C1/2008/1466

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

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

APPELLANT'S SKELETON ARGUMENT

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1) The Appellant appeals against a decision of McCombe J given on 22nd May 2008 in which he dismissed the Appellant's application for judicial review.

2) The issues on the appeal are whether the judge erred in finding that the taking of photographs of the Respondent on 27 April 2005 by an evidence gathering team of the Metropolitan Police and the retention and use of images so captured on or after 27 April 2005 was not a breach of Articles 8, 10, 11 or 14 of the ECHR.

3) This case relates specifically to the events of 27 April 2005 but that was an instance only of the application of a practice adopted by the Respondent as to overt photography of protestors and the retention of images. This is referred to in further detail in the statement of Alex Gask [paras 7 – 12, JR bundle pp 41-2] and below at paragraph 5. The Appellant also seeks permission to adduce further evidence of this practice that has become available since the hearing (see the 2nd statement of Alex Gask). This shows that it remains widespread and indeed its use appears to be increasing.

Background facts

4) These are set out at paragraphs 3 to 18 of the judgment. The Appellant does not take issue with that summary[1] but has the following additions and observations:

a) At paragraphs 4-5 reference is made to a history of unlawful protest at Spearhead's offices. In its AOS (JR 124(6)) the Respondent asserted that members of CAAT had been involved in unlawful protests. However, no particulars were given of this. EA was alleged to have been a former member of CAAT. An attempt was made in the evidence of DI Weaver to link the AGM with a different demonstration by a group called Rising Tide. This was unfounded and was addressed by Mr Wood in his second statement.

b) At paragraph 6 the judge refers to the Respondent having taken the view that there was a "real possibility of demonstration at the AGM and that unlawful activity might occur". The main evidence on this point was contained in the statement of CI Weaver at 137-141. That evidence shows that the object of the deployment was also to obtain intelligence in case the Appellant or others attended other similar events in the future.

c) At paragraph 13 the judge refers to the suggestion that the Appellant was seen speaking to EA. The Appellant does not remember this and on the available evidence it seems unlikely that the Appellant was in fact speaking to her. In their evidence officers may well have mistaken KB for EA.

[1] He refers to the statement of facts in his original skeleton argument for the cross references to the evidence bundle.

d) The Appellant believed that he was still being photographed as he waked towards the underground station. The photographs exhibited in evidence [162-8] appear to support this.

e) An example of the type of sheet referred to in paragraph 15 is in the bundle at page 31 of the bundle. It is not the case that the copies are held only in the public order branch of the Respondent (CO11). The master copy is held in SCD4(3) headquarters – that is the forensic services department of the Respondent's specialist crime directorate. The Appellant refers to paragraph 20 of his skeleton below for a description of the Respondent's evidence as to how copies of the images were kept.

f) It is not clear (as stated in para 17) that the perceived need for photographs was limited to fears of unlawful activity at the DSEi Arms Fair due to be held in September 2005. The Respondent did say that the photographs would have been be destroyed shortly after that event if the Appellant had not brought these proceedings but that was linked to the point that 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 (AOS pp 128-9 and statement of Supt Gomm at p. 173). It seems to follow that the images would have been retained if he had attended the AGM. The Respondent also said that images are normally kept in CO11 for one year and then retained if they have "significant intelligence value".

The Respondent's policy

5) Similar action to that taken against the Appellant has been taken in relation to others involved in protest activity including arms-trade protesters and legal observers at demonstrations. The techniques used are described by Alex Gask in his statement at p. 41 – 42 (Para 8-12) and typically involve the use of repeated close range photography that the participants find intimidating. The Respondent has a general policy on overt photography [pp 55 - 57] but this is subject to standard operating procedures that "must be read in conjunction with" it. Access to these procedures has been denied on the grounds that their disclosure would prejudice future police

operations[2]. The Appellant's evidence is that the operating procedures contain no additional guidance as to the circumstances in which overt photography will be used.[3] It is impossible to verify this.

The progress of these proceedings

6) The Appellant started these proceedings on 25th October 2005 [1-5] claiming that the actions in taking and retaining the photographs were:
   a) Unjustifiable interferences with the Appellant's rights under Articles 8, 10 and 11 of the ECHR.
   b) Amounted to unlawful discrimination contrary to Article 14 ECHR, taken together with Articles 8, 10 and 11.

7) Permission to apply for judicial review was initially refused by Silber J on 1st February 2006 and by Charles J following a hearing on 10 July 2006. Sedley LJ granted permission on 23rd October 2006 [175-80]. McCombe J heard argument on 1-2 May 2008. On 7 May 2008 the Court of Appeal delivered judgment in *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 and McCombe J accepted further submissions in relating to that case in writing. In a decision handed down on 22 May 2008 he dismissed each of the Appellant's claims finding that:

   a) There was no interference with the Appellant's Article 8 rights.
   b) Any interference that the Appellant might have shown was both in accordance with the law and justified.
   c) There was no interference with the Appellant's Article 10 or 11 rights.
   d) Any such interference was in accordance with law and justified.
   e) As to Article 14:
      i) The facts did not fall within the ambit of any relevant Convention right.
      ii) The Appellant compared himself with other people attending the AGM but his circumstances were not relevantly similar to theirs.

[2] Pp. 80 – 82
[3] Statement of Superintendent Gomm, p. 174.

8) McCombe J granted permission to appeal and extended time for appealing. This skeleton argument deals firstly with the Appellant's application to adduce further evidence and then addresses the issues in the same order in which they were considered by the judge.

Further evidence

9) The Respondent seeks to adduce the following additional evidence:

a) Second statement of Alex Gask.
b) Third statement of Andrew Wood.

10) The Court of Appeal has discretion to admit new evidence (CPR 52.11(2)). The principles in *Ladd v Marshall* [1954] 1 WLR 1489 are relevant but not decisive and in judicial review proceedings the discretion to admit further evidence has been exercised flexibly where the interests of justice require it (see *E v Secretary of State* [2004] QB 1044).

11) The statement of Alex Gask deals with material about the general use of overt photography that has become available since the hearing. It could not have been adduced before then. It has an important bearing on the issues in this case because the judge's findings, both in relation to Article 8 and 10 and 11 were based largely on the insignificant impact of the interference and his assessment that it would not be seen to be intimidating by a person who was not unduly sensitive. This material shows that that is not the case. The practice has attracted widespread and justifiable concern and is known to be perceived as intimidating. When used to combat anti-social behaviour that appears to be its object, at least in part.

12) The third statement of Andrew Wood adduces material that was available at the hearing. However, it is intended to correct a misunderstanding as to the nature of his role as a media officer within CAAT.

A. Whether there was an interference with Article 8(1)

Taking of photographs - general principles

13) Article 8 protects a range of interests and the notion of private life "is a broad term not susceptible to exhaustive definition"[4]. These rights can extend to the control over the capture and use of personal information including one's image. As the ECtHR said in *Von Hannover v Germany* (2005) 40 EHRR 1 at para 50: "the concept of private life extends to aspects relating to personal identity, such as a person's name, or a person's picture" and at para 57 that private life included "the protection of a person's picture against abuse by others". In *Sciacca v Italy* 43 EHRR 400 (at para 29) it held "the concept of private life includes elements relating to a person's right to their picture"[5]. The case law is most highly developed in this area in relation to the unwanted publication of photographs. These cases often draw the distinction between the taking of photographs, which is held not to involve an interference, and the subsequent publication, which does subject to justification[6]. However it does not follow that photography in a public place (without further general publication) cannot amount to an interference or that unwanted publication is the only way in which this aspect of the right to private life can be interfered with.

14) In the publication cases both the European and domestic Courts have adopted a reasonable or legitimate expectation test. In *Murray v Big Pictures (UK) Ltd* it was expressed as follows:

> "whether David had a reasonable expectation of privacy in the sense that a reasonable person in his position would feel that the photograph should not be published"

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[4] See *Pretty v United Kingdom* (2002) 35 EHRR 1 at para 60. See also Van Dijk Theory and Practice of the European Convention on Human Rights 4th edn at p. 665: "...the use of the notion of private life or privacy to indicate the whole of the rights in Article 8 might be misleading. The Court seems willing to accept that Article 8 is to be understood as containing various guarantees to personal autonomy, personal privacy, personal identity, personal integrity, personal development, personal identification and similar concepts linked to the individual notion of personhood".

[5] This does not mean that there is a right to ones image. As explained by Baroness Hale in *Campbell* there is no such right under English Law.

[6] See e.g. *Campbell v MGN* [2004] 2 AC 457 in the passages cited at paras 31-3 of the judgment and, *Murray v Big Pictures (UK) Ltd* at para 17.

15) However, it must be noted that:

a) The question is not what the Appellant in fact expected but what they were reasonably entitled to expect. The term “should not be published” in the above passage and the reference to “legitimate” expectation in *Von Hannover* at para 52 make this clear.

b) The reasonable expectation test is not confined to publication cases but also applies to other intrusions, for example telephone intercepts (as stated in *Von Hannover* at para 52 referring to *Halford v United Kingdom* (1997) 24 EHRR, 523.

c) The reasonable expectation test is necessarily related to the type of intrusion about which complaint is made. Is that interference something to which the complainant is reasonably entitled to object?

d) It is accepted that in answering this question there is a threshold of severity and trivial interferences may not call for any justification at all (see *Gillan* – below). But subject to this there is no reason to set a high standard. An interference will always be capable of being justified if the conditions in Article 8(2) are made out.

16) The question is, as the judge accepted at paragraph 25, a fact sensitive one that has to take account of all of the circumstances of the case. This follows from the passage cited by him from *Murray v Big Pictures (UK) Ltd* at para 36:

> "As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes into account all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the Appellant was engaged, the place at which it was happening, the nature of the purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the Appellant and the purposes for which the information came into the hands of the publisher".

17) This is consistent with European cases in which the Court has repeatedly referred to a non-exhaustive list of factors such as whether the taking amounted to an intrusion into the individual’s privacy, whether the photographs related to private matters or public incidents, and whether the material was envisaged for a limited use or was intended to be made available to the general public[7].

[7] *PG v JH* (2001) Appl 44787/98 at para 58, *Peck v UK* Appn no 44647/98 at 61; *Von Hannover* at 52. In the light of *Von Hannover* intrusion into privacy for these purposes may now include

18) Photography in a public place does not involve an interference with Article 8 if the manner in which the photograph is taken is analogous to the kind of exposure that anyone must expect when they go out in public. That is because in that case they have no reasonable expectation of privacy. This also extends to "real time" video monitoring where there is no permanent or semi-permanent record:

"There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily a conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain."

PG and JH v United Kingdom (App. No 44787/98) - para 57[8].

19) However, this only applies to "normal" photography similar to ordinary observation or analogous, contemporaneous monitoring in a public place. Features that may take the photography outside this routine category include:

a) Where the manner of taking of the image intrudes into the Appellant's "inner circle" (*Friedl v Austria* 23 EHRR 83 at para 49) or is otherwise objectionable or an abuse (see *Von Hannover*).

b) Whether the photographs relate to private matters. The decision of the Court in *Von Hannover* has extended the scope of the Article 8 concept of "privacy" in the public sphere, such that it may now include many activities carried out in public. In the case of "ordinary individuals", this private zone is greater than in the case of a "public figure" (*Sciacca v Italy* (2006) 43 EHRR 20).

c) The object for which the photographs are taken.

harassment or the manner in which photographs are taken – para 59.

[8] See also *Peck v UK* at paras 58-60

d) Whether the photographs are taken by or for the purposes of the state, at least where this is with a view to identifying a specific individual. It has been accepted that the photographing by the state without consent of individuals in custody *prima facie* interferes with Article 8(1). Article 8(1) has also been engaged when photographs are taken covertly of individuals who have voluntarily attended a police station for interview or who are attending court for trial[9]. The circumstances of the present case are more closely analogous to such a situation than to the situation of, for example, photographs taken by press photographers of celebrities. *X v UK* 1973 5877/72 and *Friedl v Germany* (1995) 21 EHRR 83 referred to by the judge at paragraphs 45-6 are not, properly understood, counter examples suggesting that police photography is in general permitted.

i) In X v UK, the Commission held that an application under Article 8 was manifestly ill-founded because the taking of photographs of the applicant after she had been arrested at an anti-apartheid demonstration at a rugby match did not engage Article 8(1). This was primarily because "the taking of her photographs was part of and solely related to her voluntarily public activities and does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention". The Court's case law has moved on since this decision and now recognises that the taking of photographs in public can involve a *prima facie* interference with Article 8(1). The Commission's reasoning is inconsistent with later decisions of the Court that the photographing of detainees against their will is a *prima facie* interference with Article 8(1) (see e.g. *Murray*). Further, the present case is distinguishable on the facts in the following ways:

(1) The applicant in *X v UK* had been arrested before she was photographed: in *Perry v UK* (2004) 39 EHRR 3, the Court drew a distinction between the taking and use for identification purposes of photographs or video footage when those were obtained voluntarily or on the occasion of a previous arrest, and when the footage was obtained covertly and without

[9] *Murray v United Kingdom* (1995) 19 EHRR 193 – photography of the applicant while detained in an army interrogation centre; *R v Loveridge (William); R v Lee; R v Loveridge (Christine)* [2001] EWCA Crim 973 – filming of Respondents in the public parts of the Magistrates' Court. *Perry v UK* (2004) 39 EHRR 3 – covert filming in a custody suite.

consent, holding that the latter amounted to an interference with Article 8(1).

(2) The arrest took place in the course of a public demonstration involving the invasion of a rugby pitch by a large number of people. The Appellant was not in this case engaged in a public demonstration when he was photographed.

ii) In *Friedl* the Appellant was photographed in the course of a demonstration. However, it was crucial to the Commission's decision (as later explained in *Perry* at para 61) that the photographs were not intended to identify the applicant but were used solely as an aid to policing the demonstration on the relevant day. In any event the more modern cases recognise that there may be an intrusion into the Appellant's "inner circle" for the purposes of Article 8 even where there has been no intrusion into his home. The crucial question is whether there has been an interference with the Appellant's zone of interaction with others.

The decision below

20) McCombe J discussed the cases in detail at paragraphs 26-50 but the main elements of his reasoning are:

a) The effect of *Campbell v MGN* , *Von Hannover* and *Murray v Big Pictures (UK) Ltd* is that "the mere taking of a person's photograph in a public street may not generally interfere with that person's right of privacy" without more such as the publication of medical confidences (para 43). At paragraph 49 he observed correctly that the English authorities were "in any event binding on me". However, it is not clear whether he considered himself bound by the English cases to reach the conclusion he did or whether he considered that there was any relevant conflict between *Campbell* and *Von Hannover*, in which case he would be bound to follow the former.

b) He accepted that the nature and purpose of the photography as a whole was relevant (para 43). This was not followed through expressly in relation to the

taking of photographs but he held at para 59 that the Appellant did not have a reasonable expectation of privacy in relation to his attendance at the AGM. In particular because (para 59):

i) He was attending as media co-ordinator.
ii) One of CAAT's members was actively and publicly canvassing those attending the meeting.
iii) Reed had been subject to criminal activity in the past.
iv) The Appellant was photographed in a public street.
v) Police presence could not have been unexpected.
vi) The images were to be retained for limited purposes and were not part of any dossier.

c) The level of intrusion here was insufficiently serious to involve a breach of Article 8 (para 40-3 referring to *Gillan v Comissioner of Police* [2006] AC 307, 344F and para 58). From footnote 2 to paragraph 43 it seems that the judge was sympathetic to an argument that this point ought to be considered under Article 8(2) but considered himself bound to hold otherwise.

21) The judge was wrong to reject the Appellant's contention that the taking of photographs was an interference requiring justification on this basis.

22) Although the judge apparently accepted that all circumstances were relevant, his decision was based almost entirely on the non-private nature of the occasion on which the photographs were taken and the lack of publication. This is apparent from:

a) His reference to the "tenor" of the English authorities that were binding on him.

b) At para 43 where he referred only to case involving publication as examples of cases where factors beyond mere photography in a public place may cause the threshold to be crossed. This treats freedom from publication as the only relevant interest protected by this aspect of Article 8 but that is not the case (see above).

23) In any event he failed to give proper weight to the expanded understanding of the term “private life” referred to in *Von Hannover*. The judge observed at paragraph 36, that this covered many activities conducted in public but at paragraph 43 confined that case to being one where there had been “encyclopedic press recording”. Even though the Appellant was in a public place his activities can properly be described as private, at least to the extent that they were entitled to protection from the type of intrusive recording that took place. He was a private individual without any celebrity status. At the relevant time he had left the meeting. His functions as a media officer had no bearing on his actions at the time and he was engaged in conversation with other private individuals. He was not then involved in any demonstration. The fact that one of the people to whom he was talking may have been handing out leaflets is not in point and cannot convert his activity into a public activity.

24) He judge ought to have given particular weight to the fact that the photographs were being taken by and for the purposes of the state with a view to specifically identifying the Appellant– see above. He ought to have treated *Perry* as demonstrating that police involvement pointed to Article 8 being engaged. The judge was wrong to explain that case only on the basis that a ploy had been used to secure the photograph without the Appellant’s consent and that it was used at his trial. In particular:

a) The lack of consent could not convert something into an intrusion if it was not otherwise an intrusion – *Campbell v MGN*.

b) The fact that the material was used at trial could not be decisive. The interference occurred when the images were taken. The crucial ingredient is that they were taken for police purposes.

25) To the extent that the judge considered the limited purposes for which the photographs were intended to be retained (para 59) he wrongly directed himself (para 54) that “the use of lawfully obtained photographs by police for the purposes of investigations will not normally entail interference with Article 8, in the absence of publication elsewhere”. This is not supported by the cases on which he relied and is considered under retention (below). But in any event, the proposition that the police

may use lawfully obtained photographs cannot be used to support the proposition that they were lawfully obtained in the first place.

26) The judge wrongly concluded that the interference was insufficiently serious to amount to an interference with Article 8. This failed to give proper weight to the intimidatory impact of the photography and fails also to put the practice in context. This was not a one off occasion but part of a pattern – see above. In addition:

a) The photography cannot be separated from the later use and retention.

b) The judge was not bound as he thought by *Gillan* to hold that this intrusion was not an interference. *Gillan* establishes that there is a threshold requirement before Article 8(1) is engaged but it is wrong to use that case to extend by analogy the types of intrusion that do <u>not</u> qualify. In different contexts equally limited physical intrusions (e.g. *Acmanne v Belgium* 10435/83) have been held to be a prima facie interference – albeit justified. Each example must be examined on its own facts. In any event the facts of *Gillan* are not comparable with the present case for at least three reasons:

i) The search requirement in *Gillan* was expressly for a limited purpose, subject to specific authorisation under statute and regulated by PACE Codes of Practice. It had to be authorised at a senior level and the officer had to give a clear explanation of the search and their name and an opportunity to retain a copy of the search. These safeguards are absent in this case. These factors go to justification but are also relevant to whether or not there has been "respect" for private life.

ii) In *Gillan* no systematic record was kept of the search although the police would keep a copy of the form. The object of the photographs in this case was to create a record.

iii) In *Gillan* Lord Bingham was influenced by the fact that the intrusion was similar to that to which members of the public routinely submit at airports. There is no similar everyday analogy in the present case.

27) The judge ought to have held that Article 8 was engaged having regard to the Respondent's whole course of conduct, including the taking of the photographs. In particular:

a) The Appellant was not incidentally included in a picture or captured by routine monitoring but was singled out as the specific object of police attention. This was emphasised rather than diminished by the fact that this happened in public and other people were not treated in the same way.

b) At the time that the photographs were taken the Appellant was not participating in any public demonstration and nor was he suspected of having committed any criminal offence.

c) The photograph was taken in circumstances where the Appellant reasonably feared that it would be used to identify him as a subject of particular concern to the police should he attend a similar event in the future.

d) The manner in which the photographs were taken was intrusive:

   i) Photographs were taken at close range.

   ii) More than one photograph was taken. Although it is the Respondent's case that only two photographs were taken of the Claimant, it is admitted that numerous photographs were taken of his companion and the Appellant could not have known at the time how many photographs were directed at him. It is the effect on him at the time which is relevant in this context.

   iii) Several uniformed officers were involved. At one point at least four officers were present, in addition to the photographer.[10]

e) No explanation was given to the Appellants to why photographs were being taken of him. It was the Respondent's officers who had singled the Appellant out for attention and the responsibility lies on them to explain their conduct.[11]

f) The Appellant was followed by at least two officers to the underground station, a distance of about 400m.

g) The Appellant was asked to provide details of his identity and was asked about the event he had attended. When the Appellant refused to give his name, attempts were made to obtain this covertly through the assistance of London Underground staff.

h) The purpose of taking the photographs was to identify the Claimant.

[10] Statement of PC Palfrey, paragraph 9, p. 153 and Statement of PS Dixon, para 11, p. 145.

[11] In particular, under the PACE Codes where a person is photographed under PACE s. 64A (see below), the officer is under a duty to inform the subject of the purpose of the photograph being taken and the purposes for which it may be disclosed, used or retained before taking the photograph (PACE Code D para 5.16). The Respondent's policy suggests that subjects should be given this information if they ask but that cannot be determinative against any obligation on the Respondent to volunteer the information.

i) The photographs were taken with a view to their retention for intelligence purposes.

28) This went far beyond the kind of incidental exposure to public gaze that everybody accepts when they go out in public. It is a significant intrusion calling for a justification.

Subsequent retention and use: Article 8(1)

Retention

29) The European Court has consistently held that the storing by a public authority of information relating to an individual's private life amounts to an interference with their Article 8(1) rights, regardless of whether that information is subsequently used in any way (see, for example, *Amann v Switzerland*, para 69). This is so even if the information that is stored is "public" in the sense that it was obtained in the public domain (*Rotaru v Romania,* App No 28341/95, judgment of 4 May 2000). In *Segerstedt-Wiberg v Sweden* (2007) 44 EHRR 2, much of the information held in the files had originated from public sources such as newspaper articles.

30) The only exception to this rule is where the information that is held merely records the fact of a publicly known event, such as an arrest, and where there is no additional "surveillance or similar information in respect of the applicant or any subjective appreciations which he might have wished to refute" (*Kinnunen v Finland*, App. No. 24950/94).

31) In the present case, the retention of the Appellant's photographs falls within the category of personal information with additional surveillance and "subjective appreciations" for the following reasons:

a) The Respondent processed the photographs to establish the Appellant's identity;

b) Although the Respondent asserts that the photographs are not identified by name but only by reference to the occasion on which they were taken, it is clear that there must be some connection at least to a record of the Appellant's identity

otherwise there would be no purpose whatsoever in the Respondent retaining the photographs;

c) In any event, the fact that the record shows that the photographs were taken as part of a CO11 operation connected to arms trade protests at least implies that the Appellants an arms trade protestor in whom the police have reason to have an interest for public order reasons;

d) The fact that the photographs were taken because the Appellant was allegedly seen speaking to EA must presumably be recorded somewhere; the fact that this was considered sufficient to establish a legitimate interest in the Appellants the kind of "subjective appreciation which he might wish to refute" as was referred to in *Kinnunen*.

Subsequent use

32) The evidence as to the subsequent use of the photographs is that:

a) The photographs would be kept at CO11 for as long as they retained some intelligence significance, which might only be on the basis that the Appellant continued to exercise his right to peaceful political protest (for example, if he had attended the DSEi in September 2005);

b) The photographs might be kept at SCD4(3) headquarters indefinitely and could be accessed there by CO11 officers if it is believed that they might be of assistance in the investigation into a criminal offence.

c) The photographs would be used by CO11 to prepare sheets of photographs of known protestors for the Respondent's officers in policing subsequent events.

33) The Respondent's evidence is that "Mr Wood did not appear to have attended [DSEi in September 2005]".[12] The only way that the Respondent could know that the Appellant did not attend DSEi is if it had used its photographs and any other intelligence retained in its files as part of its surveillance operations at the DSEi. This clearly demonstrates the use to which the files relating to the Appellant are used to monitor his activities.

[12] Statement of Superintendent Gomm, para 13, p. 173.

34) The effect is that the Appellant has been marked out as a potential public order risk. He will be the subject of police attention over and above that paid to the ordinary member of the public at any future protest activity in which he participates, regardless of whether such activity is entirely peaceful.

The judge's reasoning:

35) The judge ought to have found that the retention and use of the photographs involved an interference with Article 8(1) for the reasons given above. There are 4 main elements to the judge's decision on this issue:

a) What ECHR authority there is (*Lupker v Netherlands* and *X v Y*) supported the proposition that: "the use of lawfully obtained photographs by police for the purpose of investigations will not normally entail interference with Article 8, in the absence of publication elsewhere" (para 54).

b) Systematic collection of information in a police file over many years – for example *Segerstedt Wiberg* will engage Article 8 but there was nothing like that here and the amount of information gathered was small and for a limited purpose (para 55 and 59).

c) *R (S & Marper*) v *South Yorkshire Police* [2004] 1 WLR 2196 was decisive against the Appellant because that case involved the retention of DNA that was inherently more "private" than photographs. If there was no interference in that case then *a fortiori* there was none here (56-8).

d) The Appellant could have little expectation of privacy generally in relation to his attendance at the AGM for reasons noted at 20(b) above.

36) None of these points supports the proposition that there was no interference in this case.

a) In *Lupker* photographs of suspects had been supplied either when they had been taken on arrest or for driving license applications. They were put into an album and shown to witnesses in the course of an investigation, after the event, into a specific crime. This does not apply to the retention of the Appellant's photographs because:

i) It is open to doubt whether this represents the modern approach to Article 8 in the member states. The Data Protection Directive (see below) places much more emphasis now on information only being kept for specified purposes and it is doubtful whether the applicants could reasonably have expected the use that happened in *Lupker*, at least where the photographs had not been supplied on arrest.

ii) The object of the photographs being kept here is different. At the time they were taken and kept there was no suggestion that the Appellant had been guilty of any criminal offence. They were kept as part of an ongoing record that would be checked depending on what other protest activity the Appellant engaged in. They also could be provided to police attending future events as a means of singling out the Claimant. They operate prospectively in respect of crimes that have never happened and may never happen as opposed to being an aid to the investigation of an actual crime after the event. That is much closer to the kind of database considered in cases like *Segerstedt* even though the quantum of information collected is smaller.

b) The principle that the creation of a systematic record engages Article 8 does not depend on the quantum of information recorded but on the exercise of creating the record. In *PG & JH* (cited at paragraph 47 of the judgment below) the European Court explained that private life considerations may arise once <u>any</u> systematic or permanent record comes into existence. The information kept here was a systematic record of that kind: The photographs were taken and retained by the Public Order Unit that makes a practice of taking photographs of similar protests. The record has to be considered in the light of all information available to the Respondent. Together that provided an insight into his political activity. It included the Appellant's name, his image, the fact that he was a member of CAAT and a singe shareholder in Reed Elsevier, he had attended the AGM and was thought to be likely to attend the DSEi Arms Fair and according to the police he had been seen associating with EA. Moreover a record of this type may grow over time. It is unrealistic to suggest that a Claimant should wait until sufficient information has accumulated before taking action but that is what would follow from the judge's approach.

c) The relevant point to extract from *Marper* is not the relative intimate character of DNA profiles as against photographs but the use to which the information can be put. The limited use of the samples was crucial to the decision in *Marper* (see especially paras 29 and 86 per Lords Steyn and Brown respectively). They were not subject to any active processing and could only be matched against DNA recovered in the future through expert analysis. The information could not be used to affect the way that the police or others dealt with the Claimants unless there was a positive match from another crime scene. Lord Brown thought that the only logical objection to the retention of DNA was "that it will serve to increase the risk of the person's detection in the event of his offending in future", which was plainly not a legitimate objection (para 86). The position here is different. The Appellant has not been arrested or charged with any offence but the information nonetheless identifies him as an object of police concern in the future. There has been active processing of his photographs with a view to identifying the Claimant. The information held is comprehensible without expert input. It consists in photographs, together with some information linking the Appellant to protest activity.

d) The Appellant's reasonable expectation is of limited relevance in connection with the retention or later use of data because it is well established that there may be a prima facie interference with Article 8 even where the information recorded originated in the public domain. In any event the Appellant had an expectation that he would be free from interference of this kind (see above).

Article 8(2): justification for interference

In accordance with the law

37) There is no statutory authority for the Respondent's actions in taking, retaining or subsequently using the Appellant's photographs. In this respect the position is anomalous because photography of people in the Appellant's position is less regulated than for those who have been arrested. This is regulated by s. 64A Police and Criminal Evidence Act (PACE) 1984 and by PACE Code D paragraphs 5.12 –

5.17[13]. Photography deployed as part of covert surveillance operations is controlled by the Regulation of Investigatory Powers Act 2000 (RIPA).

38) It is accepted that the common law powers of police constables may permit them to take photographs in circumstances such as the present *Rice v Connolly* [1966] 2 QB 414. This is the route through which the Respondent sought to argue that the practice had a basis in law even though it was not established by statute. The sufficiency of the common law as a source of the power to take photographs was recognised in *Murray v United Kingdom* (1994) 19 EHRR 193 where the European Court held that the taking of photographs of a person who had been detained under emergency powers was authorized by law even though there was no express statutory authority[14].

39) However, *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 – see e.g. *Malone* (1985) 7 EHRR 14, *Silver v UK* (1983) 5 EHRR 347. The Respondent submitted, and the judge accepted, that *Murray* must have considered these elements because it post-dated those cases, but there is no indication in the judgment that these points were in issue and the court did not address them.

40) The position is not therefore determined by any existing decision. The judge found that sufficient certainty was supplied either by the general requirements of administrative law, or alternatively by the Data Protection Act 1998. Neither provides a sufficient answer in this case. Certainty requires that citizens should be able to forsee with precision the exact scope and meaning of a provision (or here common law power) so that they can regulate their conduct accordingly. There must also be safeguards against abuse of a kind that clearly define the scope of any discretion. The degree of precision required varies with the circumstances and the subject

[13] Which also covers certain other person such as those required to wait by a community support officer or those issued with a fixed penalty notice.

[14] Paragraph 65 of the judgment misrecords the Respondent's submission on this point. The Respondent did not support this decision on the ground that the absence of any tortious remedy meant that any interference was in accordance with law. The Respondent instead relied on the passage emphasised in italics at para 68 of the judgment "the common law rule entitling the Army to take a photograph equally provides the legal basis for its retention".

matter[15]. It is only in limited cases that regulation can be left entirely to implied powers. In *PG v UK* the Court considered the use of covert listening devices to record, for the purposes of voice analysis, the applicants' voices while they were being held in police cells and when charged. The Court noted:

> "… the Government relied as the legal basis for the measure on the general powers of the police to store and gather evidence. While it may be permissible to rely on the implied powers of police officers to note evidence and collect and store exhibits for steps taken in the course of an investigation, it is trite law that specific statutory or other express legal authority is required for more invasive measures, whether searching private property or taking personal body samples… The underlying principle that domestic law should provide protection against arbitrariness and abuse in the use of covert surveillance techniques applies equally in that situation…" (para 62).

41) This was said in the specific context of covert surveillance but the requirement for express statutory authority does not depend on that. It applies whenever there are "more invasive measures" than simply collecting evidence incidental to a lawful investigation. The level of interference in this case is not as grave as a communication intercept but nor does it arise necessarily by implication in the course of a specific investigation that is itself subject to detailed lawful control. The entire legal basis for the interference is said to be a general power to prevent crime.

42) General standards derived from administrative law do not make the power compliant. They cannot enable anybody to forsee how the power will be exercised.

43) In any event, the Respondent has a policy about overt photography but part of that policy, the standard operating procedures (SOP), has not been disclosed. As a matter of general public law the Respondent would be expected to act consistently with its policies. If the relevant policy is not disclosed then public law standards cannot provide sufficient certainty because the Appellant will never be able to tell whether the Respondent has followed or had regard to its policy. In order for the procedure to be in accordance with law the Respondent must at least have an accessible policy or rules which set out with sufficient clarity the circumstances in which overt photography could be used, and the circumstances and conditions under which such photographs could be retained and used subsequently The Respondent

[15] See e.g. Van Dijn at pp 336-9.

claims that the SOP adds nothing to the circumstances in which photographs are taken [p. 174] but it is not clear whether this is intended to cover the use and retention of images. In any event the requirement of accessibility is not satisfied by a statement of this kind. The Appellant is entitled to consult the relevant source material and not to have to rely on an interpretation given by the Respondent's witness.

44) But if the SOP adds nothing then the published policy is still inadequate:

a) It does not define the circumstances in which overt filming and photography will be used by officers as a tool for the prevention and detection of crime;

b) It makes no provision as to the manner in which photographs must be taken, the number of photographs of a given subject which may be taken, or the range at which photographs should be taken;

c) It makes no provision for the circumstances in which officers must give information to the subjects of filming and photography as to the purpose of the filming/photography, providing only that officers must "be able" to give such information;

d) It makes no provision for the subsequent retention, storage or use of photographs obtained through overt photography and in particular makes no provision for access to photographs by members of the public, for the destruction of images after any given period, or restricting the uses to which they may be put.

45) As a result an individual cannot foresee the circumstances in which it is likely that his/her photographs will be taken, retained or used. The policy does not set out any safeguards to protect citizens from the arbitrary use of those powers, or to enable them to challenge the use of the power under domestic law principles.

46) In any event the Respondent has not followed its policy[16]:

a) The policy states that such photography may be used "to record identifiable details of subjects suspected of being involved in crime or anti sociable

[16] Even if the legal framework is sufficiently certain, failure to follow it will mean that the interference is not in accordance with the law – *Perry v United Kingdom Application no. 63737/00* 17 Jul 2003 - at paras 48-9.

behaviour…and associates for the purposes of preventing and detecting crime and to assist in the investigation of alleged offences". The Appellant has not been involved in crime. The limited (and disputed) evidence about a conversation with EA is far too tenuous to make him an "associate" of hers in relation to any criminal activity.

b) The policy also states:

> "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 the 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".

The Respondent's officers did not explain the reason why they were taking photographs of the Appellant or asking for his identity and no explanatory leaflet was given.

47) The judge did not address arguments based on the availability or adequacy of the policy or breaches of it.

48) McCombe J also accepted that an argument to the effect that the procedure was made sufficiently precise by the Data Protection Act 1998. He ought not to have done so.

49) As he recognised (para 72), the Data Protection Act 1998 (DPA) implements Directive 95/46. Recital 10 to the Directive states that the object of the national laws relating to the processing of data is to protect fundamental rights and "notably" the Article 8 right to privacy. The Appellant does not argue that the Act fails to implement the Directive but the judge drew the wrong conclusion from this. It does not follow that the Directive or the Act exhaust the requirements of certainty for the purposes of Article 8(1). The Act applies to any data controller and not only public bodies. It imposes requirements framed at a high level of generality. For example the data protection principles include the requirement that data shall be processed lawfully and fairly. Many of these principles could be derived from Article 8 itself and they do

not in themselves give sufficient information about how any specific power should be exercised.

50) In addition section 29 contains a significant exception from the data protection principles where data is processed for the purposes of the prevention or detection of crime or the apprehension or prosecution of offenders. It is then exempt from the first data protection principle to the extent that compliance with it would prejudice the purpose for which the data is processed (s. 29(1) DPA). There must be a "very significant and weighty chance of prejudice to the identified public interests" for the exemption to be relied on (*R (Lord) v SSHD* [2003] EWHC 2073). However, this means that any further protection given by the DPA is limited in this type of context. The Appellant produced at the hearing letters in response to a data protection request from another member of CAAT in which this exemption had been relied on.

51) There were beaches of the Act in any event because:

a) The Respondent did not comply with the First Data Protection Principle which requires that data be processed fairly and lawfully. This requires *inter alia* that information be given about the purpose or purposes for which the data are being processed, and such further information as is necessary to make the processing fair.[17] It is not necessary that the data subject request this information.

b) The Respondent did not comply with the Fifth Data Protection Principle which requires that the data be kept for no longer than is necessary for the purpose for which it is processed. This overlaps with justification below and the potential periods for which the data could be held are addressed there.

52) The judge did not consider it necessary to address whether or not there had been breaches because he considered that this was not in point because it did not negate the existence of controls that were in existence. He was wrong to take this approach. An argument by the government to similar effect failed in *Perry* (above) where there had been breaches of PACE (paras 45-9). The obligation on the part of the contracting state is to "secure the right to respect for private life in due form".

[17] Part II, Sch 1 DPA 1998, para 2(2).

Proportionality

53) The judge dealt with this at paragraphs 74-5. He did not identify the test that he applied but his conclusions were apparently influenced by his earlier view that any intrusion was at a low level and so required little in the way of justification.

54) The judge erred in relation to justification and failed to strike the right balance between the reasonable requirements of law enforcement and the rights of Appellant. This was not a case that required him improperly to second guess operational decisions by the police. All the relevant information was before him and he could make a judgment on it.

55) He ought to have directed himself that the interference should be subjected to close scrutiny. In this respect the Appellant's Article 8 and 10/11 claims ran together. This is a case where the interference with the Appellant's Article 8 rights has arisen in to context of the exercise of his article 10 and 11 rights and weighty justifications are required (see the passage from *Pro-life Alliance* cited at para 78).

56) The judge placed a great deal of emphasis on the assertion that the Appellant had been seen "associating with" EA. However, there was substantial material to suggest that the Appellant would have been photographed even if he had not been seen speaking to her. If so then it supported the Appellant's case that the decisive reason why his image was captured and retained was because of his association with CAAT and despite the fact that there was no other basis to suggest that he might be involved in any unlawful activity. It was on this basis that the Appellant agued he was being monitored on the basis of his peaceful expression of political views, that this was inherently objectionable. The judge failed to deal with this feature of the case. The Appellant relies in particular on:

a) The Respondent's case in its pre-action protocol letter p. 86 which describes a decision made in advance of the meeting to photograph CAAT attendees, apparently on the basis that they may have committed offences in the past or may do in the future:

"it was therefore considered necessary to photograph and if possible identify those who had attended the AGM in order to protest in case they had either caused disruption in the past or else planned to do so in the future, and in particular at DSEi."

b) In her statement Chief Inspector Weaver's evidence referred to the gathering of information in general terms not related to specific association with identified individuals [p. 140 paras 13 and 15]. PS Dixon also says that the decision to take photographs of the Appellant and IP was not solely because of their association with EA but also in case any offence had been committed inside the hotel that was not yet apparent [143-4].

c) The evidence of general evidence gathering by overt photography of CAAT members and others even where this does not appear to be linked to any criminal activity (see the first and second statements of Alex Gask).

57) The suggestion that the Appellant spoke to EA is in any event unreliable. PS Dixon says [144] that the Appellant and IP were speaking to KB and then they were joined by EA. This is his recollection and there is no contemporaneous record of this observation or who made it[18]. This, he says, was what prompted him to direct Mr Williams to take photographs. However, none of the photographs show the Appellant or IP with EA, despite the fact that one at least appears to have been taken outside the hotel where they are claimed to have been talking [162]. The woman in that photograph is KB, against whom no allegations are made. The Respondents may have confused KB with EA as suggested by Mr Prichard at 110. At best the alleged association with EA was extremely tenuous and an insufficient basis to treat the Appellant as an associate.

58) The judge failed to distinguish between the different kinds of use to which photographs might be put. Even if he was entitled to find that the initial taking of the photographs was justified he ought to have considered:

[18] None of the witnesses actually say that they saw them speaking. They say that they "were seen associating" or "were seen to speak to EA". PC Palfrey says that "they spoke to EA" but it is not clear whether this is his own observation [153].

a) Whether they should have been destroyed once it became clear that the Appellant had not committed offences in the AGM.

b) The practice of giving copies of the photographs to officers attending similar events in the future [see page 31]. This placed the Appellant the Appellant at particular risk or adverse and unjustified police attention at such an event.

Articles 10 and 11

59) The judge rejected the Appellant claim because he did not consider that the Respondent's actions were sufficiently serious to have an inhibiting effect on the exercise of the Appellant's rights: "the provisions of the Convention are not designed for the protection of the unduly sensitive". He held at paragraph 75 that: "The exercise of the proper common law power to take and retain photographs in this case could not in my judgment sensibly be said to restrict the Claimant's rights under either of these Articles". In the context of political free speech this is not the correct test. The question is not whether the Defendant's actions actually did inhibit the Claimant's exercise of those rights but whether they might have that effect.

"The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern"

Bladet Tromso and Stenaas v Norway (2000) 29 EHRR 125, para 64.

60) The judge's approach seriously underestimated the adverse impact on the Appellant and failed to have regard to the manner in which the photographs were taken and to the fact that the Appellant did not know the purposes for which they were being taken. The Appellant's evidence was that he felt "shaken and frightened" and that he found the taking of the photographs "intrusive and intimidating". He was extremely worried that information was being compiled on him. It was not suggested that this was not an accurate statement of the Appellant's perception but the Respondent's case was it was not warranted and that that they had sought to keep a reasonable distance and the exchange with the Appellant was amicable.

61) The judge also failed to place this incident in context. It was not a one-off event in response to an apparent association with EA but formed part of a pattern of similar photography (see pp 41-2 and 47-8). This is re-inforced by the further statement of Alex Gask that gives other examples of the practice that have become available since the hearing. This material demonstrates that the practice has and is known to have an intimidating effect.

62) The judge was wrong to place the reliance that he did on *Gillan*. For reasons given above that case cannot be extended by analogy to other cases but in any event the facts here were materially different. The Claimants in *Gillan* knew that if they went to a demonstration then they might be stopped and searched but no systematic record would be kept. But here the essence of the interference is the creation of a record and it is precisely the fear of adding to that record that inhibits future participation.

Article 14

63) The Appellant refers to his skeleton argument below for the way in which this part of his case was put. The judge held that:

a) The facts of the present case did not fall within the ambit of any relevant convention right "for the reasons already given" (para 82).

b) The reasons for photographing the Appellant were not relevantly similar to others who were attending the meeting and so he was not discriminated against for his political beliefs.

64) The finding on the first issue does not sufficiently explain why it is that the facts did not even fall within the ambit of the relevant convention rights. The judge's earlier reasoning all related to whether or not the Articles 8, 10 or 11 were themselves engaged. The judge ought to have held that the facts were at least "linked to the exercise" of those rights (*Secretary of State v M* [2006] UKHL 11 per Lord Brightman at para 59):

a) The passages cited above from *Sciacca v Italy* and *Von Hannover*. These suggest that the protection of personal information and one's personal image are within the scope of Article 8 even if the facts do not show a substantive interference with the right to respect for that right.

b) The judge's own findings that Articles 8, 10 and 11 were not engaged because the interference was insufficiently severe. This is consistent with the facts falling within their ambit because it suggests that the difference between substantive interference and non interference is a matter of degree.

65) The judge's finding on analogous group refers back to paragraph 74. The decisive feature is the alleged association with EA. If this is the reason for the photography then it is accepted that this does not apply to others and the Appellant is not in an analogous situation. This association was insufficient to justify the Respondent's conduct but that is not separately pursued under Article 14.

66) However, the Respondent's treatment does not only depend on this. As set out above there was a decision taken in advance to gather information about those attending the AGM and who were associated with CAAT. The judge did not address this. If he had done so then he would have concluded that the Appellant was in an analogous situation with other people attending the event because there was no intelligence about any of them to associate them with past or future unlawful activity. The Appellant's only distinguishing was his peaceful and lawful political activity through CATT.

Relief sought

67) The Appellant' appeal should be allowed and the following relief granted

a) An order that any photographs taken of him on 27 April 2005 and any photographic records of him be destroyed, in whatever form and wherever they are currently stored;

b) A declaration that the Respondent's actions in taking photographs of him and seeking to establish his identity on 27 April 2005 have violated the Appellant's human rights;

c) A declaration that the Respondent's policy of overt photography of those who are involved in political protests or demonstrations but who are not reasonably suspected of any criminal offence is unlawful.

MARTIN WESTGATE

July 21, 2008