Court of Appeal Ref: 2008/1466

IN THE COURT OF APPEAL
ON APPEAL FROM THE ADMINISTRATIVE COURT

BETWEEN

THE QUEEN
on the application of
ANDREW WOOD

Appellant

and

COMMISSIONER OF POLICE FOR THE METROPOLIS

Respondent

RESPONDENT'S FURTHER SUBMISSIONS

INTRODUCTION

1. These further submissions are served in accordance with the direction given by Laws LJ and respond to the further submissions of the Appellant. They follow an exchange of correspondence between the parties, which itself came after recent articles in the Guardian newspaper concerning photography and retention of data by the Respondent. These articles referred to information obtained by a Guardian journalist from Superintendent Hartshorn a senior officer within the Respondent's Public Order branch, CO11 [1].

2. While it is not the purpose of the Respondent's further submissions to respond to the Guardian articles *per se*, as opposed to the written submissions filed on behalf of the

[1] NB: Superintendent Hartshorn is not, as stated by Liberty, the head of CO11. The head of CO11 is Chief Superintendent Ian Thomas.

Appellant, one matter should be addressed at the outset. In the main article published on the front page of the Guardian on Saturday 7 March 2009, entitled "*Caught on film and stored on database: how police keep tabs on activists*" [2], reference was made to the present litigation in the following terms:

> "...The human rights watchdog Liberty – which did not know about the database – is challenging police surveillance tactics in a judicial review at the court of appeal.
>
> **Privacy rights**
>
> However police appear not to have disclosed to the court that they were transferring the private details of campaigners to a database. Lawyers believe the transfer makes it more likely the technique is in violation of privacy rights under Article 8 of the Human Rights Act [sic]".

3. In fact, Liberty was made aware of the database of images held by CO11 as long ago as December 2005, because the database was expressly referred to the Respondent's Summary Grounds of Defence appended to its Acknowledgement of Service in the present proceedings. Those Summary Grounds of Resistance stated:

> "27. In addition to keeping images on a CD, CO11 may transfer images onto a database if the image is considered to be of particular intelligence value. That image will have the individual's name associated with it. The image will be deleted when (in accordance with the review referred to above) it is no longer needed."

4. Given that Mr Wood's image was never placed on this database, no further reference was made to it in the Respondent's evidence. However the statement in the Guardian that Liberty was unaware of the database and the impression created that the Respondent had somehow failed in his duty of candour, is wrong.

5. For the avoidance of doubt, at no stage in these proceedings did Liberty make any request for further information concerning the database referred to in paragraph 27 of the Summary Grounds of Defence, nor about the criteria for determining whether an image should be placed or retained on it.

The evidence on retention of images and the "new material"

[2] This article was published the day after Liberty's letter to the Respondent dated 6 March 2009

6. The Appellant's further written submissions at paragraphs 4 to 11 seek to summarise: (a) the Respondent's evidence that was before the Court as to the retention of images, in particular on the database referred to above, and (b) the "new material" on this issue. Rather than providing another summary, the Respondent simply invites the Court to re-read the following material:

   a. The witness statement of Neal Williams: tab 22, pages 228-233, in particular paragraphs 13 to 17.

   b. Superintendent Roger Gomm: tab 23, pages 242 to 247, in particular paragraphs 12 to 15.

   c. The Respondent's letter of 19 March 2009 responding to Liberty's letter of 6 March. (A copy of the Respondent's letter is attached for convenience).

SUBMISSIONS

7. At the outset, the trite but nonetheless important point must be made that Mr Wood's Judicial Review claim and his present appeal to this Court should be determined on the facts of this case. It should not constitute a general inquiry into the Respondent's systems for obtaining and retaining intelligence, whether photographic or otherwise.

Interference with Article 8(1)

8. Mr Wood's photograph was never placed on a database by the Respondent. While the Respondent has always made clear that CO11 held a database of images, as explained above, it has never been argued, at least until these further submissions, that the existence of that database was relevant to whether Mr Wood's Article 8 rights had been violated.

9. Such an argument is self-evidently misconceived. The mere possibility of Mr Wood having his photograph placed on a database can no more constitute an interference with his Article 8 rights than the possibility of some other Article 8(1) interference, such as (for example) being arrested and searched.

10. The Appellant's further submissions argue as follows (para 21, emphasis added):

> "21. As *Marper v UK* makes clear (Tab 41 para 67 and 121), the mere storage of information relating to the private life of an individual is an interference

however it is used. If presence on a database is capable of affecting the question whether or not the information held "relates to" private life then what matters is whether Mr Wood's images were liable to be so placed rather than whether they were actually used in this way. Concerns about future use of private information are relevant in determining whether there has been an interference (see Marper at Para 71)."

11. It simply does not follow from the fact that storing of data (if that data relates to a person's private life) amounts to an interference with Article 8(1), that "what matters is whether Mr Wood's images were liable to be so placed rather than whether they were actually used in that way". The Appellant gives no logical reason why this should be so and none exists.

12. Put another way, the Appellant simply cannot claim to be a "victim" of any interference (as required by section 7 of the Human Rights Act 1998) on the basis of a mere possibility of his image being placed on a database were he to have met the criteria for inclusion (which he did not).

13. In circumstances where Mr Wood's photograph was never placed on a database, and where, despite being made aware of the existence of the database (see above) his case has never proceeded on the basis now advanced, the Respondent does not accept that it should be necessary to provide a detailed response to each of the Appellant's criticisms concerning the evidence relating to inclusion on the database. Nonetheless, the Respondent comments as follows.

    a. At paragraph 8a, the Respondent is implicitly criticised for not referring to or explaining the database of images. As already explained, that database *was* referred to in the Summary Grounds of Resistance. The Appellant did not, in any of his written or oral argument in the Administrative Court or this Court, pursue an argument based on its existence. There was therefore no need to address it further.

    b. The statement in the Respondent's Skeleton Argument for this Court at para 40(i) noting the shift in the Appellant's case (away from an assertion that the photographs were taken "with a view to their retention on a police database"), which is also implicitly criticised, was accurate. Given that Mr Wood was not involved in any criminal activity at the time he was photographed, it was not

likely that his image would be placed on the database and his photograph was not taken with a view to such retention.

c. At paragraphs 12 to 16 of the Appellant's further submissions it is asserted that there is "considerable confusion" about the criteria concerning when a person's image will be placed on the CO11 database and about its retention on that database. This confusion is said to arise from an asserted inconsistency between what Superintendent Hartshorn told the Guardian journalist, and the information subsequently given in the Respondent's letter of 19 March 2009. To the extent that the two explanations are not identical, the Respondent confirms that the information set out in the Respondent's letter of 19 March, rather than that based on an informal newspaper interview (informal in the sense that it was not understood to be the means of providing evidence to the Court) represents the accurate position. For the avoidance of doubt, the accuracy of information set out in the letter has been confirmed by Superintendent Hartshorn.

d. The Appellant also (para 23) refers to the part of the interview with Superintendent Hartshorn where he mentioned the use of "spotter cards" such as that at page 68 of the bundle. The Respondent can confirm that Mr Wood's image was not placed on a "spotter card". Even if it had been, it does not follow that this would have constituted an interference with his Article 8 rights, in particular given the very tight restrictions on the use of such cards, as set out in the Respondent's evidence (see statement of Roger Gomm at para 14).

14. Thus in summary, the Respondent does not accept that the interview with Superintendent Hartshorn advances the Appellant's case on Article 8(1) any further.

Justification

15. The gist of the Appellant's case is that the criteria for retention on a database are not sufficiently clear, and that this is relevant to his "in accordance with law" argument and to the issue of proportionality. However:

a. at the risk of repetition, the Appellant's image was never placed on the database and he cannot seek to use this Appeal as a means of conducting an inquiry into the adequacy of the criteria for inclusion/retention on the database;

b. the Respondent would (were the matter properly to have been the subject of the present appeal) have advanced similar argument on the "in accordance with law" point as those already advanced, including relying on the provisions of the Data Protection Act 1998;

c. unlike in *Marper*, there is no nationwide database of data, indefinitely retained, covering all suspected but unconvicted persons. Thus the facts concerning proportionality which the Grand Chamber held to be significant in that case, simply do not apply to the CO11 database of images.

16. For all these reasons, the Respondent submits that the Appellant's case is no stronger now than before, and the Court is respectfully invited to dismiss his appeal.

SAM GRODZINSKI

Matrix Chambers

23 March 2009