlighted the most relevant passages from Lord Mustill's speech. These principles were referred to by the Court of Appeal in an immigration context in *R (Talpada) v. Secretary of State for the Home Department* [2018] EWCA Civ 841 (*Talpada*). In *Talpada*, Singh LJ (in agreement with both Hallett and Underhill LJJ) helpfully explained the difference between procedural and substantive unfairness, the need to distinguish between the two, and in the case of substantive unfairness, the need to avoid what I might call judicial overreach (see, in particular, [64]-[65]). I will return to Singh LJ's judgment when I consider the question of remedies in this case. I say, at once, however, that his judgment, read in its entirety, provides important legal context for what we have to decide. In *R (Segalov) v. Chief Constable of Sussex Police* [2018] EWHC 3187 (Admin), a Divisional Court applied Lord Mustill's principles in *Doody*, holding that a journalist ought to have been given the gist of the complaints made against him to enable him to make submissions before the police decided to exclude him from the Labour conference.

Article 8

48. Article 8 provides as follows:

> 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.

49. In the course of oral submissions, I asked Ms Newbegin, who argued the article 8 points for the claimant, what article 8 added to the arguments advanced under domestic law. In response, she relied on *Volkov v. Ukraine* [2013] 57 EHRR 1, where the European Court of Human Rights (ECtHR) had endorsed at [165]-[167] the parties' agreement that the dismissal of a judge from his office in the Supreme Court engaged his article 8 rights, notwithstanding that the relationship was of a business or professional nature. In that case, the ECtHR said this about whether the interference in question satisfied the conditions of Article 8(2) at [169]-[171]:

> 169. The expression 'in accordance with the law' [in article 8(2)] requires, firstly, that the impugned measure should have some basis in domestic law. Secondly, it refers to the quality of the law in question, requiring that it should be accessible to

> the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law. …
>
> 170. The phrase thus implies, inter alia, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention (see CG and others v Bulgaria, no. 1365/07, (2008) 47 EHRR 1117, paragraph 39). The law must moreover afford a degree of legal protection against arbitrary interference by the authorities. The existence of specific procedural safeguards is material in this context. What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question …

50. The claimant's submission in this regard can be taken from her skeleton as follows:

> The process is not sufficiently foreseeable because it does not provide an adequate indication regarding: the extent of, and reliance upon, statutory consultation; the fact that consent will not be sought for disclosure to the candidate of the contents of the consultation response(s); or the circumstances in which the results of statutory consultation (including sub-consultation) may be used to downgrade a candidate so that they are not regarded as appointable, contrary to the views of the selection panel.

51. The Grand Chamber of the ECtHR considered the applicability of article 8 to employment-related scenarios comprehensively in *Denisov v. Ukraine* (Application No 76639/11), 25.09.18 (*Denisov*) where article 8 was held not, on the facts, to be engaged when a judge was dismissed as President of the Court of Appeal, though not removed from office. The Grand Chamber's analysis at [100]-[108] of its judgment is valuable. The JAC argued that the claimant's case was to be distinguished from *Volkov* and *Denisov* because she was seeking a new appointment, rather than being removed from any office.

52. I do not think we need to resolve that argument in this case. I take the view that article 8 does not add anything to domestic law, on the facts and submissions as they actually appeared at the end of the oral argument. I accept, however, that article 8 might have been relevant had the argument not developed as it did in the hearing. In the circumstances, therefore, I need say no more about the law relating to article 8.

<u>Does section 88 or Regulation 30 require, as argued by the claimant, that the statutory consultee provide comments without reference to any sub-consultees or other third parties?</u>

53. For convenience I will recite regulation 30(1) again as follows:

> (1) As part of the selection process under section 88 the [JAC] must, unless paragraph (4) applies, consult—
>
> (a) where the selection relates to the office of puisne judge of the High Court, the Lord Chief Justice;

(b) in all other cases, a person (other than the Lord Chief Justice or Senior President of Tribunals where he or she is the appropriate authority) who has held the office for which a selection is to be made or has other relevant experience.

54. There is nothing in these formulations that indicate one way or another whether the "person" to be consulted is to be permitted to seek assistance from sub-consultees. That issue might, however, be informed by the purpose for which consultation is envisaged. Underhill LJ suggested in argument that the final words of regulation 30(1)(b) identifying the consultee as someone "who has held the office for which a selection is to be made or has other relevant experience" pointed towards the consultation being about what the office demanded, rather than a general wide-ranging consultation about the personal characteristics of individual candidates. The JAC has not, however, consulted specifically about the demands of the office, either before 2013 when regulation 30 was put into its current form, or afterwards. It has always used regulation 30 as its platform for asking the consultee for evidence-based comments about the competencies of the candidates for the office.

55. In my judgment, regulation 30 is not a felicitous foundation for the kind of consultation undertaken by the JAC. But it does not seem to me that the consultation process adopted by the JAC is, in any sense, unlawful. Section 88(1) expressly allows the JAC to determine "the selection process to be applied" and to apply that process in each case. It is obliged to consult a particular consultee, under regulation 30, which is what it does. Regulation 30 does not specify what the consultee is to be asked. Even if regulation 30 contemplates consulting a person with experience of the office in question, that does not limit the questions that that person can be asked. There is, in my judgment, no warrant for construing regulation 30 as limiting the kind of selection process that the JAC can adopt under section 88.

56. Accordingly, as a matter of statutory construction, it seems to me that neither section 88 nor regulation 30 requires that the statutory consultee should provide comments without reference to any sub-consultees or other third parties. I reach that conclusion without regard to the practical arguments advanced on both sides about the desirability or fairness of sub-consultation. The fact that there is no statutory inhibition on sub-consultation does not, of course, answer the fairness questions raised by the claimant, to which I shall now turn.

<u>Was it unlawful for the JAC to place some reliance on statutory consultation provided by sub-consultees?</u>

57. On the construction of section 88 and regulation 30 that I have adopted, it is obviously not unlawful for the JAC to adopt a selection process that involves asking a consultee to procure evidence-based comments about candidates from other judges or third parties who might have experience of their work.

58. There is much force in the argument advanced by the JAC that any other consultation process would be undesirable because many candidates would receive no comments, even favourable ones. It must also be recalled at every stage of this debate that section 88 and regulation 30 apply as much to selection processes where candidates are solicitors and barristers, as it does to selection processes where candidates are serving judges (whether salaried or fee-paid). It is inconceivable that either the Lady Chief Justice (referred to in regulation 30(1)(a) in relation to High Court appointments) or "a

person who has held the office for which a selection is to be made or has other relevant experience" (referred to in regulation 30(1)(b) in relation to other appointments) could have personal experience of all the candidates in every competition.

59. I shall deal with the question of the fairness of the process of sub-consultation actually adopted by the JAC after I have considered the proper construction of section 139.

<u>On the proper construction of the confidentiality provisions of section 139, what uses of consultation material are available to the JAC?</u>

60. As I have already indicated, there was a measure of common ground on this issue by the end of the hearing.

61. Section 139 is headed "[c]onfidentiality" and appears as the first section in Part 7 of the Constitutional Reform Act 2005 under the heading "General". It therefore applies to Part 4 of the Act, which relates to judicial appointments and discipline.

62. The scheme of section 139 is to provide at section 139(1) that confidential information must not be disclosed "except with lawful authority". Section 139(3) makes clear that information is confidential if it **relates to** an identified or identifiable individual. Then section 139(4) identifies 5 situations in which confidential information about an individual can be disclosed **with** lawful authority. The five situations are important. They may be summarised as follows.

63. The first situation relates to disclosure "with the consent of each person who is a subject of the information", but section 139(4)(a) makes it clear that that is "subject to [section 139(5)]". Section 139(5) makes it clear that information given by one individual (A) about another (B) (a) is information that **relates to** (under section 139(3)) both individuals, and (b) must not be disclosed to B without A's consent. Thus, in the situation with which we are concerned, each of the consultee and the sub-consultees are individuals (who gave information about the claimant) and whose consent is required before there can be lawful authority under section 139(4)(a) for disclosure of the information.

64. The second situation in section 139(4)(b) allows lawful authority for disclosure where such disclosure is "for (and is necessary for) the exercise by any person of functions under a relevant provision". It is obvious that the JAC would be exercising its functions under section 88 if it disclosed confidential information as part of the selection process. So, the questions in this context are: (a) whether section 139(4)(b) is also subject to the consent provision in section 139(5), and (b) when is it "necessary" for the JAC to disclose such information for the exercise of its functions. I will return to those questions.

65. The third situation in section 139(4)(c) allows lawful authority for disclosure where such disclosure is for (and is necessary for) the exercise of functions under section 11(3A) of the Senior Courts Act 1981 or a decision whether to exercise them. Section 11(3A) relates to the Lord Chancellor recommending to the Sovereign the removal of a senior judge on a motion of both Houses of Parliament. It would make no sense for section 139(5), which prevents disclosure of confidential information **<u>to</u> the person it is about** without the provider's consent, to apply to section 139(4)(c), which simply makes it lawful for confidential information obtained about a judge to be used, where

necessary, by the Lord Chancellor in considering whether to recommend that judge's dismissal.

66. The fourth situation in section 139(4)(d) allows lawful authority for disclosure where such disclosure is for (and is necessary for) the exercise of functions under section 108 of the Constitutional Reform Act 2005 or a decision whether to exercise them. Section 108 relates to the disciplinary powers of the Lord Chancellor and the Lady Chief Justice over judges. Once again, it would make no sense for section 139(5), which prevents disclosure of confidential information **to the person it is about** without the provider's consent, to apply to section 139(4)(d), which simply makes it lawful for confidential information obtained about a judge to be used, where necessary, by the Lord Chancellor and the Lady Chief Justice in considering whether to discipline them.

67. The fifth situation in section 139(4)(e) allows lawful authority for disclosure where such disclosure is required, under rules of court or a court order, for the purposes of legal proceedings. Yet again, it is hard to see the relevance of section 139(5) to this provision. Section 139(4)(e) preserves the right of the court to order disclosure of confidential information for the purposes of legal proceedings.

68. In my judgment, sections 139(4)(b)-(e) concern situations to which section 139(5) has no real relevance. It could be said that section 139(5)(a), providing for information given by one person about another to be information relating to them both, is of general application. But that is not what we have to decide. It is plain, in my judgment, as the JAC ultimately accepted, that section 139(4)(b) is not materially qualified by section 139(5). In other words, the person providing the information does not have to provide their consent before it can be lawful for the JAC to disclose negative material to the candidate for the purposes of the selection procedure where it is necessary to do so.

69. I return, then, the questions I posed at [64] above. Section 139(4)(b) is not, in my judgment subject to the consent provision in section 139(5)(b). The second question was as to when it would be "necessary" for the JAC to disclose such information for the exercise of its functions. I am not sure that it is helpful for us to try to give an exhaustive answer to that question. The JAC has suggested that disclosure might be permissible in "exceptional circumstances". I am not sure that those words provide a helpful addition to "necessary". The provision is far broader than this case, and I would not want to fetter its application. On the facts of our case, I can certainly envisage circumstances in which a consultee refused consent to the disclosure of negative material to a candidate for that candidate's comments. In that situation, it seems to me that the JAC would have to decide whether, in all the circumstances of the particular case including the nature of the information and its importance to the appointment process, disclosure to the candidate was indeed necessary. That is the fifth of the five options that I mentioned earlier (see [13] above).

70. My conclusion in this regard is that the application of section 139 to this situation is not complex. Section 139 simply provides for three relevant options in relation to disclosure of negative material to candidates. Such material can be disclosed to the candidate (a) with the consent of the consultee and any relevant sub-consultee under section 139(4)(a), (b) without the consent of the consultees if the JAC determines that it is necessary to do so for the purposes of the selection exercise under section 139(4)(b), and (c) without the consent of the consultees by an order of the court where required for the purposes of legal proceedings under section 139(4)(e).

71. Section 139 does not, of course, prescribe how the JAC is to deal with negative material in the context of a selection exercise. It seems obvious to me, however, that each of the five options identified above is available to the JAC. It may, in its discretion, when in receipt of negative material about a candidate: (i) disregard the negative material, (ii) seek to explore the negative material at interview without making the candidate aware of it or making any direct reference to it, (iii) put the gist of the negative material to the candidate, whilst preserving the confidentiality of the consultee and sub-consultees (a process which will not always be possible), (iv) seek the consent of the consultee to disclose the negative material for the candidate's comments and then do so, if consent were granted, or (v) even if such consent were refused, decide to put the negative material to the candidate under section 139(4)(b). Each of the five options would be lawful, in an appropriate case.

Were the JAC's policy or practices as to the use of consultation material unlawful or unfair?

72. As mentioned at [13] above, the JAC's practice was not to seek consent from the consultee to disclose negative consultation material to the candidate "absent some exceptional set of circumstances". The JAC seeks to defend that practice on the basis that any other would make the selection exercises unwieldy and difficult. I do not accept that argument. It seems to me that the JAC has, in fairness, to consider whether and how it should take negative material into consideration. *Doody* makes that clear. In reality, it obviously does that now. As we see from the facts of this case, a decision was taken by the panels to explore the negative material about the claimant provided in relation to the "Working and Communicating with Others" competence. Effectively, the JAC adopted the second option I have described. Those questions elicited a detailed discussion about the Covid incident, which seems to have been important in the decision-making process. It could, as the claimant submits, have followed other options, including asking the Consultee for consent to put the negative material directly to the claimant.

73. In my judgment, the JAC was not entitled to adopt a practice or a policy of only seeking consent from the consultee to disclose negative consultation material to the candidate in an exceptional set of circumstances. One can envisage many circumstances in which each of the five options would be appropriate. No doubt, options one and two will be, by far, the most commonly adopted, but I do not think the JAC should fetter its discretion in advance by adopting the binary practice that Ms Stevens-Hoare described in her evidence. It is not any more burdensome for the JAC to have to consider the five options in every case. They already have to decide how to deal with negative material. It is just a question of being aware of the options and considering which is appropriate in the circumstances.

Was the JAC's use of negative consultation material concerning the claimant unlawful or unfair or in violation of the claimant's rights under article 8?

74. This issue concerns the way in which the JAC actually made use of the negative material it received in relation to the claimant. As I have already said, I do not see how this issue can be resolved without seeing the negative material in question. I have deliberately described the process that the JAC followed in some detail at [24]-[33] above.

75. We could speculate about what the negative material was about. We know it was not about the bullying incident, and it is plausible to imagine that it concerned the Covid incident. But we do not know, and no application was made early enough to make it possible to find out in time for the hearing of this application. In these circumstances, it would simply be unfair and inappropriate for us to decide, in ignorance of what the negative material actually said about the claimant, whether the JAC's actual use of it was unlawful, unfair or in violation of her article 8 rights.

76. That said, I think it is worth commenting that the evidence we have seen does **not** seem to support the proposition that the process adopted by the JAC in this case was obviously unfair. The Chair of the panel had clearly decided specifically to explore the "Working and Communicating with Others" competence without referring expressly to what had been said by the Consultee. She asked the claimant to speak about a time when she had had to assert her authority in a work environment. That took the claimant directly to the Covid incident. If the negative material was about the Covid incident (which I re-emphasise we do not know) then that was an apt way of finding out what the claimant had to say about it. It is true that the Chair did not put to the claimant that her description was not a good example of the "Working and Communicating with Others" competence, but at least, as I say, the claimant had an opportunity to tell her side of that story.

77. It is not clear from Ms Stevens-Hoare's evidence or the redacted minutes of the SCC meeting precisely what negative evidence was discussed in relation to the "Working and Communicating with Others" competence, but it is at least possible that it centred on the Covid incident. It is, however, clear from the minutes that the decision was based on **both** the negative material and the "similar issues" identified by the panel. The negative material did not, it is worth reiterating, concern the bullying incident as the claimant feared.

78. I do not find it necessary to go further in the analysis. It seems to me that, had the JAC decided from the five options to pursue the second option in this case, it would not, on the evidence we have been able to see, have been an unreasonable or unfair approach.

79. I would say two more things under this heading. First, as I have explained, sub-consultation is not unlawful. But negative material must be used fairly, and the JAC has to decide in each case between (at least) the five options I have enunciated. There may be other options in other circumstances – we cannot predict the future. Secondly, it should be made clear that it is not inappropriate for the SCC to decide to change the grading recommended by the panels. That is its job in an appropriate case. The facts of this case provide a good example. The panels seem to have regarded the Covid incident as a strong example of the claimant's ability to work and communicate with others. At the least, there could be two sustainable views about whether it was actually a strong example. The SCC seems to have thought it was not, and that it was rather a negative example. We do not know enough to decide either way. It is, however, worth commenting that the SCC would have been entitled to take its own view (even if different from the panels) as to the quality of the evidence that the claimant had demonstrated, taken alongside the negative material, in relation to this competence. That is particularly so if, in fact, the Covid incident was explored because it was the subject of the negative material.

80. In conclusion, therefore, I do not think we can decide, for the reasons I have given, whether the JAC's actual use of the negative material concerning the claimant was in fact unfair, unlawful or in violation of her article 8 rights.

Was the JAC's failure to inform the claimant that comments would be sought by the Consultee from sub-consultees unlawful or unfair or in violation of the claimant's rights under article 8?

81. I have already described the factual background to this issue at [14]-[17] above. In essence, in this case, the JAC did not inform the claimant in advance that comments about her competencies would be sought from sub-consultees, including her leadership judges. The claimant argued that it was crucial to her to know that this would happen, particularly because of the bullying incident. The selection exercise was, therefore, she submits, unfair. Two things are important to note immediately. The JAC's practice has now changed, and candidates in current competitions are able to see the guidance given to consultees which makes clear that information may be sought from sub-consultees. Secondly, this is an allegation of substantive, not procedural, unfairness. Procedural unfairness, as Singh LJ explained at [57] of *Talpada*, is about natural justice, bias or the opportunity to be heard. It may be noted that the allegation dealt with above (to the effect that the negative material was not put to the claimant) is a classic example of an allegation of procedural unfairness. Singh LJ explained the parameters of substantive unfairness at [59]-[65] of *Talpada*. The substantive allegation here is, in effect, that the claimant had a legitimate expectation that she would be told if anyone other than the Consultee were to be asked for comments about her. She suffered detriment as a result, because she went through a competition she might otherwise not have entered, and because negative comments from her leadership judges were taken into account in the determination of her application. As Singh LJ notes at [61] and [64] in *Talpada*, only substantive unfairness that amounts to an abuse of power is justiciable, and the court's role is principally to "correct errors of law made by public authorities and ensure that fair procedures have been complied with".

82. On the facts of this case, it is now accepted that it is desirable for candidates to be told that Consultees will be permitted to provide comments received from sub-consultees. I would entirely endorse that approach. Moreover, I would add that I do not think it is sufficient for the JAC to refer to the sub-consultation process merely by providing a link to "Guidance provided to the statutory consultee". In fairness, candidates should be told, in general terms at least how the sub-consultation process works and what categories of people may be sub-consulted.

83. In my judgment, therefore, the information process operated by the JAC at the time of this competition, which made no mention of sub-consultation in its pre-application materials, was neither appropriate nor fair. It is not an answer to this point to say that candidates "ought to know" that sub-consultation would take place, or that the process was widely understood or even that it was obvious that the Consultee could not know everyone, so would have to ask others. As the JAC itself said in its "Key Messages" document for 2022: "our processes are fair and transparent – every aspect of the process is clearly outlined on our website". The sub-consultation part of the process was not outlined, clearly, or at all, on the JAC's website in advance of this competition. It should have been.

84. As will appear, I do not think that this conclusion means that the JAC's decision not to select the claimant can or should be overturned. Once again, Singh LJ explains the position succinctly at [65]-[66] of *Talpada* as follows:

> 65. As I have said, in appropriate cases, the court will and must be able to correct an abuse of power. The doctrine of substantive fairness is an important tool which enables the court to ensure that a public authority acts lawfully and, in particular, does not abuse the powers which have been entrusted to it by Parliament. However, that doctrine does not and should not give the court a wide-ranging discretion to overturn the decision of a public authority where it considers it to be unfair. This is not only because that risks blurring the important dividing line between the function of the court and the function of the executive. It is also because the doctrines according to which a court will interfere with the decisions of the executive need to be set out in reasonably clear and predictable form so that everyone can arrange their affairs accordingly. This (the principle of legal certainty) is as much an important aspect of the rule of law as is the need to correct abuse of power.
>
> 66. Turning to the facts of the present appeal, I have come to the clear conclusion that, for the reasons set out more fully by Hallett LJ, this case comes nowhere near the sort of extreme case where it can be said that there was unfairness amounting to an abuse of power.

85. The unfair failure to inform candidates in advance about the sub-consultation process was wrong and has already been partially corrected. But it comes nowhere near the kind of extreme case in which the court should, in my judgment, intervene to quash the decision made.

What, if any, relief should be granted to the claimant?

86. As I have explained, the JAC misunderstood the correct approach to dealing with negative material provided by consultees. I would be prepared to declare, in effect, that the JAC's practice of only considering in "some exceptional circumstances" options three, four or five (see [13] above), by which negative material might be disclosed to the candidate for their comments, was an inappropriate fetter on its discretion. I suggest an appropriate formulation at [88(ii)] below. It has, however, not been shown that that practice had an adverse effect on the claimant in this case.

87. The JAC also failed to explain its sub-consultation process in advance to the claimant and other candidates in the 2021/2022 circuit judge competition, as it should have done. I would not be prepared to quash the decision affecting the claimant that followed, but I would be prepared to declare that the JAC ought, as a matter of fairness, to explain its sub-consultation process in advance to candidates.

Conclusions

88. For the reasons I have given, this application will be allowed in part. I would declare (subject to any submissions that may be made by the parties) that:

    i) Section 139(5) of the Constitutional Reform Act 2005 does not preclude disclosure of information given by one identified or identifiable individual (A)

about another (B) where any of the circumstances specified under section 139(4) apply.

ii) Where the JAC is considering whether to disclose such information, or the gist of it, to B for the purposes of its functions under Part 4 of the Constitutional Reform Act 2005 (or regulations or rules under it), it would be an unlawful fetter on the exercise of its discretion to proceed on the basis that such disclosure should only occur "in some exceptional circumstances".

iii) The conduct of a fair selection process under section 88 of the Constitutional Reform Act 2005 requires that the JAC should inform prospective candidates of the classes of person from whom opinions or information about them may be sought.

89. As I have made clear at [48]-[52] above, I do not think that the claimant's reliance on article 8 adds anything to her common law claims in this case.

**LORD JUSTICE UNDERHILL:**

90. I respectfully agree with the Master of the Rolls' judgment and with his dispositive reasoning. I only wish to add something about the two statutory provisions which were (at least until the hearing before us) relied on by the JAC as underpinning its practices as regards consultation and confidentiality – that is, regulation 30 of the Judicial Appointments Regulations 2013 and section 139 of the Constitutional Reform Act 2005.

Regulation 30

91. It may not at first sight seem surprising that the JAC's position, both in own thinking and in its case in these proceedings, was that consultation exercises of the kind with which we are concerned – that is, the collection of information about the qualities of multiple candidates from "sub-consultees" who know their work – are conducted pursuant to regulation 30: it is, after all, headed "Consultation". But that first impression is very hard to reconcile with the actual content of the regulation. I can summarise the difficulties as follows.

92. The starting-point is that on a straightforward reading regulation 30 appears to be directed at consultation only with single individuals, namely:

(a) when selecting High Court judges, the Lord Chief Justice ("the LCJ"), and

(b) in the case of any other office, "a person who has held [that] office" or has "other relevant experience" ("the Consultee").

In this case we are concerned with (b), the Consultee being the Deputy Senior Presiding Judge. But someone in that position will only in rare cases have held any of the offices for which the JAC recruits and they can thus only be a proper consultee if they can be said to have "relevant experience". Absent any other context, the fact that that qualification is an alternative to the qualification of having held the office in question strongly suggests that the "experience" referred to is the kind of experience that you would get by having held that office. But even if "relevant experience" could be stretched so as to encompass experience of the qualities of the candidates, that still does

not help because, as the Master of the Rolls points out, the SPJ or their deputy will have no personal knowledge of many or most of the candidates. In truth, the role of "Consultee" under present arrangements is not (save occasionally and by chance) to supply information based on their own experience but to gather and pass on to the JAC information and opinions about the candidates obtained from others. Nothing in the language of regulation 30 suggests such a role, and it is particularly hard to reconcile with the focus on a single consultee. The latter point is reinforced by the terms of paragraph (2), which allow the JAC (though only with the agreement of the LCJ and its own Chair) to consult "another person" – which most naturally reads as one other person – in class (b): that would make little sense if there was a general power to sub-consult.

93. It might perhaps be possible, despite those difficulties, to construe regulation 30 as conferring a power to conduct an information-gathering exercise of that kind if there were strong contextual considerations indicating that that was the legislative intention. As to that, regulation 30 originated in an equivalent, though not identical, provision in section 88 (3) of the 2005 Act itself (which was repealed with effect from the coming into force of the Regulations); but we were not referred to any materials that shed light on the purpose either of that original provision or of the version in which it was re-enacted in 2013. In the absence of such material, I am frankly uncertain what kind of consultation, and for what purpose, the regulation or its predecessor provision envisaged; but I am not persuaded that it provides any statutory foundation for the kind of consultation exercise that we are concerned with in this case.

94. It does not, however, follow that no statutory basis for such consultation exists. On the contrary, I agree with the Master of the Rolls that it can readily be found in section 88 (1) of the 2005 Act. The phrase "selection process" is clearly capable of covering an exercise to obtain information and opinions about the qualities of candidates from persons who have personal experience of their work. Mr Collins submitted that such a process was unnecessary and that the JAC could properly proceed on the basis of the references which the candidate was required to supply and its own assessment. That seems to me highly debatable, but all that matters for present purposes is that the JAC's view that such an exercise is valuable is on any view a reasonable one.

95. I have thought it right to give my own analysis of the effect of regulation 30 because I would go rather further than the Master of the Rolls in holding that it affords no statutory basis for the kind of consultation exercise carried out by the JAC in the present case. But since we are agreed that section 88 (1) supplies an alternative basis that does not affect my agreement with him on the lawfulness of such exercises.

Section 139

96. The question about section 139 is how the prohibition on (non-consensual) disclosure in subsection (5) (b) relates to the other provisions of the section. Until the hearing the position of the JAC was that it was "freestanding", and in particular that it operated irrespective of the provisions of subsection (4). As the Master of the Rolls demonstrates, that construction would produce results which Parliament cannot have intended: most obviously, it would be extraordinary if the prohibition would apply even if a court believed that disclosure was necessary in the interests of legal proceedings (head (e)). It was, as I understood it, because of those consequences that Sir James

Eadie abandoned the position adopted in his skeleton argument. However, I think it worth explaining explain how that result is compatible with the language of the section.

97. I start by identifying the structure of subsections (1)-(4). This can be analysed as follows:

(1) Subsection (1) is the primary provision which renders disclosure of the prescribed information unlawful in the absence of lawful authority. Subsections (2)-(4) gloss or define the key terms used in it. Specifically:

(2) Subsection (2) identifies the "relevant provisions" under or for the purposes of which the information in question must have been disclosed – i.e. (in short) a judicial appointment or disciplinary process.

(3) Subsection (3) sets out when information counts as "confidential" – namely when it "relates to" an identified or identifiable individual, defined as the "subject".

(4) Subsection (4) specifies what constitutes lawful authority – in short, (a) the consent of the subject(s); (b) where necessary for the purpose of a judicial appointment process; (c)/(d) where necessary for the purpose of a disciplinary process against a judge; and (e) where required or ordered for the purpose of legal proceedings. Those circumstances are alternatives. Thus – most pertinently for our purposes – if head (b) is satisfied, disclosure will be authorised even if head (a) is not.

That is the structure into which subsection (5) has to fit. It has two provisions – (a) and (b) – which I consider in turn.

98. As to subsection (5) (a), it is clear that its effect is to expand, or in any event clarify, the reference in subsection (3) to an individual to whom the information "relates". That was necessary because as a matter of ordinary language information would (or at least might) only be understood to "relate to" a person, so that they are the "subject" of it, if it is information *about* them. But subsection (5) (a) makes it clear that in this context information is to be taken as "relating to" not only the person who it is about but also the person (if identifiable) who gives it ("the source"); and it follows that both are to be treated as falling within the terms of subsection (3) and thus, however counter-intuitively, as being "subjects" of the information. Although the prohibition is framed in terms of the disclosure of the information (which includes "opinions") the essential purpose is evidently to protect the identity of the source, who will be identifiable if the information is disclosed.

99. As for subsection (5) (b), this prohibits the disclosure to the person who the information is about of the identity of the person who gave it (though arguably redundantly since subsection (1) would anyway do the work once the source is brought into the definition in subsection (3)). But the foregoing analysis of the structure of section 139 shows that it must be subject to subsection (4): since subsection (5) feeds, via subsection (3), into the meaning of "confidential information" in subsection (1), it must be subject to the exception for lawful authority which is provided for in it.

100. That is intended to do no more than spell out why Sir James's concession is consistent with the drafting of section 139. It follows, as the Master of the Rolls says, that

disclosure, without their consent, of the identity of the source of information about the candidate is in principle permitted in the circumstances identified in section 139 (4) (b) – i.e. where it is necessary for the purpose of the exercise by the JAC of its functions in the selection of judges. However, the fact remains that section 139 (5) means that consultees can expect their identity to be kept confidential unless the JAC believes that it is necessary to disclose it (or one of the other heads in subsection (4) applies). That point is worth making because Mr Collins submitted that part of the purpose of the introduction of the new system for judicial appointments under the 2005 Act was to do away with the old system of "secret soundings" altogether. That overstates the position. The enactment of section 139 (5), which maintains at least a starting-point that the identity of the sources of information about candidates should not be disclosed, shows that Parliament appreciated the value of confidentiality, in the context of a more professional and transparent selection process, even though it could not be assured in all cases. As the Master of the Rolls identifies, there are a number of ways in which the JAC may, depending on the particular circumstances, maintain the confidentiality of a source without compromising fairness.

**LADY JUSTICE NICOLA DAVIES:**

101. I agree with the judgment of the Master of the Rolls. Save that I prefer the Master of the Rolls's conclusions on Regulation 30 at paragraphs 54-56 to those of Lord Justice Underhill at paragraphs 92-95, I also agree with Lord Justice Underhill's judgment.