

Neutral Citation Number: [2009] EWCA Civ 414

Case No: C1/2008/1466

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
The Hon Mr Justice McCombe

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 21/05/2009

Before:

LORD JUSTICE LAWS LORD JUSTICE DYSON and

LORD COLLINS OF MAPESBURY

Between:

Wood - and -	Appellant

Mr Martin Westgate (instructed by Liberty) for the Appellant **Mr Sam Grodzinski** (instructed by **The Metropolitan Police Service**) for the Respondent

Hearing dates: 28 & 29 January 2009

Approved Judgment

LORD JUSTICE LAWS:

INTRODUCTION

1. This is an appeal against the judgment of McCombe J ([2008] EWHC Admin 1105) given in the Administrative Court on 22 May 2008 by which he dismissed the appellant's application for judicial review. The appellant's complaint was and is that officers of the respondent Commissioner's police force had taken and retained photographs of him in central London in the context of a meeting on 27 April 2005 in Grosvenor Square, and that these actions were unlawful and in violation of his rights guaranteed by Articles 8, 10, 11 and 14 of the European Convention on Human Rights (ECHR). Permission to appeal was granted by the learned judge below.

THE FACTS

The Judge's Account

- 2. The following account, taken from the judge's judgment, gives the primary facts. After setting it out I must address certain further matters which are of some importance.
 - "3. At the relevant time the Claimant was a media co-ordinator employed by an unincorporated association known as Campaign against Arms Trade ('CAAT'). CAAT's name clearly indicates its objects. The Claimant had and has no criminal convictions and has never been arrested as a result of any campaigning activities or otherwise.
 - 4. Reed Elsevier PLC ('Reed') was the parent company of Spearhead Exhibitions Limited ('Spearhead') which is concerned in the organisation of trade fairs for various industries, including the arms industry. One of the events with which it has been concerned is an exhibition held every other year in London called Defence Systems and Equipment International ('DSEi'). Because of the association with Spearhead, Reed's offices in this country had been subjected to demonstrations, some involving criminal damage. Other damage had been caused to Reed's premises in the Netherlands.
 - 5. Prior to Reed's Annual General Meeting on 27 April 2005 (due to take place at an hotel in Grosvenor Square in London) the police were contacted by a member of Spearhead staff explaining that the company had recently noted the purchase of single shares entitling the new holders to attend the forthcoming AGM. Some five or six share transactions were said to have involved members of CAAT. One individual known to hold a proxy for a shareholder was a woman, called in this case 'EA', a member of CAAT until 2003, who had a history of unlawful activity against organisations involved in the defence industry and had been convicted of a number of offences in that context.

- 6. The Defendant took the view that there was a real possibility of demonstration at the AGM and that unlawful activity might occur. He (or his senior officers) therefore decided to deploy a number of officers around the hotel where the meeting was to be held. One inspector, three sergeants and 21 constables were so allocated. In addition, two 'Forward Intelligence Teams' ('FITs') of three and two officers respectively and an 'Evidence Gathering ('EG') Team' of three officers and a civilian photographer were engaged. These officers were in uniform and the photographer, although a civilian, wore a uniform identifying him as engaged with the police.
- 7. The EG team gathers intelligence by taking photographs and making notes of significant events which may be thought to be of potential evidential value; the FIT teams are used to monitor people's movements at events of the kind in question to assist in the efficient deployment of resources.
- 8. Before the meeting a CAAT member ('KB') approached the officer in charge and asked to hand out leaflets at the hotel entrance to those attending the AGM. The officer agreed to this on the understanding that no obstruction would be caused and KB would be acting alone. KB did carry on her leafleting activity without problems arising.
- 9. The Claimant attended the AGM having previously bought a share in Reed. He attended with about six other CAAT members, but entered the meeting with only one other. He states that his purpose was to learn more about Reed's involvement with Spearhead and to ask appropriate questions.
- 10. At the meeting two people, EA (already mentioned) and one RH, were ejected by private security staff, apparently after chanting slogans. There is no suggestion that the Claimant was in any way involved in this activity. His participation appears to have been confined to asking one unobjectionable question. There appears to have been no other disturbance at the meeting.
- 11. The Claimant left the meeting as soon as formal business was over, without staying for the social reception held thereafter for which other shareholders did stay. He left the hotel in the company of another CAAT employee, a Mr. Ian Prichard. They spoke to KB and, while they were doing so, a man (whom the Claimant believed to be a police officer, but who was in fact the civilian photographer already mentioned) got out of a police vehicle and began to take photographs. There is a dispute as to how many photographs were taken but the Claimant's evidence is that the photographer was working continuously for some time and approached to within two metres of the Claimant and Mr. Prichard. The photographer says that he customarily tries to keep a safe distance from subjects in order not to invade their

'personal space' and for his own safety and the safety of his equipment. In evidence, seven images have been produced of which only two show the Claimant clearly.

- 12. The Claimant complains that he was not told the reason why the photographs were being taken. On the other hand, it appears that he did not ask the officers for the reason either.
- 13. The Defendant's evidence is that, after eviction from the meeting, EA joined KB outside the hotel. It is stated that the Claimant and Mr. Prichard stopped to speak to KB (as they accept) and that they were joined by EA. The Claimant says that he cannot recall EA joining the group. In his evidence, a sergeant from the EG team states that he decided that it was appropriate to photograph the Claimant and to try to establish his identity. His reasons for doing so were the sighting of the Claimant in a group with EA and the possibility that unlawful activity in the meeting, from which EA had been ejected, might later come to light. Other officers also give evidence of having seen the Claimant with EA at this time.
- 14. The Claimant and Mr. Prichard walked away from the hotel towards an Underground railway station. They were followed by officers from the EG team. The Claimant says that a police vehicle pulled up near to him and Mr. Prichard and about four officers came and stood near to them. The Claimant was asked for his identity, as was Mr. Prichard. Mr. Prichard identified himself, but the Claimant asked whether he was obliged to do so and, on being told he was not, declined to answer. They both refused to answer questions about the AGM. They were told that they were free to leave the scene and that they were not being detained, although two officers then followed them to the station, trying at one stage to get the assistance of railway staff to obtain the Claimant's identity from the Claimant's travel document. The Defendant's evidence is that the two men were followed in order to see whether they were truly leaving the area or whether they might return to the venue of the AGM or become involved with a different demonstration which was thought by the police to be occurring in St. James's Square. There is no evidence to suggest that the exchanges between the police on the one hand and the Claimant and Mr. Prichard on the other hand were other than polite on each side.
- 15. The Defendant has adduced detailed evidence as to retention of photographs taken in such circumstances as these. It appears that they are retained subject to strict controls. Usually they are kept only for use by officers of the Public Order branch of the force. Copies are not permitted to be taken outside the offices of that branch. The one exception to this is that at future public events where there is a potential need to identify persons involved in unlawful activity, who may have participated in

similar events previously, a sheet of relevant images may be given to a limited number of EG and/or FIT team members. However, the images do not identify the names of those depicted, each image merely being allocated a code. The sheets are returned after the event and are then destroyed.

- 16. It seems that, in this case, the police did subsequently find out the Claimant's identity. They apparently found from company records the names of the new shareholders in Reed. They were able to ascertain the identities of all others, apart from the Claimant, and by process of elimination worked out that the person photographed in the company of Mr. Prichard and others was the Claimant.
- 17. The perceived need for photographs generally in the present case appears to have been because of police fears of unlawful activity at the DSEi event to be held in September 2005, after the disturbances at Reed's premises in this country and in the Netherlands, and the association on this occasion of the Claimant and others with EA who had previous convictions for unlawful activities in related manifestations. The Defendant says that, but for the proceedings in this court, the retained photographs of the Claimant would have been destroyed shortly after the September 2005 event. It is said that such photographs are not accessible for general intelligence purposes but are used only if a civil claim is made against the police in relation to the recorded events or if a specific offence has come to light and it is believed that the images may provide material evidence in relation to that offence.
- 18. The Claimant says that he felt scared and intimidated by the events in issue. He also says that the incident was 'extremely upsetting' and that he 'felt shaken and frightened as a result'. He says that he feels very uncomfortable that information may be kept about him indefinitely and may be used without his consent or knowledge. The Defendant, through Counsel, accepts that the Claimant may have felt 'unsettled' by what occurred. However, the Claimant relies on his unchallenged evidence to the effect that I have just outlined, asserting that the incident was more than just 'unsettling' so far as he was concerned."

Minor Matters

3. There are next two minor issues with which I can deal shortly. First, the dispute as to how many photographs were taken (paragraph 11 in the judge's account) merely reflects the unsurprising contrast between the appellant's perception that he was being photographed continuously (paragraph 9 of his first statement, 30 October 2005) and the fact that in the result there were only two clear "front-on" images of him (statement of the police photographer Neal Williams, 23 November 2006, paragraph 6). Secondly the question whether there was any association outside the hotel between the appellant and the woman EA (the judge's paragraph 13) is again a matter of perception: it is plain that officers believed there was some association, whether in fact there was or not.

What Did the Police Hope to Gain?

4. I stated (paragraph 2) that there were certain further matters of some importance. The first is to consider what the police hoped to gain from the exercise. On this we have in particular the statements of the officer in charge, CI Claire Weaver (27 November 2006), and of one of the evidence gatherers, Sgt David Dixon (24 November 2006). Taking them together it is clear that the pictures were taken (1) so that if disorder erupted and offences were committed (or it transpired that offences had already been committed inside the hotel), offenders could be identified, albeit at a later time if necessary; and (2) so that persons who might possibly commit public order offences at the DESi fair in September could be identified in advance: this would or might assist the police operation at the forthcoming event.

What Was Done with the Photographs?

- 5. The second matter, about which for reasons that will appear I need to say rather more, is what was done with the photographs. Within the evidence that was before the judge there is first the statement of the photographer Mr Williams to which I have already referred. The pictures were initially recorded on a flash card in Mr Williams' digital camera. Copies of the original images were recorded onto three CD ROMs. Of these the master CD and a working copy were stored at the headquarters of what is called SCD4(3), which is the Forensic Science Branch of the Metropolitan Police. Williams says (paragraph 13) that the images on these two CDs could only be read on SCD4(3) computers with the requisite software. Further copies in what is known as JPEG format were also stored at SCD4(3) headquarters. Copies in the same format were forwarded to CO11, which is the Public Order Branch. The JPEG images, as I understand it, could be viewed on any computer. The master CD, working copy, and JPEG copy were all securely stored at SCD4(3), but (Williams paragraph 16) no information is kept there which of itself would enable anyone to correlate any particular image with an identified individual. Rather a database keeps information about the assignment on which the pictures were taken, the date, basic details of the event, the name of the photographer, and the requesting or commissioning officer (in this case CI Weaver).
- 6. The part played by the Public Order Branch, CO11, in these arrangements was described by Superintendent Gomm (statement, 28 November 2006), who works in CO11. He confirms (paragraph 12) that after an event where overt filming has been carried out by the Metropolitan Police, the photographer forwards a CD containing the images to CO11. They are securely stored and access to them is restricted, monitored and supervised. An image is only circulated to officers outside CO11 if there is a belief that its subject may attend some future event and commit offences (paragraph 14). In that case a numbered sheet of photographs is circulated to the relevant officers attending the event. Each officer is required to hand in his sheet for destruction at the end of the day.
- 7. Images kept by CO11 are reviewed after about a year and only retained if they have any "ongoing significant intelligence value", something which is difficult to define precisely (paragraph 12). In the present case Superintendent Gomm says (paragraph 13) that but for the commencement of these proceedings the images of the appellant would have been destroyed after the DSEi exhibition in September 2005, which it appears he did not attend.

- 8. That would likely have served as a sufficient account of the somewhat complex arrangements within the Metropolitan Police for the retention and use of photographs taken at an overt filming event, but for the receipt by the court, at a time when the preparation of this judgment was well under way, of further material from the parties. An exchange of correspondence between them was generated by an article in the Guardian newspaper published on 23 February 2009 headed "Britain faces summer of rage police". The article was based in part on an interview with Superintendent Hartshorn, a senior officer within CO11. The appellant says that Superintendent Hartshorn revealed further significant information which assists his case. I directed that the parties file additional written submissions on the impact of this material by 23 March 2009, and that has been done.
- 9. It is submitted for the appellant that the new material shows as a matter of fact that there is a database of images, searchable by name, held within CO11; that the criteria for the inclusion of any person's image on this database are unclear; and that the sheets of photographs to which Superintendent Gomm referred (see paragraph 6 above) described as "spotter cards" are sometimes supplied to members of FIT teams where the subjects "could be... known activists. Known people who've caused us problems", and "a number of people we might be looking for".
- 10. The respondent's substantive observations on the factual issues arising from Superintendent Hartshorn's interview are contained in a letter to Liberty of 19 March 2009. Amongst other things it is stated that there is indeed a database of images held by CO11. In his further written submissions of 23 March 2009 counsel for the respondent complains of comments in a further piece in the Guardian on 7 March 2009 (the main article on the front page) that Liberty did not know about the database and that "police do not appear to have disclosed to the court [sc. in these proceedings, which had by that date been reserved for judgment] that they were transferring the private details of campaigners to a database". In fact this database had been referred to at paragraph 27 of the respondent's Summary Grounds for Resistance dated 9 December 2005; no further reference was made to it because, as is common ground, the appellant's image never appeared on it. The appellant, knowing what was in the respondent's Summary of Grounds, advanced no argument and pursued no enquiry relating to the CO11 database.
- 11. As for the other points summarised in the appellant's further submissions, the letter of 19 March 2009 states the criteria for inclusion on the database: observed or suspected participation in unlawful activity at the event when the pictures were taken, or participation of such activity at an earlier time. Mere presence at a demonstration or other event is not enough. The appellant's image was never placed on a "spotter card".
- 12. I have thought it right to summarise this new material given the reliance placed on it by the appellant, the terms of the respondent's reply, and my own direction seeking the parties' further submissions. However for reasons I shall explain it does not, in my judgment, affect the outcome of the case and I would not grant any formal leave to admit it as new evidence.

The Published Policy

13. There is also before us, as it was before the judge, evidence of a published policy evolved by the Metropolitan Police on "the Use of Overt Filming/Photography". Under the heading "Policy Statement" it has this:

"The Metropolitan Police Service (MPS) is committed to providing MPS personnel with a particularly useful tactic to combat crime and gather intelligence and evidence relating to street crime, anti-social behaviour and public order.

It may be used to record identifiable details of subjects suspected of being involved in crime or anti-sociable [sic] behaviour such as facial features, visible distinctive marks e.g., tattoos, jewellery, clothing and associates for the purposes of preventing and detecting crime and to assist in the investigation for all alleged offences.

This tactic may also be used to record officers' actions in the following circumstances. Maintaining public confidence and to justify police tactics. During incidents where police face substantial levels of violence, immigration arrests, detention of mentally ill persons and actions taken during high profile or critical incidents.

To demonstrate to the public that cameras are deployed overtly officers should clearly identify themselves as police officers or police staff and not hide the fact that they are filming. This can be achieved by:

- Use of uniformed officers
- Use of marked vehicles

When a pre-planned deployment is authorised officers must be able to clearly state the reasons for the filming or photography and provide a copy of an explanatory leaflet. These contain details of the purpose of the filming and provide guidance on how members of the public may obtain further information and access to their images."

Then under the heading "Associated Documents and Policies" three items are listed, of which the first is "Standard Operating Procedures for 'Use of Overt Filming/Photography". This document has not been disclosed.

THE CONVENTION RIGHTS

14. The material provisions of the ECHR are as follows:

"Article 8

- 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... for the prevention of disorder or crime... or for the protection of the rights and freedoms of others.

Article 10

- 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
- 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security,... public safety, for the prevention of disorder or crime... for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

- 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime,... or for the protection of the rights and freedoms of others...

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

It is not I think necessary to cite the material provisions of the Human Rights Act 1998 (HRA), which gave effect to the ECHR in our domestic law. It is common ground (and elementary) that the Metropolitan Police were by law obliged to respect the appellant's Convention rights.

ARTICLE 8

- 15. The principal issue in the case as the argument has developed is whether the appellant's right to respect for his private life, guaranteed by ECHR Article 8, was violated by the police taking and retaining photographs of him on 27 April 2005.
- (1) The Scope of Article 8
- 16. Article 8 is one of the provisions of the ECHR most frequently resorted to in our courts since the HRA came into force. It falls to be considered most often in immigration cases, where the nature of the actual or putative interference with private and family life is plain enough: the claimant complains that if he is removed or deported he will be separated from family members, often a spouse and children, settled in the United Kingdom. In this present case, however, the nature of the claimed interference is more elusive. So is the nature of the private or family life interest which is said to be assaulted. It is useful therefore to have in mind the many facets of the Article 8 right acknowledged by the European Court of Human Rights, and if it can be ascertained what it is that links them.
- 17. The leading case of *Von Hannover v Germany* (2005) 40 EHRR 1 concerned the publication of photographs of Princess Caroline of Monaco engaged in various everyday activities such as horse riding, shopping, dining in a restaurant with a companion, on a skiing holiday, leaving her Paris home with her husband and tripping over an obstacle at a private beach club in Monaco. The Strasbourg court held that there had been a violation of Article 8, even though all the photographs were taken when the Princess was in a public place except those, taken at long range, when she was at the private beach club. I should cite the following passages from the judgment:
 - "50. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name, or a person's picture.

Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Art. 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'.

- 51. The Court has also indicated that, in certain circumstances, a person has a 'legitimate expectation' of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant 'would have had a reasonable expectation of privacy for such calls'.
- 52. As regards photos, with a view to defining the scope of the protection afforded by Art.8 against arbitrary interference by public authorities, the Commission had regard to whether the

photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public.

- 53. In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life..."
- 18. In *Marper v UK* (Applications no. 30562/04 and 30566/04, judgment delivered on 4 December 2008) the applicants were arrested on suspicion of serious offences and their fingerprints and DNA samples were taken. They were in due course acquitted (or the charge not pressed). They asked for their fingerprints and DNA samples to be destroyed, but in both cases the police refused. They brought judicial review proceedings to challenge the police decision, culminating in an appeal to their Lordships' House, but were unsuccessful. The Strasbourg court said this, under the heading "General Principles":
 - "66. The Court recalls that the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *Pretty v*. the United Kingdom, no. 2346/02, § 61, ECHR 2002 III, 35 EHRR 1, and Y.F. v. Turkey, no. 24209/94, § 33, ECHR 2003 IX, 39 EHRR 34). It can therefore embrace multiple aspects of the person's physical and social identity (see Mikulić v. Croatia, no. 53176/99, § 53, ECHR 2002-I, BAILII: [2002] ECHR 27). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, among other authorities, Bensaid v. the United Kingdom, no. 44599/98, § 47, ECHR 2001, 33 EHRR 10, I with further references, and Peck v. the United Kingdom, no. 44647/98, § 57, ECHR 2003 I, 36 EHRR 41). Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family (see mutatis mutandis Burghartz v. Switzerland, 22 February 1994, § 24, Series A no. 280 B; and *Ünal Tekeli v. Turkey*, no. 29865/96, § 42, ECHR 2004 X (extracts), 42 EHRR 53). Information about the person's health is an important element of private life (see Z. v. Finland, 25 February 1997, § 71, Reports of Judgments and Decisions 1997 I, 25 EHRR 371). The Court furthermore considers that an individual's ethnic identity must be regarded as another such element (see in particular Article 6 of the Data Protection Convention quoted in paragraph 41 above, which lists personal data revealing racial origin as a special category of data along with other sensitive information about an individual). Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, Burghartz, cited above, opinion of the Commission, p. 37, § 47, and Friedl v.

Austria, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45, 21 EHRR 83). The concept of private life moreover includes elements relating to a person's right to their image (*Sciacca v. Italy*, no. 50774/99, § 29, ECHR 2005-I, 43 EHRR 20).

- 67. The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116, 9 EHRR 433). The subsequent use of the stored information has no bearing on that finding (*Amann v. Switzerland* [GC], no. 27798/95, § 69, ECHR 2000-II, 30 EHRR 843). However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see, *mutatis mutandis*, *Friedl*, cited above, §\$49-51, and *Peck v. the United Kingdom*, cited above, § 59)."
- 19. These and other cases show that the content of the phrase "private and family life" is very broad indeed. Looking only at the words of the Article, one might have supposed that the essence of the right was the protection of close personal relationships. While that remains a core instance, and perhaps the paradigm case of the right, the jurisprudence has accepted many other facets; so many that any attempt to encapsulate the right's scope in a single idea can only be undertaken at a level of considerable abstraction. But it is an endeavour worth pursuing, since we need if possible to be armed at least with a sense of direction when it comes to disputed cases at the margin.
- 20. The phrase "physical and psychological integrity" of a person (*Von Hannover* paragraph 50, *Marper* paragraph 66) is with respect helpful. So is the person's "physical and social identity" (*Marper* paragraph 66 and other references there given). These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual. I claim no originality for this description. In *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 Sir Anthony Clarke MR, giving the judgment of the court, referred at paragraph 31 to Lord Hoffmann's emphasis, at paragraph 51 of *Campbell v MGN Ltd* [2004] 2 AC 457, upon the fact that "the law now focuses upon the protection of human autonomy and dignity 'the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.'"
- 21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him should make him master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the "zone of interaction" (*Von Hannover* paragraph 50) between himself and others. He is the presumed owner of these aspects

of his own self; his control of them can only be loosened, abrogated, if the State shows an objective justification for doing so.

- 22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if Article 8 is to be engaged) attain "a certain level of seriousness". Secondly, the touchstone for Article 8(1)'s engagement is whether the claimant enjoys on the facts a "reasonable expectation of privacy" (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the State pursuant to Article 8(2). I shall say a little in turn about these three antidotes to the overblown use of Article 8.
- 23. As for the first "a certain level of seriousness" see for example *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307, paragraph 28 *per* Lord Bingham of Cornhill:

"It is true that 'private life' has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms, and I incline to the view that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level."

24. As for the second – a "reasonable expectation of privacy" – I have already cited paragraph 51 of *Von Hannover*, with its reference to that very phrase, and also to a "legitimate expectation" of protection. One may compare a passage in Lord Nicholls' opinion in *Campbell* at paragraph 21:

"Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

In the same case Lord Hope said at paragraph 99:

"The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity."

In *Murray v Big Pictures (UK) Ltd* Sir Anthony Clarke MR referred to both of these passages, and stated:

- "35... [S]o far as the relevant principles to be derived from *Campbell* are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. ...
- 36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."
- 25. We can see, then, that while an individual's personal autonomy makes him the master of all those facts about his own identity of which the cases speak, his ownership of them depends by law on there being a reasonable expectation in the particular case that his privacy will be respected. This may operate as a factor limiting the scope of the Article 8 right. As I will shortly explain, it is a major dimension of Mr Grodzinski's case on behalf of the respondent Commissioner that what happened here took place in a public street, where people may take photographs at any time; there was, he says, no reasonable expectation that the appellant would not be photographed.
- The third safeguard against too pervasive an application of Article 8 consists in the 26. relation between Article 8(1) and 8(2). The first two antidotes, a certain level of seriousness and a reasonable expectation of privacy, though clearly important, still allow an open gate to Article 8(1) in very many circumstances; but it will often be closed by Article 8(2). Once the 8(2) stage is reached, and the court is looking for a justification from the State for what would otherwise amount to a violation, the first question will be whether the action complained of was taken or to be taken in pursuance of a legitimate aim; that is always crucial. If that condition is met, there will be other issues (such as compliance with the requirement of legal certainty). Important for present purposes is the familiar question, whether the action is proportionate to the legitimate aim in whose service it was taken. At that stage, subject always to context and the case's particular subject-matter, the court is likely to acknowledge and attribute a margin of discretion to the responsible State. This exercise provides an important contrast with the court's task under 8(1). Its application may amount to a significant restraint upon the bite of Article 8.
- I recognise, of course, that the court's assessment of proportionality will always and necessarily be sensitive to the facts of the particular case, and the scope of the State's margin of discretion must vary according to the importance of the impugned right in the particular instance, the force of the legitimate aim involved, and other balancing factors. The overall point to be made is that while the application of 8(1) and that of 8(2) are logically separate, and the second arises only if the first is fulfilled, there is a symbiosis: Article 8(1) is generously applied, but the justifications properly available under 8(2),

- not least given the margin of discretion which the decision-maker is likely to enjoy, may sometimes cut its application close to the quick.
- 28. The value of this approach is I think to be understood in light of the important fact that the paradigm case of Article 8's application is where the putative violation is by the State itself. It seems to me entirely in harmony with the fair balance which falls to be struck throughout the Convention provisions between the rights of the individual and the interest of the community (see for example *Sporrong v Sweden* (1982) 5 EHRR 35, paragraph 69) that where State action touches the individual's personal autonomy, it should take little to require the State to justify itself, but equally if (and I repeat, this is critical) the action complained is taken in good faith to further a legitimate aim a proper justification may be readily at hand. This is no more than the rule of law in action. Thus the State organ in question, here the police, is subjected by Article 8 to proper standards of conduct; but through the margin of discretion recognised in the jurisprudence, the law will allow it proper practical scope to fulfil its public duty.
- (2) Article 8(1) Was There a Prima Facie Violation?
- 29. Against that background I turn to the issues in this appeal. It is useful first to refer to the respondent Commissioner's case. Mr Grodzinski on his behalf contends that the actions of the police in taking and retaining the pictures did not touch the appellant's right under Article 8: there was no *prima facie* violation of Article 8(1), and therefore nothing for the respondent to justify by reference to any of the considerations set out in Article 8(2). In the course of his submissions he drew a distinction between the *taking* of the photographs and the *retention* of the images. His case is that neither involved any *prima facie* violation of Article 8(1). The learned judge below agreed. Although for reasons I shall explain I consider that this distinction is in the end unhelpful (at least in the present case) for the purpose of ascertaining the reach of the Convention right, it is nevertheless convenient first to consider whether Article 8(1) was engaged by the mere taking of the photographs.
- (2a) Is Article 8(1) Engaged by the Mere Taking of the Photographs?
- 30. Mr Grodzinski supports his position as regards the taking of the photographs principally by reference to two propositions given by the authorities, one broad, the other narrow. I have already introduced the broad proposition. It recalls that the ECHR is concerned with the protection of fundamental rights and freedoms; and is to the effect that the facts said to constitute an interference with the right guaranteed by Article 8 must attain "a certain level of seriousness". This is supported by a wealth of authority; Mr Grodzinski cites *R* (*Gillan*) *v* Commissioner of Police for the Metropolis [2006] 2 AC 307, *per* Lord Bingham of Cornhill at paragraph 28, a passage which I have set out above at paragraph 22.
- 31. I have also foreshadowed the second, and narrower, proposition advanced by Mr Grodzinski. It is that ordinarily the taking of photographs in a public street involves no element of interference with anyone's private life and therefore will not engage Article 8(1), although the later publication of such photographs may be a different matter. Here I should again cite *Campbell v MGN Ltd*. The facts in barest outline were that a well-known fashion model was photographed in a public street leaving a narcotic addiction therapy session, and the photographs (or some of them) were later published. The House of Lords was divided as to the outcome of Miss Campbell's

privacy/confidence claim, albeit on a very narrow aspect of the case. The force of the following *dicta* is unaffected by their authors' concurrence in the result or otherwise. Lord Hoffmann said this at paragraphs 73 - 74:

"In the present case the pictures were taken without Miss Campbell's consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and even the not so famous who go out in public must accept that they may be photographed without their consent... But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large..."

Lord Hope of Craighead said this at paragraph 122:

"The photographs were taken of Miss Campbell while she was in a public place, as she was in the street outside the premises where she had been receiving therapy. The taking of photographs in a public street must, as Randerson J said in *Hosking v Runting* [2003] 3 NZLR 385, 415, para 138, be taken to be one of the ordinary incidents of living in a free community. The real issue is whether publicising the content of the photographs would be offensive..."

Finally, Baroness Hale of Richmond at paragraph 154:

"Publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, they are not objectionable. Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591. We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint..."

- 32. In the present case there was, of course, no question of the photographs being published. Mr Grodzinski says there are no aspects of the facts that could elevate the case to "a certain level of seriousness": the fact that more than one picture was taken, or that the police followed the appellant down Duke St, cannot suffice. He submits that in the end this is no more than an instance of photographs being taken in a public street and there can be no Article 8 complaint.
- 33. It is clear that the real vice in *Campbell* (and also *Von Hannover* and *Big Pictures*, which concerned the covert photographing of a well known author, J K Rowling, her husband and young child in a public street in Edinburgh) was the fact or threat of publication in the media, and not just the snapping of the shutter. Can Mr Westgate for the appellant sustain a claim that the mere taking of the pictures, irrespective of the use made of them (a claim he vigorously pursued), engages Article 8(1)?

- I would certainly acknowledge that the circumstances in which a photograph is taken in a public place may of themselves turn the event into one in which Article 8 is not merely engaged but grossly violated. The act of taking the picture, or more likely pictures, may be intrusive or even violent, conducted by means of hot pursuit, face-to-face confrontation, pushing, shoving, bright lights, barging into the affected person's home. The subject of the photographers' interest in the case I am contemplating, there will usually be a bevy of picture-takers may be seriously harassed and perhaps assaulted. He or she may certainly feel frightened and distressed. Conduct of this kind is simply brutal. It may well attract other remedies, civil or criminal, under our domestic law. It would plainly violate Article 8(1), and I can see no public interest justification for it under Article 8(2). But scenarios of that kind are very far from this case. I accept Mr Grodzinski's submission that the fact that more than one picture was taken, or that the police followed the appellant down Duke St, cannot turn this episode into anything remotely so objectionable.
- 35. The core of Mr Westgate's case is however that it was the police and thus the State who took the pictures. As I have stated (paragraph 28), the paradigm case of Article 8's application is where the putative violation is by the State. Can that make all the difference, simply as regards the taking of the photographs and nothing more? In my judgment it cannot. It is no surprise that the *mere taking* of someone's photograph in a public street has been consistently held to be no interference with privacy. The snapping of the shutter of itself breaches no rights, unless something more is added.
- Accordingly I conclude that the bare act of taking the pictures, by whoever done, is not of itself capable of engaging Article 8(1) unless there are aggravating circumstances. I have already referred (paragraph 34) to the case where the subject of the photographer's attention is harassed and hounded, and perhaps assaulted. As I have said that is plainly not this case. And as for this particular case, I have already rejected (again paragraph 34) the suggestion that the fact that more than one picture was taken, or that the police followed the appellant down Duke St, could give rise to a *prima facie* violation of the Article. I would add that notwithstanding the appellant's apprehensions, there is in my view every reason to accept Mr Williams' evidence that he was generally at pains "to keep a safe distance from the subject and try not to invade their 'personal space'", for reasons he gives at paragraph 5 of his statement. It is also obvious that the new material I have described, based on Superintendent Hartshorn's interview, cannot advance the case as regards the bare act of taking the pictures.
- 37. I should note that Mr Westgate also submits, somewhat more generally, that the use of overt photography by the police has actually become an intimidating feature of London life. He relies on a second witness statement from Mr Gask, an employee of Liberty, for whose introduction in evidence we gave permission at the hearing. Mr Gask gives particulars of three press publications on the subject. One of these (the Guardian, 30 May 2008) describes an operation by Essex police involving intensive surveillance of youths (including repeated photography) in a bid to curb anti-social behaviour; an operation which was welcomed by some very muscular observations by the Secretary of State. In my view all this puts the matter far too high. None of Mr Gask's instances suggests, far less demonstrates, that the snapping of the shutter by the police in a public place is capable without more of engaging Article 8(1), or that the facts of this case (so far as they concern only the taking of the pictures) do so.

- 38. The real issue is whether the taking of the pictures, along with their actual and/or apprehended use, might amount to a violation.
- (2b) Article 8(1): the Taking of the Photographs and their Use
- 39. It might be thought that if (as I would hold) the mere taking of the pictures does not engage Article 8(1), there follows a wholly separate question: whether their retention and intended use might do so. But I do not think this is the right way to analyse the case. I stated earlier (paragraph 29) that the supposed distinction between the taking of the photographs and the retention of the images is in the end unhelpful for the purpose of ascertaining the reach of the Article 8 right. We have seen that the respondent's policy is that "cameras are deployed overtly... officers should clearly identify themselves as police officers or police staff and not hide the fact that they are filming". This is certainly as it should be; if it were done covertly, there would be other very substantial arguments to consider which in this case do not arise. As it is, the subject – here, the appellant - observes who is taking his picture and knows it is a police photographer. He is bound to assume that the picture will be kept, and that it will, or at least might, be used for a police purpose. Mr Grodzinski submitted that if the taking of the pictures is not itself any interference with the appellant's Article 8(1) right, it cannot become so by reason of the pictures' potential use; but this I think is too simplistic. The subject's complaint – absent any question of intimidation or harassment – is that his image is being recorded by State authorities, an act to which he does not consent, which he believes to be unjustified, and whose precise purpose is unknown to him. The police operation, from the taking of the pictures to their actual and intended retention and use, must in my opinion be judged as a whole. Accordingly I am inclined to agree with Mr Westgate's submission recorded by the learned judge below as follows:
 - "24... It is impossible... to 'compartmentalise' the taking of the photographs without regard to the circumstances in which they were taken, the purposes of their retention, whether, for example, it is intended thereby to identify the individual and whether there is proper and certain legal control over the photography as a whole. He submits that here the Claimant's identity was discovered and there was a degree of systematic gathering of information about CAAT activity and its members. He pointed also to evidence from the Claimant's solicitor of other occasions when members of CAAT have been similarly photographed."
- 40. Mr Grodzinski cited two decisions of the Strasbourg Commission, *X v UK* (Application no 5877/72) and *Friedl v Austria* (1995) 21 EHRR 83, which I think tend to confirm that (at least in a case about the taking of pictures by the police) we are to look at all the circumstances of the case in order to see whether Article 8(1) is engaged. The facts of *X v UK* involved a protest against the apartheid laws in South Africa. The applicant was arrested during a rugby match in England involving the South African national team and was photographed upon arrest and thereafter at the police station. She said that she was told that the photographs would be kept in case she made trouble at future matches. The Commission's decision, declaring the claim inadmissible, stated as follows:

"The Commission has noted here the following elements in the case as it has been presented: first, that there was no invasion of the applicant's privacy in the sense that the authorities entered her home and took photographs of her there; secondly, that the photographs related to a public incident in which she was voluntarily taking part; and thirdly, that they were taken solely for the purpose of her future identification on similar public occasions and there is no suggestion that they have been made available to the general public or used for any other purpose. Bearing these factors in mind, the Commission finds that the taking and retention of the photographs of the applicant could not be considered to amount to an interference with her private life within the meaning of Article 8...

An examination by the Commission of the applicant's complaint... shows that the taking of her photographs was part of and solely related to her voluntary public activities and does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention and in particular in the two articles just considered."

- 41. *Friedl* (in which *X v UK* was cited) was a case where there had been a demonstration involving a round-the-clock "sit in" of about fifty persons in an underground pedestrian passage in Vienna, held with a view to drawing public attention to the plight of the homeless. The police took photographs and also recorded images on a video cassette for use in the event of a prosecution. The applicant also claimed that he was photographed individually, his identity was checked and his particulars noted down. The Commission held the applicant's Article 8 claim to be admissible but in the event found there was no violation, stating:
 - "49. In the present case, the Commission has noted the following elements: first, there was no intrusion into the 'inner circle' of the applicant's private life in the sense that the authorities entered his home and took the photographs there; secondly, the photographs related to a public incident, namely a manifestation of several persons in a public place, in which the applicant was voluntarily taking part; and thirdly, they were solely taken for the purposes, on 17 February 1988, of recording the character of the manifestation and the actual situation at the place in question, *eg* the sanitary conditions, and, on 19 February 1988, of recording the conduct of the participants in the manifestation in view of ensuing investigation proceedings for offences against the Road Traffic Regulations.
 - 50. In this context, the Commission attaches weight to the assurances given by the respondent Government according to which the individual persons on the photographs taken remained anonymous in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system, and no action was taken to identify the

persons photographed on that occasion by means of data processing.

- 51. Bearing these factors in mind, the Commission finds that the taking of photographs of the applicant and their retention do not amount to an interference with his right to respect for his private life within the meaning of Article 8(1) of the Convention."
- 42. What, then, of the Article 8(1) issue on the facts of the present case? In his first witness statement the appellant says:
 - "9... I was... confused as to why this was happening to me, as I knew I had not done anything wrong.

•••

11. I felt threatened and uncomfortable throughout this. At no point would any of the officers explain why we were being photographed or questioned. It was my unease at this and my knowledge that I had not done anything wrong which meant that I chose not to give them my identity...

...

- 15. The knowledge that I have nothing to hide in terms of my own actions does not make this situation any easier for me. Instead it makes me more anxious that the photographs were taken when there did not seem to be any reasonable explanation as to why there was a need to do so.
- 16. I feel that I do not know how any information might be used by the police in the future, and that I had no control over the photographs being taken. I feel very uncomfortable that the information might be kept on my file by police indefinitely..."
- 43. The appellant has not been cross-examined, and his witness statement has of course been crafted, perfectly properly, by his solicitor. But the essential point being made is clearly right: he found himself being photographed by the police, and he could not and did not know why they were doing it and what use they might make of the pictures. The case is in my judgment quite different from X v UK, in which the photographs were taken on and after the applicant's arrest, when the police might well have been expected to do just that. It is possibly closer to Friedl, but in that case there had been a demonstration – a sit-in – where again the taking of police photographs could readily have been expected. In R (Gillan) v Commissioner of Police for the Metropolis, which I have cited at paragraph 23, Lord Bingham referred to "an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports": another instance in which the putative violation of Article 8 (if any violation were suggested) consists in something familiar and expected. In cases of that kind, where the police or other public authority are acting just as the public would expect them to act, it would ordinarily no doubt be artificial and unreal for the courts to

find a *prima facie* breach of Article 8 and call on the State to justify the action taken by reference to Article 8(2).

- 44. I do not of course suggest that there is a rigid class of case in which, once it is shown that the State actions complained of (such as taking photographs) are expected and unsurprising, Article 8 cannot be engaged; nor likewise that where they are surprising and unexpected, Article 8 will necessarily be applicable. The Strasbourg court has always been sensitive to each case's particular facts, and the particular facts must always be examined. And the first two limiting factors affecting Article 8's application a certain level of seriousness and a reasonable expectation of privacy are not sharpedged.
- 45. But in my judgment it is important to recognise that State action may confront and challenge the individual as it were out of the blue. It may have no patent or obvious contextual explanation, and in that case it is not more apparently rational than arbitrary, nor more apparently justified than unjustified. In this case it consists in the taking and retaining of photographs, though it might consist in other acts. The Metropolitan Police, visibly and with no obvious cause, chose to take and keep photographs of an individual going about his lawful business in the streets of London. This action is a good deal more than the snapping of the shutter. The police are a State authority. And as I have said, the appellant could not and did not know why they were doing it and what use they might make of the pictures.
- 46. In these circumstances I would hold that Article 8 is engaged. On the particular facts the police action, unexplained at the time it happened and carrying as it did the implication that the images would be kept and used, is a sufficient intrusion by the State into the individual's own space, his integrity, as to amount to a *prima facie* violation of Article 8(1). It attains a sufficient level of seriousness and in the circumstances the appellant enjoyed a reasonable expectation that his privacy would not be thus invaded. Moreover I consider with respect that this conclusion is supported by the judgment of the Strasbourg court in *Marper*. It will be recalled that the first sentence of paragraph 67 reads:

"The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8..."

And at paragraph 121 the court said:

"The Government contend that the retention could not be considered as having any direct or significant effect on the applicants unless matches in the database were to implicate them in the commission of offences on a future occasion. The Court is unable to accept this argument and reiterates that the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data (see paragraph 67 above)."

However the impact of these observations on the present case is I think weakened by the fact that the appellant's image was not placed on the CO11 database, which I have described in dealing with the new material arising from the Guardian article, nor on any other database. And I should make clear my view that this new material does not assist the appellant in any respect. The fact that the CO11 database exists cannot conceivably support the appellant's contention that his Article 8 rights have been interfered with, since his image was never placed upon it; and he has no proper business advancing any arguments – if this is what he seeks to do – to assault the practice or procedure of the respondent (as regards the storage and use of information) in circumstances where any such arguments cannot actually bear on his claim.

47. In arriving at this conclusion on the application of Article 8(1) I intend no criticism of the police. Their action's merits will be for consideration under Article 8(2). Their subjection to the discipline of Article 8 means that the fair balance which falls to be struck throughout the Convention provisions between the rights of the individual and the interest of the community has to be struck on the facts of this case. That I think is as it should be.

(3) Article 8(2)

- 48. First, it seems to me that there can be no question but that the taking and retention of photographs of the appellant on 27 April 2005 were in pursuit of a legitimate aim. As I have stated (paragraph 4), the pictures were taken (1) so that if disorder erupted and offences were committed (or it transpired that offences had already been committed inside the hotel), offenders could be identified, albeit at a later time if necessary; and (2) so that persons who might possibly commit public order offences at the DESi fair in September could be identified in advance: this would or might assist the police operation at the forthcoming event. In Article 8(2) terms, the action was taken "for the prevention of disorder or crime"; perhaps also "in the interests of... public safety or... for the protection of the rights and freedoms of others". So much is not I think disputed.
- 49. Mr Westgate's argument on this part of the case is twofold. He submits first that the police action was not "in accordance with the law", because any putative legal justification for it (certainly for the retention and use of the pictures) is not sufficiently clear and precise. Secondly he says that the police action was disproportionate to the legitimate aim in view.

(3a) "In Accordance with the Law"

50. Mr Grodzinski submits that the taking and retention of the photographs was done pursuant to the respondent's common law powers to detect and prevent crime. He cites *Rice v Connolly* [1966] 2 QB 414 *per* Lord Parker CJ at 419: with respect I need not set out the passage. As regards the requirements of clarity and certainty, Mr Grodzinski relied on the striking decision of the Strasbourg court in *Murray v UK* (1994) 19 EHRR 193. In that case the first applicant was arrested and detained under the Northern Ireland (Emergency Provisions) Act 1978. She was suspected of collecting money for the purchase of arms for the Irish Republican Army. At an Army screening centre she refused to answer questions, was photographed without her knowledge and consent and the photographs were kept on record along with personal details about her, her family

and her home. She was later released without charge. The Strasbourg court (seventeen judges: the equivalent of today's Grand Chamber) roundly stated:

"The taking and, by implication, also the retention of a photograph of the first applicant without her consent had no statutory basis but, as explained by the trial court judge and the Court of Appeal, were lawful under common law.

The impugned measures thus had a basis in domestic law. The Court discerns no reason, on the material before it, for not concluding that each of the various measures was 'in accordance with the law', within the meaning of Article 8(2)."

51. McCombe J had this to say:

- "69. Mr Westgate submitted that the decision in *Murray* was 'wrong'. He was prepared to accept that *Rice v Connolly* might provide the outline of a legal basis for what was done here and prevents the conduct in issue from being actionable in tort, but it does not address the recognised requirements of accessibility, certainty and precision now recognised in European jurisprudence. In answer, Mr. Grodzinski submitted that the decision in *Murray* was that of the Full Court and post-dated *Malone* (1985) 7 EHRR 14, *Silver v UK* (1983) 5 EHRR 347 and *Sunday Times v UK* (1980) 2 EHRR 245 in which the principles of precision, certainty and accessibility were fully considered; it was inconceivable, it was submitted, that the Court would not have had those principles well in mind.
- 70. I recognise that the European Court in *Malone* stated (at paragraph 68 of its judgment, 7 EHRR at p. 41) that the degree of precision required of the law will depend on the subject matter and, on any footing, any interference with the Claimant's rights under Article 8 must, in my view, be no more than modest. In the circumstances, it appears that the common law power relied upon by the defendant must, in the circumstances of this case, be sufficiently in accordance with the law to satisfy Article 8(2). Further. as the Defendant submits, the exercise of that power is subject to public law control reaching over and above the inherent 'lawfulness' of the actions. In addition, I cannot accept that it is my place simply to dismiss the decision of the Full Court in Murray as 'wrong', as Mr. Westgate would have me do. That would do inadequate respect for the decisions of that court, the ultimate arbiter of these matters, in a case in close proximity of subject matter to the present one."
- 52. It appears that on seeing a draft of the judgment Mr Westgate disavowed having made so stark a submission; but the judge indicates (footnote 8 to the judgment) that paragraph 69 accurately records his note of the argument. In his skeleton argument for this appeal Mr Westgate submits (paragraph 39) that "*Murray* dealt only with the

source of the power to take photographs and not with the other established requirements that the law be sufficiently precise, certain and accessible", and refers to *Malone* and *Silver*. However it is to be noted, as Mr Grodzinski pointed out (skeleton argument paragraph 74), that the court in *Murray* upheld the earlier decision of the Commission, which had referred expressly (p. 216, paragraph 80) to the *Malone* case.

53. It seems to me that the judge's reasoning is correct. I would attach particular importance to the nature of the intrusion said to violate Article 8. There is some suggestion in the cases of a relativist approach, so that the more intrusive the act complained of, the more precise and specific must be the law said to justify it. Thus in *Gillan*, to which I have already referred, Lord Hope said this:

"56. As the concluding words of para 67 of the decision in Malone v United Kingdom (1985) 7 EHRR 14 indicate, the sufficiency of these measures must be balanced against the nature and degree of the interference with the citizen's Convention rights which is likely to result from the exercise of the power that has been given to the public authority. The things that a constable can do when exercising the section 44 [sc. of the Terrorism Act 2000] power are limited by the provisions of section 45(3) and 45(4). He may not require the person to remove any clothing in public except that which is specified, and the person may be detained only for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle has been stopped. The extent of the intrusion is not very great given the obvious importance of the purpose for which it is being resorted to. In my opinion the structure of law within which it is to be exercised is sufficient in all the circumstances to meet the requirement of legality."

Malone concerned telephone intercepts. As McCombe J observed at paragraph 70, the Strasbourg court in that case stated at paragraph 68 that the degree of precision required of the law will depend on the subject matter. The previous paragraph, referred to by Lord Hope in *Gillan*, has this:

"Undoubtedly, as the Government rightly suggested, the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence."

It is also interesting to note this observation by the Strasbourg court in *Marper*:

"96. The level of precision required of domestic legislation — which cannot in any case provide for every eventuality — depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (*Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI, with further references, 34 EHRR 55)."

- 54. In the present case, though for reasons I have given the Article 8(1) threshold is crossed, the nature of the respondent's interference with the appellant's private life was, as the judge observed, no more than modest. In those circumstances the requirement of legality is in my judgment satisfied by the general common law power referred to in *Murray*, and the judge was right so to hold.
- 55. There were some other points on this part of the case. Mr Westgate relied on the respondent's failure to disclose the "Standard Operating Procedures for 'Use of Overt Filming/Photography'", to which I referred at paragraph 13. I should in fairness note that this document has been withheld, as I understand it, on grounds permitted under the Freedom of Information Act 2000. The respondent says that throws no light on the circumstances in which police photographs may be taken. In any event, however, the respondent in my judgment does not need to rely on the terms of his policy, or any established internal procedures relating to overt photography, in order to establish compliance with the requirement of legality. The common law power suffices. For the same reason I do not find it necessary to enter into the further debate between the parties as to whether the legality requirement might be met by the provisions of the Data Protection Act 1998. Likewise, the new material arising out of the Guardian article does not affect the matter.

(3b) Proportionality

McCombe J dealt with this aspect very shortly. He considered (paragraph 74) that "it was entirely reasonable and proportionate for the police to photograph persons who, as it might turn out, had been engaged or might be likely to engage in criminal disorder". Ironically, as it has turned out, he relied on some observations of Lord Steyn in *Marper* in the House of Lords ([2004] 1 WLR 2196, paragraph 1):

"My Lords, it is of paramount importance that law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science. Such real evidence has the inestimable value of cogency and objectivity. It is in large measure not affected by the subjective defects of other testimony. It enables the guilty to be detected and the innocent to be rapidly eliminated from inquiries. Thus in the 1990s closed circuit television ('CCTV') became a crime-prevention strategy extensively adopted in British cities and towns. The images recorded facilitate the detection of crime and prosecution of offenders. Making due allowance for the possibility of threats to civil liberties, this phenomenon has had beneficial effects."

- 57. As I have indicated their Lordships' House considered that the retention of the applicants' DNA and fingerprints did not offend their rights under Article 8. The Strasbourg court took a very different view. They held:
 - "117. While neither the statistics nor the examples provided by the Government in themselves establish that the successful identification and prosecution of offenders could not have been achieved without the permanent and indiscriminate retention of the fingerprint and DNA records of all persons in the applicants' position, the Court accepts that the extension of the database has nonetheless contributed to the detection and prevention of crime.
 - 118. The question, however, remains whether such retention is proportionate and strikes a fair balance between the competing public and private interests.
 - 119. In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed...; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.

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125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion obviates the need for the Court to consider the applicants' criticism regarding the adequacy of certain particular safeguards, such as too broad an

access to the personal data concerned and insufficient protection against the misuse or abuse of such data."

- 58. Plainly there might be a question whether this court should follow the House of Lords or the European Court of Human Rights in *Marper*. If this court were required to confront such a question, it would follow the House of Lords: *Kay v Lambeth LBC* [2006] 2 AC 465. But in my judgment *Marper* is wholly distinguishable on its facts. Pictures of the appellant were taken because the police believed that he had contact with EA who had a history of unlawful activity, and there was the possibility that he had been involved in unlawful activity in the meeting from which EA had been ejected. The taking of the pictures was in no sense aggressively done. The retention of the pictures was carefully and tightly controlled. The appellant's image was not placed on any searchable database, far less a nationwide database indefinitely retained. But for the commencement of these proceedings the images of the appellant would have been destroyed after the DSEi exhibition.
- 59. In my judgment no useful comparison can be made between the facts of this case and the features of *Marper* which led the Strasbourg court to reject the State's Article 8(2) justification. There is a qualitative difference between photographic images on the one hand and fingerprints and DNA on the other, not least as regards the reach of the use to which they might be put. The appellant's photograph was in my judgment taken, and retained, in the course of a properly controlled operation undertaken for perfectly good policing reasons consistently with a balanced and reasonable published policy.
- 60. I acknowledge that any link between the appellant and EA is disputed; that the appellant is a person of good character; that any suspicion that the appellant might have committed an offence at or in connection with the AGM must have been quickly dissipated; and that the only justification for keeping the images thereafter was to monitor his conduct at the DSEi fair several months later. But that was a legitimate aim, in service of which the images were kept. For my part I find it impossible to categorise what was done as outwith the margin of operational discretion which, it must surely be acknowledged, the police possess in such circumstances. In my judgment the retention of the images was proportionate to the legitimate aim of the exercise.

ARTICLES 10, 11 AND 14

- 61. I hope it will not be thought discourteous to Mr Westgate if I deal with these further complaints summarily. I consider it fanciful to suppose that in the events which happened there was any interference with the appellant's rights under Article 10 and 11. Apart from anything else he was not purporting to exercise either such right on the occasion in question.
- 62. As for Article 14, the police had good reason, arising from their perception of events which was itself reasonable, to photograph the appellant. There was no discrimination contrary to Article 14.

CONCLUSION

63. I would dismiss the appeal.

Lord Justice Dyson:

64. I gratefully adopt the account of the facts and issues set out so fully by Laws LJ. I agree with his valuable analysis of the article 8(1) issue and his reasons for concluding that article 8 is engaged on the facts of this case. For the reasons that follow, however, I have reached a different conclusion on the article 8(2) issue. Before I explain why in my judgment the interference with the appellant's article 8 rights was disproportionate, I need to emphasise some of the relevant facts. I regret that this will inevitably involve some repetition of the account already given by Laws LJ.

The relevant facts

- 65. Chief Inspector Weaver was Operations Chief Inspector at West End Central Police Station at the material time. The police had been informed that there might be some form of protest by members of CAAT at the AGM of Reed on 27 April 2005. A second demonstration was due to take place on the same day outside the premises of BP by an environmental campaigning group and Chief Inspector Weaver was concerned that the two protest groups might combine and exacerbate the problem. Her concerns that there might be trouble at the AGM were further increased when it became known that a named individual (EA), who had a history of unlawful demonstrations against companies involved in the arms trade and who had a number of previous convictions for offences in this context, had been nominated as a proxy to vote at the AGM. It was these concerns which led Chief Inspector Weaver to decide that the AGM had to be policed: see paras 4 to 6 of her witness statement.
- 66. 24 officers were allocated to the policing of the event. In addition, intelligence gathering officers were deployed. The purpose of the intelligence gathering teams was to "gather intelligence, primarily by taking photographs and making notes which may be of subsequent evidential value should offences be committed or disorder break out" (para 10 of Chief Inspector Weaver's statement).
- 67. At para 13, she says:

"The reason why I decided to request the use [of] FITs and EGs was because of the ongoing nature of the protests against companies involved in the arms trade and the attendance of known trouble makers so that I believed that public disorder may result. In such situations it is vital that the police know who has attended and what their involvement is".

68. And again at para 15:

"Intelligence had to be gathered at the time so that, should disorder result or offences subsequently come to light, those guilty of an offence could be identified so that they could be arrested, if not at the time then in the future. Thus if those attending the AGM caused trouble they could be identified and either arrested at the time or if appropriate, shortly after. Further, I took the view that if those individuals who might attend and commit public order or other offences at the DSEi fair in September could be identified in advance, by ascertaining their identity at the Reed AGM, that would help to police the DSEi event and deal with any such offences".

- 69. Police Sergeant Dixon was an officer in one of the intelligence gathering teams on 27 April. In his statement, he says (para 5) that of particular interest to the team were two activists (EA and RH) both of whom had a history of violent protests and who, it was believed, had a tendency to encourage otherwise peaceful protesters to commit offences.
- 70. The AGM was conducted peacefully, although EA and RH were ejected by private security officials for disrupting the meeting. The appellant left the hotel after the conclusion of the AGM at about 12.30 pm with another man (IP). They stopped to speak to KB and were joined by EA. It was in these circumstances (ie because the appellant and IP were seen associating with EA) that PS Dixon says that he directed the photographer to take the photographs which have given rise to these proceedings. PS Dixon says at para 10 of his statement:

"The decision to take the photographs of the claimant and IP was not solely because of their association with EA but also because the photographs could be of subsequent evidential value if any, as yet undiscovered, offences had been committed inside the hotel. Such offences are not always immediately apparent and may have become known only after the meeting was over."

- 71. The evidence as to the extent of the association between EA and the appellant is as follows. The appellant has no recollection of being joined by or seeing EA after the AGM. IP says that he and the appellant had a "brief chat" with EA lasting about one minute before they dispersed. PS Dixon says that the group comprising the appellant, IP and KB was joined by EA, but he does not say how long they stayed together. Neal Williams, the photographer, says that at about 12.44, the two females who had been ejected from the meeting joined other protesters outside the hotel and that was when he was asked to take the photographs. He does not say how long the two females remained with the appellant.
- 72. The only other evidence to which I should refer is that the appellant is a man of good character with no previous convictions. Some time after 27 April (on a date which has not been disclosed), the police discovered his identity. This they did by discovering the names of the new shareholders in Reed and working out by a process of elimination that the person photographed in the company of IP and others was the appellant.
 - 73. A number of points need to be emphasised. First, the only evidence of a link between the appellant and EA is the brief association between them when the appellant was speaking to IP and they were joined by EA for about one minute. There is no evidence that the appellant went to the meeting with EA or that after he had been photographed outside the hotel, he was accompanied by her as he went along Duke Street and into Bond Street underground station.
 - 74. Secondly, the principal reason why Chief Inspector Weaver involved the intelligence gathering teams was her concern that there might be disorder and criminal conduct at the AGM and/or in the vicinity of the hotel. Moreover, the reason why PS Dixon requested photographs to be taken of the appellant (and IP) was because of their association with EA and because such photographs could be of evidential value if it transpired that offences had been committed inside the hotel. Chief Inspector Weaver did, however, also see advantage in gathering evidence which would enable those who

might attend the DSEi fair in September to be identified as well. The possible use of the photographs to identify persons who attended the DSEi fair does not, however, seem to have been a factor which led to the decision of PS Dixon to require the photographs to be taken.

- 75. Thirdly, it was acknowledged by Chief Inspector Weaver (and as is obvious), that if any offences had been committed in the hotel, this would have become apparent shortly after the conclusion of the AGM.
- 76. Fourthly, although it is not clear when the police first became aware that the appellant was a man of good character, they did know on 27 April that, unlike EA and RH, he had not been ejected from the meeting and that he was not guilty of any misconduct outside the hotel; and they must have known within a few days of 27 April (at the latest) that there was no evidence that he had been guilty of any misconduct inside the hotel either.
- 77. It follows that, within at most a few days of the conclusion of the meeting, there could no longer be any justification for retaining the photographs as evidence of the identity of a person who might have committed an offence at the meeting. The justification for retaining the photographs thereafter must have been as evidence of the identity of a person who might attend the DSEi fair several months later and who might commit an offence at that meeting.
- 78. It is against this background that it is necessary to consider whether the interference with the appellant's article 8 right to a private life constituted by the taking and retaining of the photographs was justified pursuant to article 8(2).

Article 8(2)

Legitimate aim

79. I agree with Laws LJ that the taking and retention of the photographs were in pursuit of a legitimate aim, namely "for the prevention of disorder or crime" or "for the protection of the rights and freedoms of others": article 8(2). The phrase "prevention of disorder or crime" includes the detection of disorder or crime: see, for example, *Marper v UK* (Application 30562/04 and 30566/04, judgment of ECtHR 4 December 2008). The contrary was not argued by Mr Westgate.

"In accordance with the law"

- 80. The next question is whether the interference with the appellant's article 8 rights was "in accordance with the law". In view of the conclusion that I have reached on the issue of proportionality, I do not find it necessary to express a view on this question. I do, however, wish to express one reservation about Laws LJ's analysis.
- 81. At [53], Laws LJ attaches particular importance to the nature of the intrusion said to violate article 8 and suggests that, broadly, the more intrusive the act complained of, the more precise and specific must be the law said to justify it. I would merely say that I have some doubt as to whether [56] of the speech of Lord Hope in *Gillan* supports such a proposition or that, if it does, it is supported by the concluding words of [67] of the decision in *Malone v UK* 7 EHRR 14. In any event, I see no support for this

proposition in the speech of Lord Bingham in *Gillan*. It is to be noted that all the other members of their Lordships' House (including Lord Hope himself) agreed with the reasoning of Lord Bingham.

"Necessary in a democratic society": proportionality

82. The phrase "necessary in a democratic society" has been considered and applied by the ECtHR on many occasions. In *Marper* at [101], the court said:

"An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient".

- 83. In deciding whether the interference is necessary, the court must have regard to the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference: see *Marper* at [102]. At [103], the court went on to say that the protection of personal data is of fundamental importance to a person's enjoyment of his or her article 8 rights and the domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of article 8. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes.
- 84. In other words, the court is required to carry out a careful exercise of weighing the legitimate aim to be pursued, the importance of the right which is the subject of the interference and the extent of the interference. Thus an interference whose object is to protect the community from the danger of terrorism is more readily justified as proportionate than an interference whose object is to protect the community from the risk of low level crime and disorder. The importance of the former was emphasised by the House of Lords in *R* (*Gillan*) *v Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307: see per Lord Bingham of Cornhill at [29] and Lord Scott of Foscote at [62].
- 85. I agree that *Marper* is wholly distinguishable on the facts. Whether an interference with a Convention right is proportionate is a fact-sensitive question. I accept that the retention of the photographs by the police was not an interference of the utmost gravity with the appellant's article 8 rights. Nor, however, should it be dismissed as of little consequence. The retention by the police of photographs taken of persons who have not committed an offence, and who are not even suspected of having committed an offence, is always a serious matter. I say this notwithstanding the fact that I accept that the retention of the photographs in this case was tightly controlled and that there is a qualitative difference between photographic images on the one hand and fingerprints and DNA on the other. It should also be recorded that the evidence is that, had these proceedings not been commenced, the photographs would have been destroyed after the DSEi fair. That is because the appellant did not attend that event and there was no intelligence suggesting that he had prior to that event (and after the AGM) participate in any other unlawful activities: see para 13 of the statement of Superintendent Gomme.

- 86. The retention by the police of photographs of a person must be justified and the justification must be the more compelling where the interference with a person's rights is, as in the present case, in pursuit of the protection of the community from the risk of public disorder or low level crime, as opposed, for example, to protection against the danger of terrorism or really serious criminal activity.
- 87. I return to the facts of this case. Within a few days of the AGM, the retention of the photographs could not rationally be justified as furthering the aim of detecting the perpetrators of any crime that may have been committed during the meeting. There was no realistic possibility that evidence that a crime had been committed at the meeting would only be obtained weeks or months after the event. The meeting was well attended. There were Reed officers and private security officials present who were on the look-out for trouble-makers and who did indeed eject two of them (although there is no evidence that even they committed any offence). I repeat that the principal object of the evidence-gathering operation was to obtain evidence about possible disorder and criminal conduct at the AGM and/or in the vicinity of the hotel and the sole reason given by the officer who instructed the photographer to take the photographs was to obtain evidence which would be of value if offences had been committed at the AGM.
- 88. The fact that the appellant had been seen briefly in the company of EA after the AGM may have provided further justification for retaining the photographs for a few days after 27 April. But thereafter, in my judgment, neither the brief association with EA nor anything else relating to the AGM provided any justification for retaining the photographs any longer.
- It follows that the only justification advanced by the police for retaining the 89. photographs for more than a few days after the meeting was the possibility that the appellant might attend and commit an offence at the DSEi fair several months later. But in my judgment, even if due allowance is made for the margin of operational discretion, that justification does not bear scrutiny. First, the DSEi fair was not the principal focus of the evidence-gathering operation. The principal concern of the police was what might happen at the AGM and/or in the vicinity of the hotel. But for that concern, the evidence would suggest that the operation would not have taken place in the first place. Secondly, the sole reason why the photographs were taken was to obtain evidence in case an offence had been committed at the AGM. Thirdly, once it had become clear that, notwithstanding his brief association with EA, the appellant had not committed any offence at the AGM, there was no reasonable basis for fearing that, even if he went to the DSEi fair, he might commit an offence there. His behaviour on 27 April was beyond reproach, even though he was subjected to what he considered to be an intimidating experience. There was no more likelihood that the appellant would commit an offence if he went to the fair than that any other citizen of good character who happened to go to the fair would commit an offence there.
- 90. It is for the police to justify as proportionate the interference with the appellant's article 8 rights. For the reasons that I have given, I am of the opinion that they have failed to do so. I would allow this appeal.

Lord Collins of Mapesbury:

- 91. I agree with Dyson LJ that the appeal should be allowed. Plainly the court must not be quick to second guess, or interfere with, operational decisions of the police force. All that in fact happened at the AGM of Reed Elsevier plc on April 27, 2005 was that two people, EA (who had a criminal record of unlawful activity against organisations in the defence industry) and RH, were ejected by private security staff after chanting slogans, without any suggestion of any involvement in criminal activity. There was a very substantial police presence. It consisted of a chief inspector, 3 sergeants, 21 constables, 5 officers in forward intelligence teams, and 3 officers in an evidence gathering team (together with a civilian photographer in uniform). With the benefit of hindsight, of course, the deployment of 33 police officers and a photographer in uniform was not necessary.
- 92. When I first read the papers on this appeal, I was struck by the chilling effect on the exercise of lawful rights such a deployment would have. I was also disturbed by the fact that notwithstanding that the police had no reason to believe that any unlawful activity had taken place, and still less that Mr Wood had taken part in any such activity, when he (with Mr Prichard) walked from the hotel in Grosvenor Square where the meeting had taken place towards Bond Street Underground station via Duke Street he was followed by a police car, and then questioned about his identity by 4 police officers, two of whom then followed him on foot and tried to obtain the assistance of station staff to ascertain Mr Wood's identity from his travel card.
- 93. The reason for the police presence was that demonstrators against the arms trade might try to disrupt the AGM. The purpose of the evidence gathering team with the photographer was "to gather intelligence, primarily by taking photographs and making notes which may be of subsequent evidential value should offences be committed or disorder break out" (Chief Inspector Weaver, para 10). Chief Inspector Weaver decided to use the evidence gathering team because public disorder might break out, and it was therefore vital that the police knew who had attended and what their involvement was (para 13). Intelligence had to be gathered at the time, so that, should disorder result or offences subsequently come to light, those guilty of an offence could be identified: para 15. She also added that she "took the view that if those individuals who might attend and commit public order or other offences at the DSEi [Defence Systems and Equipment International] fair in September could be identified in advance, by ascertaining their identity at the Reed AGM, that would help to police the DSEi event and deal with any such offences."
- 94. Police Sergeant Dixon headed the evidence gathering team. Chief Inspector Weaver told him that one of her fears was that once inside the hotel demonstrators might commit acts which would only subsequently come to light. EA was of specific interest to the evidence gathering team, and the decision to take the photographs was "not solely because of their association with EA but also because the photographs could be of subsequent evidential value if any, as yet undiscovered, offences had been committed inside the hotel" (PS Dixon, para 10). PS Dixon says that such offences are not always immediately apparent and may become known only after a meeting is over. But unless there was absolutely no communication between Reed Elsevier's staff or security officers and the police, I do not find it easy to imagine what undiscovered offences might have been committed.
- 95. There is conflicting evidence on whether Mr Wood and EA were together in Grosvenor Square after the meeting. But what is not in doubt is that Mr Wood is a person of good

character with no previous convictions; and that the police had no reason to believe that he had taken any part in unlawful activities at the AGM, or indeed been guilty of any misconduct at all. To the extent that the photographs were taken in case any unlawful activity inside the hotel were subsequently to come to light, it would have been apparent very soon after the meeting (as Dyson LJ says, within a few days at most) that no criminal offences had been committed.

- 96. I agree with Laws and Dyson LJJ that Article 8(1) was engaged, but that the taking and retention of the photographs were in pursuance of a legitimate aim, namely "for the prevention of disorder or crime" or "for the protection of the rights and freedoms of others" for the purposes of Article 8(2).
- 97. But I agree with Dyson LJ that the interference was not proportionate. He has referred to the crucial facts, of which it seems to me that the following are the most important. First, the main object of the evidence gathering operation was to obtain evidence about possible disorder and criminal conduct at the AGM and/or in the vicinity of the hotel, and the sole reason given by PS Dixon who instructed the photographer to take the photographs was to obtain evidence which would be of value if offences had been committed at the AGM. Second, the retention of the photographs for more than a few days could not be justified as furthering the aim of detecting the perpetrators of any crime that may have been committed during the meeting. Third, a possible brief association between Mr Wood and EA on the day did not provide any justification for a lengthy retention of the photographs. Fourth, the suggestion that retention of the photographs was justified by the possibility that Mr Wood might attend and commit an offence at the DSEi fair several months later is plainly an afterthought and had nothing to do with the decision to take the photographs.
- 98. Like Dyson LJ, I prefer to express no concluded view on the question whether the interference was "in accordance with the law". In many cases the European Court of Human Rights has said that not only must the impugned act have some basis in domestic law, but also that it should be compatible with the rule of law and be accessible to the person concerned who must be able to foresee its consequences for him: for recent examples see, e.g. *Liberty v United Kingdom* [2008] ECHR 58243/00, July 1, 2008; *Marper v United Kingdom*, December 4, 2008; *Iordachi v Moldova*, February 10, 2009. The taking of the photographs in the present case was lawful at common law, and there is nothing to prevent their retention. There is a published policy by the Metropolitan Police on the use of overt filming and photography, but not on the retention of photographs.
- 99. As Laws LJ says, there is a striking decision of the full court of the European Court of Human Rights in *Murray v United Kingdom* (1995) 19 EHRR 193. That case concerned the right of the Army in Northern Ireland to take and retain photographs of a person who was being questioned at an Army screening centre on suspicion of being involved

in the collection of money for IRA arms purchases. The Court noted (at [40]) that the common law rule entitling the Army "to take a photograph equally provides the basis for its retention" and said (at [88]): "The taking and, by implication, also the retention of a photograph of the first applicant without her consent had no statutory basis but, as explained by the trial court judge and the Court of Appeal, were lawful under the common law." The Court concluded (ibid): "The impugned measures thus had a basis in domestic law. The Court discerns no reason, on the material before it, for not concluding that each of the various measures was 'in accordance with the law', within the meaning of Article 8(2)."

100. Nevertheless, it is plain that the last word has yet to be said on the implications for civil liberties of the taking and retention of images in the modern surveillance society. This is not the case for the exploration of the wider, and very serious, human rights issues which arise when the State obtains and retains the images of persons who have committed no offence and are not suspected of having committed any offence.