

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

B E T W E E N:

THE QUEEN

On the application of

ANDREW WOOD

Claimant

And

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendant

GROUND FOR APPLICATION TO APPLY FOR JUDICIAL REVIEW

- 1) The Claimant is a former employee of the Campaign Against Arms Trade (CAAT). CAAT is an unincorporated association, established in 1974. Among other things it engages in lobbying and protests at or near events associated with the arms trade. It is committed to pursuing its protests by peaceful means.
- 2) On 27th April 2005 Reed Elsevier plc ("Reed") held its annual general meeting at the Millenium Hotel in Grosvenor Square, London. W1. Reed is the parent company of Spearhead Exhibitions Ltd ("Spearheard"). Spearhead is the organiser of an arms fair: Defence Systems Equipment International.
- 3) The Claimant was a shareholder of Reed having bought a share in advance of the AGM.
- 4) On 27th April 2005 7 individuals representing CAAT, and a few more CAAT supporters, attended Grosvenor Square. Two people handed out leaflets with the prior agreement of the police. There were some other protestors present.
- 5) The Claimant entered the AGM. In the course of the AGM he asked a question about the activities of Spearhead.

- 6) The Claimant started to leave the hotel immediately after the AGM together with another employee of CAAT who had also attended the meeting. Very shortly after they left the entrance to the hotel a police officer emerged from a vehicle, approached them and started taking photographs of them from just a few metres away with a wide angle lens. The Claimant and the other employee felt intimidated and left the vicinity of the hotel. As they did so a police vehicle drew up beside them. Four police officers got out, stood around them and started to ask questions about their identity. They followed them closely some 300 or 400 metres to Bond Street station.
- 7) 6 other members of CAAT were also repeatedly photographed in a similar way on leaving the Reed AGM.
- 8) CAAT, through Ann Feltham, complained to the police about the officer's conduct in a letter dated 28th April 2005. That complaint is ongoing.
- 9) On 1st June 2005, the Claimant's solicitors, Liberty, wrote to the Defendant asking for certain information about the decision to photograph the Claimant and others and a copy of the Defendant's standard operating procedures.
- 10) There was no substantive response until 1st August 2005 when the Defendant refused to disclose a copy of the standard operating procedures, relying on section 31 of the Freedom of Information Act 2000 and claiming that the information would, if released, prejudice the ability of the Metropolitan Police Service to prevent or detect crime and to apprehend and prosecute offenders.
- 11) On 13th July 2005 Liberty wrote a pre-action protocol letter to the Defendant asking that they acknowledge that their actions had breached the Claimant's convention rights under Articles 8, 10 and 11 and that the Defendant take steps to prevent the "intimidatory use of photography against legitimate peaceful protesters".
- 12) The Defendant responded to the pre-action protocol letter on 9th August 2005. It stated that it had received information from Spearhead of a number of recent

share purchases and that Spearhead believed that those individuals may attend the AGM intending to cause disruption.

"An assessment by police, given their experience in policing such events, concluded that there was a likelihood that demonstrators may well engage in criminal acts at the AGM, such as causing criminal damage by daubing slogans and engaging in acts of civil disobedience. This assessment was made on the basis of past experience from similar events and also through knowledge of the tactics adopted by some anti-arms trade campaigners, e.g. Disarm DSEi. In these circumstances it was decided that there should be a police presence outside the AGM

"An additional factor that was taken into consideration was the fact that the DESi arms fair is due to take place in London in September. DSEi has been a focus for demonstrations in the past and some pressure groups, for example Disarm DSEi, are active in demonstrating against companies involved in arms sales, so that it was believed that they may plan demonstrations at the Reed Elsevier AGM. Relevant to this is the fact that the Reed Elsevier Head Office in Richmond is subjected to weekly demonstrations and criminal damage.

"It was therefore considered necessary to photograph and if possible identify those who 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.

"Police fears that criminal actions may occur were increased when it became known certain individuals with a history of violent demonstrations against companies involved in the arms trade had been nominated as proxies to vote at the AGM. This fact lent credence to the fears that of violent action may be planned at the Reed Elsevier AGM."

- 13) The letter accepted that the AGM itself passed off peacefully except with regard to "two protesters who were both ejected by spearhead staff" in connection with the decision to take photographs the letter said:

"It was in compliance with the directions to photograph those attending the AGM that your client was photographed when he left the AGM. The police photographer and the three officers with him were wearing uniform and were clearly identifiable as officers. Their purpose in photographing in your client was so that he could be identified, firstly to see if he had caused disruption in the past but also to identify him in case he caused trouble in future, particularly at the DSEi in September.

"As well as being photographed, both individually and in company, your client was also asked for his personal details by uniformed officers but a declined to supply them."

"Officers engaged in intelligence gathering operations such as this are deployed in uniform, overtly, in public places and use non-intrusive

techniques. They are thus doing no more than any member of the public is entitled to do. It may be argued that their presence has a "chilling" effect on one's human rights; in fact it is intended to do no more than remind participants of the need to comply with the law. The purpose of the surveillance is to collate evidence which may be used later to identify those who break the law, that is in accordance with the MPS's notification to the Information Commissioner under the Data Protection Act 1998. It is important to note that in carrying out their duties surveillance officers are instructed not to impinge on any lawful activities in which the individuals under surveillance are engaged, for example peaceful protesting, handing out leaflets etc.

"Any claimed interference with your client's Convention Rights must also be weighed against the rights of those attending the AGM and their expectation that police would protect their rights to freedom of expression and assembly. The police are also under duty to protect property pursuant to Article 1 of the First Protocol.

"There is also an overriding duty upon police to prevent crime and keep the peace.

"It was in complying with these duties that police surveillance takes place."

- 14) As to Article 8 the Defendant denied that the Claimant had an expectation of privacy because "the protest was held in public, it was the intention of CAAT and the other demonstrators to attract publicity; and the photographs have only been used as an aid to police and have not been published. I am thus of the view that police actions did not amount to a breach of your client's Article 8 rights."
- 15) As to Articles 10 and 11 the Defendant denied that there had been any direct interference with the Claimant's convention rights as the case law "primarily relates to the physical impediment of the freedom of expression and/or assembly...or...punishment...following arrest", "nor can [overt photographing of your client] be argued to have a 'chilling' effect".
- 16) Responding to specific questions the Defendant asserted that the Claimant had been photographed

"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 the police have engaged on intelligence gathering operations in the run up to DSEi.”

“Photographs were taken of your client on a number of occasions for intelligence purposes, that is not just to establish his identity but also those he associated with. Again, this is not because of the fact that your client or his associate worked for CAAT but due to the fact that others who have broken the law in the past did attend the AGM and it was necessary to establish whether not your client was an associate of such violent demonstrators.”

“The photographs would have been used to establish the identities of those photographed and would have been compared against previous intelligence.”

“The photographs have been retained by the MPS.”

“The photographs were taken for the purpose of gathering intelligence in advance of DSEi. At the conclusion of DSEi the need to retain such intelligence will be considered on a case-by-case basis. The digital image itself will be retained beyond this period but due to the fact that all intelligence relating to the subject of the image will have been destroyed it will be impossible to identify your client or others from the image.”

- 17) The Claimant believes that the Defendant has adopted a practice or policy of taking photographs in a manner similar to that used in this case. The policy or practice is applied to those believed to be involved in political protests. The main characteristics are that the photography takes place at close range sometimes using flash. Individuals are singled out as the subjects of the photographs and numerous images are recorded. The photographers are in police uniform and neither seek consent nor explain why the photographs are being taken. They are usually accompanied by other officers and follow the subject at close quarters if they walk away. The Claimant relies on his own statement and the evidence set out in the statement of Alex Gask. The practice or policy has the effect of intimidating those to whom it is applied and deters them from engaging in political activity. It amounts to an unlawful interference with their rights under Articles 8, 10 , 11 and 14 of the ECHR for the same reasons that those rights were breached in respect of the Claimant and as set out below.

Prima facie breach of convention rights

18) The Defendant's actions involve a prima facie breach of the Claimant's rights under articles 8, 10, and 11 of the ECHR for the reasons set out in the following paragraphs. In each case the burden lies on the Defendant to demonstrate that its actions were justified.

Article 8 ECHR

- 19) The acquisition, storage and release of information (including photographs) relating to an individual's private life is an interference with Article 8(1) of the ECHR requiring justification under Article 8(2)¹.
- 20) The Defendant relies on *Friedl v Austria* (above) in support of its proposition that Article 8 is not engaged because the Claimant did not have any reasonable expectation of privacy that could be protected by Article 8 as he was photographed in connection with his attendance at a public demonstration.
- 21) In *Friedl v Austria* (above) the Commission considered that there was not an interference with Article 8 rights where the police took photographs of the Applicant at a demonstration. However, the photographs then were taken in the course of a "public incident", and were taken solely for the purposes of recording the demonstration itself. The commission accepted assurances given by the respondent government to the effect that individuals in the photographs remained anonymous and that no action was taken to identify the persons photographed.
- 22) The taking and retention of the photographs of the Claimant involves an interference with Article 8 notwithstanding *Friedl* for the following reasons, none of which were present in that case.
- 23) An element in deciding whether there has been respect for an individual's private life is the extent to which any alleged intrusion has the Claimant as its focus as

¹ See for example *Friedl v Austria* 21 EHRR 83 (Commission) and the cases cited at para 46.

opposed to the interference only incidentally involving the Claimant. In *Campbell v MGN Ltd* [2004] 2 AC 457, Lord Hope, at para 122 drew a distinction between a person who is in a street when a photograph is taken and appears in it only incidentally (in which case they cannot complain about publication) and a case where the "the public nature of the place where a photograph is taken was simply used as the background for one or more persons who constitute the true subject of the photograph". Similar reasoning is developed in *Durant v The Financial Services Authority* [2003] EWCA Civ 1746 in determining whether data "relates to" a living individual for the purposes of the Data Protection Act 1998.

"Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity. A recent example is that considered by the European Court in *Criminal Proceedings against Lindquist*, Case C-101/01 (6th November 2003), in which the Court held, at para. 27, that **"personal data" covered the name of a person or identification of him by some other means, for instance by giving his telephone number or information regarding his working conditions or hobbies**". (emphasis added).

- 24) The act of photographing the Claimant here singled him out as the specific object of the photograph. It was taken with a view to identifying him (as the Defendant accepts in his response to the pre-action protocol letter).
- 25) The activity in which the Claimant participated was not public in the sense of the demonstration in *Friedl*. The Claimant participated in an AGM in a hotel at which it would have been open to the organisers to refuse access to those who were

not members of the company. The Claimant did not draw attention to himself except by asking a question at the AGM.

- 26) In *Friedl* the Commission accepted that questioning the Claimant with a view to establishing his identity involved an interference with his Article 8 rights. It follows from this and from the terms in which the Commission decided that the photograph did not involve a breach in that case (i.e. in part because the complainant was not identified) that a decision by the police to photograph a person with a view to identifying them does involve an interference with the subject's rights under Article 8, as does a decision to take a photograph following a prior identification. In this case it appears from the Defendant's pre-action protocol letter that the Claimant had been identified to the police by Spearhead or its agents.
- 27) In any event the making of a record and the retention of the photographs is an interference (PG and JH v United Kingdom – Reports of Judgments and Decisions 2001 – ix p. 195). In *Marper* the retention of DNA profiles on individuals who had been arrested (at which point the relevant sample was taken) but not been convicted was held, by a majority, not to involve an interference with private life. However, the information was there held as part of a database where the samples could be matched with a specified individual only through expert analysis. There was no active processing of any sample relating to an individual. The object of keeping the data was so that it could be checked for a match on DNA recovered from a future crime rather than allowing for the specific tracking of the individuals on the database. *Marper* is distinguishable from the present case. The object of the photograph is to be retained specifically with a view to identifying the Claimant at a future demonstration.
- 28) The Defendant's actions also interfere with the Claimant's autonomy and dignity, both protected by Article 8. In *Campbell*, Lord Hoffmann (dissenting as to the result but not so as to affect this part of his reasoning) described the approach to the values protected by confidentiality and Article 8 as follows:

“the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based on the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses on 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".

- 29) The photograph removes from the Claimant control over how information about him is disseminated. The Claimant participated appropriately in a lawful activity. By taking the photographs with a view to identifying the Claimant the Defendant has used private information relating to him (his image and identity) to his detriment in that he is stigmatised as a legitimate object of police concern on public order grounds. The keeping of this information makes it more likely that his activities will be followed in the future and more likely that he will be subjected to other intrusive policing techniques such as stop and search using powers such as those contained in the Terrorism Act 2000 (deployed against arms trade protesters in *R (Gillan) v Commissioner of Police for the Metropolis* [2005] QB 388).

Articles 10 and 11

- 30) The Claimant's participation in protests against the arms trade and his attendance at the AGM on 27th April 2005 self evidently involved the exercise by him of his right to freedom of expression and to peaceful assembly. This appears to be accepted by the Defendant. The Defendant does not accept that it interfered with the Claimant's exercise of those rights. However, the Defendant's approach as to what amounts to an interference is too narrow.
- 31) As the Defendant accepts, an interference with Article 10 and 11 rights need not be direct in the sense of a physical or legal impediment. It is sufficient if action by the Defendant has a chilling effect in tending to inhibit the exercise of the right (for example in *Steel & Others v United Kingdom* 28 EHRR 603 at para 93). The Defendant is wrong to limit this to matters similar to arrest or fear of arrest. The inhibition might, for example, arise through a fear of excessive liability in damages or costs, fixed without reference to ability to pay (see e.g. *Steel and Morris v United Kingdom Application no. 68416/01* at paragraph 96).
- 32) The question in each case is not how the action of the Defendant is to be classified but what is likely to be its impact.

33) In this case the Claimant relies on the following matters:

- a) He was subjected to repeated and intrusive photographs being taken. He cannot, until after disclosure of the Defendant's evidence, say how many photographs were taken but contends that the number was excessive.
- b) He was pursued for a considerable length of time both by the photographing officer and by other officers who pressed him for personal details of his identity.
- c) The Claimant had not acted unlawfully. He had conducted himself with propriety in the meeting and as far as he is aware no justifiable complaint had been made against him. The effect of the Defendant's course of conduct was to leave the Claimant feeling defensive and intimidated and that he had been subjected to having a police "file" opened on him for no good reason.
- d) He was photographed at close range by a police officer in uniform. Although fact that the officer was in uniform may have been intended to ensure that the photography was not seen as an intrusion by being covert the effect was, in context, to increase the intimidatory impact on the Claimant.
- e) The Claimant was not given any information as to why photographs were being taken. He was not given any information about what use would be made of them.
- f) The Defendant knew or must have been aware that its actions would be seen as intimidatory by the Claimant and that the Claimant would feel unease and concern about what use would be made of the photographs after they were taken.
- g) The Defendant's actions fall within the definition of harassment in the Protection from Harassment Act 1997 (below).

Justification

In accordance with law

34) The Defendant does not rely on any specific statutory authority for its actions but instead asserts that the officers were "doing no more than any member of the public is entitled to do". This is not sufficient for the interference to be in accordance with the law. This requirement refers not only to the legal basis for action but also to the quality of the law, which must be predictable and accessible.

"Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." (Sunday Times judgment, p. 31, para. 49; Silver and Others judgment, p. 33, paras. 87 and 88)

Malone v United Kingdom 26th April 1985 A95 at para 66.

35) Where the law confers a discretion then the law must indicate the scope of the discretion (*ibid* para 67).

36) In the present case the law relating to overt photography is neither accessible nor predictable. The Defendant's officers operate under standard operating procedures. These are not publicly available and the Defendant has refused to disclose them, relying on an exception from disclosure in the Freedom of Information Act 2000. The Defendant has disclosed details of an overt filming and photography policy which is publicly available. However, that gives only general statements about the objects for which overt photography will take place and does not state when such filming will take place.

37) In any event, to the extent that the policy does govern the use of overt photography the Defendant has failed to follow it and its actions are not in accordance with law for that reason. In particular:

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

behaviour...and associates for the purposes of preventing and detecting crime and to assist in the investigation of alleged offences”.

b) The Defendant has not alleged that the Claimant or anybody associated with him has been involved in crime.

c) 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”.

d) This was not followed. As stated above the Defendant’s officers did not explain the reason why they were taking photographs of the Claimant or asking for his identity.

Proportionality

38) The interference is disproportionate and imposes an excessive burden on the Claimant. Any alleged justification must be subjected to close scrutiny:

“The rights to freedom of expression and assembly and association, which are protected by articles 10 and 11 of the Convention respectively, are of the greatest importance to the proper functioning of any democracy. Any intrusion upon the rights, either by the developing common law or by the intervention of statute law, has to be jealously scrutinised” – *R (Laporte) v Chief Constable of Gloucestershire* [2005] QB 678 at para 35.

39) The action was disproportionate for the following reasons:

a) The Defendant’s actions amounted to a significant interference with the Claimant’s convention rights calling for a compelling justification. I refer to the matters set out above.

b) If, which is denied, it was appropriate for any photographs to be taken of the Claimant then the number taken and the manner in which they were taken

was excessive. It was not necessary for the Defendant repeatedly to photograph the Claimant at close range, nor was it necessary to follow him to Bond St station while pressing him for details of his identity.

- c) The Defendant does not claim to have had any information to the effect that the Claimant was disruptive or had otherwise acted unlawfully or improperly on 27th April 2005 or that he had done so in the past or that he intended to do so in the future. He had done no more at the meeting than to ask a single question at an appropriate time and in the proper manner, in his capacity as shareholder.
- d) The police knew that the Claimant was a member of CAAT, an organisation with a long record of peaceful protest. The Claimant is himself of good character with no history of violence or disorder.
- e) The Defendant does not claim to have had any information to the effect that he associated with anybody who was involved in any relevant criminal activity. The pre-action protocol letter refers to a need to establish whether or not the Claimant "was an associate of violent demonstrators". It is not admitted that the establishment of such a link would justify such surveillance in the absence of any evidence that the Claimant was himself involved in carrying out or facilitating such conduct but in any event the Defendant does not assert any basis for thinking that the Claimant might have been so associated with violent protesters. The surveillance process is intended to support mere speculation.
- f) It is accepted that in some cases, police action may indirectly affect innocent individuals where it is not possible for the police to differentiate in time to prevent a reasonably apprehended and imminent breach of the peace. *Laporte* (above) was such an example². However, this is the opposite case. There was no suggestion that there was any imminent criminal conduct yet the Claimant was specifically targeted. That action could only be justified by specific grounds to suspect him of criminal activity. There are none.

² The principles are discussed at para 44. The level of appropriate response from the police depends on the gravity of the feared harm and how imminent it is.

- g) The Defendant claims (pre-action protocol letter) that part of the reason for taking these photographs was to “do no more than remind participants of the need to comply with the law”. The Defendant’s action is not rationally connected with this aim particularly given that the officers did not explain what they were doing and why. The Defendant does not explain how it would serve that object (other than by dissuading protesters from attending such events at all) and the action is excessive. There is no suggestion that the Claimant needed any such reminder.

Discrimination contrary to Article 14.

- 40) The Claimant has been discriminated against contrary to Article 14 taken together with Articles 8 - 11.
- 41) By reference to the approach in *Michalak v LB Wandsworth* [2003] 1 WLR 617:
- a) The facts are within the ambit of the convention rights. The Claimant repeats his submissions above.
 - b) The Claimant has been treated less favourably than the members of the following groups:
 - i) Other members of the public generally.
 - ii) Other people who attended the AGM in their capacity as shareholders.
 - c) The Claimant was subjected to less favourable treatment on a proscribed ground, namely his political and conscientious opposition to the arms trade.
 - d) The others with whom the Claimant compares himself are in an analogous situation because they are all (so far as relevant) individuals in respect of whom the police do not claim to have any specific intelligence about their criminal activity. Furthermore, this second class of persons were present at

the time and place where the Claimant was subjected to the action he complains about.

e) The action is not justified. The Claimant repeats his submissions above.

Protection from Harassment Act 1997

- 42) The actions of the officers on 27th April 2005 were a course of conduct which as they knew or ought to have known, amounted to harassment of the Claimant contrary to section 1 of the Protection from Harassment Act 1997 (the PHA).
- 43) To the extent that the Defendant may allege that the action was taken for the purpose of preventing or detecting crime and so is excluded from the definition of harassment by section 1(3)(a), the Claimant's case is that this subsection must be narrowly construed in order to be compatible with the ECHR. It does not protect any action taken with the purported purpose of preventing or detecting crime but only action that is taken on reasonable grounds, is rationally connected to that ground, and is proportionate. For the reasons set out above this does not apply to the Defendant's actions.

Delay

- 44) 3 months from 27th April 2005 expired on 27th July 2005. The Claimant drew attention to this in its pre-action protocol letter of 13th July 2005. In its response, dated 9 August 2005, the Defendant asked for agreement that the Claimant not issue proceedings until after 5th September 2005.
- 45) The Claimant's delay following completion of the pre-action protocol has been caused mainly by difficulty in obtaining public funding. Funding was first applied for, on an emergency basis, on 16 August 2005 and refused on 9 September 2005. It was granted following a timely appeal on Friday 14 October 2005.
- 46) In any event the Claimant's claim ought to be allowed to proceed because:

- a) No prejudice is caused to the Defendant. The Defendant has been aware of the general subject matter of the Claimant's complaint since the day after the AGM as a result of a letter from CAAT. The Defendant asked the Claimant not to start proceedings until after the expiry of the normal period for issuing.
- b) The matter concerns the continuing operation of a policy by the police.
- c) The case involves issues of general importance as to the use by the police of surveillance techniques such as photography.
- d) The Claimant's complaint could be brought by way of private law action for breach of the Claimant's convention rights. In that case the limitation period would be one year (and longer in respect of his claim under the PHA). He has chosen to bring the claim by judicial review because the case is unlikely to involve the resolution of contested facts and the Administrative Court is the appropriate forum to deal with the issues raised. He ought not to be penalised for delay because of the type of proceedings he has issued.

MARTIN WESTGATE