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 SKELETON ARGUMENT

- References take the form [tab/page/paragraph]
- Time Estimate: 2 days
- Essential Reading: the Defendant would invite the Court to read the witness statements filed by both parties at tabs

INTRODUCTION

1. This is an appeal brought by Mr Andrew Wood against the decision of McCombe J made on 22.5.08 dismissing his claim for Judicial Review. By that claim, the Appellant challenges the lawfulness of the Respondent having taken photographs of him on 27 April 2005 and having then retained those photographs. The primary challenge is advanced on the basis that these actions constituted an unlawful interference with the Appellant's right to respect for his private life under Article 8 of the European Convention on

Human Rights ("the Convention"). It is also argued that these actions unlawfully interfered with the Appellant's rights under Articles 10 (freedom of expression), 11 (freedom of assembly) and 14 (non-discrimination) of the Convention.

2. The Judge found that there had been no interference with the Appellant's Convention rights in this case. Further, he found that any such interference as there might have been was at a low level, was in pursuit of the legitimate aim of preventing crime (a point conceded by the Appellant), was in accordance with the law and was proportionate.

3. The Respondent's position is that the appeal should be dismissed, essentially for the reasons given by the Judge below.

4. A number of features of this case are worth highlighting at the outset:

   (i) The Appellant was photographed while standing and walking on a public street. He does not claim to have been photographed in a private place, nor while engaged in activity that could sensibly be described as private. On the contrary, the Respondent's photography of the Appellant took place following his attendance at the AGM of Reed Elsevier plc ("Reed"), which he had attended not in any private capacity, but as part of his work as the press officer for the CAAT (Campaign Against Arms Trade).

   (ii) The photography was overt - i.e. there is no suggestion of covert surveillance.

   (iii) While the Appellant has asserted that he felt intimidated by the photography and by the actions of the Respondent's officers, the Respondent's evidence strongly refutes the possibility that the Appellant had any reasonable grounds to

feel intimidated or harassed in any way by the officers' conduct. On the contrary, it is clear that the Respondent's photographer kept a respectful distance from the Appellant, and that the Respondent's officers were polite to the Appellant at all times.

(iv) While the Appellant complains that he was not made aware of the reasons for the photographs being taken, in fact he never troubled to ask the Respondent's officers on the day why he was being photographed. This is despite the fact that they engaged him in conversation to ask him his name, a question which he refused to answer.

(v) There is no question of the photographs being published by the Respondent.

(vi) The retention of the photographs and the use to which they are allowed to be put within the Metropolitan Police, is tightly controlled by the Respondent.

(vii) The Claimant's photograph has not been placed on any kind of national database. Nor has a file been created on the Claimant containing details of his private life.

5. In these overall circumstances, the Respondent respectfully submits that it would be very surprising if a proper analysis and application of the relevant legal principles led to the conclusion that the Appellant's fundamental human rights, as protected by the Convention, had been violated. For the reasons developed below, they have not been.

THE FACTS

6. The Respondent respectfully adopts the Judge's description of the facts at paragraphs 2 to 18 of the judgment below. However the

following points, some of the detail of which are not included in the judgment, are emphasised.

Events prior to the Reed AGM

7. As the Judge noted at paragraph 4, Reed's premises had been regularly targeted by anti-arms trade protestors prior to April 2005 because of its association with Spearhead. For example, Reed's offices in Richmond were subjected to weekly demonstrations, frequently involving criminal damage to property. On 21 March 2005 (i.e. the month before the Reed AGM in London) Reed's offices in Utrecht, Holland, had been targeted by a group called "Disarm DSEI", who had daubed paint and slogans over their offices (see the statement of Chief Inspector Claire Weaver at [18/212/§3]).

8. As the Judge noted at paragraph 5, Reed's AGM was due to take place on 27 April 2005 at the Millennium Hotel in Grosvenor Square, London. Prior to the meeting, the Respondent was contacted by a member of staff of Spearhead, who explained that there had recently been several purchases of single shares in Reed, by members of the CAAT. The purchase of single shares entitled the shareholders to attend the AGM. Single share purchases had in the past been commonly used by CAAT protestors to gain access to AGMs, who had then conducted their protests in a manner intended to disrupt the meeting. Further, and notwithstanding that the stated aims of CAAT were non-violent, members of CAAT participating in previous anti-arms protests had been involved in unlawful activities during those protests [10/73/§6].

9. The purpose of the Respondent's deployment of his officers, including the two Forward Intelligence teams and the Evidence Gathering team, was to police the event itself and to obtain

intelligence that might prove useful in preventing or detecting crime in the future. In the latter context, it was known that the next DSEi exhibition was due to take place in Docklands in September 2005. If the identities and appearances of those attending the Reed AGM could be established on the day of the AGM, that would assist the police if those individuals were later seen carrying out unlawful activities at the DSEI exhibition [18/214/§15].

Events on the day of the Reed AGM – 27th April 2005

10. During the AGM, EA and another individual RH, who also had a known history of participation in violent protest, caused disruption and were required to leave the meeting. Following their removal from the meeting, the Respondent allowed EA to join KB at the entrance to the hotel, despite having previously required KB to stand alone. At around 12.30pm, while a number of shareholders were still inside the hotel, the Appellant left the hotel together with another individual, referred to below as IP. The Appellant and IP stopped to speak to KB, and were then joined by EA. The group (the Appellant, IP, KB and EA) engaged in conversation[1].

11. In these circumstances, an officer in the Evidence Gathering team that had been deployed (Sergeant David Dixon, whose statement appears at [216-220]), decided that it was appropriate to photograph the Appellant, and to seek to establish his identity. The main reasons for this decision were:

    (i) In light of the fact that the Appellant had been seen talking in the group which included EA. EA, like others with a history of unlawful protests, was believed to have encouraged peaceful

[1] The Appellant's evidence is that he cannot recall EA joining the group [13/147/§17]. However several of the Respondent's officers confirmed that she was present (Sergeant Dixon at [19/218/§9]; Constable Hesketh at [20/221A/§5]; Constable Palfrey at [21/226/§7]). The proper approach to this evidence is addressed further below in the Respondent's submissions on proportionality.

protestors to commit offences. Based on his apparent association with EA, it was possible that the Appellant might be encouraged in this way by her or her associates, and might then himself engage in unlawful activities during protests in the future, in particular at the DSEi fair. In that event, it would be important for the Respondent to be aware of his identity and appearance.

(ii) Although the Appellant had not been ejected from the AGM, it was not at this stage known to the Respondent whether he had acted lawfully during it. The unlawful activities of protestors at such meetings sometimes only become known to the police after the meeting is over. The Appellant's photograph was therefore also taken in case it subsequently came to light that he had acted unlawfully on the day in question.

12. A number of photographs of the Appellant were taken by the Respondent's photographer, Neal Williams, after the Appellant left the hotel. A number of photographs were also taken of IP. At all times the photographer sought to keep a reasonable distance between himself and the Appellant. As Mr Williams explains:

> "…I generally try to keep a safe distance from the subject and try not to invade their 'personal space'. On 27 April 2005 I used a 80mm to 400mm lens to enable me to keep a safe distance from my subject. This is primarily for my own safety as I have been assaulted on previous occasions due to my overt photographic role. Also, my technical camera equipment is expensive so I try to keep a safe distance from my subjects to avoid the equipment being damaged." [22/229/§5].

13. The evidence of several of the Respondent's officers is that at no point did the Appellant or IP ask the photographer or the officers to explain why they were taking these photographs. This evidence is not disputed by the Appellant.

14. Subsequently, the Appellant and IP walked away from the hotel where the AGM had been held and were followed by the officers from the Evidence Gathering team. When they were in Duke Street, Sergeant Dixon approached IP and explained that he wanted to ask him some questions as he had been at the AGM. He asked for IP's name, which IP gave to him. Sergeant Dixon then asked the Appellant to give his name. The Appellant asked whether he was obliged to give his name and was told that he was not, and he then declined to do so. The Appellant and IP then asked whether they were free to go or whether they were being detained. Sergeant Dixon said that they were not being detained, that they were free to go, but that he would like to ask them about the AGM. However the Appellant and IP said they wished to go, and so the officer thanked them for their time. The whole exchange was amicable [19/219/§11].

15. Sergeant Dixon and the other members of his team then returned to Grosvenor Square, where a group including EA and RH had gathered. Sergeant Dixon directed Neil Williams to take further photographs. Sergeant Dixon's statement describes how EA and RH then started jumping around and crashing into him, trying to bang into Neil Williams, and how they encouraged the other members of the group to try and frustrate Mr Williams' attempts to take photographs by jogging towards him. Even after Mr Williams put his camera down "members of the group were coming up to us, jabbing their fingers towards our faces…"

16. In the meantime, two members of a Forward Intelligence Team had followed the Appellant and IP to Bond Street underground station. They wanted to check that the Appellant and IP were not intending to return to the AGM nor intending to join up with another group of protestors from a "Rising Tide" demonstration

that was taking place outside the BP Building in nearby St James's Square [21/226/§§8-10].

17. Neither the photographer, nor any of the officers, at any time acted in a manner reasonably capable of being interpreted as intimidating.

Identification of the Appellant and retention of the photographs

18. The Respondent was subsequently able to ascertain the Appellant's name, and to match it to the photographs taken of him. Access to and the retention of this intelligence is however subject to very strict controls within the Metropolitan Police. The following account of those restrictions is taken primarily from §§12-15 of the statement of Superintendent Roger Gomm [tab 23] of the Public Order Branch of the Metropolitan Police (which branch is known by the code CO11); and from §§13-17 of the statement of Neal Williams, the photographer [tab 22].

19. The photographs of the Appellant were taken on a digital camera. The images on the memory card were then transferred onto a number of CD's. One of the CD's is held at New Scotland Yard, within CO11. The other CD's are held in a storage warehouse by the photographic branch of the Metropolitan Police (referred to as SCD4).

20. None of the CD's (wherever kept) identify the individuals whose images are held on them. Thus the photographs of Appellant do not have marked against them the Appellant's name or any other identifying details. The CD's are marked on the basis of the relevant date and the event at which the photographs were taken.

21. There is no general access to the images stored on the CD's within the Metropolitan Police; on the contrary it is very strictly

controlled. Access to the CD held by CO11 is only granted to officers outside CO11 for good reason, if there is reason to believe that the person whose image is recorded has been involved in criminal activity. Even then, the images may only be viewed within CO11's offices and under supervision of CO11 officers. Copies of the images are not, with one exception, allowed to be taken out of those offices. That exception is that at future public events where there is a potential need to identify persons involved in unlawful protests who may have participated in similar past events, a sheet of relevant images may be given to a limited number of Forward Intelligence Team or Evidence Gathering Team officers. However these sheets do not identify the names associated with the images: each image is only allocated a code. Further, these sheets (which are numbered) must be returned to the CO11 team after the event in question and are then destroyed.

22. Images held on the CO11 CD are only retained for a limited period of time. In the present case, had the current Judicial Review proceedings not been commenced, the images of the Appellant would have been destroyed after the DSEi exhibition in September 2005. The Appellant did not appear to have attended that event (and had certainly not come to the attention of the police there), nor was there intelligence suggesting that he had, prior to that event (and after the Reed AGM), participated in any other unlawful activities associated with protests of the kind described above.

23. Three other copies of the CD are held in a storage warehouse by SCD4, and the images are not destroyed at the same time as those held by CO11 or at a fixed point in time thereafter. Again however there is there nothing on the CDs that will identify the people whose images are held on it. There is no general access to

the images held on these CD's: access will only be granted to that branch of the Metropolitan Police which generated the photographs in the first place (in this case CO11). Further, the images are not accessible for general intelligence purposes: they are accessible only if a civil claim is made against the police in relation to the events recorded on the CDs, or if a specific offence has come to light and it is believed that the image will provide evidence relating to that offence.

Legal submissions

24. This Skeleton Argument will address the legal issues in the same order as that set out in the Appellant's Skeleton Argument:

    (i) Whether the taking of the Appellant's photograph constituted an interference with his right to privacy under Article 8(1).

    (ii) Whether the retention and potential use of the Appellant's photograph constituted such an interference.

    (iii) If there was such an interference, whether it was justified and in particular whether it was: (a) in accordance with the law; and (b) proportionate within the meaning of Article 8(2).

    (iv) Articles 10 and 11: inference and justification.

    (v) Article 14: interference and justification.

Article 8 ECHR

The taking of the Appellant's photograph: interference?

25. The taking of the Appellant's photograph in a public street after his attendance at Reed's AGM did not constitute an interference with his right to respect for his private life under Article 8(1) ECHR. This conclusion is supported by a long line of Strasbourg authority and by recent domestic authority of the Court of Appeal and the

House of Lords. The relevant authorities are considered below in chronological order.

26. At the outset, however, it is important to bear in mind (as the Judge rightly noted at paragraph 29 of the judgment), that the Convention is concerned with the protection of fundamental rights and freedoms. Thus the Courts have on many occasions stressed that before an interference with such rights is established, a certain level of seriousness must be reached: see e.g. *R(Gillan) v Commr of Police of the Metropolis* [2006] 2 AC 307, 344F per Lord Bingham.

27. In *X v United Kingdom* (Application 5877/72; Decn 12.10.73), the Commission found there to have been no interference with the applicant's Article 8(1) rights when she was photographed by the police after taking part in an anti-apartheid demonstration against the South African rugby team. The relevant passages from the Commission's decision are set out in paragraph 45 of the Judgment below. The Commission's decision is inconsistent with several propositions advanced by the Appellant:

(i) That photography by the State is *prima facie* likely to be an interference with Article 8(1).

(ii) That if the photograph is taken in an intrusive way, that will tend to mean that there is an interference.

(iii) That if the police seek to ascertain the person's identity, there will be an interference.

28. The Appellant's Skeleton Argument (at paragraph 19(i)) wrongly suggests that the present case is distinguishable from *X* because, in contrast to the applicant in *X*, he had not been arrested. However no part of the Commission's reasoning in *X* was predicated on the fact of the arrest. If anything, one would have

thought that photography following an arrest would be more not less intrusive. Further, the Appellant's reference to *Perry v UK* in this context and to the distinction between overt and covert photography does not help him: the photography in both the present case and in *X* was overt, not covert. Similarly, the fact that the applicant in *X* was engaged in a public demonstration can give rise to no meaningful distinction with the present case.

29. In *Friedl v Austria* (1995) 21 EHRR 83, the Commission again found there to have been no interference with the applicant's Article 8(1) right to privacy where photographs were taken of him by the police during a public demonstration, which were subsequently used to identify him. Again, the central passages are set out in paragraph 46 of the Judgment below. The Appellant's Skeleton Argument asserts (paragraph 19(ii)) that it was crucial to the Commission's decision in *Friedl* that the photographs were not intended to identify the applicant and were used solely as an aid to policing the demonstration on the relevant day. That is wrong: see paragraph 45 of the Commission's judgment.

30. Also relevant are the Court's decisions in *PG & JH v United Kingdom* (App No 44787/98; Judgment 25.12.01), and *Perry v United Kindgom* (App No 63737/00; Judgment 17.10.03), both of which are referred to in the Judgment below (at paragraphs 47 to 48).

31. The conclusion that the taking of the Appellant's photograph did not constitute an interference with his Article 8(1) rights is also strongly supported by the decision of the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457. In *Campbell*, Lord Hope stated (ibid at para 122):

> "The taking of photographs in a public street must, as Randerson J said in *Hosking v Runting* [2003] 3 NZLR 385, 415, para 138, be taken to be one of the ordinary incidents of living in a free community. The real issue is whether publicising the content of the photographs would be offensive: Gault and Blanchard JJ in the Court of Appeal [2004] NZCA 34, para 165."

32. Baroness Hale stated (ibid at para 154):

> "Publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, they are not objectionable. Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf *Aubry v Éditions Vice-Versa Inc* [1998] 1 SCR 591. We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. *The activity photographed must be private*. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint." (emphasis added)

33. Following *Campbell*, the Strasbourg Court decided *Von Hannover v Germany* (2005) 40 EHRR 1. The relevant passages of *Von Hannover* were set out by the Judge below, who also had the benefit of this Court's judgment in *Murray v Big Pictures (UK) Limited* [2008] EWCA Civ 446 in which the scope of Article 8 following *Campbell* and *Von Hannover* was considered. In summarising the principles identified by Lord Nicholls in *Campbell v MGN*, the Court of Appeal stated: "Essentially the touchstone of private life is whether *in respect of the disclosed facts* the person in question had a reasonable expectation of privacy" (emphasis added) (para 24(iv)). The Court of Appeal in *Murray v Big Pictures* further noted that Baroness Hale's approach in *Campbell* had been the same: the balancing exercise only begins when the person publishing the information knows or ought to know that there is a reasonable expectation that "*the information* in question will be kept confidential" (para 28; emphasis added). The Court

noted that the same approach had been taken by Lord Hope and Lord Carswell (para 30).

34. Similarly, the principle derived by the Court of Appeal from its own earlier decision in *McKennitt v Ash* [2008] QB 73 was that the first question to be asked was "whether the *information* is private" (para 27; emphasis added).

35. The Court of Appeal in *Murray v Big Pictures* affirmed (at paragraphs 35-36) that the first question to be asked when considering whether there had been an interference with Article 8(1) was whether there is a "reasonable expectation of privacy", which was an objective question, taking into account all of the circumstances of the case. However it is clear from its judgment overall (and in particular the passages referred to above) that each of the factors identified by the Court in paragraph 36 of its judgment went to the question of whether, in relation to the publishing of the photograph, there was a reasonable expectation of privacy in respect of the disclosed facts/information. If there was no such expectation, then there would be no interference with Article 8. This is no more than common sense demands.

36. Thus contrary to the implication of paragraph 22 of the Appellant's Skeleton Argument, the Judge below was clearly right to focus on the "non-private nature of the occasion on which the photographs were taken and the lack of publication".

37. Likewise, the Appellant is wrong to suggest (at paragraph 23 of his Skeleton Argument) that the Judge below "failed to give proper weight to the expanded understanding of the term 'private life' following *Von Hannover*". The Court of Appeal in *Murray v Big Pictures* explained (paras 54-56) that there continue to be circumstances, even after *Von Hannover*, in relation to which

there can be no reasonable expectation of privacy even in relation to publication (of which there was none in the present case).

38. In the present case, the Appellant cannot possibly be said to have been engaged in activity of a private nature when he was photographed outside the Millenium Hotel and on the street walking to Bond Street tube station. On the contrary, it is clear that the Appellant's purpose in attending it was connected to the very public campaign mounted by CAAT against Reed. This conclusion is unaffected by the Appellant's third witness statement which has been filed since the judgment below. The gist of this statement is that CAAT did not hold a demonstration, nor a press conference or photo call at the AGM and that the Appellant did not expect media attention. However whether or not CAAT had taken positive steps to publicise its attendance at this AGM, there can be no doubt that CAAT members were engaged in their public campaign as evidenced, for example, by the leafleting that took place outside the hotel. It cannot sensibly be suggested that the Claimant, the CAAT's press officer, would have wanted to keep private his involvement or presence at the AGM, still less that he could have had a reasonable expectation of doing so.

39. How then does the Appellant seek to argue that the taking of the photographs (as opposed to their subsequent retention/use) interfered with his Article 8(1) rights? He relies on various factors at paragraph 27 of his Skeleton, each of which is addressed below. However when considering each of these factors, it is important to keep in mind the general observation (referred to above) that interference with private life has to be of some seriousness before Article 8(1) is engaged: see *Gillan* (supra); *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 at para 83 per Lord Walker;

applied in the context of information privacy rights by the Court of Appeal in *McKennitt v Ash* [2007] 3 WLR 194 at para 12 per Buxton LJ.

40. Turning to deal with each of the factors at paragraph 27 of the Appellant's Skeleton:

(a) The fact that the Appellant was "singled out" as the specific object of the photograph takes him nowhere. The Appellant in *Campbell* was also "singled out", and that was a case involving not just the taking of photographs, but their publication in the press.

(b) The fact that "at the time the photographs were taken the Appellant was not participating in any public demonstration nor was he reasonably suspected of having committed a criminal offence". However the Appellant's activities on the day in question were clearly public in nature: see above. The fact that he was not (at the time of the photograph) actively engaged in a demonstration is immaterial. Further, while there may have been no evidence that the Appellant had committed a criminal offence sufficient to warrant an arrest, the fact is that he had been seen associating with someone with a history of unlawful protest, himself having just come out of the Reed AGM, in circumstances where the Respondent's officers were as yet unaware of what may have taken place in that meeting.

(c) It is said that 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 should he attend a similar event in future. This fear has proved to be well founded". However this concern effectively collapses into the separate complaint about the <u>use</u> of the images

(which is separately addressed below), rather than the fact of them having been taken in the first place. Even if the image would be used to identify him as a subject of concern at a future event, this factor could not convert the act of photography itself into something sufficiently serious to interfere with his Article 8(1) rights.

(d) It is argued that the manner in which the photographs were taken was intrusive. Yet there was no physical contact whatever between the Appellant and the Respondent's officers. Nor can the Appellant point to any other conduct by the Respondent's officers which could reasonably be construed as intimidating. In this context, it is highly relevant to note that in *Gillan* Lord Bingham stated (para 28) that even a superficial physical search of the person (involving physical contact) was not sufficiently serious to engage the operation of the Convention. None of the factors in paragraph 26(b) of the Appellant's Skeleton Argument renders Lord Bingham's observation inapt in the present context. The regulation of the search in *Gillan* by PACE Codes of Conduct and the difference in the kinds of records kept in each case, are irrelevant to the basic point about the level of seriousness required before it can be said that fundamental rights and freedoms have been interfered with. It is also noteworthy that below, the Appellant argued that "the manner in which the photographs were taken was intrusive *and interfered with the Appellant's physical and psychological integrity*" [9A/68K/§33(d)]. Had this threshold been reached, then plainly there would have been an interference with Article 8(1). But such an argument was always unsustainable on the facts; and has now tellingly been abandoned.

(e) The fact that no explanation was given to the Appellant as to why the photographs were being taken of him. However, as noted above, the Appellant did not ask any of the officers why he was being photographed. Further, even if there had been some obligation on the Respondent to explain the reasons for the photographs being taken (which is denied[2]), any non-compliance with that obligation could only be relevant to whether an interference with the Appellant's Article 8(1) rights was lawful under Article 8(2). It could not convert the photography into an interference with Article 8(1) where otherwise it would not be.

(f) The fact that the Appellant was followed by two officers to Bond Street tube station, a distance of about 400 yards. Again, it cannot sensibly be said that this matter contributes to a conclusion that the Appellant's right to respect for his private life under Article 8(1) was being interfered with.

(g) The fact that the Appellant was asked to provide details of his identity and was asked about the AGM that he had attended. However:

(1) The Appellant has made no free-standing challenge to the lawfulness of the Respondent's officers asking him for his name or about his attendance at the AGM.

(2) The Appellant was not compelled to give his name and indeed declined to do so.

(3) The questions put to the Appellant cannot have converted the separate act of photography into an Article 8(1) interference where otherwise it would not have been.

[2] The Appellant's reliance on the PACE Codes at footnote 11 is misplaced: the context of a photograph following arrest is clearly distinguishable from the present case.

(h) The fact that "the purpose of taking the photographs was to identify the Claimant". Many of the cases referred to above involved just such a purpose, and yet the Courts concluded that there had been no interference with Article 8(1). It is very difficult to see why, if the taking of photographs for the purpose of publication, which will inevitably identify them, does not interfere with their Article 8(1), the taking of photographs for identification without publication should do so.

(i) The fact that the photographs were taken with a view to their retention for "intelligence purposes". This factor collapses into the separate challenge about the retention of the photographs. The issue of retention is addressed in detail below. However in that context, it is important to note (at this stage) another telling shift in the way the Appellant puts his case. Below, he argued that that "The photographs were taken with a view to their retention *on a police database*" [9A/68K/§33(i)]. Given the Respondent's evidence as to the manner of retention, that was an unsustainable assertion which is no longer pursued. This is an important point given the Appellant's reliance on the Grand Chamber's decision in *Marper v United Kingdom* which was of course concerned with retention of DNA samples and fingerprints on a nationally accessible police database, as explained further below.

41. Thus for all these reasons, the proper conclusion is that the taking of the Appellant's photograph by the Respondent on 27 April 2005 did not constitute any interference with his right to respect for his private life under Article 8(1) ECHR.

Retention and potential use of the Appellant's photographs: interference?

42. The Judge below rightly found that the retention of the Appellant's photographs and the limited use to which those photographs could be put, did not constitute an interference with the Appellant's Article 8(1) rights: paras 51-59. The Judge's conclusion was supported by both the Strasbourg and domestic authority to which he referred. The Respondent addresses those authorities in further detail below. In addition, the Respondent will address the relevance of the Grand Chamber's decision in *Marper v United Kingdom* which was given on 4 December 2008, after the judgment below. It is understood that the Appellant will be serving a Supplemental Note/Skeleton to make further submissions in light of *Marper*, but at the time of drafting this Skeleton, the Respondent has not yet seen that Note/Supplemental Skeleton.

The cases prior to *Marper*

43. In *X v United Kingdom* (supra), the facts of which are set out above, the Commission found that the retention of the applicant's photograph did not interfere with her Article 8(1) rights. In *Friedl v Austria* (supra), the photographs taken by the police were retained in a file relating to the demonstration which he had attended. In finding there to have been no interference with the applicant's Article 8(1) rights, the Commission noted (at para 49) that there had been no intrusion into the "inner circle" of the applicant's private life by entry into his home; that the photographs related to a public incident in which the applicant had voluntarily taken part, and that they had been taken for purposes including recording the conduct of the participants in the demonstration in view of the ensuing investigation for road traffic

offences. Further, while the respondent Government had assured the Commission that no action was taken to identify the persons photographed on that occasion by means of data processing (para 50), it is clear that after the demonstration, his identity was established and recorded (para 45).

44. The facts of *Lupker v The Netherlands* (App No 18395/91; Decn 7.12.92) are summarised in paragraph 53 of the Judgment below. It is clear from the Commission's decision that the retention of photographs by the State for the purposes of future identification of suspects, in the absence of the State making those photographs available to the public or for some wider purpose, will not entail an interference with Article 8(1). The Appellant seeks to distinguish *Lupker* at paragraph 36(a) of his Skeleton Argument. Firstly, he relies on the Data Protection Directive to show that the law has moved on and places more emphasis on information only being kept for specified purposes. This is presumably a reference to the fact that the some of the photographs in *Lupker* were taken for the purposes of passport applications and then used for suspect-identification purposes. Yet that point does not help the Appellant: the purposes for taking his photographs in the first place (see above) are the same purposes for which they were subsequently been retained.

45. In *Kinnunen v Finland* (Decn 15.5.96; App No 24950/94), the Commission again rejected as inadmissible the applicant's complaint based on the fact that his photographs and fingerprints had been taken in the course of his arrest and then retained on police files after he had been acquitted of the charge of fraud. It found that these matters did not constitute an interference with his Article 8(1) rights.

46. The Appellant relies on the decision in *Rotaru v Romania* (App No 28341/95; judgment 4.5.00). However that case related to the storing of information by the Romanian Intelligence Service ("RIS") about the applicant's student life and political activities, which had been gathered by the RIS over the course of more than 50 years; some of which was false and likely to injure the applicant's reputation (para 44). The Court concluded that the RIS clearly held information about the applicant's private life, and that the storing of information and its use, coupled with the refusal to allow the applicant the opportunity to refute it, amounted to an interference with his Article 8(1) rights. The case of *Rotaru* could not be more different from the present case: no information about the Appellant's private life has been held; the photographs relate to one incident on one date; there is in no "file" on the Appellant in the sense of the RIS file on the applicant in *Rotaru*; the photograph held cannot be said to be damaging to the Appellant's reputation; and he has not been denied the chance to refute any information.

47. The case of *Amman v Switzerland* (App No 27798/95; Judgment 16.2.00), also relied on by the Appellant, concerned the creation of a card-index file on the applicant by the Swiss Intelligence Service, containing information about the applicant's business contacts with someone at the former Soviet embassy and with a certain company, which had been obtained by an intercepted phone call. The Court found that the information obtained and retained related to the applicant's private life, so that there had been an interference with Article 8(1) (paras 65-70). Again however, the crucial distinction between *Amman* and the present case is that the photograph does <u>not</u> record information about the Appellant's private life.

48. Similarly, the Appellant relies on *Segersted-Wiberg v Sweden* (2007) 44 EHRR 2. Yet this case again related to the storage of detailed information on Secret Police files kept on each applicant concerning events over many years. In relation to the first applicant, for example, it contained 51 pages of information obtained from 1940 onwards (see para 14). In these circumstances, the Court (applying *Amman* and *Rotaru*) found that the information stored by the Secret Police constituted data pertaining to their private life, even though some of the information had been in the public domain (para 72). Again, this case is plainly distinguishable from the present for similar reasons given above in relation to *Amman* and *Rotaru*.

Conclusion on the Strasbourg cases prior to *Marper*

49. The Respondent submits that the principles to be derived from these cases are as follows. Mere retention of photographs by the police will not of itself constitute an interference with the subject's Article 8(1) rights. Further, the mere linking of a photograph to someone's identity on an administrative file is not sufficient. Rather, retention may give rise to an interference in the following circumstances:

(a) If the photograph is of activities in relation to which the person could have a reasonable expectation of privacy.

(b) If the photograph is held or used for some improper purpose wider than the prevention and detection of crime.

(c) If the photograph is linked to information which contains a "subjective appreciation" which the applicant may reasonably wish to refute.

(d) If the photograph is held as part of a file that has been created on the subject of photograph, containing details of his

activities over a significant period of time, even where some of the activities are public.

50. Applying these principles, it is impossible to conclude that the retention of the Appellant's photograph constitutes an interference with his right to respect for his private life under Article 8(1):

(i) The only activity photographed, on one single day, was the Appellant standing outside the Millenium hotel on Grosvenor Square and then walking to Bond Street. For the reasons already given, these were not activities that could possibly be described as private.

(ii) The purpose in retaining the photographs was to assist the Respondent in identifying the Appellant, in case he had already carried out some unlawful act at the AGM (which might not yet have been discovered) or in case he did so at a similar event in the future.

(iii) The Appellant's suggestion that he might want to refute a "subjective appreciation" by the Respondent based on his having been seen with EA and/or his participation in activity for CAAT is fanciful. Indeed when the Appellant was politely asked about his presence at the AGM, he refused to give any information at all, whether to refute any suspicion that he believed was evidenced by the photography, or otherwise.

(iv) As set out above, none of the CD's that were retained with the Appellant's photographs identify him. Access to those CD's is very strictly controlled.

(v) In light of the Appellant having done nothing to bring himself to the attention of the Respondent after the events on 27 April 2005 (including at the DSEi event in September 2005),

CO11's copy of the Appellant's image on the CD would (but for the present JR) have been destroyed at around 12 months.

(vi) The copies held for longer by SCD4 cannot be used for general intelligence purposes.

(vii) In no sense can it be said that a file has been kept on the Appellant recording his private life and identifying him as an object of suspicion or police interest so as to bring him within the principles derived from the Strasbourg cases referred to above.

51. As the Judge below rightly held (at paragraph 59):

> "…The Claimant was photographed in a public street, in circumstances in which police presence could not have been unexpected by the Claimant or by anyone else. The images were to be retained, without general disclosure, for very limited purposes. The retention of the images was not part of the compilation of a general dossier of information concerning the Claimant of the type that has been held in the past to constitute an interference with Article 8 rights."

The decisions of the House of Lords and the Grand Chamber in *Marper*

52. In *R(S& Marper) v Chief Constable of South Yorkshire Police* [2004] 1 WLR 2196, the issues before the House were whether fingerprints, cellular samples and DNA profiles obtained from the appellants and then retained by the police, despite the fact that neither had been convicted of any offence, constituted an interference with their Article 8(1) rights and if so, whether such interference was lawful under Article 8(2).

53. The majority of the House (Baroness Hale dissenting) was of the view that the retention of these samples did not amount to an interference with the Appellant's Article 8(1) rights. Lord Steyn at paras 25-31 conducted a detailed review of the Strasbourg authorities, including those concerning the retention of photographs, and formed the view at paragraph 31 that looking at the matter in the round, Article 8(1) was not engaged, and that if he was wrong about that "any interference is very modest indeed". Lords Rodger, Carswell and Brown agreed with Lord Steyn.

54. In her dissenting speech, Baroness Hale drew a distinction between the retention of a person's DNA, and the retention of information that was not sufficiently private to engage Article 8, referring to the decision in *Campbell v MGN* which concerned the taking of photographs. At paragraph 71 Baroness Hale stated:

> "It can also be said that not all information about a person is so private that it enjoys the protection of article 8. This is so. There must be a reasonable expectation of privacy before it is protected: see *Campbell v MGN Ltd* [2004] 2 WLR 1232. But there can be little, if anything, more private to the individual than the knowledge of his genetic make-up. Again in the words of the Canadian Privacy Commissioner: 'No surveillance technology is more threatening to privacy than that designed to unlock the information contained in human genes.'"

55. Following the Judgment of McCombe J below, the Grand Chamber of the ECtHR delivered its judgment in *Marper v United Kingdom* in which it found that the "blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences" constituted a disproportionate interference with the applicants' Article 8 rights (para 125).

56. In summary, the Respondent's position in relation to the Grand Chamber's decision is that: (a) to the extent that there is a conflict

between the decision of the House of Lords and the Strasbourg Court, the Court of Appeal should follow the decision of their Lordships' House; (b) in any event, the decision of the Grand Chamber in *Marper* does not lead to a conclusion that there has been an interference with Article 8(1) in the present case, given the fundamental differences between the two cases.

The proper approach where there are conflicting decisions of the House of Lords and Strasbourg

57. It is well established that where the Court of Appeal considers that an earlier decision of the House of Lords, which would otherwise be binding on it, may be, or even is clearly, inconsistent with a subsequent decision of the ECtHR, then absent wholly exceptional circumstances the Court of Appeal should faithfully follow the decision of the House of Lords, and leave it to their Lordships to decide whether to modify or reverse its earlier decision: see *Kay v Lambeth LBC* [2006] 2 AC 465 at paras 40-45 per Lord Bingham; *R(RJM) v SSWP* [2008] 3 WLR 1023 at para 64 per Lord Neuberger. This is the correct approach even where the conflicting decisions arise (as in the present case) in the same litigation: see *R(Purdy) v DPP* [2008] EWHC 2565 (Div Ct) per Scott Baker LJ at paras 42-45.

58. The approach in the cases cited above primarily concerned the application of the doctrine of precedent. The Respondent accepts, indeed avers, that the facts of the present case are distinguishable from those of *Marper*. However to the extent that this Court considers itself constrained on the facts to follow the guidance in *Marper*, and to the extent that the guidance differs in relevant way between that of the House of Lords and that given by Strasbourg, the Respondent submits that it is the guidance of their Lordships' House which should be followed.

59. However the Respondent emphasises that this Court is unlikely to need to resolve what might be a difficult issue concerning the scope of the *ratio* in *Kay v Lambeth*, given the submissions below - that nothing in the Strasbourg decision in *Marper* in fact leads to the conclusion that the Appellant's submissions are well founded.

The applicability of the Strasbourg decision in *Marper* to the issue of interference

60. At paragraph 67 of the Grand Chamber's judgment, in setting out the General Principles to be applied, the Court stated (emphasis added):

> "The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116). The subsequent use of the stored information has no bearing on that finding (*Amann v. Switzerland* [GC], no. 27798/95, § 69, ECHR 2000-II). However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see, mutatis mutandis, *Friedl,* cited above, §§49-51, and *Peck v. the United Kingdom*, cited above, § 59)."

61. This statement of general principle is entirely consistent with the principles derived from the previous case-law, including on retention of photographs, as summarised in paragraph [49] above. The question identified by the Grand Chamber (applied in the present case) is whether the Respondent has stored data relating to the Appellant's private life, having regard to the context in which the photographs were taken and retained, the way in which the photographs have been used and processed (if at all) and the results that may be obtained. Yet for all the reasons already given

above, the retention of the photographs does not constitute retention of data relating to the Appellant's private life.

62. The reasons given by the Grand Chamber as to why the retention of cellular samples and DNA profiles constitutes the storing of private information are plainly distinguishable from the present case:

    (i) The Court paid significant regard to possible future developments in genetics and information technology and thus that "in the future the private-life interests bound up with genetic information may be adversely affected in novel ways or in a manner which cannot be anticipated with precision today" (para 71).

    (ii) The Court also placed significant weight to the "highly personal nature of cellular samples" and to the fact that they contained "much sensitive information about an individual, including information about his or her health", as well as a "unique genetic code of great relevance to both the individual and his relatives".

    (iii) Further, the DNA profiles could be used "for familial searching with a view to identifying a possible genetic relationship between individuals" and the Court considered that this was itself sufficient to conclude that their retention interfered with the right to the private life of the relevant individuals (para 75).

63. Plainly, none of these factors can be said to arise from the simple retention on CD's of photographs of the Appellant, in particular where the photographs have not been placed on any database, searchable or otherwise (as to which, see further below).

64. As to fingerprints, the Court found at paragraph 85 that their retention *may* in itself give rise to private life concerns. However the Court did not suggest that such retention would necessarily constitute an interference with Article 8(1). On the contrary, it is clear from paragraph 86 that what led to the finding of an interference was the fact that the fingerprints were "subsequently recorded on a nationwide database with the aim of being permanently kept and regularly processed by automated means for criminal identification purposes". In the present case, by contrast:

(i) The Appellant's photographs are not recorded on a nationwide database.

(ii) The images held by CO11 are not kept permanently. As noted above, the general position is that a CO11 review takes place around 12 months after the images are created. That review will consider whether the images have any ongoing significant intelligence value. Thus the Appellant's photographs held by CO11 would (but for these proceedings) have been destroyed within no longer than 12 months of their having been taken.

(iii) The copy CD's kept in the SCD4 storage warehouse storage (and which would not have been destroyed at the same time) cannot be used for general intelligence purposes, let alone searched in any way on a national database. The CD's do not identify the Appellant.

(iv) There is no regular processing of the Appellant's photographs by automated means for criminal identification purposes.

65. For all these reasons, the decision of the Grand Chamber in *Marper* does not assist the Appellant's case on interference. On

the contrary, it re-affirms the existing principles established by Strasbourg, the application of which make clear that there has been no such interference.

ARTICLE 8(2) – JUSTIFICATION

66. If contrary to the above, the taking or retention of the Appellant's photographs did constitute an interference with his Article 8(1) rights, then such interference was lawful under Article 8(2).

67. Before turning to each of the matters to be considered under this heading, the Respondent makes the overall submission that any interference that there might have been with the Appellant's Article 8(1) rights would have been at the lowest level. This point goes not just to the issue of proportionality, but also to the degree of precision required to meet the requirement of being "in accordance with the law": see *R(Gillan) v Commr of Police of the Metropolis* (ibid) at para 56 per Lord Hope.

In accordance with law

68. The Judge rightly found that the taking and retention of the Appellant's photographs was "in accordance with the law" within the meaning of Article 8(2). There is no requirement that there be a statute or statutory code in order for this requirement to be met; "the law" in this context includes the common law: *R(Munjaz) v Mersey Care NHS Trust* [2005] 3 WLR 793 per Lord Hope at para 91.

69. The taking and retention of the photographs was done pursuant to the Respondent's common law powers to detect and prevent crime. In *Rice v Connolly* [1966] 2 WB 414 at 419, Lord Parker CJ stated:

> "It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to

him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice."

70. Further, the positive duties on constables have now been incorporated into statute by virtue of the attestation taken police officers pursuant to section 29 and Schedule 4 of the Police Act 1996[3].

71. Inherent in the exercise of these powers are common law safeguards that prevent exercise thereof for arbitrary purposes or purposes unconnected with the duty of detecting or preventing crime.

72. In *Marper* (supra), Lord Steyn at paras 35 to 36 (with whom the other members of the House agreed) roundly rejected the appellants' argument that retention of the DNA samples and fingerprints was not in accordance with the law. The Grand Chamber did not consider it necessary to decide whether the wording of section 64 of PACE met the "quality of law" requirements in Article 8(2) (see para 99).

73. As the Judge below found, the Respondent's submissions in this context are strongly supported by the Strasbourg decision in *Murray v United Kingdom* (1994) 19 EHRR 193. The seventeen Judge Court (the equivalent of today's Grand Chamber) accepted that for a non-intrusive measure such as taking a photograph, even one taken without the applicant's knowledge or consent, the simple fact of there being a common law power to do so was

[3] I . . . .do solemnly and sincerely declare and affirm that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power, cause the peace to be kept and preserved and prevent all offences against people and property; and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law

sufficient to meet the requirement of being in accordance with the law, without the need for any statute[4].

74. The decision in *Murray v United Kingdom* presents an insurmountable obstacle to the Appellant's submission that in the present case, the power for the Respondent to take photographs had to be more closely defined. The suggestion at paragraph 39 of the Appellant's Skeleton Argument that *Murray* provides no guidance on this area because the Court's decision did not expressly refer to the implied requirements of certainty and accessibility is unsustainable, for the reasons recorded by the Judge below in paragraph 69. Further, it is important to note that the full Court in *Murray* upheld the decision of the Commission which had (at ibid page 216; para 80) expressly referred to the earlier case of *Malone v United Kingdom* in which the implied requirements referred to above were set out.

75. Thus it is unsustainable for the Appellant to argue that there needs to be a closely defined statutory or extra-statutory code regulating precisely when and how the non-intrusive power to take overt photographs should be exercised, any more than their needs to be such a code to define, for example, when and how the police can visually observe someone's behaviour in a public place, or makes notes about it. While the Appellant relies on the decision of the ECtHR in *PG & JH v United Kingdom* (supra) in support of his case that the power to take photographs needed to be more closely defined, in fact the very passage cited at paragraph 40 of his Skeleton undermines his case. The Court in that passage expressly drew a distinction between: (a) covert surveillance and invasive measures such as searching private

[4] NB: the Respondent's submission below was not precisely as the Judge has recorded it at paragraph 65. The point made on the basis of *Murray* was that set out in paragraph [73] above. It was not submitted that conduct will be "in accordance with law" just because it is not tortuous or otherwise contrary to law.

property or taking personal body samples, which needed specific statutory authority or other express legal authority; and (b) "the implied powers of police officers to note evidence and collect and store exhibits taken in the course of an investigation", which needed no such express authority. It is plain that the overt taking of photographs in the circumstances of the present case is far more akin to (b) than to (a).

76. Further, as the Judge below noted at paragraph 72, the taking, retention and use of the photographs was subject to the detailed safeguards contained in the Data Protection Act 1998 ("the DPA"). For example, the Appellant would have been entitled to exercise his right of access to the data (i.e. the photographs) pursuant to section 7 of the DPA, and to exercise his right to prevent processing of the data under section 10, subject to the various provisions of that Act, including section 29 (which provides express exemptions concerning data processed for the prevention or detection of crime, to the extent that the exercise of the rights would be likely to prejudice that aim). Further, the Respondent's handling of the data is subject to core standards contained in the various Data Protection Principles set out in Schedule 1 of the Act. Thus the statutory framework provided by the DPA re-inforces the conclusion that the taking, retention and potential use of the Appellant's photograph were all "in accordance with the law".

77. Although no mention was made of this in the Claim Form/Grounds of Challenge, the Appellant argued below (and maintains the argument) that the Respondent failed to comply with the First Data Protection Principle, because the officers did not explain to him the purpose of the photography on the day in question. He asserts that this is a breach of paragraph 2(2) of Part II of Schedule 1 of the DPA. This argument, which is contrary to

commonsense, is also unsustainable on the language of the DPA. This simply requires that the data subject "has, or is provided with, *or has made readily available to him*" (para 2(1)(b); emphasis added) the relevant information. In the present case, once the Appellant asked the Respondent about the purposes for which the photographs were taken (in his pre-action protocol letter), the relevant information was made available to him in the Respondent's letter at [12/139-142].

78. The Appellant also argues that the Respondent failed to comply with the Fifth Data Protection Principle requiring data processed for a purpose to be kept for no longer than is necessary for that purpose. However as explained above, the copy of the photographs held by CO11 would have been destroyed after around 12 months (but for this JR). While the CD's held by SCD4 would not have been destroyed at that point, there is, as already explained, nothing on the CD's to identify the people whose images are held on it; there is no general access to the images held on these CD's; and they are not accessible for general intelligence purposes. The limited purpose for which they are held are explained in the witness statement of Neal Williams at [22/232/§§15-17]. They are kept in case a civil claim is later made against the Respondent in relation to the events recorded on the CD's, or in case there needs to be some further investigation of those events. The example given by Mr Williams of photographs taken of the Broadwater Farm riots in 1985, the investigation of which was recently re-opened and which used images stored by SCD4, amply demonstrates why it is impossible for the Appellant to argue that the Fifth Data Principle has been contravened.

<u>The Respondent's policy</u>

79. The Appellant refers to the Respondent's policy on overt photography, contained at [12/108-111] and complains that it is inadequate, because it fails to specify various matters including the circumstances in which overt photography will be used as a crime prevention/detection tool; the manner in which the photographs will be taken, the number of photographs that can be taken and from what range; the circumstances in which officers must be able to give information about the reasons for photographing; nor makes any provision as to their subsequent retention (see para 44 of the Appellant's Skeleton).

80. However for the reasons given above, the Respondent does not need to rely on any policy on overt photography in order to render the taking or retention of photographs as "in accordance with the law". The fact that the policy itself refers to a Standard Operating Procedure which is not publicly accessible, a matter about which the Appellant also complains (at paragraph 43 of his Skeleton) is therefore likewise irrelevant.

81. The Appellant also argues (para 46 of his Skeleton) that the taking of his photograph was in breach of the policy in two respects. Neither of his complaints is well made. First, he says that he is neither someone suspected of crime or anti-social behaviour, nor "an associate" of such a person. But he was seen associating in a group with one or more individuals with a history of criminal behaviour. The Appellant asserts that this was insufficient to make him "an associate". However it is for the Respondent's officers, and not the Appellant, to make a judgment about such issues. As Lord Denning MR held in *R v Chief Commr of Police of the Metropolis* [1968] 2 QB 118 at 136 (in a passage subsequently approved by the House of Lords in *R v Chief Constable of Sussex Police ex p International Trader's Ferry* [1998] 3 WLR 1260):

> "Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, *it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued*, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter." (emphasis added)

82. As to the complaint about the lack of an explanation, the Respondent repeats that the Appellant did not even ask why he was being photographed, instead refusing to engage in conversation with the Respondent's officers. Below, the Appellant argued in his Skeleton that it was "not fair to put the onus on [him] to seek an explanation". It is not clear whether this point is pursued. In any event, the Appellant has failed to explain why this should be so. If he was genuinely concerned to know the reasons for the photographs being taken, there is nothing unfair about expecting him to ask. In any event, even if this was "unfair" in some way, that does not mean that the actions of the Respondent's officers failed to comply with the policy, nor that they failed to act "in accordance with the law".

83. Finally, the Appellant complains (at para 47) that the Judge did not address the arguments based on the alleged breaches of the policy. That is probably because these arguments were not (so far as can be recalled) expressly pursued in oral submissions.

Proportionality

84. The Respondent's actions were proportionate to the legitimate aim of preventing and/or detecting crime. Two general comments fall to be made before addressing the Appellant's arguments. First, the Respondent relies on all the reasons set out above,

concerning why there was no inference with the Appellant's Article 8(1) rights at all, to support the alternative case that any such interference as there might have been was of a very low level. Second, the Judge below was plainly right to find that the Court should not second-guess the detailed operational activities of police officers on the ground (see *ex parte Blackburn* (supra)). Once the legality of overt photography as a legitimate evidence-gathering tool is accepted, the Respondent's officers should be afforded a wide margin of discretion as to, for example, how many photographs they can be allowed to take and in precisely what circumstances.

85. The Appellant argues (para 55) that his Article 8 claim "ran together" with his Article 10/11 claims, so that "weighty justification" was required. This submission is confused. Either there has been an interference with the Appellant's Article 10 and/or 11 rights, or there has not. If there has, then it will call for justification. If it has not, then the Article 8 claim cannot be advanced further by reference to these rights.

86. The Appellant then asserts that "there is substantial material to suggest that the Appellant would not have been photographed even if he had not been seen speaking to [EA]" (para 56 of his Skeleton Argument). He argues that without this factor, the photography would have been unjustified because it would only have taken place on the basis if the Appellant's "peaceful expression of his political views". This argument is also unsustainable:

    (i) The fact is that the Appellant was seen at an AGM, in a capacity not as an investing shareholder, but as a member of an organisation, CAAT which (while its aims were non-violent)

had had amongst its membership people who had in the past carried out criminal acts under the guise of political protest.

(ii) At the time the photographs were taken, it was not yet known what may have happened inside the hotel at the AGM. It might have been for example that the Appellant (acting similarly to other CAAT members in the past) had caused criminal damage inside the hotel.

(iii) In these circumstances, it would have been absurd if the Respondent's officers, who had the opportunity to photograph on that day and subsequently to identify him, would have been prevented from doing on grounds of proportionality.

(iv) Thus even had the Appellant not been seen associating with EA, there would have been ample justification for photographing him. Such justification has nothing to do with the Appellant's "peaceful expression of his political views".

87. As already noted, a further reason for taking the Appellant's photograph was the fact that he was seen with EA, a person known to have used violence in the past, and who may have encouraged the Appellant to act similarly. The Appellant now seeks to suggest that the Respondent's evidence in this respect is unreliable. However the Appellant accepted below that where there is a conflict of evidence, it is the Respondent's account that should be preferred (see paragraph 2 of the Judgment). This was plainly an appropriate concession, certainly in the absence of any application for cross-examination - see generally *Fordham: Judicial Review Handbook* (5th edition at §17.3.6); and (b) because the Appellant simply says that he cannot remember speaking to EA [13/147;§17]; whereas the positive evidence of the Respondent's officers was that she was present (Sergeant Dixon at [19/218/§9];

Constable Hesketh at [20/221A/§5]; Constable Palfrey at [21/226/§7]).

88. Finally, the Appellant argues that the Judge did not distinguish between the different kinds of use to which the photographs might be put (para 58). He argues by implication that the images should have been destroyed once it became clear that he had not committed any offence at the AGM. But such an approach would have prevented the photographs being used so as to identify him at the forthcoming DSEi event. Further, there was nothing disproportionate about providing copies of photographs to officers policing such an event, in particular given the stringent safeguards attached to the limited distribution of the photo-sheets set out above.

ARTICLES 10 AND 11

Interference

89. In granting permission, Sedley LJ stated that he was "less certain that arts. 10 and 11 are engaged, although it is arguable that they are" [26/253].

90. The Respondent would not concede that the Appellant's attendance at the Reed AGM, while undoubtedly connected to CAAT's public campaign against Reed, necessarily constituted the exercise by him of his right to freedom of expression under Article 10, nor his right to freedom of assembly under Article 11. On the Appellant's own evidence he had simply asked the Board of Directors one question about "whether they were concerned that Reed's involvement in the activities of Spearhead might have a negative impact on Reed's other brands, such as their educational publishing business" (see the Appellant's statement at [11/89/§7]).

91. However the Respondent respectfully suggests that it is not necessary for the Court to resolve this issue, because even if the Appellant was engaged in activities protected by Articles 10 and/or 11, there was simply no interference with those rights by the Respondent taking his photograph on the street outside the Millenium Hotel, or in asking him for his name and about the AGM. The actions of the police officers, as already described above, cannot on any objective view be said to have had a "chilling effect", sufficient to hinder the Appellant in the exercise of his rights to freedom of expression and assembly.

92. In *R(Gillan) v Commr of Police of the Metropolis* (ibid) the Appellants, a student on his way to join a demonstration against an arms fair in Docklands, and a journalist who was in the area to film the protest, complained that the exercise of stop and search powers by the police under the Terrorism Act 2000 unlawfully interfered with their rights under Articles 10 and 11 (as well as Article 8). At para 30, Lord Bingham stated that the stop and search power might, if misused, infringe the Convention rights to freedom of expression and assembly: if for example the power were "used to silence a heckler at a public meeting". However Lord Bingham (with whom the other member of the House agreed) went on to say that would find it hard to conceive of circumstances in which the power, properly exercised, could be held to restrict those rights in a way which infringed either of those Articles.

93. On any view, the exercise of a power to stop and search someone is clearly was more intrusive than a power simply to photograph them and ask them to answer a question voluntarily. The fact that the photographs might be retained in the manner described above

does not (contrary to the Appellant's Skeleton at para 62) affect that conclusion.

94. Nor is the Appellant's case assisted by the evidence filed following Judgment below as to the practice of police photography at other events. In any event, the Court is required to consider the facts of the present case and not what (if any) effect the exercise of police photography might have in other factual contexts.

Justification

95. Even if there was (contrary to the above submissions) some interference with the Appellant's Article 10 or 11 rights, that interference would have been at the lowest level and would be justified under Article 10(2) and 11(2) for the same reasons as are set out above in relation to Article 8(2). Contrary to the Appellant's argument, it would be wrong to require any higher level of justification under Article 10 than it would under Article 8. Neither Article has any precedence over the other: see *In re S (A Child) (Identification: Restriction on Publication*) [2005] 1 AC 593 at para 17, per Lord Steyn.

ARTICLE 14

96. The facts of the present case do not fall within the ambit of any of the Convention rights alleged by the Appellant (Articles 8, 10 and 11) for the reasons given above, so that Article 14 is not engaged.

97. Even if Article 14 applies, the persons with whom the Appellant compares himself - non-CAAT members at the AGM - were not in

an analogous situation to him so as to call for justification for the fact that they were not photographed.

98. The Appellant now concedes that his association with EA distinguishes him from the comparator group (paragraph 65 of his Skeleton Argument). This concession is sufficient to dispose of his Article 14 case. However even absent the association with EA the Article 14 case would have had no merit. This is because there was no reason to think that members of the comparator group might have been engaged in unlawful activities inside the AGM. Such a distinction is not, as the Appellant's Skeleton Argument asserts, based on his peaceful and lawful political activity. Rather, it is based on the Respondent's knowledge and experience of the unlawful conduct of individuals who had been engaged in similar "protests" in the past.

CONCLUSION

99. For all these reasons, the Court is respectfully invited to dismiss the Appeal.

SAM GRODZINSKI

Matrix Chambers

14th January 2009