CO/8624/2005

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

GROUNDS FOR RENEWED APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

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1) This application was issued on 25th October 2005. The Defendant's acknowledgement of service (AOS) is dated 9th December 2005. Silber J refused permission to apply for judicial review in a decision given on 1st February 2005. The initial claim form or grounds are not repeated and should be read together with this notice which seeks to address the grounds for refusal and associated submissions in the AOS.

Article 8 ECHR

2) There are two grounds for refusal, both of which suggest that there is no prima facie breach of Article 8 requiring any justification:

   a) The taking of photographs of an individual in a public place is not an interference with the individuals Article 8 Rights – *Campbell v* MGN[2004] 2 AC 457 at paras 122 and 154.

   b) The retention of those photographs does not amount to an interference – *R (S) v Marper* [2004] 1 WLR paras 85 and 86.

The taking of photographs

2) Campbell and the passages cited from it do not support a general proposition that the taking of photographs in a public place cannot amount to an interference with a Claimant's Article 8 rights. This does not normally amount to such an interference because exposure to this kind of activity is one of the ordinary incidents of being in public, even where the photographs are taken without consent. This explanation is given in *PG and JH v United Kingdom* at para 57:

> "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 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."
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> [see to similar effect *Campbell v MGN* [2004] 2 AC 477 para 73 per Lord Hoffmann and Lord Hope at para 122].

3) Where a permanent or systematic record is kept or the information is published then this will more readily found to be an interference with Article 8(2) even where the information itself is public or has been gathered in public.

> "Moreover, public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person's distant past".

Rotaru v Romania (App No. 28341/95).

4) This type of interference is considered specifically below. It is suggested that part of the reason for this is that once systematically recorded the information identifies the Claimant as a specific individual subject to surveillance or to the special attention of the state. It increases the potential for them to be subjected to other forms of arbitrary interference. Freedom from this kind of risk is a core concern of Article 8 (see e.g. *Qazi v London Borough of Harrow* at para 50 per

Lord Hope and para 89 per Lord Millett). In other circumstances the manner in which the photograph is taken may itself be or be evidence of arbitrary interference.

5) In addition photography in a public place can involve a prima facie breach of Article 8 if the manner in which the photograph is taken (or other information is obtained) intrudes into the Claimant's "inner circle" (*Freidl v Austria* at para 49). In using this term the commission in *Friedl* had in mind the Claimant's home but there is no reason why the concept should be so confined in this way. Article 8 also protects an individual's personal and physical integrity. For example acts amounting to harassment are capable of being an interference even though no other wrong is committed (*Whitehead v United Kingdom*)[1].

6) The term private life is not susceptible to exhaustive definition (*Peck v United Kingdom Application no. 44647/98* at para 57). Cases such as *Peck* and *PG* only go so far as to suggest that there is no breach resulting from ordinary observation or analogous monitoring in a public place, this being the kind of activity that anybody venturing out in public accepts may happen. Beyond this, there is a range of activity that is not expected in this sense and that can reasonably be objected to as an interference with Article 8. Where this includes the taking of a photograph then the whole circumstances have to be considered[2].

7) The Claimant's article 8 complaint here must be seen in the context of the Defendant's whole course of conduct, including the taking of the photographs. In particular:

[1] Similarly, in *Verliere v Switzerland* 41953/98 there was an interference with the Claimant's Article 8 rights when she was the subject of surveillance by an insurance company investigating a personal injury claim. The enquiry agents monitored her movements and took photographs and video footage in public places. The interference was justified and there was in the event no breach, but the finding of an interference did not depend on whether or not the photographs were retained or used. This had happened but the complaint was that she had been the fact that she had been kept under surveillance by the detectives employed by the insurance company.

[2] In *Von Hanover v Germany Application no. 59320/00* the Court was mainly concerned with the publication of covertly obtained photographs. However, at paragraph 68 it also drew attention to the context in which they were taken: "The Court finds another point to be of importance: even though, strictly speaking, the present application concerns only the publication of the photos and articles by various German magazines, the context in which these photos were taken – without the applicant's knowledge or consent –and the harassment endured by many public figures in their daily lives cannot be fully disregarded (see paragraph 59 above)".

a) The Claimant 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) The Claimant was taken in circumstances where the Claimant reasonably feared that it would be used to identify him as a subject of particular concern should he attend a similar event in the future. This fear has proved to be well founded given the Defendant's explanation as to how they have processed the photographs (see in particular paragraph 9c below).

c) The manner in which the photographs were taken involved was intrusive and interfered with the Claimant's physical and psychological integrity.

   i) Photographs were taken at close range. The Claimant's case is that this was from at most 2 metres away [statement para 9]. The Defendant does not directly dispute this but claims only that the photographer "sought to keep a reasonable distance" [AOS para 17]. The camera used appeared to be a wide angle lens [Wood statement para 9] and the distance would have to be appropriate for a photograph clearly identifying the Claimant.

   ii) More than one photograph was taken. Although the Defendant says that only two images were taken [AOS para 17] the Claimant was with another person (IP) and an unspecified number of images were taken of him. The perception at the time would be that a repeated number of images were being taken – "[he] was photographing us continuously" [Wood para 9].

   iii) Several officers were involved. Precisely how many is a matter of dispute. There was an EG team comprising 3 officers. Initially photographs were taken by one "tall, well built officer" [Wood para 9] but other officers were present [AOS para 18]. The Claimant was later followed by at least 4 officers and believes that he was photographed then as well [statement para 10-12]. This is disputed [AOS para 19-21].

d) No explanation was given to the Claimant as to why photographs were being taken of him. The Defendant objects [para 18] that the Claimant did not ask why but the onus cannot be on him to do so and the Defendant's policy (original grounds para 37(c)) requires the officers to state the reasons and provide an explanatory leaflet.

e) The Claimant was followed to the underground station. The circumstances are in dispute [see references at (b)(iii) above] but the fact that he was followed is not in issue.

f) The Claimant was asked to provide details of his identity. This is accepted.

The retention of data

8) The grounds for refusal of permission rely on *Marper*. In that case DNA profiles were kept on individuals who had been arrested but not been convicted. The samples had been lawfully taken on arrest. 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.

9) *Marper* is distinguishable from the present case for reasons set out in paragraphs 26-8 of the original claim form. The information in the Defendant's acknowledgment of service supports these grounds of distinction.

a) It is clear from paragraph 22 that there has been active processing of this photograph with a view to identifying the Claimant. This has involved the collation of other information held in relation to the Claimant "the Defendant was subsequently able to ascertain the Claimant's name and to match it to the photographs taken…".

b) The image was transferred onto "a number of CDs" [para 23]. Although it is suggested that these CDs do not contain the Defendant's name or other identifying details [para 24], they clearly contain a serial number or code allowing the Claimant to be identified [para 25].

c) Copies of the images may be made available to officers policing similar events. A photocopy of a sample sheet is attached to this submission. It consists of a series of "passport" sized photographs. The AOS suggests that this will happen only where there is "a potential need to identify persons

involved in unlawful protests who may have participated in similar past events" [para 25]. It is not explained how this will assist the policing of the second or subsequent event. If the individuals engage in unlawful conduct on that occasion then that can justify police action against them then. The sheets do not contain the names of the individuals concerned and if, as suggested, they are destroyed after the event then they cannot be used to identify perpetrators. But in any event, even if this is the object of the sheets the inevitable effect will be (as anticipated in paragraph 28 of the original grounds) that the Claimant is identified as somebody who is the object of specific concern should he attend similar events. It is likely that he will be more closely monitored than others who do not appear on similar sheets.

d) It is suggested that information is reviewed and destroyed after 12 months if not needed [AOS para 26]. However, it also appears from that paragraph that the criteria for retaining the information include mere presence at a similar future event.

10) The fact that this information would be subject to the controls of the Data Protection Act 1998 does not affect the question whether or not this is a prima facie breach of Article 8. In any event, section 29 excludes right of subject access (section 7) and also modifies the first data protection principle (that data shall only be processed lawfully and fairly).

Articles 10 and 11

11) The grounds of refusal do not specify whether the learned judge found there to be no interference with Article 10 or 11[3] or whether he considered that there was an interference but that it was justified.

12) As to whether there was such an interference the Claimant repeats his original grounds.

13) The Defendant's account differs materially from that put forward by the Claimant [compare Claimant's statement paragraphs 9-13 with AOS paragraphs 14-21].

[3] The notice contains a typographical error in that the reference is to Articles 9 and 10.

14) Even on the Defendant's account the events still amount to an interference in that they tend to inhibit the exercise of the Claimant's Article 10 and 11 rights. The Claimant had committed and is alleged to have committed no offence. He had attended a meeting in the course of a lawful protest against the arms trade. The Defendant underestimates the intimidatory impact on such a person of being photographed, questioned and followed for a substantial distance by a number of uniformed police officers.

15) Alternatively, there should be an Order for oral evidence and for the officers concerned to be cross-examined. The question whether or not there has been an interference with the Claimant's Article 10 and 11 rights requiring justification raises issues of primary fact that cannot be resolved without cross examination (compare *R (Wilkinson) v Broadmoor Special Hospital* [2002] 1 WLR 419).

Justification

16) The proposed reasons put forward for the Defendant's actions are:

a) The Claimant was seen speaking to somebody who, in the past, "was believed to have encouraged peaceful protesters to commit offences". No grounds are given for this belief, nor is it suggested that she had actually incited such offences or that the Claimant was likely to commit them. No previous association with EF is alleged.

b) The Claimant might have committed an offence in the meeting because "sometimes" this is only made clear to the police after the meeting ends.

17) In each case any feared involvement by the Claimant in future criminal activity is entirely speculative. The reasons given offer no sensible basis for distinguishing the Claimant from anybody else in respect of whom the Defendant has no specific reason to believe they have committed an offence. The second reason could afford no justification for keeping the image at all after it became clear that the Claimant had not committed an offence at the meeting.

18) The interference was not in accordance with law. This point is not answered by observing [AOS para 35-8] that the officer's general authority to take the action

in question derives from their duty to keep the peace. In the present context, where there is no suggestion of any present or imminent breach of the peace, this requirement lacks any sufficient precision.

> "The requirement that any interference with the right guaranteed by article 8(1) be in accordance with the law is important and salutary, but it is directed to substance and not form. It is intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied".
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> *R (Munjaz) v Mersey care NHS Trust* [2005] 3 WLR 793 (HL) at para 34 per lord Bingham

19) In any event, the Defendant purports to govern itself by a policy that is not accessible or (as far as the Claimant is concerned) predictable because it has not been disclosed. This is the opposite of the position in *Munjaz* (above). In that case the hospital acted under a seclusion policy that was sufficiently precise and was made generally available. For example Lord Hope at para 92 said:

> "In my opinion the policy satisfies the requirements of precision and accessibility. The procedures which it lays down are spelled out with the same clarity and attention to detail as those in the Code. They have been reduced to writing, of course, and the policy is published within the hospital so that it is available to all who need to see them. Uniformity of practice is ensured by this process, so the way this form of intervention is being managed at Ashworth is entirely foreseeable. Patients are protected against random or arbitrary interferences with their article 8(1) rights by the fact that the policy sets out standards in the light of which under domestic law judicial review of such interferences is available. The protections that are available to patients under the civil and the criminal law are reinforced by them. I would conclude that the purposes for which the requirement that the interference must be in accordance with the law is set out in article 8(2) are satisfied".

Article 14

20) The grounds of refusal state that there is no basis for this claim. They do not state whether this is because it was accepted that the facts did not fall within the ambit of articles 8, 10 or 11 or that it was accepted that the others were not in an analogous situation [Defendant's AOS paragraphs 47-8].

21) The facts alleged here are within the ambit of Article 8 and 10-11 in that they are linked to the exercise of those rights (see e.g. *R (Douglas) v North Tyneside DC* [2004] 1 All ER 709) even if the degree of interference was not sufficient to amount to a prima facie breach calling for a specific justification.

22) The Defendant was in an analogous situation with others with whom he compares himself. This is a typical case where this question merges with the alleged reason for and justification for the discriminatory treatment (see the observations of Baroness Hale in *Ghaidan v Godin Mendoza* [2004] 2 AC 557 at para 134 commenting on *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617). The Claimant is alleged not to be in an analogous group because he is said to have "been seen associating with a group which included individuals with a history of criminal acts committed in the course of protests". This makes the unwarranted assumption that the Claimant himself has a propensity to criminal activity because he is also engaged in protest. It is an assumption based on his political beliefs and so is prohibited by Article 14. The same point can be made about very many protesters whose activities are entirely lawful and where there is no reason to believe they will ever commit an offence. The alleged association is insufficient to distinguish the Claimant from members of the public generally or to justify the action taken against him.

MARTIN WESTGATE

08 February 2006