

IN THE COURT OF APPEAL
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN

On the application of

ANDREW WOOD

Appellant/Claimant

And

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Respondent/Defendant

FURTHER SUBMISSIONS ON BEHALF OF THE APPELLANT

1. These submissions are lodged in accordance with the direction given by Laws LJ that the parties file additional submissions by 23 March 2009. They relate to further information that has become available since the hearing, and particularly the transcript of an interview with Superintendent Hartshorn.
2. On 6th March 2009 the solicitors for the Appellant, Liberty wrote to the Defendant asking for their comments on extracts from an interview with Superintendent Hartshorn, who is now the head of the public order branch of the Metropolitan Police. A copy of the letter, together with its attachments, is annexed to this note. The Defendant responded on 19 March 2009.
3. This note addresses the following two issues:
 - a. How does the new material relate to the evidence already before the court?

- b. What bearing does it have on the issues?

The new material

4. The Respondent's case has always been that the Appellant's photograph was not placed on a database and the images on the CDs did not contain any personal identifying information. It has always been clear that there must be some way of linking a known individual to their photographs otherwise the other uses to which it is accepted they are put would be impossible. However, the new material shows that:
 - a. There is an image database held within CO11, searchable by name. The database was referred to in the Respondent's AOS [para 27 p. 78] but not later dealt with in evidence or the skeleton arguments. Mr Wood's photograph was not put on this database.
 - b. The criteria as to how and when a person's image is placed on the database are unclear and several apparently inconsistent accounts are given as to this.
 - c. The new material also provides additional information as to the circumstances in which photographs may appear on a sheet like that at page 68, referred to as a "spotter card".
5. Before coming to the new material it is necessary to set out how the case was put in the Respondent's evidence.
6. The initial explanation for taking and retaining the photograph is in the response, dated 9th August 2005, to the letter before claim at pp 141-2. At that time the DSEi Arms Fair had not yet taken place. The letter said that:

"The MPS took photographs of your client and associates as they left the AGM for the purpose of identifying whether or not they had engaged in public disorder at such meetings in the past. In addition, their photographs were taken so that their

identity would be known should they attend DSEi. Thus it was not the fact that your client was a member of CAAT that led to his photograph being taken, but the fact that the targeting of companies such as Reed Elsevier and others associated with DSEi by protest groups has meant that police have engaged on intelligence gathering operations in the run up to DSEi”

7. The letter said that after DSEi the need to retain “such intelligence” would be reviewed on a case by case basis.
8. At the hearings before McCombe J and the Court of Appeal the main account about the way in which photographs were held by CO11 and used by them came from Superintendent Gomm [Tab 23 pp 242-47] particularly at paras 12-14¹. In summary his evidence was that:
 - a. Images were held securely in CO11. He did not say that those “images” were not identifiable by name. However, the Defendant’s skeleton argument, which referred to CDs and not images, said that “none of the CDs (wherever held) identify the individuals whose images are held on them...The CD’s are marked on the basis of the relevant date and the event at which the photographs were taken”. The Defendant’s evidence and skeleton argument did not refer to or explain the database of images held by CO11 and at 40(i) the skeleton expressly rejected the notion that the photographs had been taken with a view to inclusion on such a police database.
 - b. There was no general access to those images for other members of the MPS not in CO11. This was permitted only under supervision and following an appointment if there was reason to believe that the person whose image is recorded has been involved in criminal activity.
 - c. Images might be circulated on a sheet (referred to by Supt Hartshorn as a “spotter card”) to FIT/EG officers if “there is a belief that individuals who have been photographed and identified in the past, may attend another event and commit offences” [Gomm Para 14]. The skeleton argument put it more broadly and said “where there is a potential need to identify

¹ Mr Williams dealt with the images in SCD4 but the new material does not touch on that.

persons involved in unlawful protests who may have participated in similar past events” [skeleton Para 21].

- d. Images are retained in CO11 for 12 months and are subject to an internal review “around” that time. They are only retained if a positive decision is taken to do so. That decision depends on whether they have “any ongoing significant intelligence value” and this includes whether there is a specific reason to believe that they may become useful in the future for intelligence or evidence purposes [Gomm: Para 12].
 - e. In the Claimant’s case the images would have been destroyed after the DESi arms fair as he “did not appear to have attended that event, nor was there intelligence suggesting that he had, prior to that event (and after the Reed AGM) participated in any other unlawful activities associated with protests of the kind described above” [Gomm Para 13]
 - f. It is not clear whether, when talking about “images” and decisions that are made to retain them, Superintendent Gomm was talking about images on the CDs or the CO11 database or both and whether different criteria applied to the decision to retain images depending on whether they were held on the database or CD. The Respondent’s AOS [para 27 at p. 78] implies that the same test applies to both.
9. Superintendent Hartshorn is now the head of CO11. He was interviewed by a Guardian journalist, Paul Lewis. A copy of the interview was supplied to Liberty and extracts from that interview have been transcribed. He says that:
- a. Members of Forward intelligence Teams (FIT) are sometimes supplied with “spotter cards” containing photographs of people who “could be...known activists. Known people who’ve caused us problems”. They contain the photographs of “a number of people we might be looking for” [page 1].
 - b. There is a database of images. The manner in which individuals appear on the database was variously described as:

- “if we’ve got someone who is a known activist for a particular group and we keep their images live on that intelligence database, along the side of that intelligence, there will be a report justifying why that image is being kept”.
- Persons falling into the following categories (added emphasis):
 - “(a) they are someone who’s got a criminal record as a result of taking part in activity in relation to that particular type of demonstration. [b] **They are people that we have seen on a regular basis, involved but may not have been charged or arrested, but believed to be on the periphery in relation to those.** [c] Or it may, as we’ve already talked about, they might be outstanding suspects for an offence”,
- “this person has been seen at this event, they’ve been dealing with people who’ve been arrested on this event, so they’ve.. there are a number of factors, not just the fact we’ve seen them floating around”
- “so for example they would have been bordering on, to use the term, civil disobedience, or carrying out... to be actually physically be held on the database, of doing something more than attending a rally”.

10. Liberty invited the Defendant’s comments on this interview in their letter of 6th March 2009. In particular they noted that the interview was in apparent conflict with the impression given that photographs of “innocent protesters are never identifiable by name and cannot be added to a searchable database”.

11. The Defendant’s letter in response is dated 19 March 2009 and contains a number of new pieces of information about the retention of images taken by FIT and EG teams. In particular:

- a. There is a database of images held in CO11 and this is searchable by name by officers of CO11 where the name of the individual is known [points 4 and 7].

- b. The image database is not generally accessible to those outside CO11. Such access is subject to the same controls as access to the CDs (i.e. only on a specific request and under supervision).
- c. Para 4 asserts that “the criteria taken into account when deciding whether to place an image on this database are: (a) where the person is observed to be participating in unlawful activity at the event in question; (b) where the person is suspected of having participated in unlawful activity at that event; (c) where the person is suspected of having participated in unlawful activity at an earlier time”.
- d. Images on the database are reviewed about every 12 months and are removed if the individual has “done nothing to justify retention of the image on the database”. It is not clear whether the image is then deleted altogether or whether it is kept on a CO11 CD.
- e. Mere presence at a demonstration or other event will not of itself lead to the person’s image being placed on a database, nor will regular attendance at demonstrations of itself be enough [point 5]. However, the letter does not explain what additional factors are necessary.
- f. Mr Wood’s image was not placed on the database [point 1].

12. The new material creates considerable confusion about what criteria are applied to decide whether images are to be retained at all or whether they are to be placed on the database. Images within CO11 are kept in at least 2 ways.

13. Firstly there is a database of images. This is kept in some format other than on the CDs and is searchable by name. The Claimant was not on this database but as noted below he was vulnerable to being put on it.

14. It is not clear what intelligence information, if any, is held with the images on the CO11 database. It is not referred to in the 19 March letter but Supt Hartshorn says that images are kept alongside intelligence and a report justifying why the image is kept. Since the Crimint database (the general intelligence database available to all officers) does not contain photographs this seems to be a reference to CO11. But the MPS are later recorded as saying that there is no FIT or public order database. In any case, CO11 officers have access to general Crimint files in the same way as any other officers and can cross refer this information with that on the CO11 database.

15. There is equally no clear explanation of the grounds on which a person's image may be put on the database. The factors in para 4 of the Defendant's response of 19 March 2009 (which are not said to be exhaustive criteria but only criteria to take into account) are not consistent with the account given by Supt Hartshorn (images may be kept of people who are "on the periphery") and are arguably inconsistent with the AOS which maintains that images may be placed on the database if they have "particular intelligence value". The Respondent and Supt Hartshorn both say that mere presence or regular presence at demonstrations is not enough but it is unclear what in addition to this will justify inclusion. Would the Claimant have been placed on the database if he had simply attended the DSEi Arms Fair? Would this be more than "mere presence" [Defendant's letter Para 5] when taken together with his past alleged contact with EA, and his position in CAAT?

16. There is similar lack of clarity as to what will justify retention of an image on review. Must the subject have done something to justify retention or must retention simply be justified on broader intelligence grounds.

17. Secondly there are images held on CD. These have not been transferred to the database and so are not searchable by name in the same way. However:

- a. Despite the fact that the CD's do not identify the Claimant by name he is clearly identifiable when the information on the CD is taken together with other information in the hands of the police. Images of the Claimant can be retrieved in this way.
- b. As with the images on the database any such image can be considered together with information on the Crimint database which is available to all officers.
- c. It follows that images on CD may be "promoted" to the database at any time if other intelligence suggests this is warranted. Consider what would have happened if the Claimant had been seen at DSEi (possibly through the use of a "spotter card") and had been observed (but not photographed) committing an offence. The earlier photograph would then be eligible for inclusion on the database. The same point applies if, as suggested above, the threshold for inclusion is in fact much lower than suspicion of unlawful activity.

18. It is not clear how the grounds for retention of CD images relate to being put on the database. There are some indications that the same test applies but a lower threshold must apply to the CD images, otherwise they would all be placed on the database, at least where there is a known individual.

Application to this case

Article 8(1)

19. The Claimant's main case is that it is not necessary for him to be included on a database in order for there to be an interference with Article 8(1). It is sufficient that the police hold a photograph that is identifiable by name when taken together with other information held by the police. This is the point developed in earlier submissions and is not repeated.

20. To the extent that a database is relevant the distinction between the database and the CD images held by CO11 is not clear cut. It seems that images may move from one to the other depending on what other general intelligence is available. So long as an image is held by the Defendant on a CD and is retrievable by them then it is liable to be placed on the database where it will be subject to active processing and will be searchable by name. If an image is placed on the database then will be an interference (subject to justification) even on the Respondent's approach as it meets the material parts of the formulation in *Marper* (relied on at Para 64 of the Respondent's skeleton) that "subsequently recorded on a nationwide database with the aim of being permanently kept and regularly processed by automated means for criminal identification purpose". For reasons given in the Appellant's submissions in relation to *Marper* a nationwide database and permanent retention (stressed in the Respondent's skeleton para 64) go to justification rather than interference. In any event, there is here an intention to retain indefinitely if such retention is justified following periodic reviews.
21. As *Marper v UK* makes clear (Tab 41 para 67 and 121), the mere storage of information relating to the private life of an individual is an interference however it is used. If presence on a database is capable of affecting the question whether or not the information held "relates to" private life then what matters is whether Mr Wood's images were liable to be so placed rather than whether they were actually used in this way. Concerns about future use of private information are relevant in determining whether there has been an interference (see *Marper* at Para 71).
22. For similar reasons, potential use of the database is relevant in determining whether the taking of the photographs was an interference. There was no unconditional intention so to use them but it was within the range of anticipated use when the photographs were taken.
23. The new evidence also sheds light on a separate point about use, namely the spotter cards. These seem to be used to track "known activists" who the police

want to follow. This definition is capable of applying to the Claimant and there is no suggestion that photographs included on the spotter sheets are those that have already been placed on the database (and so have, assuming the criteria in the 19 March letter to be accurate, passed through a “filter” of considering whether the subjects are suspected of unlawful activity). The potential for such cards to have an adverse impact on the Claimant is obvious and was developed in the original submissions. The Respondent has not said whether or not the Claimant’s image was used in this way.

Justification

24. The Claimant accepts that complete definition in this area is impossible. However, the various criteria that have been suggested indicate that different officers have different approaches or understandings as to the function of the images and when they can be used or retained and where. This may be a consequence of the fact that there are no sufficiently clear or detailed rules governing retention (the Claimant’s “in accordance with law” point) but in any case the range of criteria that are in practice used fail to provide any sufficient safeguards against abuse. Such guarantees are an essential element in deciding whether the Respondent has demonstrated that the reasons given by the authorities for an interference are “relevant and sufficient” (see particularly *Marper v UK* at paras 101-3). The language used by Supt Hartshorn would enable images to be kept on the database when any possible connection with unlawful activity or the prevention or detection of crime is so remote as to be disproportionate. Since the CD images may apparently be kept when a still lower intelligence standard is met then the same point applies to them *a fortiori*.

Conclusion

25. The information now available supports the Claimant’s case that there was an interference with his Article 8(1) rights because:

- a. He was liable to be included on the searchable database of images held by CO11.
- b. He was liable to have his photograph used on a spotter sheet as an “activist”.

26. The Respondent has failed to discharge the burden on him of showing that the retention of his image was proportionate because the explanations given as to the circumstances in which the image will be retained or used fail to offer any adequate safeguard against excessive use.

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