Neutral Citation Number: [2024] UKIPTrib 8

Case No: IPT/19/84/CH
and IPT/22/122/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

17 December 2024

Before:

Lord Justice Singh (President)
Lady Carmichael
Stephen Shaw KC

B E T W E E N :

(1) Barry McCAFFREY
(2) Trevor BIRNEY

Claimants

- and -

(1) CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND
(2) CHIEF CONSTABLE OF DURHAM CONSTABULARY
(3) SECURITY SERVICE
(4) GOVERNMENT COMMUNICATIONS HEADQUARTERS
(5) SECRETARY OF STATE FOR NORTHERN IRELAND
(6) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(7) SECRETARY OF STATE FOR THE FOREIGN COMMONWEALTH AND DEVELOPMENT OFFICE
(8) COMMISSIONER OF POLICE OF THE METROPOLIS

Respondents

NATIONAL UNION OF JOURNALISTS

Intervener

Ben Jaffey KC (instructed by Finucane Toner Solicitors) appeared on behalf of Mr McCaffrey
Stephen Toal KC (instructed by KRW Law) appeared on behalf of Mr Birney
Cathryn McGahey KC and David Reid (instructed by the Crown Solicitor's Office Northern Ireland) appeared for the First and Fifth Respondent
Aaron Rathmell (instructed by Durham Constabulary) appeared for the Second Respondent
Andrew Byass (instructed by the Government Legal Department) appeared for the Third, Fourth, Sixth and Seventh Respondents
James Berry and Chloe Hill (instructed by Metropolitan Police Service Directorate of Legal Services) appeared for the Eighth Respondent
Jonathan Glasson KC and Rachel Toney appeared as Counsel to the Tribunal
Brenda Campbell KC (instructed by DWF Law) for the Intervener (written submissions only)
Michael McCartan (instructed by the Crown Solicitor's Office Northern Ireland) appeared on behalf of Mr Ellis

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Lord Justice Singh and Lady Carmichael (with whom Mr Shaw agrees):

Introduction

1. This is the unanimous OPEN judgment of the Tribunal. There is also a CLOSED judgment.

Background

2. Mr McCaffrey and Mr Birney, the claimants, are journalists. Mr McCaffrey is a senior reporter with the Detail. Mr Birney is a documentary producer who co-founded the Detail in 2011, after founding the independent television production company Below the Radar in 2005. He also founded Fine Point Films, in 2012.

3. The claimants produced a documentary film entitled *No Stone Unturned* ("NSU"). The film is about the murder of six unarmed men by members of the Ulster Volunteer Force at the Heights Bar in Loughinisland, County Down, on 18 June 1994. No-one has ever been prosecuted for those murders. The premiere of the film took place at the New York Film Festival on 30 September 2017. The claimants invited us, without objection, to view the film. It is a serious investigative documentary addressing a matter of obvious public interest and concern.

4. When they were making the film, the claimants met on a number of occasions with the Police Ombudsman for Northern Ireland ("PONI"), Dr Michael Maguire. He was carrying out an investigation into the Loughinisland murders. The PONI report was published on 10 June 2016. One of the findings in that report was that collusion between the Royal Ulster Constabulary and the Ulster Volunteer Force was a significant feature of the murders. Dr Maguire concluded that the investigation into the murders had been undermined by a wish to protect informers, even if they had been involved in committing the murders.

5. The claimants told PONI that they intended to name three suspects in respect of the murders, and potentially a covert human intelligence source ("CHIS"). On 6 April 2017 Mr Birney and his colleagues met the Assistant Chief Constable of PSNI, Stephen Martin, and told him that they intended to name four suspects. They said that the names of the suspects had been in the public domain since their inclusion in a letter received by an SDLP councillor in February 1995. ACC Martin did not ask them to refrain from identifying the suspects. They decided not to name the alleged CHIS, but to name the other three suspects.

6. On 3 October 2017, before the film was released in the United Kingdom, Dr Maguire and Paul Holmes (the PONI director of current investigations) watched it. They became aware that the film included two PONI documents that had not been disclosed by PONI. Those were an undated seven-page executive summary, and a 55-page

investigation report dated 3 June 2008 and marked, "Secret". Mr Holmes reported the matter to PSNI on 4 October 2017. The United Kingdom premiere took place on 7 October 2017, and NSU was released generally three days later.

7. PSNI commissioned Durham Constabulary to investigate what appeared to be the leaking of those two documents. The investigation was given the name Operation Yurta. The senior investigating officer ("SIO") was retired Detective Superintendent Darren Ellis.

8. On 18 August 2018 HHJ Rafferty granted a search warrant authorising the search of the claimants' homes and business premises. PSNI executed the warrants on 31 August 2018. The claimants were arrested on suspicion of theft and a breach of the Official Secrets Act 1989. That same day, they made a successful emergency leave application in the High Court of Northern Ireland before Morgan LCJ, who directed Mr Ellis and a senior officer of the PSNI to sign an undertaking on behalf of Durham Constabulary and PSNI not to examine certain data seized under the warrants, until further order of the court.

9. At a later date, Morgan LCJ, Treacy LJ and Keegan J (as she then was), sitting in the Divisional Court in Northern Ireland, held that the claimant journalists were subjected to unlawful search warrants. The warrants were granted in an *ex parte* hearing that "… fell woefully short of the standard required to ensure that the hearing was fair", in circumstances where there was "… no overriding requirement in the public interest which could have justified an interference with the protection of journalistic sources…": *Re Fine Point Films* [2020] NIQB 55; [2021] NI 387 ("the JR judgment"), at para 55.

<u>These proceedings</u>

10. In June 2019 both claimants issued section 7 proceedings (that is proceedings under section 7(1)(a) of the Human Rights Act 1998 ("HRA")) and made complaints to the Tribunal on the basis that they thought it likely that the warrants executed against them were "not the only attempt made to identify their confidential sources". Those proceedings and complaints were directed against the first to seventh respondents.

11. PSNI produced information in relation to directions issued by the Tribunal under section 68 of the Regulation of Investigatory Powers Act ("RIPA"). The information disclosed the following matters.
    (a) On 26 September 2013 PSNI made an application for communications data relating to Mr McCaffrey.
    (b) On 23 August 2018 PSNI applied for access to the claimants' communication data. The single point of contact highlighted that the application was seeking call data to journalists, and that the applicant would need to approach a specified legal adviser. The application did not proceed. The claimants make no claim or complaint in relation to this application.

(c) On 31 August 2018 the Chief Constable of PSNI granted a directed surveillance authorisation in respect of a named individual.
(d) On 1 September 2018 a detective sergeant of PSNI sent an email to Apple Inc attaching a preservation request and emergency law enforcement information request. The emergency law enforcement information request specified that the law enforcement agency making it was Durham Constabulary, and named Mr Ellis as the requesting officer.
(e) On 27 September 2018 PSNI made a further application for the communications data of both claimants. The single point of contact wrote, "Don't want to be daft, but have you spoken to [name] surrounding the potential that the subject of this inquiry MAY be deemed to be a journalistic source?" Again, the application did not go any further. The claimants make no claim or complaint in relation to this application.

12. The claimants were not aware of the conduct that had taken place in 2013. An issue about limitation arose, which PSNI ultimately conceded.

The eighth respondent

13. During the course of the proceedings it came to light that the Metropolitan Police Service ("MPS") conducted an investigation, known as Operation Erewhon, in 2012. That operation concerned alleged leaks of confidential information by staff of the Office of the Police Ombudsman for Northern Ireland ("OPONI") to Mr McCaffrey, and to Vincent Kearney, a BBC journalist who has brought separate proceedings. In late 2011 and early 2012 the then PONI, Al Hutchison, referred the matter to PSNI. The Chief Constable of PSNI set the terms of reference for a criminal investigation, and asked HM Chief Inspector of Constabulary to identify an independent police force to conduct it.

14. The MPS agreed to conduct the investigation. The terms of reference included:

> "The alleged leaking of the draft CJINI [Criminal Justice Inspectorate of Northern Ireland] Inspection Report (published August 2011) into the Independence of the Office of the Police Ombudsman for NI."

15. Extracts of the first draft of the CJINI report had appeared in an article by Mr McCaffrey published on 13 August 2011. The Ombudsman had received the first draft on 24 June 2011 and sent it to the directors of OPONI three days later. The allegation was that OPONI staff had leaked it to Mr McCaffrey. On 6 June 2012 officers of MPS asked Mr McCaffrey who had given him the report. He declined to answer their questions, on the grounds of journalistic privilege.

16. On 8 June 2012 the MPS made applications for communications data under section 22 RIPA for data relating to eight telephone numbers, one of which was Mr McCaffrey's. The application was approved by the designated person, a detective superintendent. The application was for subscriber details, and incoming and outgoing call data, cell

site data, IMEI, MMS and GPRS data. The MPS obtained communications data from Mr McCaffrey's communications service provider. Within those data were details of Mr McCaffrey's calls with Mr Birney. MPS attributed Mr Birney's number to him only when responding to a search direction from the tribunal in these proceedings, and they did not attribute his number to him in 2012.

17. The MPS concluded that a copy of the first draft of the CJINI report was leaked from OPONI, but was unable to reach a conclusion as to who was responsible.

18. The MPS was joined as a respondent in these proceedings and complaints in February 2024.

19. The MPS pleaded that it was proceeding on the assumption that the Operation Erewhon outcome report was passed to PSNI. It had found no evidence to suggest that the underlying materials, including communications data, were provided to PSNI.

20. In June 2018, officers of Durham Constabulary working on Operation Yurta contacted the MPS. They had learned from OPONI about Operation Erewhon. The MPS provided a report from Operation Erewhon to the Durham officers. On 19 June 2018 Durham Constabulary asked the MPS for the telecommunications data obtained in Operation Erewhon. In August 2018 one or more officers of MPS briefed one or more officers of Durham Constabulary about what information had been gathered in Operation Erewhon. On 23 August 2018 an MPS officer sent a Durham officer a spreadsheet of communications data obtained in Operation Erewhon with an attribution list. It did not contain all the data gathered in Operation Erewhon, or all the data gathered in that operation relating to Mr McCaffrey. It included some of the communications data obtained in Operation Erewhon, but none for Mr Birney.

Issues at the substantive hearing

The 2013 authorisation

21. In September 2013 Mr McCaffrey received information that PSNI was investigating allegations that a senior official in the force had received what appeared to be illegal payments from a recruitment agency. Mr McCaffrey contacted the PSNI press office to ask for comment. The head of the press office asked him to delay any reporting of the allegation, as PSNI had a covert operation in place against the official which was due to be completed within three days. Mr McCaffrey agreed to postpone publication. After three days had passed, he again contacted the PSNI press office, and was told that any publication would compromise its investigation, but was not told when the investigation would be completed. After a further editorial discussion Mr McCaffrey decided that he could not delay publication indefinitely, and notified the PSNI press office of that.

22. On 26 September 2013 a PSNI detective constable lodged an application under section 21 of RIPA with the purpose of "identify[ing] a PSNI employee who has passed police information to a journalist". A detective superintendent granted the application the following day. The police obtained access to ten pages of Mr McCaffrey's outgoing call data from 7 September 2013 to 26 September 2013.

23. On 27 September 2013 a short article was published on the Detail.tv website. It did not name the officer or set out the allegations of wrongdoing in detail. It narrated that a senior member of the PSNI was "at the centre of allegations of receiving payments from a private company", and that the PSNI had "been pressing for an indefinite news blackout of the story".

24. The PSNI accepted that the authorisation process did not contain effective safeguards in relation to Mr McCaffrey's Article 10 rights (that is the right to freedom of expression in Article 10 of the European Convention on Human Rights ("ECHR"), which is one of the Convention rights set out in Schedule 1 to the HRA). First, the 2007 "Acquisition and Disclosure of Communications Data: Code of Practice" (the 2007 RIPA code) did not provide effective safeguards in a case in which the purpose of an authorisation under section 22 of RIPA was to obtain disclosure of a journalist's source: *News Group Newspapers Ltd* v *Metropolitan Police Commissioner* [2015] UKIP Trib 14_176-H. Second, the designated person did not apply a stricter test, or heightened scrutiny, or give any express consideration to the public interest in the protection of the confidentiality of journalistic sources. The application had, however, been made in good faith and in accordance with the 2007 RIPA code, which was the established procedure at the time. A declaration would afford Mr McCaffrey just satisfaction.

25. The claimants invited the tribunal to make findings of fact as to what happened, to declare that the conduct was unlawful on a wider basis, and to determine whether there was any interference with Mr Birney's rights.

Acquisition and use of communications by the MPS

26. The MPS admitted that in obtaining Mr McCaffrey's communications data in 2012 it breached his Article 8 and 10 rights. The basis for that concession was the same as that for the PSNI's concession regarding the 2013 authorisation. The MPS submitted that there was no interference with Mr Birney's rights. His data were not sought, and his number was not attributed to him.

27. The claimants alleged, but the MPS disputed, that the MPS breached Mr McCaffrey's Article 8 and 10 rights because it should have applied on notice for a production order from the court, rather than using covert means. The MPS maintained (a) that no finding was necessary, given the concessions already made; (b) a similar argument was rejected in *News Group*, at para 91; and (c) any breach of Article 10 by reason that an alternative procedure should have been used would not have been unlawful under

section 6(1) of the HRA, by virtue of section 6(2)(b): *News Group*, paragraphs 112-126.

28. The MPS accepted that it was unlawful for it to interrogate and analyse Mr McCaffrey's data, because the data had been acquired unlawfully.

29. The MPS accepted also that passing Mr McCaffrey's data to PSNI, by way of the summary contained in the Operation Erewhon closing report, which included attribution of a specified number to him, breached his Article 8 and 10 rights because the data had been obtained unlawfully. Passing his communications data to Durham Constabulary breached those rights, for the same reasons.

Information obtained by non-statutory means

30. The claimants complained that both PSNI/Durham and MPS obtained information by non-statutory means. Those included, in the case of Durham, conducting searches of information held by the police (referred to as the "defensive operation") and in the case of PSNI/Durham and MPS by obtaining communications data and content by agreement with PONI.

31. The expression "defensive operation" appeared in a note made by an officer of Durham Constabulary of a meeting that took place on 15 November 2017. Detective Superintendent Foster of PSNI provided a statement about this matter. "Defensive operation" referred to a routine anti-corruption procedure carried out by the PSNI's anti-corruption unit ("ACU"). ACU checked outgoing calls from PSNI extensions and PSNI-issued mobile phones for inappropriate or unexplained calls. Those could include calls to subjects of interest or premium rate numbers. The numbers were checked against the numbers held for journalists. The journalists' numbers were either ones that were publicly available or that the journalists had themselves supplied to PSNI as contact numbers. There was nothing covert about the procedure. Officers and staff were aware that all transactions on police systems were recorded centrally and monitored and were the subject of continuous auditing to comply with PSNI policies. If an unexplained call were discovered, ACU would send an email to the user of the extension to ask for an explanation, before starting further inquiries. Mr Ellis had been asking ACU for information about individuals who might be responsible for leaking material to journalists.

32. There was a dispute both as to whether this conduct fell within the jurisdiction of the Tribunal, and as to whether it was unlawful. The claimants submitted that no attempt was made to apply to a court for a production order, and that there were no systems in place to protect the integrity of journalistic sources.

Authorisation of directed surveillance – 31 August 2018

33. The application was made by a detective sergeant of PSNI, and granted by the Chief Constable, George Hamilton. The application narrated that an individual was suspected of supplying material to journalists. The OPEN application narrated, amongst other things:

> "One of the stolen reports from PONI (Executive Summary) had a very limited circulation amongst senior members of PONI. [Redacted] was included in this circulation. [Redacted] was initially interviewed as a witness by members of the OP YURTA investigative team. [Redacted] stated [redacted] would not have seen any sensitive/secret documents in PONI, including those documents seen in the film 'No Stone Unturned'. It was only when [redacted] was confronted with information from [redacted] confirming that [redacted] received copies of the secret documents seen in the film, that [redacted] admitted [redacted] may have seen them. However, [redacted] still maintained that [redacted] could not remember this.
>
> [Redacted] also stated that [redacted] was given copies of the secret report seen in the film on two separate occasions. These were on the [redacted]. Furthermore [redacted] stated that [redacted] had access to the same document for a [redacted] and, a [redacted] period respectively.
>
> …
>
> [Redacted] stated that [redacted] was 'insistent' on being given unfettered access to secret and top secret intelligence.
>
> Minutes of an [redacted] meeting (PONI Loughinisland investigation) stated that the secret report was with [redacted] in order for [redacted] to draft a public statement.
>
> [Redacted] work account suggests irregular contact, in duty time and otherwise, with the No Stone Unturned Production team.
> …
>
> [Redacted] was a suspect of an investigation by the Metropolitan Police in 2012. This was in relation to the leaking of documents from PONI. [Redacted] fell short of being prosecuted.
> …
>
> It is the SIO's opinion that [redacted] is a suspect because there is no other member of PONI who has combined contact with the journalist community, the producers of No Stone Unturned, who has unfettered access to the material and who was investigated by the Metropolitan Police.
>
> The SIO plans to arrest [the claimants] on the morning of 31st August 2018 and search premises associated with them.

> The SIO has requested surveillance for one week from 31st August 2018. The objective of the surveillance is to establish whether or not [redacted] meets with [either of the claimants].
> SIO seeks to capture conversations involving [redacted] in the event that he meets with [either of the claimants], and/or any other as yet unidentified persons.
> The SIO has requested that if [redacted] does meet with [either or both of the claimants], that if documents are passed, then there should be a police intervention, to establish the nature of these documents."

34. The application contained the following, under the heading "Is this surveillance likely to result in the acquisition of confidential material?"

> "Consideration has been given to the specific role of [redacted] as the [redacted] there is the possibility that journalistic material may be obtained from the covert activity sought. In the event that such material is obtained, it will be handled in accordance with Codes of Practice. In additional [*sic*] having identified the likelihood that the confidential material will be obtained, authorisation for the activity has been elevated to the Chief Constable in accordance with Point 4.3 of COPs."

Under the heading: "Proportionality – Explain how the proposed surveillance is proportionate to what it seeks to achieve and why it cannot reasonably be achieved by less intrusive means", the applicant entered this text:

> "The criminality referred to poses a significant risk to undermining public trust and confidence in the PSNI and PONI. Against this backdrop there is no doubt that communities throughout NI would expect the PSNI to take all proportionate and reasonable steps to place [redacted] and indeed other associated perpetrators before the courts.
>
> The current investigation illustrates the PSNI's commitment to robustly investigate those involved in serious crime and to utilise all legitimate means to secure evidence. The arrest of those suspected of involvement in the criminality referred to and thereafter placing them before a suitable judicial authority will increase the public confidence in the PSNI and PONI.
>
> The planned activity represents the least intrusive means of achieving the SIO's objectives of identifying whether or not [redacted] meets with the arrestees after their release.
>
> The PSNI also has a lawful obligation to prevent and detect all crime as enshrined with Section 32 of the Police (Northern Ireland) Act 2000. The SIO has also taken into consideration Articles 2 and 8 of the ECHR and it has been assessed that the general public would be unequivocally supportive of this investigation."

35. On 13 September 2018 a detective sergeant requested that the authorisation be cancelled. The application for cancellation narrated:

> "There are currently criminal proceedings instituted against Barry McCAFFREY, and Trevor BIRNEY. There is ongoing examination of electronic media, seized from the journalists, at their home addresses. However, material seized from business premises is subject to a Judicial review. Therefore the SIO has no immediate plans to arrest [redacted].
> ...
> The objectives of this authority have not been met. The SIO, having reviewed the available [redacted] and evidence, has directed that to continue this covert operation is no longer progressing the investigation at this time."

36. The Chief Constable reviewed the authorisation on 14 September 2018. Following an operational update, he gave a verbal direction that all surveillance activity was to cease immediately. He cancelled the authorisation on 18 September 2018.

37. The claimants submitted that the authorisation was unlawful. PSNI could not evade the safeguards for a journalist's source by claiming only to seek to monitor a person thought to have leaked a document, rather than the journalist. It appeared that HHJ Rafferty had not been told about the plan for directed surveillance. The Divisional Court was told that at the time of the warrant application it was not possible to identify the PONI suspect.

(a) The Chief Constable had not applied his mind to whether there was an overriding requirement in the public interest that the source be disclosed. He had misdirected himself in law.
(b) Following the reasoning in *News Group*, where directed surveillance was being used to discover a journalist's source, there required to be judicial authorisation of it.
(c) There were breaches in the duty of candour in applying for the authorisation. There was no mention of the fact that an application for communications data had been met with a requirement that legal advice be sought.
(d) The application, and therefore the authorisation, were tainted by the belligerent and overzealous approach of Mr Ellis. He held negative views about the claimants, their lawyers, and NSU. He made a series of intemperate allegations about others and viewed himself as a victim. The Tribunal should infer that Mr Ellis held sectarian views that he attributed in correspondence to a senior officer of PSNI. The application proceeded entirely on his analysis, on which the Chief Constable had relied.

38. PSNI submitted that there had always been a recognition that the directed surveillance could lead to identification of journalistic material. It was highly targeted and specific. Although there was nothing in the terms of the authorisation or in a statement from the

Chief Constable to indicate that he had considered whether there was an overriding public interest, he was, on the material before him, entitled to conclude that there was such an overriding public interest. It could be inferred that he had addressed that test. Ms McGahey KC, who appeared for PSNI, accepted that if the correct test were not applied, then the authorisation would not be in accordance with the law for the purposes of Article 10 of the ECHR. The earlier attempt to apply for communications data was irrelevant to the decision the Chief Constable had to make. Any underlying views that Mr Ellis might have held were also irrelevant. PSNI expressed no view on his state of mind at the time of the application, but submitted that the application was properly made and justified on the information presented to the Chief Constable.

Request to Apple – 1 September 2018

39. On 1 September 2018 PSNI submitted a preservation request to Apple in respect of data for the account linked to Mr Birney's Fine Point Films email address. The data to be preserved were:

> "iCloud email content and iCloud Drive content to include all stored files and emails. Account registration data to include names, addresses, email addresses, associated mobile phone numbers, linked accounts, IP event history & contacts."

It was accompanied by an Emergency Law Enforcement Information Request. Durham Constabulary was named as the law enforcement agency making the request, and Mr Ellis as the requesting officer. His electronic initials appear in the attestation field of the form, which includes a declaration that the information in the form was correct to the best of his knowledge. Detective Sergeant Stevenson of PSNI submitted the preservation request and information request to Apple. Apple responded on 5 September 2018, agreeing to preserve the account for 90 days. A mutual legal assistance treaty process was initiated. The preservation period was extended on two occasions. PSNI did not acquire any data from Apple.

40. Durham Constabulary accepted, but PSNI did not, that the Tribunal has jurisdiction in relation to this matter. The claimants' contention was that the request to Apple was an unlawful attempt to avoid the safeguards of the statutory regime for the compulsory preservation and acquisition of data from a communications provider.

Responsibility for damages

41. PSNI accepted that in the event that the Tribunal granted any remedy by way of just satisfaction damages in respect of conduct by an officer of either Durham Constabulary or MPS, it was PSNI that should satisfy the resulting liability.

Mr Ellis's evidence

Preliminary matters

42. Mr Ellis provided three statements for the purposes of these proceedings. Only the first of those was prepared with professional assistance. In his second statement, Mr Ellis expressed his unhappiness that he should be asked about correspondence that he had submitted to Barbara Gray, who was at the time of the correspondence the Assistant Chief Constable of PSNI. The correspondence was "private" but had been leaked to the *Belfast Telegraph*. He referred also to a "contrived set of circumstances" which led to a "senior elected official" submitting what Mr Ellis said was a "false" statement in the judicial review proceedings.

43. At a hearing on 18 July 2024 we gave a judgment indicating that the oral evidence and cross-examination of Mr Ellis was required in OPEN and CLOSED session.

44. By the time of the substantive hearing, it was clear that what Mr Ellis alleged in his statement was that Grahame Morris, Member of Parliament for Easington, was the author of the "false" statement. It was common ground that Mr Ellis had, in December 2018, made a call to Mr Morris's constituency office about a photograph of Mr Morris and the claimants, which one of the claimants had posted on social media. The tone and content of that call were the subject of dispute. The claimants produced statements from Mr Morris, and from his parliamentary caseworker, Leeann Clarkson, regarding the call. Those statements contained allegations that Mr Ellis had said that Mr Morris needed "educating" and that he had had his photograph taken with "criminals and thieves". The claimants also produced a newspaper article other than the one in the *Belfast Telegraph* to which Mr Ellis had referred in his statement. It was one published in the *Irish News* on 1 October 2019. It contained an allegation that Mr Ellis had written emails criticising the Lord Chief Justice of Northern Ireland in relation to the judicial review proceedings.

45. Before Mr Ellis gave evidence, Mr McCartan, his counsel, raised an objection to the admission of the *Irish Times* article and witness statements. Mr McCartan submitted that Mr Jaffey should not be permitted to cross-examine Mr Ellis about his communication with Mr Morris's office, or the content of the newspaper article, because the lines were irrelevant. If they were relevant, then Mr Ellis should, as a matter of fairness, be permitted to lead evidence in rebuttal. There had been other witnesses to his call to Mr Morris's office. There was correspondence relevant to the allegations in the newspaper article.

46. Mr Jaffey submitted that it was legitimate for him to cross-examine about material that might demonstrate that Mr Ellis had engaged in a pattern of conducting and expressing himself intemperately in relation to the claimants.

47. We ruled that the proposed line of cross-examination was in principle relevant. We did not accept that fairness to Mr Ellis required that the proceedings be delayed in order for Mr Ellis to put further evidence before the Tribunal. Without prejudging the issue, we bore in mind that Mr Ellis would be giving sworn testimony, and that the other accounts of his call to Mr Morris's office were in unsworn statements, one of which itself contained a hearsay account. There was no suggestion that we would be required to make a finding as to whether in fact Mr Morris had made a false statement in the judicial review proceedings, as Mr Ellis alleged. There might be further material available to PSNI or to Durham Constabulary. If there were it might be shown to Mr Ellis before he gave evidence. In considering fairness, we took into account also the lengthy procedural history of the case and the interests of the public and the parties in having it determined without further delay.

Mr Ellis's OPEN evidence

48. Mr Ellis adopted his witness statements and gave further oral evidence. Recurring themes in his evidence were that he felt let down by his previous force, Durham Constabulary, that he had had to provide information to the Tribunal without professional assistance for most of the proceedings, and that he did not have access to documents in the hands of the first and second respondents. He said he felt he had been abandoned by Durham Constabulary after serving for thirty years without a "blemish" on his professional record. He described himself as a passionate and tenacious professional police officer. His investigation had been ethical. He was concerned that his character and conduct were being misrepresented in these proceedings.

49. Mr Ellis was adamant that Operation Yurta was not intended to identify journalistic sources, but to investigate the leaking of documents. He expressed the view that the use of the documents in the film presented a serious risk.

50. Mr Jaffey asked Mr Ellis about a passage in the judicial review judgment that referred to him. It read:

> "[24] He [Mr Ellis] clearly took issue with the content of the NSU film as he wrote in the Policy Book that the misreporting and sensational hypotheses reached were being broadcast with impunity and continued unchecked. He was so exercised by this that he had asked PSNI to reflect on the decision not to seek an injunction to prevent further broadcasting. He noted:
>
> > "The process appears unfair with a pseudo-type journalistic murder investigation intent on embarrassing the authorities."

51. Mr Ellis initially said that he did not recognise the passage as coming from his policy book, although he later seemed to depart from that. He denied thinking that NSU

contained misreporting. He said that he respected the roles that journalists fulfilled in society. His role was to "search ethically" to discover how documents had come to be lost from PONI. He was concerned that he was being misrepresented and portrayed in these proceedings as someone that he was not. His training was to record in his policy book his thoughts and feelings at the time of an investigation.

52. Mr Jaffey asked Mr Ellis also about the following passage from the JR judgment:

> "[25] On 22 March 2013 [*sic*] Mr Ellis addressed in the Policy Book the balance to be struck in the pursuit of his investigation:
>
> > "I understand that the balance between public interest driven by freedom of speech and a press/media community who are "free" to provide educational and informative product around topics which can help hold to account state organisations. That said one must also respect the need for public/national safety; the ability of state organisations, particularly law enforcement/military, to tactically operate within often high-risk situations. Clearly the well-being of those with whom state agencies engage and indeed those whom they serve is uppermost in thought.
> >
> > Transparency, fairness, proportionality and clear/unambiguous information which respects the needs of all concerned is key. From my personal perspective the production of what is in the "NUS" [*sic*] documentary does not provide balance. It is sensational documentary making which often leads the uneducated viewer to reach inaccurate conclusions".

53. Mr Ellis denied thinking that the documentary was unbalanced. He said he was not "running a witch hunt, or running amok". He acknowledged that he might have been wrong to refer to the potential for a viewer to reach inaccurate conclusions. He was not able to say, more than six years after the date of the entry in his policy book, exactly what had been in his mind at the time. He denied having a hostile view of the film. He professed not to be interested in whether the allegations in NSU about the police investigations into the murders were accurate or not. He said he did not know whether the documentary was misleading. He was unconcerned as to whether the content of the film damaged the reputation of the police. His interest was only in relation to the use of secret documents in it.

54. Mr Jaffey referred to a passage from Mr Ellis's policy book which read:

> "The production of the film is, in my opinion, a clandestine pseudo murder investigation which pieces together some available information whilst missing other vital parts. The hypothesis and conclusions reached may fulfil an agenda but I strongly feel the production does nothing to serve anyone's purpose including those bereaving [*sic*] families involved in the Loughinisland incident."

Mr Ellis denied any personal motivation in the investigation, and again maintained that his only interest was in the use of documents leaked from PONI.

55. In relation to the application for communications data on 23 August 2018, Mr Ellis said that the single point of contact had acted as gatekeeper. He never intended to resubmit the application, because he had other lines of inquiry that were proving successful. He accepted that the comments from the single point of contact about the application made on 27 September 2018 were essentially the same. A triage of Mr McCaffrey's mobile phone had shown a WhatsApp conversation in which he said he could ask a friend in OPONI for a copy of a report. The application sought subscriber details for the source. Mr Ellis accepted that the application narrated that the "potential ramifications of the leaked documents" had "direct Art 2 impacts" on persons named in the documentary. He said that it was the PSNI who had managed the threat to life consequences, and he had understood that there were a number of such threats. He did not know that the three suspects named in the film had been told they would be named in the film before it was made public.

56. In an email sent on his behalf to PSNI dated 22 August 2018 Mr Ellis had referred to a "covert strategy … in place to maximise all evidence and intelligence opportunities". He said that he had considered a written covert strategy. He looked to appoint a covert advisor. The investigation developed quickly to be a traditional reactive investigation, and did not come to have a written covert strategy. The overt inquiries were yielding sufficient information for his purposes. A third party was a person of interest. Mr Ellis reflected on existing intelligence about that third party.

57. In relation to the directed surveillance authorisation, Mr Ellis maintained that its target was not either of the claimants, but that third party, who was a PONI official. The purpose of the directed surveillance was to gather evidence in support of the suspicion that attached to that individual.

58. Mr Ellis was referred to para 50 of the affidavit he provided in the judicial review proceedings:

> "[50] From a practical perspective, police had to be extremely careful as to how to commence this investigation. Prior to the searches, I was simply not in a position to identify a suspect within the OPONI with the necessary degree of confidence. In contrast to the OPONI line of enquiry, police were able to clearly identify the current suspects, namely Mr Birney and Mr McCaffrey and their associated companies engaged in the making of the *NSU* film. It would, therefore have been totally illogical for this investigation to have been initiated other than by reference to them."

He said that there was enough evidence to support a DSA application but not to support a warrant so far as the third party was concerned. He had no idea whether the High Court was told about the DSA in the judicial review proceedings. He did not know whether that would have been relevant. Mr Ellis was reluctant to agree that he was hoping that the arrest of the claimants would lead him to the claimants' source. He described the third party as "somebody suspected of committing criminal offences".

59. Mr Ellis and an officer of PSNI had signed an undertaking to the High Court in these terms:

> "The two intended Respondents, Durham Constabulary supported by PSNI, undertake to complete the imaging of a server at the Applicant's premises situated at Callendar House, 58-60 Upper Arthur Street, Belfast BT1 4GJ and when that process is complete, seal all material seized from the premises and will not examine same until further order of the Court."

Mr Ellis did not accept that the purpose or effect of the undertaking was to protect the identity of the claimants' sources until further order of the court. He emphasised that the undertaking related only to material seized from the premises at Callendar House.

60. Mr Ellis said he had not seen the Emergency Law Enforcement Request submitted to Apple before its submission. He could not remember whether he had completed it. It bore his electronic initials, but he could not remember if he had placed them on it. He said that the application had been done for him, and that he had commissioned it on the basis of expert advice from a member of his team. He had taken legal advice with regard to the effect of the undertaking, and been told that it related only to business premises at Callendar House. He had information that suggested that the applicants might seek to delete data stored in the cloud, and that information resulted from the searches of the claimants' home addresses.

61. Mr Jaffey suggested to Mr Ellis that he did not like KRW Law, the claimants' solicitors. He responded that they were not there to "grease the wheels" for him. He had to work with that. Both he and the solicitors had roles to fulfil. He was referred to two passages from his written arrest policy:

> "Both are experience [*sic*] journalists and know better to manage "secret" documents in the manner they have. This shows a mental and flawed approach to issues of this nature. Their decision making in this regard appears to lack objectivity.
> ...
> I have experience of KRW law as a firm of solicitors. I find them to lack objectivity; provide legal advice to a client which I thought was not in his interest; a firm who seem to disproportionately challenge every detail of an investigation with loud, verbose and often aggressive style to represent the suspects. I consider their involvement will be, as it

always seems to be, not to engage or be seen to engage with investigators."

Mr Ellis said that the document was one that he had put together. He had a law degree, but not a degree in "ethical writing". He had been writing in his capacity as an investigator, and his choice of language should be viewed in that context. Mr Jaffey asked him about para 4k(a) of the report of Operation Yurta, which related to engagement with the Law Society of Northern Ireland, and read:

> "Throughout 2017, investigators interacted with the Law Society of Northern Ireland. Whilst that provided an opportunity for the investigators to impart observations and concerns, the Society felt that they were unable to facilitate or assist further in the absence of a criminal conviction of one or more of their members. A full office note was obtained."

Mr Ellis denied having made complaints to the Law Society of Northern Ireland. He had had concerns about a "series of activities" and regarded it as his duty to brief the Law Society of Northern Ireland about them. Another note read:

> "A meeting has been held to discuss obvious concerns regarding the conduct of some legal representatives. Rather disappointingly the Law Society are clear in that they will only intervene once a member is convicted of a criminal offence. Investigators found the representatives to be unsympathetic and defensive."

Mr Ellis said that he had not been trying to get the regulator to take action, but merely trying to raise his concerns about the conduct of solicitors.

62. Mr Ellis began giving evidence on 1 October 2024. On the morning of 2 October 2024, when he was due to continue giving evidence, Durham Constabulary disclosed 18 further pages of material. They contained an allegation by Mr Ellis that former ACC Barbara Gray had made comments about the Roman Catholic background of some judges and lawyers in Northern Ireland. They contained also an allegation by Mr Ellis that the National Union of Journalists had made an improper payment to Mr Morris, and information that Mr Ellis had asked Durham Constabulary to record the allegation that Mr Morris had made a false statement as a reported crime. Mr McCartan requested an opportunity to consult with Mr Ellis about the contents of those documents. Mr Jaffey objected to this. We did not permit the request, as Mr Ellis was in the course of giving his evidence at the time.

63. Mr Jaffey asked Mr Ellis about an email from him dated 24 June 2019 and timed at 1214h, which was one of the documents newly disclosed. It read:

> "I think this situation is an absolute outrage. The general 'judicial' oversight and management of this case, including the 'performance' of the LCJ himself, beggars belief."

Mr Ellis explained that he made those comments after a legal briefing. The briefing was to the effect that the Lord Chief Justice had directed that the parties should have only 24 hours in which to decide whether to appeal against the decision of the Divisional Court. Mr Ellis's understanding was that the law was normally that parties had 28 days from the date of the judgment. He described his use of language as clumsy, and said that he was not a wordsmith. The recipients of the email would have been senior officers of PSNI. He respected the judiciary. The comments were made in relation to efforts made over many months to prepare for the judicial review proceedings. Mr Ellis had sent a further email to ACC Gray at 1254h the same day:

> "Another, quite stunning decision this morning by the LCJ, can be found below. Probably best for you to read from the bottom – ie [redacted] email.
>
> I forward this to alert you to the preposterous direction of the court. I sense [redacted] will be linking with you or your Exec colleagues. Equally, I am attempting to speak to track down Mr Barton."

Mr Ellis explained that at the time ACC Gray was his "logistical single point of contact". On 25 June 2019 ACC Gray replied:

> "I had an opportunity to read your email – the content of which I consider to be totally unacceptable.
>
> This totally inappropriate communication has been raised at the most senior level within PSNI and will be raised with Mr Barton as your senior lead.
>
> The independence and conduct of the LCJ and courts in NI cannot be called into question in this manner and your comments do not reflect the impartiality and independence of policing."

Mr Ellis did not accept that ACC Gray's reply to him was a reprimand. He accepted that she was critical of the language he had used, and said that he would not, on reflection, use similar language again.

64. Another newly disclosed document was a letter sent as an attachment to an email on 21 April 2024 from Mr Ellis to Deputy Chief Constable Ciaron Irvine of Durham Constabulary. In that letter, Mr Ellis described the context of his email to ACC Gray as being:

> "... that I had held several conversations with Gray, given her responsibility to ensure my teams investigative welfare needs were met, regarding Operation Yurta. During those discussions Gray expressed the challenges faced by the PSNI in relation to the Republican and National interests within the context of policing.
>
> Gray informed me of the tensions within the legal system and advised me to "exercise caution" when dealing with solicitors, barristers and members of the judiciary given the disproportionate representation of

> those from a Roman Catholic background. She explained to me that people from that community who wished to pursue a career in Law were, more often than not, uncomfortable in joining the police as a chosen career. That was, with respect, despite the laudable aspirations of the Good Friday Agreement.
>
> Gray informed me of what she considered to be "perverse decision making" within criminal justice processes by those of a religious and political persuasion, given the prevalence of those from a catholic background within the "Northern Ireland Courts system"."

Mr Ellis said that he had written the letter because "no-one [from Durham] want[ed] to speak to [him]". He did not himself have any concerns regarding the Roman Catholic backgrounds of lawyers or judges. He did not understand the Northern Irish community. He did not share the view that he attributed to ACC Gray.

65. Mr Ellis had telephoned the office of Mr Morris, MP, on two occasions. The first was on 11 December 2018. An intelligence officer had made him aware of a photograph on social media. He had been asked to inform Mr Morris of its existence. Mr Ellis said he had had a cordial conversation with "Leeann", who had told him that she had been in post for only two days. He had served for 9 years as head of professional standards for Durham Constabulary, something that he could not have done were he "objectionable". His tone was "soft, advisory and consultative". He had not made any allegations during the call or referred to "criminals". He did not receive any call back from Mr Morris. He described the allegation that he had referred to the claimants as thieves as "outrageous". He was unaware that Mr Morris had written to the Police Commissioner and the Chief Constable of Durham Constabulary on 17 December 2018 about his call. Mr Morris wrote asking for confirmation as to whether the call had genuinely been made by Mr Ellis, as he had suspected it might be a hoax. He set out his understanding of what Mr Ellis had said during the call.

66. The witness was asked about an email to the Tribunal dated in 16 July 2024 in which he had referred to "the criminal conduct of MP Morris". He said he was referring to a statement provided in the judicial review proceedings. What was said about his conduct during the telephone call was not true. When he asked Durham Constabulary to register the allegation against Mr Morris as a crime, he had been trying to "hunker down and look after [him]self." He felt vulnerable and abandoned. Mr Jaffey referred to the following passage in the same email:

> "The Applicants and their legal teams operate in a community when no-one ever holds them to account. In a system that simply allows them to ride rough-shod over people who 'dare' challenge them. For too long they shout and they brawl and intimate [*sic*] others. I consider it to be a strategy to frighten and softly intimidate and hence place a ring of steel around corrupt activity."

Mr Ellis again said that he felt that he was being misrepresented. He had been "hung out to dry", and had done nothing wrong.

67. Mr Toal cross-examined Mr Ellis about the request to Apple. Mr Toal suggested that the request was unnecessary because the police had seized Mr Birney's telephone during the search of his home. Mr Ellis accepted that when a phone was seized, it should be placed in a "Faraday cage", but did not know whether that had been done in respect of Mr Birney's phone. A particular individual in his team had been responsible for IT matters. Mr Ellis had been briefed as a direction from the applicants or one of them that data should be destroyed remotely, and advised that the right thing to do was to try to "freeze" the cloud. Mr Ellis accepted that he had been present at the business premises that were searched. He explained that he had been at the police station and received a call to attend the business premises because staff felt intimidated by Mr Toal and his colleague.

68. Mr Ellis rejected suggestions by Mr Toal that his investigation had not been objective and independent. He accepted that he had met with a Mr White, the head of an association of retired police officers, and that that association had a grievance regarding PONI. He had not gone looking for Mr White, but had been asked to meet him. He was grateful to have a conversation with him, as he provided information which assisted Mr Ellis to understand the context in which he was working.

69. The witness gave evidence in CLOSED, and the following is the OPEN gist of his evidence, provided after his evidence concluded on 2 October 2024:

> "CTT questioned Mr Ellis on the CLOSED material.
>
> CTT also asked Mr Ellis to clarify whether there was anything he had to add in CLOSED to the three topics that he had identified during OPEN questioning.
>
> The first issue concerned the clip of documents containing the correspondence between Simon Byrne and Mike Barton including the email exchanges that preceded them.
>
> The second issue was in relation to investigating lawyers.
>
> The third issue was in relation to Mr White.
>
> The responses given by Mr Ellis to those three issues very largely repeated points that he had made in OPEN and there is nothing further to be opened up."

70. On 3 October 2024 CTT provided a form of words in relation to a further opening up of the evidence Mr Ellis had given in CLOSED:

> "In the closed hearing Mr Ellis was asked what was the closed evidence he wished to refer to in relation to "investigating lawyers". He repeated what he had said in OPEN and also said that in the examination of electronic equipment from the Applicants there was reference to Mr Murphy selling a firearm.
> CTT are not aware of any CLOSED material in these proceedings which support what Mr Ellis said. They have asked Durham and PSNI whether they are aware of any CLOSED material and they have also confirmed that they are not aware of any. PSNI have referred to page 492 of the OPEN hearing bundle as being potentially relevant to what was alleged."

Page 492 of the OPEN bundle contained a handwritten note made by a police officer other than Mr Ellis. It appeared to be a note made following examination of a device and to relate to an exchange on 18 December 2017 between BM (Mr McCaffrey) and NM (Niall Murphy, solicitor). It reads:

> "Exchange attachments. BM asks NM if he knows of anyone interested in a 9mm with 2 x clips and 20 shells. Then discuss RH doing a cleaning job."

Shortly after receiving the form of words from CTT, the claimants produced a WhatsApp message and attached image. It was plain from the attached image that the message had been intended to be humorous. The image showed seashells, two bulldog clips and a spanner. The reference to RH doing a cleaning job is readily understood by anyone who has seen NSU as a reference to one of the suspects named in it and what was said in the film to be his then-current occupation. Mr Ellis was not questioned about the entry made by the other police officer. There was no request to recall him for that purpose. We heard no evidence about whether he saw the message or attachment referred to in the handwritten entry, or whether the officer who made the entry saw the substance of the attachment to the message.

Mr Ellis's CLOSED evidence

[redacted]

Conclusions in relation to Mr Ellis's evidence

71. For the reasons that we give elsewhere in this judgment, we consider that Mr Ellis's motivation and subjective state of mind in August 2018 are not relevant to the decisions we have to make as to the lawfulness of the DSA and the request made to Apple. Separately, we have found in fact, for the following reasons, that he did not harbour or act on any improper motive in relation to the application for the DSA or the making of the request to Apple.

72. The extracts from Mr Ellis's policy book, affidavit and reports put to him in cross-examination speak for themselves. There is no dispute as to their terms. They show that Mr Ellis had a poor opinion of the merits of NSU as a piece of journalism; that he thought that the claimants were wrong to have used the leaked documents from OPONI in the film; and that he did not like the way that KRW Law conducted their business. It came to be common ground in submissions that the DSA was properly regarded as an interference with the confidentiality of journalistic sources, and required to be justified on the basis of an overriding public interest. Mr Ellis was wrong, as a matter of law, in thinking that that analysis was not required where surveillance was sought in respect of a suspected perpetrator of a crime, rather than in respect of the journalists whose source he was thought to be. We do not, however, infer that he had an improper motive for seeking the DSA or the preservation of material by Apple. We are not satisfied that he made the application or the request because he was "out to get" either or both of the applicants or because he did not like their lawyers.

73. Our impression from Mr Ellis's oral testimony is that he is, as he said, a passionate individual. He is given to expressing himself at some length and, at times, to expressing himself colourfully and emphatically. He remained genuinely exercised at the time of the hearing about the fact that documents had been disclosed without permission and used in a documentary. We have no doubt that he was anxious about these proceedings, and that his anxiety was exacerbated by his participation in them for some time without professional assistance or representation. So far as statements and communications from him during the latter stages of these proceedings are concerned, it is fair to view them, and the language used in them, as having been produced in the context of genuine anxiety and a degree of distress. They post-date the decisions with which we are concerned. We do not consider that they cast light on his state of mind at the material time.

74. We are unable on the evidence to make a finding as to what was said in the call between Mr Ellis and Ms Clarkson on 11 December 2018. On the one hand we have Mr Ellis's sworn testimony, and on the other signed witness statements including statements of truth from Ms Clarkson and Mr Morris. Mr Morris's statement adds nothing to that of Ms Clarkson. Mr Morris did not participate in the call, and recounts only what he says he was told about it. Ms Clarkson's statement has not been tested in cross-examination.

75. Mr Ellis's comments about the Lord Chief Justice of Northern Ireland were made in June 2019. He was unhappy with the outcome of the judicial review proceedings. Aspects of his investigation were at issue in those proceedings, and he was engaged in working for the unsuccessful parties. The immediate context of the comments was apparently a direction as to the time limit for an appeal, although we have no information or evidence about what direction the court gave about that. His comments were met with a swift, unequivocal and disapproving response from ACC Gray. Criticisms of the judiciary, however trenchant, made by someone, even a professional police officer, who is effectively a disappointed litigant, are, at best, of limited

relevance to ascertaining his state of mind some ten months earlier. There is no dispute that Mr Ellis made the comments. We draw no broader inference from the fact that he did so.

76. The terms of Mr Ellis's email of 21 April 2024 are self-explanatory. We do not infer that Mr Ellis held any of the views that he attributed to ACC Gray in that email. He denied holding any of those views and there is no positive evidence that he did. There is nothing in the email that suggests to us that he, personally, held those views. ACC Gray's views, if she had any, about those matters, are not relevant to these proceedings. We are not required to make any finding about her views and are not doing so. It would in any event be unfair to her to do so, as she has had no involvement in these proceedings. The views attributed to her are not consistent with the response she provided to Mr Ellis on 25 June 2019.

The Convention rights

77. Article 8 of the ECHR provides that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety …, for the prevention of disorder or crime, … or for the protection of the rights and freedoms of others."

78. Article 10 of the ECHR provides that:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, … public safety, for the prevention of disorder or crime, … for preventing the disclosure of information received in confidence, …"

79. In *Goodwin v United Kingdom* (1996) 22 EHRR 123, at para 39, the European Court of Human Rights reiterated "that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance." The court continued that protection of journalistic sources "is one of the basic conditions of press freedom". Without such protection,

"sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest".

80. In *Sanoma Uitgevers BV v The Netherlands* [2011] EMLR 4, at para 61, the Grand Chamber of the Court observed that the fact that searches proved unproductive does not deprive them of their purpose, namely to establish the identity of a journalist's source. Accordingly, Mr Jaffey submitted that it is the purpose of a measure which is crucial, not necessarily its effect. A similar point was made by the Grand Chamber in *Big Brother Watch v United Kingdom* (2022) 74 EHRR 17, at para 443.

81. At para 444, the Court confirmed that an interference with the protection of journalistic sources cannot be compatible with Article 10 "unless it is justified by an overriding requirement in the public interest". Furthermore, the Court continued, any interference must be attended with legal procedural safeguards. First and foremost among these safeguards is:

> "the guarantee of review by a judge or other independent and impartial decision-making body with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not".

82. At para 497, in a passage on which Mr Jaffey placed particular reliance, the Court said that:

> "The protection afforded by the Convention would be rendered nugatory if States could circumvent their Convention obligations by requesting either the interception of communication by, or the conveyance of intercepted communications from, non-Contracting States; or even, although not directly in issue in the cases at hand, by obtaining such communications through direct access to those States' databases. Therefore, in the Court's view, where a request is made to a non-contracting State for intercept material the request must have a basis in domestic law, and that law must be accessible to the person concerned and foreseeable as to its effects .... It will also be necessary to have clear detailed rules which give citizens an adequate indication of the circumstances in which and the conditions on which the authorities are empowered to make such a request ..."

83. These principles, in so far as they existed in 2015, were applied by this Tribunal (Burton J, President) in *News Group Newspaper Ltd and others v Commissioner of Police of the Metropolis* [2015] UKIPTrib 14 176-H, at para 89. This Tribunal held that, although at the relevant time and under the provisions of the 2007 Code on the acquisition and disclosure of communications data, RIPA could reasonably be considered to be the appropriate means for the police to obtain such data, the issue of proportionality has to be judged on an objective basis.

84. At para 91, the Tribunal held that it is the intrusion on a journalist's rights which needs to be justified, not the procedure used to give it legal effect. The Tribunal said that the "alternative measures argument" was "not sustainable".

85. At paras 93-111, the Tribunal concluded that the legal regime which applied at the relevant time (2013), that is section 22 of RIPA, taken with the 2007 Code, "did not contain effective safeguards to protect Article 10 rights in a case in which the authorisations had the purpose of obtaining disclosure of the identity of a journalist's source." This then required the Tribunal to consider whether the acts complained of were unlawful, under section 6 of the HRA, or simply incompatible with Convention rights but not unlawful in domestic law.

86. At paras 112 – 126, the Tribunal concluded that most of the authorisations in that case were not unlawful in domestic law, because of the effect of section 6(2)(b) of the HRA. The Tribunal held that the Respondent was entitled to exercise its discretion under section 22 of RIPA and that section 6(2)(b) of the HRA – unlike section 6(2)(a) – is not confined to situations where a public authority is required to act in a particular way by primary legislation, i.e. where it has no discretion. In such circumstances, the authority can still be said to be acting to give "effect" to a provision of primary legislation, in this context section 22 of RIPA.

87. At para 127, the Tribunal noted that it has no jurisdiction to make a declaration of incompatibility under section 4 of the HRA.

The concessions made by PSNI and MPS

88. Both PSNI and MPS made concessions regarding the acquisition of communications data. The basis for the concession was first, that the 2007 RIPA Code did not provide effective safeguards in a case in which the purpose of an authorisation under section 22 of RIPA was to obtain disclosure of a journalist's source: *News Group Newspapers Ltd* v *Metropolitan Police Commissioner* [2015] UKIP Trib 14_176-H. Second, the designated person did not apply a stricter test, or heightened scrutiny, or give any express consideration to the public interest in the protection of the confidentiality of journalistic sources.

Concession by PSNI

89. The concession by PSNI appears both in its skeleton and in a separate document at pages 351-354 of the OPEN bundle. PSNI recognises that the use of RIPA and the 2007 Code represented a breach of Article 10 of the ECHR. It also recognises that the proportionality test and the need for an overriding interest to justify the obtaining of data which would reveal a journalist's sources were not articulated or applied: page 353 of the OPEN bundle, paragraphs 13 and 14. In its skeleton, PSNI again concedes a breach of Article 10 rights and then offers submissions about remedy, but without reference to the potential relevance of section 6(2)(b) of the HRA.

Concession by MPS

90. The concession by MPS relates in the first place to a CDA applied for on 8 June 2012 and granted on 18 June 2012. The other concessions by MPS regarding its treatment of the data obtained under that authorisation are all predicated on the proposition that it was unlawful for them to obtain the data in the first place.

91. MPS has conceded a breach of Article 8 and Article 10. Although MPS relied on section 6(2)(b) of the HRA so far as Mr Jaffey's alternative procedure argument was concerned, they did not otherwise do so.

News Group

92. In *News Group* the Tribunal held that it had no power to grant a remedy under section 8(1) of the HRA in respect of three of the authorisations it was considering. It found that section 22 of RIPA could not under any circumstances lawfully have been applied in a case in which disclosure was sought of the identity of a journalist's source. The respondent was giving effect to the statutory power by employing it: para 124. It also held that it was not possible for the law enforcement agency to exercise the power so as not to infringe Convention rights. It would be difficult to accept that the first basis for the concessions offered by PSNI and MPS – namely the lack of safeguards in the regime then in force – meant that the authorisations were unlawful by virtue of section 6 of the HRA without departing at least in part from the reasoning in *News Group.*

93. The Tribunal in *News Group* approached matters on the basis that it was for them to assess whether any breach of Convention rights had occurred. It did not accept (para 66) that "inadequacy of reasoning" constituted a breach of a Convention right. The Tribunal reached its own conclusions on the necessity of the authorisations: paragraphs 65, 78-82. Because it approached matters in that way, it did not address directly the second of the bases for the concessions offered in this case, which on one view can be characterised as a recognition that the authorisations were not in accordance with the law.

94. The concessions that the authorisations were incompatible with the Article 10 rights of the journalist who was the victim of them are obviously correct, and in line with the reasoning in *News Group*. The correctness or otherwise of the concessions that the incompatibility with Convention rights gave rise to domestic unlawfulness by virtue of section 6 was not the focus of submission before us. As we have noted above, at least the first basis on which the concession is made may be difficult to reconcile with the reasoning in *News Group*. For the purposes of these proceedings there is no dispute in relation to the concessions just mentioned that the conduct was unlawful so as to entitle the Tribunal to grant remedies in respect of that unlawfulness.

The 2013 authorisation

95. The mobile phone concerned did not belong to the claimants. It belonged to a limited company, although the precise details are not clear on the evidence before the Tribunal.

96. At the hearing before us Mr Toal candidly and fairly conceded that it would have been better if the claim had been amended to include the relevant company as a claimant. Nevertheless, he submitted that this should not prevent Mr Birney from being able to pursue this part of the claim on behalf of the company that owned the phone, in other words in a representative capacity. Mr Birney, personally, also should be regarded as a victim. He and Mr McCaffrey effectively "came as a pair" as journalists. Conduct which might have a chilling effect on Mr McCaffrey's sources would impact also on Mr Birney in his work as a journalist.

97. We do not accept that submission. So far as a claim under the HRA is concerned, a person has standing only if he is or would be a "victim" in the sense in which that term is understood in Article 34 of the ECHR: see section 7(1) and (7) of the HRA. In general this requires that a person is directly and personally affected by the act complained of.

98. Mr Birney, as an individual, has not made out a claim that he is such a person. Although Mr Toal advanced a submission to that effect, there is little in Mr Birney's evidence to support it. His statement goes no further than to say that he was kept fully informed as to the development of the story Mr McCaffrey was investigating in 2013, that the story would not have been published without his consent, and that Mr Birney regarded the actions of the PSNI as an attack on his company and on the freedom of the press.

99. Similarly, in domestic law, there is a longstanding and fundamental principle that a limited company has a separate legal personality from its directors or shareholders: see *Salomon v A Salomon & Co Ltd* [1897] AC 22. In what has become known as the rule in *Foss v Harbottle* (1843) 2 Hare 461, the proper claimant "in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation" itself: see *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] 1 Ch 204, at 210 (CA). It is commonplace for an application for judicial review to be brought by a limited

company, either alone or in conjunction with individuals. We note that, in the judicial review proceedings in the Divisional Court in Northern Ireland, Fine Point Films Ltd was an applicant.

100. In the circumstances of this case we consider that the claim before this Tribunal could and should have been amended in good time if a claim was to be made on behalf of a limited company. In this Tribunal, as in public law proceedings generally, there is a need for "procedural rigour": see *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [2020] 1 WLR 2326, at paras 116-117. As the Court of Appeal said there, the reason why procedural rigour is important is not for its own sake but so that justice can be done: this includes fairness to the parties so that, for example, a respondent knows what the case is that it has to answer and can file evidence in response. This would obviously include such questions as the correct identity of one of the claimants, here a limited company. We bear in mind that this Tribunal should seek to avoid undue formality, particularly in cases brought by litigants in person (see *Al-Hawsawi v Security Service & Ors* [2023] UKIPTrib 5, [2024] 1 All ER 671, at para 53), but in this case the claimants have been legally represented at all times. There have been a number of interlocutory hearings. There has been adequate time for an application to amend the claim to include a relevant company. No good reason has been advanced for why that was not done. Accordingly, we conclude that this aspect of the claim cannot be pursued in these proceedings and must be rejected so far as Mr Birney and any limited company with which he is associated are concerned.

101. The position is different for Mr McCaffrey. The police obtained ten pages of his outgoing communications data. There is no dispute that he used the phone, regardless of which entity owned it, or that the aim of the exercise was to discover the source of his information. PSNI concede, rightly, that he is a victim of an act incompatible with the rights protected by Article 10 of the ECHR.

102. PSNI accepts that the Tribunal should find it breached Mr McCaffrey's Article 10 Convention rights in relation to the 2013 authorisations. Ms McGahey accepted in her oral submissions that Mr McCaffrey was entitled to have the authorisation quashed. We will make an order to that effect. PSNI have undertaken, on the conclusion of these proceedings, to delete from all electronic systems the material obtained from the authorisation, and to provide a signed statement saying it has been deleted. In the light of that undertaking we are satisfied that there is no need for us to consider making an order requiring the destruction of the material, although Ms McGahey did not object to our making such an order.

103. We do not accept Mr Jaffey's submission that we should find the authorisation to be unlawful on any basis other than that conceded by PSNI. The failure to apply the test in *Goodwin*, on which he relies, is covered by the concession. It involves no additional aggravation. His submission that PSNI should have used a less intrusive method, in the form of a production order, fails on the analysis in *News Group*.

104. Accepting for present purposes that the conceded breach of Convention rights was unlawful by virtue of section 6 of the HRA, we are not satisfied that any award of damages is necessary to afford just satisfaction. The authorisation was sought and given in good faith and in accordance with the domestic legal regime (including the 2007 Code) in force at the time.

Operation Yurta: the DSA

105. The authorisation, and any conduct following from it, were unlawful, because the Chief Constable did not consider whether there was an overriding public interest justifying an interference with the integrity of a journalistic source. Ms McGahey acknowledged that was the test the Chief Constable was required to apply. She accepted that the authorisation would not be in accordance with the law if he had not applied that test. There is nothing in the authorisation itself or in the statement provided by the Chief Constable to indicate that he directed himself to the need for there to be an overriding public interest. The Chief Constable recorded that he was "cognizant" that the claimants were journalists. There was recognition on both his part and that of the applicant that journalistic material might be obtained. There is, however, no analysis in the authorisation indicating expressly that the person in respect of whom surveillance was being sought was, or was thought to be, the claimants' source. The application does not contain any analysis of that sort, or direct the Chief Constable to the correct test. The part of the application dealing with proportionality does not mention Article 10 of the ECHR at all (although it mentions Articles 2 and 8). Precise articulation of the test might not be required if the reasoning in the decision otherwise satisfied us that it had been applied. It does not. We do not accept Ms McGahey's submission that it can be inferred that the Chief Constable directed himself correctly in law. The terms of the application and authorisation do not support any inference of that sort, and on the contrary indicate that the Chief Constable did not consider the correct test. The authorisation is unlawful at common law. It is also incompatible with the claimants' rights under Article 10, and unlawful by virtue of section 6 of the HRA 1998.

106. Mr Jaffey submitted that the authorisation and any conduct following from it was unlawful also on the grounds that the Chief Constable took into account information deriving from Mr Ellis which was tainted by his improper motivation and animus towards the claimants. Mr Jaffey submitted that even if the authorisation fell to be set aside because the Chief Constable had misdirected himself in law, it was still relevant to consider whether it was unlawful on another basis. That might be relevant to remedy. We have concluded that the authorisation was not unlawful on the basis proposed by Mr Jaffey in this chapter of his submissions.

107. First, for the reasons given at paragraphs 71-76, we were not satisfied that Mr Ellis harboured, or acted on the basis of, any improper motive or animus towards the claimants.

108. Second, and separately, we do not accept as a matter of law that a grant of authority is rendered unlawful where an applicant for authority harbours and acts on an improper

motive, that motive is unknown to the decision-maker and does not alter the content of the information provided to the decision-maker, and the decision-maker acts properly and in accordance with the law. No authority for that proposition in the field of public law was cited to us. Mr Rathmell directed our attention to *Reynolds v CLFIS (UK) Ltd and others* [2015] ICR 1010. In the context of employment law, the Court of Appeal held that there was no basis on which the act of one individual could be said to be unlawfully discriminatory on the basis of the motivation of another person. That case turned on consideration of the particular legislative scheme for allocating liability, particularly to employers, for acts of discrimination, and does not provide a precise or useful analogy in the field of public law and warrantry.

109. Third, on the hypothesis that Mr Ellis's motivation was relevant, Mr Jaffey placed weight in his submission on the proposition that the decision maker relied on Mr Ellis's tainted analysis. On examination of the OPEN content of the DSA application, that proposition founders. While there are references in the authorisation to Mr Ellis's opinion and his strategy, there is also reference to various pieces of information causing suspicion to focus on the third party named in the application and authorisation. The Chief Constable wrote:

> "It was established that one of the stolen documents featured was a PONI (Executive Summary) which had a limited circulation amongst senior members with PONI, [redacted] was included in the circulation. I am informed that [redacted] interviewed as a witness by members of the investigating team and denied having sight of any sensitive/secret documents until [redacted] had in fact received copies of the secret documents that were featured. This is supported from minutes of a meeting that stated the document was with [redacted] in order to prepare a public statement. It is further stated that [redacted] regularly used secret PONI documents while drafting public statements on behalf of PONI.
>
> I note that other witness evidence indicated that [redacted] had an unhealthy relationship with Barry McCAFFREY. It is also indicated that [redacted] was informed by Trevor BIRNEY (film producer) prior to the release of the film that a document would feature however no PONI logo was present, so that its origin was unidentifiable and that PSNI had the same document."

110. Insofar as Mr Ellis's opinion is mentioned in the application, it is an opinion predicated on the information that had emerged from the investigation. That information was itself placed before the Chief Constable for his consideration. There is nothing to suggest that the information was inaccurate or apt to mislead the Chief Constable.

111. Mr Jaffey also submitted that the authorisation was unlawful because prior judicial authorisation was required where directed surveillance was sought with a view to discovering a journalist's source. This submission was not foreshadowed in the claimants' joint skeleton argument, and as a result not fully or properly focused in

argument before us. We reject the proposition that the absence of prior judicial authorisation gave rise to unlawfulness by virtue of section 6 of the HRA. PSNI followed the procedure available to it under section 28 of RIPA. The logic of Mr Jaffey's submission is that no authorisation of directed surveillance could be lawful where a journalist's source might be discovered. That would, as the Tribunal put it in *News Group* at para 123, thwart the Parliamentary intention that the power should be available. PSNI were giving effect to section 28 of RIPA. There was no alternative procedure by which directed surveillance might be authorised.

Consideration of DSA in CLOSED

[redacted]

Remedy

112. We will quash the DSA. We have determined that a declaration of its unlawfulness would not be sufficient to afford the claimants just satisfaction in respect of its incompatibility with the rights protected by Article 10.

113. In *Varnava and others v Turkey,* (Application nos. 16064-16066/90 and 16068-16073/90), Grand Chamber, 18 September 2009, at para 224, the court made these observations about its approach to just satisfaction damages:

> "The Court would observe that there is no express provision for non-pecuniary or moral damage. Evolving case by case, the Court's approach in awarding just satisfaction damages has distinguished situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity … and those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right. … In some situations, however, the impact of the violation may be regarded as of such a nature and degree to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards

> serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage: they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting State concerned.

Mr Jaffey suggested that the rejected CDA application should have been presented to the Chief Constable and that the failure to present it to him was incompatible with PSNI's duty of candour. Having found the DSA to be unlawful on the basis that we have, we have not considered whether there was a failure in the duty of candour such as to undermine the authorisation. The rejected CDA authorisation should, however, at least have alerted PSNI to the need to focus carefully in the DSA application on the correct legal test and the need for an overriding requirement in the public interest, and to bring it to the attention of the decision-maker. The Chief Constable granted the authorisation at 1220h on 31 August 2018, which was the day on which the warrants were executed. At some point that day Mr Pierce of KRW Law put the Crown Solicitor's Office on notice that there were to be emergency leave proceedings brought. The hearing on the application started at 1538h and ended at 1715h. The outcome of the proceedings was the granting of the undertaking referred to elsewhere in this judgment. The Chief Constable could not have been aware of that outcome at the time he granted the authorisation. What must have been plain by the evening of 31 August 2018 was that there was a serious basis for concern that the warrants represented an unlawful interference with the journalistic activities of the claimants. The authorisation was not, however, reviewed until 14 September 2018 or cancelled until 18 September 2018. We regard all of these factors as relevant to the overall context in which the breach occurred. We take into account that the activity authorised was covert, and not one that would have come to the attention of the claimants but for these proceedings.

114. Mr Jaffey referred to *Sedletska v Ukraine* (2024) 78 EHRR 10, in which the court, on an equitable basis, awarded EUR 4,500 in respect of non-pecuniary damage in respect of interference with the Article 10 rights of a journalist. In *Ernst v Belgium* (2004) 39 EHRR 35, another case involving the breach of a journalist's Article 10 rights, the court awarded each applicant EUR 2,000 in respect of non-pecuniary damage, a sum which Mr Jaffey submitted was similar to that awarded in *Sedletska*, taking into account the effects of inflation. The nature of the interferences in *Ernst* and *Sedletska* were different from the interference in the present case. *Ernst* involved physical searches, and *Sedletska* the collection of a wide range of protected communications data. Although the DSA was relatively narrow, and might be fall to be contrasted in that regard with physical searches or the acquisition of communications data, its existence is not necessarily less harmful to the interest protected by Article 10 so far as the protection of the confidentiality of journalistic sources is concerned. We award each of the claimants £4,000.

Apple preservation request

Jurisdiction

115. Since PSNI does not accept that the Tribunal has jurisdiction to consider this aspect of the claim, the first issue that we must determine is whether we do have jurisdiction to do so.

116. Since this Tribunal is the creature of statute (see section 65(1) of RIPA), it has only such jurisdiction as Parliament has conferred upon it. Section 65(2) of RIPA provides that the jurisdiction of the Tribunal shall be that which is then set out in paras (a)-(d). For present purposes, Mr Jaffey relies on the terms of para (b): "to consider and determine any complaints made to them which, in accordance with subsection (4) are complaints for which the Tribunal is the appropriate forum".

117. Section 65(4) provides that the Tribunal "is the appropriate forum for any complaint if it is a complaint by a person who is aggrieved by any conduct falling within subsection (5) which he believes –

(a) to have taken place in relation to him, to any of his property, to any communications sent by or to him, or intended for him, or to his use of any … telecommunications service or telecommunication system; and
(b) to have taken place in challengeable circumstances …"

118. Section 65(5) provides that, subject to subsection (6), the relevant conduct is, so far as material, "(b) conduct for or in connection with the interception of communications in the course of their transmission by means of a … telecommunication system" and "(czd) conduct of a kind which may be required or permitted by a warrant under Part 5 or Chapter 3 of Part 6" of the Investigatory Powers Act 2016 ("IPA"), that is "equipment interference".

119. It seems to us that there can be no doubt that the conduct of which complaint is made in relation to the Apple preservation request falls within that definition of relevant conduct. We did not understand that to be disputed on behalf of PSNI. The crucial question is then whether that conduct took place in "challengeable circumstances".

120. Section 65(7) provides that, for this purpose, conduct takes place in challengeable circumstances if it is conduct of a public authority (here there can be no dispute that PSNI is a public authority) and either "(a) it takes place with the authority, or purported authority, of anything falling within subsection (8)" (it is not suggested by Mr Jaffey that this paragraph is relevant) or "(b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration being given to whether such authority should be sought".

121. It is important not to give an unduly technical interpretation to these provisions, as otherwise conduct which Parliament intended this Tribunal to be able to consider would fall outside its jurisdiction. The context is important, as well as the purpose of these provisions. That context includes the fact that a claimant will often (for proper reasons) be in the dark as to what, if any conduct, there has been in relation to him or what the circumstances were in which a public authority engaged in that conduct. In our view, the crucial word in the language used by Parliament is "believes" in section 65(4). It is sufficient that a person who is aggrieved by any relevant conduct "believes" that it took place in challengeable circumstances. Here the claimants do have that belief.

122. It is also important to appreciate that we are presently considering only the threshold question of jurisdiction. If the Tribunal has jurisdiction, it will not follow that there has been a breach of the law. It will simply mean that the Tribunal can "consider and determine" the complaint (the language of section 65(2)(b)). If the Tribunal does not have jurisdiction, it cannot even consider the complaint, let alone determine it.

123. In the present case, Mr Jaffey submits that the Apple preservation request should not have been made by PSNI in circumstances where they could have obtained a warrant to engage in equipment interference under the IPA and where at least consideration should have been given to whether to apply for such a warrant.

124. We have reached the conclusion that this Tribunal does have jurisdiction to consider that aspect of this complaint and will proceed to determine it on its merits.

The substantive complaint

125. The scope of the argument made by Mr Jaffey on behalf of the claimants has narrowed over time. Initially he appeared to submit that there is a general principle of administrative law that, where a public authority has the statutory power to do something, conferred by legislation which sets out the safeguards which attach to the exercise of that power, for example that a warrant from another person is required, or that it has to be authorised by a judge or a judicial commissioner (as in the context of many types of warrant under the IPA), it may not circumvent those statutory provisions by requesting a person to do something voluntarily. Mr Jaffey submitted that this is an application of the principle in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, at 1030 (Lord Reid), that a statutory power must be exercised for a proper purpose and may not be exercised in a way which would impede or frustrate the policy and objects of the legislation which confers that power.

126. During the course of his submissions, however, Mr Jaffey narrowed the scope of this argument and said that it applies at least to situations where a public authority's conduct relates to the identification of the confidential sources of a journalist, because of the particular sensitivity which arises in that context. We can see no basis in legislation for

drawing that distinction, nor was any provision shown to us which would lay down such a distinction.

127. Further, no authority was cited in support of either the broader or the narrower formulation of this argument. We reject the argument, whether framed broadly or narrowly. In our view, the correct legal analysis is as follows.

128. First, the purpose of RIPA and the IPA is to regulate the exercise of compulsory powers by public authorities. It is because a person who holds certain data or information (the third party) is not willing or is unable lawfully to divulge it voluntarily that very often a warrant will be required and it may be that a judicial order or authorisation is also required. But in circumstances where the third party is able and willing to comply with a request from a public authority voluntarily, there will be no need to use compulsory powers. It is not so much a question of circumventing the statutory provisions which govern the exercise of a power; it is rather that the need to exercise that power by way of compulsion of the third party has not arisen at all.

129. Mr Jaffey pointed out that much of the data that is kept by a third party will have come from people voluntarily, for example when they use public transport and use an Oyster card. He submitted that it would not be open to a third party, such as Transport for London, to hand over a bulk dataset of that type to the police or the intelligence services; there would have to be a warrant issued under the IPA. It was not Mr Jaffey's submission that the voluntary transfer of any of the data in this case was the voluntary transfer of a bulk dataset.

130. Turning to the present case, the relationship between Apple and its customers, such as the claimants, is governed by private law, in particular the contract between them. As is well known, many people voluntarily hand over large amounts of data when they transact with companies such as Apple. This is no doubt because they wish to take advantage of the services which are provided by those companies. Although they may not in practice have read the full terms and conditions of the contractual arrangements with a company, they will usually have ticked a box which states that they have done so, again no doubt because they find it convenient to do this in order to obtain the services they wish to have. Those contractual arrangements usually include provision for the service provider to be able to do something in order to assist law enforcement or other public authorities. Apple had such terms in its contractual arrangements with the claimants.

131. The legal position of Apple is therefore governed by those contractual arrangements with its customers. If it is able and willing to do something in voluntary compliance with a request from a public authority, such as agreeing to preserve certain data for a period of time, there is nothing unlawful in its doing so. Nor, crucially, in our view, is there anything unlawful about a public authority such as PSNI making a request to Apple to preserve the data voluntarily. As we have said above, that is not an attempt to circumvent statutory safeguards; it is simply a request which does not have to be

complied with. If it is not complied with, then the public authority may have to resort to its powers of compulsion, and it is at that point that the statutory safeguards apply.

132. Mr Jaffey and Mr Toal drew attention to particular aspects of the request to Apple which they said were unsatisfactory, including the reference to risk to life in the request. Mr Toal suggested in submissions that the data might have been safe from deletion even absent the request if the telephone had been placed in a Faraday cage. We have determined as a matter of law that no process of authorisation was required because the request was one for voluntary assistance, rather than the exercise of a compulsory power. We do not require to consider the adequacy or otherwise of the information provided to Apple in connection with the request.

Data released voluntarily by PONI and PSNI

133. In our view, a similar analysis applies also to the voluntary transfer of information and data by an organisation such as PONI to a police force, or indeed internally within PSNI in the course of an investigation of this sort, although ultimately everything depends on the precise terms under which that information or data have been acquired. This may have been voluntary, for example pursuant to a contract of employment with a member of staff, or it may have been in some other way.

134. There will often be other legal regimes which govern the retention of that information or data, and its transfer. There will often be other legal regimes which govern what the recipient, such as PSNI, can then do with that information or data. Those legal regimes will include the Data Protection Act 2018, the UK General Data Protection Regulation, Article 8 of the ECHR, and the common law, including (for this purpose) principles of equity: see *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9, [2015] AC 1065, at paras 7-10 (Lord Sumption JSC), where it was explained that the police continue to have powers at common law; and *Newcastle United FC v HMRC* [2023] EWHC 3021 (Admin), [2024] 2 WLR 1449, at paras 84-87, citing *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225, especially at 261 (Nolan LJ). As was explained in the latter case, where a police force obtains information by the exercise of compulsory powers, it will be subject not only to public law principles but also the equitable doctrine of breach of confidence.

135. Mr Jaffey again submitted that it would be unlawful for a police force to request information from a body such as PONI on a voluntary basis, as an aspect of the *Padfield* principle. We do not accept that submission.

136. First, no authority is cited for it.

137. Second, it appears to us to be contrary to principle. As we have said above, the use of compulsory powers ought to be confined to situations in which it is necessary to resort to them, precisely because the police cannot otherwise acquire the information. This is

what lies behind many statutory powers, including those in RIPA and the IPA, which often speak of a warrant or other measure being "necessary and proportionate".

138. Third, it would, as Ms McGahey submitted to us, be unworkable in practice. Often, as in the present case, the third party concerned will be the person who makes a complaint to the police about a potential crime. In the present case, PONI suspected that there had been a leak of a secret report which belonged to it. It was therefore not simply acting as a public authority but as the potential victim of a crime. When a possible crime is reported to the police, the first step they will usually take is to ask questions of people who may have seen or heard something that may be relevant. Someone may have relevant records, for example it may be apparent from staff records that five employees had access to a secret report but two of them were on holiday at the time of the leak. Inquiries will then focus on the remaining three people. Voluntary provision of information may rule out one or more of those three but the time may come when the police have to apply for a search warrant to search the home of a suspect. It is only when the use of such compulsory powers becomes necessary that the statutory safeguards attached to those powers will apply. Indeed, it may well be that it is precisely because information has been provided on a voluntary basis that the police will have reasonable grounds in support of an application for a search warrant from a magistrate or judge. In our view, the police do not act unlawfully by seeking and obtaining information on a voluntary basis up to that point: they have not sought to circumvent statutory safeguards. One of those safeguards, on Mr Jaffey's submission, is the need to obtain a search warrant from a magistrate or judge but it is difficult to see how any application could be made to a court for a warrant at the very start of a police inquiry. By definition, at that point in time, there will be no evidence to give rise to reasonable grounds to suspect any particular person of a crime. Mr Jaffey was unable to say what application could be made by the police to a magistrate or judge to begin their inquiries.

Acquisition and use of communications by the MPS

139. As in relation to the 2013 PSNI authorisation, and for the same reasons, we are not satisfied that there is any basis for a finding of unlawfulness beyond that accepted in MPS's concession. There was, again, an authorisation granted in good faith using the legal regime in force at the time. The further concessions as to unlawfulness flow from the manner in which Mr McCaffrey's data were initially obtained.

140. The MPS accepts that the 2012 authorisation should be quashed, and that there should be delivery up of the communications data unlawfully obtained and any material derived from that. There is a potential complication in relation to that because of the proceedings brought by Mr Kearney. With that in mind we are minded to require an undertaking as to how the material will be stored and handled until the conclusion of those proceedings and what is to be done with them at that time. MPS accepted that the OPEN judgment should explain what happened, and how Mr McCaffrey's data were used.

141. We have concluded that those remedies are sufficient to afford just satisfaction to Mr McCaffrey. We note that MPS were joined as a respondent at a late stage of these proceedings. They produced information and made concessions very swiftly.

142. We do not accept that Mr Birney was a victim of the 2012 authorisation or anything that followed from it. His data were not sought. They were obtained along with the data of other persons by way of collateral intrusion, and his number was not attributed to him.

First, second and eighth respondents

143. We make no determination in respect of any of the first, second or eighth respondents other than as set out above.

Non-core respondents

144. We make no determination in favour of the claimants so far as the Third Fourth, Sixth and Seventh Respondents are concerned.

CLOSED consideration of non-core Respondents

[redacted]

The duty of candour

145. During the substantive hearing there was some discussion of the terms of the gist produced by PSNI in response to a direction made by the President on 22 January 2024. It related:

> "In September 2018 [*sic*] PSNI submitted two communications data applications in regards to the applicants. Both applications were refused at the first gateway within PSNI and no further action taken.
>
> No further authorisations were sought in respect of the applicants and the PSNI hold no further relevant information.
>
> It is the position of the PSNI that no covert powers were exercised in this matter."

The final sentence was said to have the potential to mislead, given regard to the information later disclosed to the claimants about the DSA. The Tribunal relies on the exercise by public authorities of their duty of candour in public law proceedings. We accept that there was no intention to mislead. So far as the Tribunal is concerned, PSNI were aware when drafting the gist that the Tribunal already had information about the DSA. The gist was intended to be confined to information about the two CDAs. The discussion that the gist generated does indicate the need for public authorities to ensure that they communicate in cases of this sort in a way that eliminates so far as

possible the potential for any misunderstanding to follow from the terms in which they express themselves.

Specification of relevant appellate court

146. Under section 67A(2) of RIPA we specify that the relevant appellate court is the Court of Appeal of England and Wales.