Neutral Citation Number: [2012] EWHC 1471 (Admin)

Case No: CO/11969/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/05/2012

Before :

LORD JUSTICE GROSS

And

MR JUSTICE IRWIN

- -

Between :

John Oldroyd Catt	**Claimant**
- and -	
The Commissioner of Police of the Metropolis	**Defendants**

- -
- -

Mr Tim Owen QC and Miss Alison Macdonald (instructed by **Bhatt Murphy**) for the **Claimant**
Mr Jeremy Johnson QC (instructed by **Directorate of Legal Services, Metropolitan Police**) for the **Defendants**

Hearing dates: 9TH FEBRUARY 2012

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Approved Judgment

LORD JUSTICE GROSS:

INTRODUCTION

1. By way of Judicial Review, the Claimant ("Mr. Catt") challenges the Defendants' retention of data ("the data") relating to his attendance at various political protests on the National Domestic Extremism Database ("the Database"), maintained by the National Public Order Intelligence Unit ("NPOIU") under the command of the National Coordinator for Domestic Extremism ("NCDE").

2. As originally advanced, Mr. Catt's claim was put on two bases:

   i) The retention of the data engaged and violated his rights under Art. 8 of the European Convention on Human Rights ("ECHR") and was neither a necessary nor proportionate response to the achievement of any legitimate aim.

   ii) The retention of the data did not comply with the requirements of the Data Protection Act 1998 ("the DPA").

   By whichever route, Mr. Catt seeks an order that, as he has not himself been engaged in criminality, any reference to him should be deleted from the allegedly unlawfully retained material.

3. Mr. Catt is now aged 87 and of good character. He has a long history of political protest, which need not be recounted here.

4. The data in issue is essentially comprised of records (or reports) made by police officers overtly policing demonstrations of a group known as "Smash EDO". Though at one stage Mr. Catt sought to contend that he had been targeted or placed under surveillance, it is plain that these records mention Mr. Catt incidentally in the course of lengthy narratives of what police officers observed at such demonstrations.

5. Brief mention needs to be made of the two Defendants (as they have now become, see below) and the relevant units and personnel under their control.

   i) The First Defendant ("ACPO") is a private company comprising the most senior police officers in the 43 police forces in England, Wales and Northern Ireland. ACPO is not a police service but an association set up to support chief officers and government; *inter alia*, it coordinates strategic national police policies. The role of NCDE was originally created by an ACPO sub-committee having responsibility for police counter-terrorism ("CT") strategy. His role, as the acronym suggests, together with that of the units under his command, is to coordinate the UK police response to domestic extremism.

   ii) The NPOIU was established to facilitate lawful protest but also to respond and prevent, reduce and disrupt public disorder and criminal activity associated with "domestic extremism" (see below) and single issue campaigning in England and Wales. As domestic extremists do not operate within police force boundaries, each force submits their intelligence to NPOIU, to facilitate the development of a national picture and the coordination of investigations.

iii) The term "domestic extremism" is not defined by law. However, as explained in the witness statement of Detective Chief Superintendent Tudway, at the material time the NCDE ("the Tudway statement"), it is a term generally used by the police and associated agencies "to describe the activity of individuals or groups who carry out criminal acts of direct action to further their protest campaign, outside the democratic process".

iv) At all material times, the NCDE and the NPOIU have been under the command or control of either ACPO or the Second Defendant ("the Commissioner" or "the Met" as appropriate). Though it will in due course be necessary to deal with one argument in this connection raised on Mr. Catt's behalf, to my mind, the history of the organisational transfers between ACPO and the Met is neither here nor there. At all events, on the material before the Court, both the NCDE and the NPOIU (apparently now subsumed within the National Domestic Extremism Unit, "the NDEU") have been transferred back to the Met. The Defendants have made it clear that the Commissioner accepts responsibility for the processing of all personal data concerning Mr. Catt by the NCDE and the units under his command.

6. By the conclusion of the hearing before this Court, with the considerable assistance of Mr. Owen QC for Mr. Catt and Mr. Johnson QC for the Defendants, to both of whom I was grateful, the issues had been clarified and significantly narrowed. In summary:

i) There was agreement that the Commissioner should be joined as the Second Defendant.

ii) Apart from an image retained for evidential purposes (and images of groups of protestors that happen to include Mr Catt) of which no complaint is made, no photograph of Mr. Catt is any longer retained by the Defendants.

iii) Although, in writing, the Defendants contended that disputes of this nature should be resolved in accordance with alternative statutory remedies rather than by way of a claim for Judicial Review, at the hearing they did not seek to oppose Mr. Catt proceeding with this claim. That said, Mr. Johnson QC underlined that the concession made by the Defendants was limited to the present proceedings and should not be taken as extending to any future proceedings.

iv) So far as concerns the original formulation of the claim pursuant to the DPA, Mr. Owen QC, accepts, rightly in my view, that if (1) Art. 8 is engaged but (2) any interference with Mr. Catt's Art. 8 rights is justified, then he cannot succeed under the DPA. Conversely, of course, if Mr. Catt succeeds under Art. 8.2, then he does not need the DPA. Accordingly, the argument under the DPA would only arise if we held (without more) that Art. 8 is not engaged at all – and said nothing as to justification under Art. 8.2. Realistically, Mr. Catt's prospects of success along that route are so remote that (wisely) neither counsel devoted any or significant time to it. Nor will I.

v) The Tudway statement properly indicates that there is further material held in respect of Mr. Catt, considered to be exempt from disclosure pursuant to s.29 of the DPA, on the ground that disclosure would prejudice the investigation or

detection of crime. Accordingly, a "closed" version of the Tudway statement has been prepared. For completeness, we record that we have not seen or asked to see that version and were not requested by any party to do so. There has been no suggestion that we cannot adjudicate on the claim without seeing the "closed" materials.

7. The upshot is that the case is reduced to a consideration of the data, essentially comprised of police intelligence records or reports ("the reports"), in the context of Art. 8, giving rise to two principal issues:

   i) Do the collation and retention of the reports engage Art.8.1 and, if yes, interfere with Mr. Catt's Art. 8.1 rights? ("Issue (I): Engagement and Interference")

   ii) If so, is the interference with Mr. Catt's Art.8.1 rights justified under Art. 8.2? ("Issue (II): Justification")

8. Art. 8, ECHR provides as follows:

> "Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private…. life…..
>
> 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 or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. "

<u>THE FACTS</u>

9. Although Issues (I) and (II) require separate consideration and should not be conflated, it is as well to begin with an overall outline of the facts.

10. *(1) "Smash EDO":* Smash EDO is a protest group which has carried on a long-running campaign, calling for the closure of EDO, a US owned arms company, carrying on a lawful business and with a factory in Brighton. Smash EDO stages regular protests. Although many people at Smash EDO protests do not commit criminal offences, disorder and criminality has been a feature of a number of the protests: over 136 offences have been recorded. On one occasion more than £300,000 damage was caused. Harassment of staff has been a feature of this campaign. As a result, EDO has spent in excess of £1 million in security measures. The Defendants' evidence, which I accept, is that Smash EDO's tactics and criminality have evolved from the animal rights movement. The Tudway statement says this:

> " Until the recent student fee protests the Smash EDO national demonstrations were regarded as amongst the most violent in the UK…."

11. Against this background, the Smash EDO protests have attracted and, in my judgment, require, a substantial policing presence. Numerous arrests have been made. Police officers record what they see at the protests. The records are retained under conditions of confidentiality for intelligence purposes (see below).

12. *(2) The data:* It is convenient at this point to look a little more closely as to the nature of the data retained, relating to Mr. Catt. It is otherwise all too easy to lapse into generalities.

13. In response to Mr. Catt's (and his daughter's) "subject access requests", the Defendants disclosed 66 entries in respect of Mr. Catt, spanning the period March 2005 to October 2009 (and 38 entries in respect of Mr. Catt's daughter, to whom no further reference need be made). Mr. Owen submitted that some 15% of these entries had nothing to do with Smash EDO, a percentage I did not understand to be in dispute.

14. It is unnecessary to lengthen this judgment with a recitation of the details of the entries in respect of Mr. Catt, but a helpful example was much relied on by Mr. Johnson in the course of the hearing. Thus a Smash EDO/ Police Oppression protest march took place in Brighton on Saturday 19th January, 2008. A video was taken and a three page police report was generated. There had been no liaison with police prior to the event. The report said this:

> "There were approximately one hundred and fifty participants with a number of protestors 'masking up' at the form-up point and keeping themselves covered throughout the demonstration. Several different campaigns were represented including Smash EDO, No Borders, Brighton Animal Action, Sussex Students Against the War, Brighton Hove Palestinian Solidarity Campaign, Rhythms of Resistance samba band and a small number of London based activists…..
>
> The march made its way to the police station where police had to cordon off the entrance to avoid a mass incursion into the building. There some minor scuffles and a ….. was arrested after jumping on a police car.
>
> The protestors eventually moved off and made their way to the town centre where further scuffles took place until the protest finished at about 15.00 hours…..
>
> During the event …… an activist believed to be …… is heard to say that Smash EDO will be taking similar measures as the animal rights movement and will begin to target suppliers and courier companies, continue 'noise' protests, direct action demonstrations and encourage other campaigns to take part in their protests."

15. The report went on to identify a number of protestors attending the event. A variety of names, together with some descriptions and observations then follow, mainly redacted. The reference to Mr. Catt was in these terms:

> "John Catt (frame 63. Elderly male with grey hair and glasses)"

16. In due course, when Mr. Catt's subject access request came to be answered there was – of course – no reference to the other protestors who had been identified in the report. What was said was this:

> "19/01/2008
>
> On Saturday 19/01/2008 Smash EDO held a protest march in Brighton combining it with a theme of Police Oppression/Right to Protest. One of the protestor[s] identified as attending was John CATT. "

As already indicated and as explained in the Tudway statement, but contrary to Mr. Catt's original contentions, it is readily apparent that he was not the specific focus of the report. Mr. Catt is the only person mentioned in the extracts from the reports disclosed to him under his subject access request – because the names of the other individuals mentioned in the reports as being present were not disclosed to him so as to preserve their data protection rights.

17. *(3) The context within which the data was retained:* The evidence was that the data is retained by the Defendants pursuant to the statutory Code of Practice on the Management of Police Information, made under the Police Acts 1996 and 1997, dated July 2005 ("the Code") and the NPIA Guidance on the Management of Police Information, 2nd edition 2010 ("the Guidance"). In broad terms, this framework for the retention of personal data for policing purposes flowed from the conclusions of the Bichard Inquiry.

18. Under the Code (para. 4.1), Chief Officers have a duty to "obtain and manage" information needed for police purposes, as defined in para. 2.2, *viz:*

> "a) protecting life and property;
>
> b) preserving order;
>
> c) preventing the commission of offences;
>
> d) bringing offenders to justice; and
>
> e) any duty or responsibility of the police arising from common or statute law."

In turn, the Guidance explains the need to collect and retain intelligence as follows (at para. 7.7):

> "The retention of information relating to criminal activity and known and suspected offenders allows the Police Service to develop a more proactive approach to policing. By contributing to the identification of criminal patterns and threats and helping to prioritise the subsequent deployment of policing resources, information retention assists forces to prevent and detect crime and protect the public."

19. *(4) The use of intelligence:* As already indicated, demonstrations of the nature and persistence of Smash EDO require an appropriate police response: balancing the facilitation of the right to lawful and peaceful protest with the need to maintain order, minimise the risks of criminal behaviour and safeguard the rights of others. As the Tudway statement explains and I accept, the use of intelligence is a fundamental policing tool. Investigators need the ability to identify relationships within protest groups. Likewise, they need to be able to identify individuals associated with the use of particular tactics, together with those with a propensity to violence, disorderly behaviour and organised coordinated actions. Although Mr. Catt has not been convicted of any offence, the evidence, which again I accept, is that his close association with violent members of Smash EDO and knowledge of this association is of intelligence value. Such knowledge forms part of a "far wider picture of information" (the Tudway statement) needed by the police, *inter alia*, to investigate incidents of criminality and to assist the policing of future events.

20. The Tudway statement seeks to apply this approach to Mr. Catt and maintains that the information regarding Mr. Catt:

> "…is held for the purposes of preventing and detecting the criminal and extremist activities of Smash EDO and the apprehension and prosecution of those who commit those offences. The information is further processed for the purposes of discharging the statutory functions of the Chief Officer of Sussex Constabulary in the first instance and the Commissioner [i.e., the Second Defendant] thereafter…. "

The "statutory functions" are those contained in para. 2.2 of the Code (set out above).

ISSUE (I): ENGAGEMENT AND INTERFERENCE

21. *(1) The rival cases:* In his excellent submissions, Mr. Owen contended that Mr. Catt had a reasonable expectation that his privacy would not be invaded by the creation and retention of written information about him by the police. As for Mr. Catt's long involvement in political protest, while he wanted everyone to know his views, it was not for the state to build up a picture of him. The entries on the database systematically recorded a range of personal and sensitive personal data relating to Mr. Catt's political views and activities, together with personal descriptions of Mr. Catt's appearance and dress. The entries were not recorded on *any* database – this was the National Domestic Extremism Database. Mr. Owen emphasised that Mr. Catt was a man of good character, not suspected of the commission of a criminal offence. The existence of the database had not been made known to Mr. Catt and he had encountered considerable difficulty in gaining access to the records kept about him, a matter exacerbated by the lack of clarity in the governance arrangements. At the forefront of his argument, Mr. Owen relied on *R (Wood) v Commr of Police of the Metropolis* [2009] EWCA Civ 414; [2010] 1 WLR 123; the unanimous observations of the Court in that case as to Art. 8 being engaged, were directly in point here. The decisions in *X v United Kingdom* (Application No 5877/72) (unreported) given 12 October 1973, E Com HR and *Friedl v Austria* (1995) 21 EHRR 83 were distinguishable. It was plain that Art. 8 was engaged; the real issue was whether the retention of the reports indefinitely could be justified.

22. For the Defendants, Mr. Johnson QC submitted forcefully that Art. 8 was not engaged at all. The creation and retention of the reports did not betray any lack of respect for Mr. Catt's private or family life; they did not reach the threshold of seriousness to engage the operation of the ECHR. Furthermore and in particular, Art. 8 did not extend to activities of an essentially public nature – which Mr. Catt's activities were: *Friend v United Kingdom* (2010) EHRR SE6. The touchstone was the reasonable expectation of privacy, considered on a fact specific basis, with reference to the material retained by the Defendants. The mere recording of information about, including the taking of photographs of, those involved in public demonstrations, did not engage Art. 8; having regard to the public activity in which Mr. Catt had been engaged, the test for the engagement of Art. 8 was not satisfied. The label of the database should not mislead; it did not exist simply for the monitoring of domestic extremists. Instead, as set out in the Tudway statement, the main function of the NPOIU was to gather, evaluate, analyse, develop and disseminate intelligence in relation to domestic extremism and single issue campaigning, carrying a substantial threat to public order or of criminal activities. Accordingly, the purpose of the database was, as Mr. Johnson expressed it:

> "…to provide the police with a substantial body of intelligence so that it can respond appropriately to demonstrations where there is a risk of criminality or public disorder."

Neither *X* nor *Friedl* was distinguishable; both these authorities supported the Defendants' case. On a careful analysis, *Wood* did not advance Mr. Catt's case and, if anything, supported that of the Defendants.

23. *(2) Authority:* Art. 8 is now a well-travelled area of our law, perhaps too well-travelled. Having regard, however, to the nature of the arguments addressed to this Court, a brief survey of the authorities to which we were referred is unavoidable – though I will seek to focus as closely as possible on the matters relevant to the present dispute.

24. It is now settled law that the "touchstone of private life" is:

> "….whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457, at [21], *per* Lord Nicholls of Birkenhead.

25. In *R (Gillan) v Commr of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307, at [28], Lord Bingham of Cornhill underlined the minimum threshold for the engagement of Art. 8:

> "It is true that 'private life' has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms…. "

26. A feature of the present case is that Mr. Catt was participating in a public demonstration. The public nature of the activity in question was considered in *Friend (supra)*, a case concerned, *inter alia,* with the applicants' contention that the hunting bans in the United Kingdom constituted an interference with their private life. Contentions of this nature had already failed before the Courts in England and Scotland. Taking very much the same view, the European Court of Human Rights ("the Strasbourg Court") rejected these Art 8 complaints as manifestly ill-founded, saying this:

> "42. ….Whether or not the person was participating in a public event has also been a relevant consideration. There is, however, nothing in the Court's established case-law which suggests that the scope of private life extends to activities which are of an essentially public nature. In this respect, the Court also considers that Lord Rodger ….was correct to draw a distinction between carrying out an activity for personal fulfilment and carrying out the same activity for a public purpose , where one cannot be said to be acting for personal fulfilment alone.
>
> 43. The Court shares the view of the House of Lords that hunting is, by its very nature a public activity….. Despite the obvious sense of enjoyment and personal fulfilment the applicants derived from hunting and the interpersonal relations they have developed through it, the Court finds hunting to be too far removed from the personal autonomy of the applicants and the interpersonal relations they rely on to be too broad and indeterminate in scope, for the hunting bans to amount to an interference with their rights under art. 8. "

27. *X (supra)* involved a demonstrator in an anti-apartheid protest, arrested and photographed after a pitch invasion in the course of a rugby match played by the touring South African team. The photographs and negatives were retained by police. The applicant asserted (*inter alia*) a violation of her Art. 8 rights, arising from the taking and retention of the photographs. The European Commission of Human Rights ("the Commission") dismissed the application as manifestly ill-founded. The Commission said this:

> "The Commission has noted here the following elements in the case as it has been presented: first, that there was no invasion of the applicant's privacy in the sense that the authorities entered her home and took photographs of her there; secondly, that the photographs related to a public incident in which she was voluntarily taking part; and thirdly, that they were taken solely for the purpose of her future identification on similar public occasions…… Bearing these factors in mind, the Commission finds that the taking and retention of the photographs of the applicant could not be considered to amount to an interference with her private life within the meaning of Article 8….

> An examination by the Commission of the applicant's complaint as has been submitted shows that the taking of her photographs was part of and solely related to her voluntary public activities and does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention…. "

28. In *Friedl (supra)*, the applicant was one of the participants in a demonstration in Vienna he had organised with others in connection with homelessness. The (Austrian) police photographed the applicant while he was involved in the demonstration and noted his identity and other personal information. That data was not entered into a data processing system but the information was stored in an administrative file which would be destroyed in 2001 (10 years after it had been consulted for the last time). The dispute made its way to the Strasbourg Court, by which time the Government of Austria and the applicant had reached a settlement. The Court struck the case out of its list but, before doing so, made a number of observations of relevance here:

> "48. For the purpose of delimiting the scope of the protection afforded by Article 8….against arbitrary interference by public authorities, the Commission has attached importance to the questions whether the taking of photographs amounted to an intrusion into the individual's privacy, whether it related to private matters or public incidents, and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public…..
>
> 49. In the present case, the Commission has noted the following elements: first, there was no intrusion into the 'inner circle' of the applicant's private life in the sense that the authorities entered his home and took the photographs there; secondly, the photographs related to a public incident….in which the applicant was voluntarily taking part; and thirdly, they were solely taken for the purposes, on 17 February 1988, of recording the character of the manifestation and the actual situation at the place in question….and, on 19 February 1988, of recording the conduct of the participants in the manifestation in view of ensuring investigation proceedings for offences against the Road Traffic Regulations.
>
> 50. In this context, the Commission attaches weight to the assurances given by the respondent Government according to which the individual persons on the photographs remained anonymous in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system, and no action was taken to identify the persons photographed on that occasion by means of data processing.
>
> 51. Bearing these factors in mind, the Commission finds that the taking of photographs of the applicant and their retention do

> not amount to an interference with his right to respect for his private life within the meaning of Article 8(1) of the Convention."

29. *Wood (supra)* is the authority principally relied upon by Mr. Catt in these proceedings. In that case, the Court of Appeal unanimously held that Art. 8.1 was engaged and *prima facie* violated. By a majority, Laws LJ dissenting, the Court held that the defendant had failed to justify the interference with the claimant's rights under Art. 8.2.

30. The facts of *Wood* appear helpfully from the head note:

> "The claimant, who was employed by an association which campaigned against the arms trade, attended the annual general meeting of R plc, which had an association with a company organising trade fairs for, inter alia, the arms industry. Because of that association, there was concern that there might be demonstrations at the meeting, or at a later trade fair, and the Metropolitan Police decided to deploy a number of police officers around the hotel where the meeting was taking place. Photographs were taken of the claimant in the street as he was leaving the hotel after the meeting and police officers….made attempts to establish his identity. There was no evidence that the claimant had been involved in any disturbance at the meeting; he had no criminal convictions and had never been arrested as a result of any campaigning activities or otherwise."

31. The lead judgment on Art. 8.1 was given by Laws LJ. Central to a judgment characteristically commanding great respect, was the notion of the "personal autonomy" of every individual, which marched with the "presumption of liberty enjoyed in a free polity": at [21]. That presumption consisted in the principle "that every interference with the freedom of the individual stands in need of objective justification": *ibid*. As it seems to me, the essence of Laws LJ's reasoning was encapsulated in the following passage:

> "22. The cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if article 8 is to be engaged) attain 'a certain level of seriousness'. Secondly, the touchstone for article 8(1)'s engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy'……. Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of article 8(1) may in many instances be greatly

> curtailed by the scope of the justifications available to the state pursuant to article 8(2)….."

32. Laws LJ went on to make it plain (for example, at [25]) that the question of a reasonable expectation of privacy was to be determined on a fact specific basis, influenced, *inter alia*, by the nature of the activity in which the claimant was engaged: see the authority cited at [24]. For his part, Laws LJ was of the view that the police operation, from the taking of the photographs to their retention and use, was to be judged as a whole: at [39].

33. The facts of the case were quite different from those of *X (supra)*; there the photographs had been taken on and after the applicant's arrest, "when the police might well have been expected to do just that": at [43]. In the case of *Friedl* too, the taking of police photographs could "readily have been expected": *ibid*. In cases of that kind, Laws LJ observed (*ibid*):

> " …where the police or other public authority are acting just as the public would expect them to act, it would ordinarily no doubt be artificial and unreal for the courts to find a prima facie breach of article 8 and call on the state to justify the action taken by reference to article 8(2)."

34. On the facts of *Wood*, however, the state action had confronted the individual "as it were out of the blue": at [45]. The police action was unexplained at the time: at [43] and [46]. It amounted to a sufficient intrusion by the state into the individual's "own space" as to constitute a *prima facie* violation of Art. 8.1: at [46]. This conclusion involved no criticism of the police; the merits of their action were for consideration under Art. 8.2:

> "Their subjection to the discipline of article 8 means that the fair balance which falls to be struck throughout the Convention provisions between the rights of the individual and the interest of the community has to be struck on the facts of this case. That I think is as it should be. "

35. The judgments of Dyson LJ (as he then was) and Lord Collins of Mapesbury are, with respect, more noteworthy in the context of Art. 8.2 (see below) than Art. 8.1. The factual context of *Wood* is, however, illuminated by the following observations of Lord Collins (at [92]):

> " I was also disturbed by the fact that notwithstanding that the police had no reason to believe that any unlawful activity had taken place, and still less that Mr. Wood had taken part in any such activity, when he (with Mr. Prichard) walked from the hotel in Grosvenor Square where the meeting had taken place towards Bond Street underground station via Duke Street he was followed by a police car, then questioned about his identity by four police officers, two of whom then followed him on foot and tried to obtain the assistance of station staff to ascertain Mr. Wood's identity from his travel card. "

36. *(3) Discussion:* As was made clear to the Court, Mr. Catt has a long history of political protest. In a free society, that is his right, subject of course to what might be termed (by way of shorthand) the Art. 8.2 qualifications. But the essential nature of such activity is that it is of a public nature. Indeed, its very object is to make others aware of his views and the causes to which he lends his support.

37. Here, Mr. Catt has closely associated himself with the long-running Smash EDO protest group. Regrettably, that group has a history of violence, criminality and disorder, with a significant impact on the rights and freedoms of others going about their lawful business (including both EDO and its staff). This does not mean that Mr. Catt or all those associated with Smash EDO have committed crimes or are suspected of criminal conduct; it suffices, however, as a fair description of Smash EDO as a group.

38. Against this background, it is only to be expected that Smash EDO will attract a robust police response; indeed, were it otherwise, questions would arise as to whether the police were failing in their duty. To make it plain, this case is concerned and only concerned with the overt police response; no questions of covert policing or covert sources arise here.

39. When, therefore, the Defendants overtly compile and thereafter retain intelligence reports of Smash EDO demonstrations (of the nature and for the purpose/s already outlined), for my part they are doing what is to be expected and no less than what is to be expected. Insofar as such reports make reference to Mr. Catt while engaged in the public activity of political protest, then, untutored by authority, I would be unable to conclude that Art. 8 had been engaged, let alone that Mr. Catt's rights under Art. 8.1 had been *prima facie* infringed. Unless I am bound by authority to hold otherwise, the nature of Mr. Catt's activity belies any reasonable expectation of privacy, at least for the duration of the Smash EDO campaign (see below). For that matter, a conclusion to this effect appears to me to accord with the reasoning and approach of the Courts in *X, Friedl* and *Friend* (all *supra*).

40. What remains to be considered under this heading is whether the decision in *Wood* requires a different conclusion. For my part and for the reasons which follow, I am not persuaded that it does.

41. First, the principle for which *Wood* is authority does not compel the conclusion that Art. 8.1 is engaged here and that Mr. Catt's rights thereunder had, *prima facie*, been infringed. The focus of Laws LJ's statement of principle (at [22] of his judgment, set out above) is on the "personal autonomy" of the individual but subject to various safeguards and qualifications which guard against Art. 8.1 claims becoming "unreal and unreasonable". With respect, however, that statement of principle does not determine the outcome of this issue. One of those safeguards hinges on whether or not there is a reasonable expectation of privacy. In turn, that question, as is plain from *Wood* (at [24] and [25]) requires a fact specific decision.

42. Secondly, the facts in *Wood* stood in stark contrast to those of the present case. The facts in *Wood*, encapsulated as they were in the passage set out above from the judgment of Lord Collins, speak of police activity, taking Mr. Wood by surprise, away from the scene of the meeting and subsequent thereto. To adopt the words of Laws LJ (also set out above) it seems to have come out of the blue, unrelated to

anything which had happened at the annual general meeting. Moreover, the police activity in *Wood* appears to have been intrusive, at least in colloquial speech. Overall, the flavour is captured by the wording in the head note, referring to the taking and retaining of photographs "with no obvious cause". The background of the Smash EDO campaign was entirely absent. The police activity in this case, unlike in *Wood*, took place at the protest meetings themselves. The intrusive pursuit, as it were, in *Wood*, was not replicated here. It is to be emphasised that the contents of the reports in the present case went no further than recording Mr. Catt's very public activities; they did not in any way intrude into what could realistically be termed Mr. Catt's private life.

43. Thirdly, the conclusion which I favour accords with the reasoning in *Wood*; by contrast, to hold that Art. 8.1 was engaged and that Mr. Catt's rights thereunder were *prima facie* infringed, would be "unreal and unreasonable", thus extending rather than applying *Wood*.

    i) Instructively, in *Wood* (at [43]), Laws LJ said of the police activity in *X* and *Friedl* (both *supra*) that it could readily have been expected; it was what the public would have expected. In those circumstances, Laws LJ observed (*ibid*) that it would "ordinarily be artificial and unreal" to conclude that there had been *prima facie* breach of Art. 8.1 requiring justification under Art. 8.2. If that same test is applied here, the police response to demonstrations such as those of Smash EDO was, in my judgment, very much as the public would have expected. If anything, the public would have expected no less. The importance and role of intelligence has already been underlined and is very clearly set out in the Tudway statement. Accordingly, on the reasoning in *Wood*, the preparation and retention for intelligence purposes of reports comprising the data here in issue should not be viewed as intruding into the personal autonomy of Mr. Catt; instead, it was readily to be expected.

    ii) In *Wood*, Laws LJ, with respect (at [22]), wisely cautioned that the claims of Art. 8, however important to a free society, should not become "unreal and unreasonable". He listed three safeguards or qualifications; the third depended on Art. 8.2 but the first two did not and turned on whether Art. 8.1 was engaged at all. Having regard both to the nature of Mr. Catt's activities and the Smash EDO campaign, in my judgment it would be "unreal and unreasonable" to assert that the police response engaged Art. 8. As already foreshadowed, I would conclude that, on the facts, Mr. Catt did not enjoy a "reasonable expectation of privacy" and that no such expectation was triggered by the wholly understandable compilation and retention of intelligence reports by the Defendants. To my mind, to treat these reports as engaging Art. 8.1, would involve extending *Wood* in a manner not warranted by the judgments in that case.

44. Fourthly (and whether or not involving an overlap with a consideration of Art. 8.2), even if the time might come when continued retention of the reports did amount to an interference with Mr. Catt's Art. 8.1 rights, that time would not be reached while the Smash EDO campaign continues.

45. For completeness, I have not overlooked Mr. Catt's complaint that the existence of the database was not made known to him. It was not, however, secret and his subject

access request was answered. As it seems to me, this point only continues to have relevance as a matter of history.

46. Accordingly, I would answer Issue (I), "no". The compilation and retention of the reports were predictable consequences of Mr. Catt's very public activities; they neither engaged nor infringed his right to privacy. That conclusion is sufficient to decide the claim for Judicial Review adversely to Mr. Catt. I do not, however, leave matters there but go on to consider Issue (II).

ISSUE (II): JUSTIFICATION

47. *(1) Introduction:* Issue (II) is addressed on the assumption, contrary to my conclusion on Issue (I), that Mr. Catt's rights under Art. 8.1 were engaged and interfered with. The question here is whether such interference is justified under Art. 8.2.

48. *(2) The rival cases:* For *Mr. Catt*, Mr. Owen submitted that the confusion and unclear division of function between the First and Second Defendants (touched upon earlier) betrayed a "lack of democratic accountability" for the NPOIU and suggested that the continued retention of the data was not "in accordance with the law". The point went beyond questions of management re-shuffles.

49. Mr. Catt had not committed any criminal offences and was not suspected of committing any offences. His data should be weeded out from that retained by the Defendants. Mr. Owen accepted the logic of his argument; if at the first Smash EDO demonstration, no criminal offences had been committed, no intelligence reports should have been retained. If at a subsequent demonstration, only one protestor had committed an offence, the Defendants would not have been justified in retaining reports on anyone other than him. At all events, it was neither necessary nor proportionate to retain data on Mr. Catt going back years. The Tudway statement did not say that the Defendants could not weed out information concerning Mr. Catt; in any event, however, if too much information had been retained, such retention could not be defended by saying that it was impractical to delete a part of it.

50. Mr. Owen drew the Court's attention to the recent (2012) HMIC report, "A review of national police units which provide intelligence on criminality associated with protest" ("the Review"). He underlined the Review's observation (at p.11) that "domestic extremism and public order policing are two different police functions". Further and in the course of reviewing the controls relating to NPOIU undercover operations, the Review had looked at the intelligence gathered by the NPOIU, held on a database. Mr. Owen relied on this passage in the Review (at p.13):

> "We found that the rationale for recording other material, such as the description of an event, was not sufficient to provide assurance that its continued retention was necessary or justified, given the level of intrusion into people's privacy."

Still further, Mr. Owen emphasised the criticisms developed in the Review (at pp. 29 – 34) as to the governance of the NPOIU and the lack of a "robust" weeding policy; there was the need to document the "objective facts" used to justify retaining intelligence (at pp. 32-33).

51. The Defendants had previously retained a photograph of Mr. Catt of which complaint had been made. The reasons now given by the Defendants for the deletion of that photograph applied equally to the retention of the data.

52. Here too, Mr. Owen submitted that *Wood (supra)* lent support to Mr. Catt's case and highlighted the seriousness of concerns as to the "modern surveillance society" (*per* Lord Collins, in *Wood*, at [100]). In all the circumstances, the interference with Mr. Catt's Art. 8.1 rights was not justified under Art. 8.2.

53. For *the Defendants*, Mr. Johnson submitted that where a group continues to exhibit criminal conduct, there was a need to retain reports for intelligence purposes; Smash EDO was such a group. Mr. Catt was closely associated with Smash EDO, whose demonstrations had been marred by criminality. Doubtless, the information retained by the Defendants would be reviewed as and when Smash EDO came to an end; that time had not yet come. The suggestion of weeding out information held in respect of individuals (as posited by Mr. Owen) was simply unworkable; at regular intervals, the police would be required to go through reports of the nature held here and look at every individual in isolation. That was not how intelligence worked. The Defendants were justified in retaining a record of events posing a threat to public order, including regular attendees such as Mr. Catt.

54. Mr. Johnson submitted that a distinction was to be drawn between the retention of photographs and the retention of the data. The reports were, justifiably, retained for wide intelligence purposes. Rightly or wrongly, a separate policy was in place with regard to the retention of images (such as photographs); such images could only be retained on the basis of a much narrower justification. In this regard, Mr. Johnson drew the Court's attention to the NCDE's "Management of Overt Images – Policy" which said this:

> "We are looking to identify those persons who are or have organised or are involved in the co-ordination of the event, action or incident including those who have partaken in criminal acts or who are part of a current investigation."

Mr. Catt did not fit within those criteria; as the Tudway statement put it, he "no longer" appeared to be involved in the coordination of Smash EDO events or actions – hence the deletion of the photograph. It did not follow that the Defendants were obliged to delete the data.

55. Mr. Johnson submitted that the question of "governance" was not strictly relevant for present purposes. There were some 43 or 44 police forces in the country. From time to time, a strategic unit was required and reorganisations took place. Whether the NPOIU was under the control of the First or Second Defendant did not matter; ultimately, a senior officer would be in control and it was neither here nor there whether the First or Second Defendant was vicariously liable for that officer.

56. As to the (HMIC) Review, it was important, Mr. Johnson contended, to understand its context. The Review was concerned with undercover police tactics, intrusive surveillance and the use of a "Covert Human Intelligence Source" ("CHIS"). Such matters gave rise to understandable concerns but were far removed from the facts of

the present case. For his part, Mr. Johnson emphasised instead the importance attached by the Review to intelligence, exemplified by the following passage (at p.6):

> "Some serious criminal activities have been associated with public protest. The right to protest is acknowledged in law: but it is not unconditional. In particular, the public right to peaceful protest does not provide a defence for protesters who commit serious crime or disorder in pursuit of their objectives. Police face the challenge of identifying those individuals who are intent on causing crime and disruption, while simultaneously protecting the rights of those who wish to protest peacefully. Key to being able to differentiate between the two is reliable intelligence….. "

57. The retention of the data was justified under Art. 8.2, even if there had been interference with Mr. Catt's rights under Art. 8.1. The data was retained in accordance with the law; its retention was necessary for the pursuit of legitimate aims and was proportionate. *Wood (supra)* did not tell against the Defendants' case on Issue (II). In weighing the balance, any interference with Mr. Catt's Art. 8.1 rights was "at the margins", involving no more than recording his presence at various demonstrations and what he had been doing. Against that, the Smash EDO demonstrations involved significant disorder and a likewise significant impact on EDO and its employees. The Defendants took the view that the data should be retained as intelligence for the purpose of policing those events. There was a rational connection between the retention of the data and the legitimate policing aims pursued by the Defendants.

58. *(3) The legal framework:* As is common ground, if there has been interference with Mr. Catt's rights under Art. 8.1 (the premise on which Issue (II) is considered), then the burden rests on the Defendants to justify such interference. The terms of Art. 8.2 make it plain that the state's justification for interference with the rights of the individual under Art. 8.1 falls to be assessed by reference to essentially cumulative requirements. Thus the action complained of:

    i) Must have been taken in pursuance of a legitimate aim; of the legitimate aims enumerated in Art. 8.2, those here relevant are "the prevention of disorder or crime" or "the protection of the rights and freedoms of others";

    ii) Must be in accordance with the law;

    iii) Must be "necessary in a democratic society" – i.e., proportionate to the legitimate aim pursued.

59. As it seems to me, the majority decision in *Wood (supra*) on the Art. 8.2 issue (Laws LJ dissenting), that the police action in that case was not proportionate, plainly turned on its own facts and does not significantly advance the argument here: see, especially, Dyson LJ, at [82] – [90] and Lord Collins, at [97]. For the reasons given earlier, the facts of the two cases are significantly different.

60. *Wood* is, however, helpful as to the applicable principles. First, whether the interference with a Convention right is justified under Art. 8.2 is necessarily a fact sensitive question: Dyson LJ, at [85]. Secondly, the decision maker is likely to enjoy

a "margin of discretion", with the result that the justifications under Art. 8.2 may "amount to a significant restraint upon the bite of Article 8": Laws LJ, at [26] – [27]. In the present context, Lord Collins' observation (at [91]) that the Court "must not be quick to second guess, or interfere with, operational decisions of the police force" is, with respect, apposite. Thirdly, there is the need for a balancing exercise; as Dyson LJ expressed it (at [84]):

> "…the court is required to carry out a careful exercise of weighing the legitimate aim to be pursued, the importance of the right which is the subject of the interference and the extent of the interference. Thus an interference whose object is to protect the community from the danger of terrorism is more readily justified as proportionate, than an interference whose object is to protect the community from the risk of low level crime and disorder. "

61. *(4) Discussion:* On the assumption that Art. 8.1 was engaged – the relevant assumption for addressing Issue (II) – I have no hesitation in concluding that any interference with Mr. Catt's rights was amply justified under Art. 8.2. Moreover and if need be, on any view, the compiling and retention of the reports comes well within the "margin of discretion" spoken of in *Wood (supra)*, at [26] – [27]. My reasons follow.

62. First, it is manifest that the Defendants' actions in this regard were taken in pursuance of the legitimate aims of preventing disorder or crime and protecting the rights and freedoms of others.

63. Secondly, these actions were taken in accordance with the law. For my part, the debate as to whether the NCDE and the NPOIU fell within the orbit of the First or Second Defendant does not begin to suggest that the reports in issue were not compiled and retained in accordance to law. To my mind, the reason for the governance changes was mundane rather than mysterious. Simply put, protest groups such as Smash EDO do not operate within police force boundaries. It follows that the police response will likely require national leadership or coordination. Organisational re-shuffles concerning national policing are, for better or worse, a fact of life and no more.

64. Thirdly, the compiling and retention of the reports was proportionate to the legitimate aims pursued and was thus "necessary in a democratic society". In my judgment, on the facts of this case, the balancing exercise required by *Wood* (at [84]) points one way. Any interference with Mr. Catt's Art. 8.1 rights was at the margins. The reports, the product of overt policing, did no more than record Mr. Catt's public activities, the very object of which was to convey his views to as wide an audience as possible. The reports were compiled and retained for intelligence purposes, in accordance with the Code and the Guidance, with a view to an appropriate police response to a campaign marred by serious, persistent criminality and posing a significant public order problem. I accept the evidence set out above from the Guidance and the (HMIC) Review as to the need for and utility of intelligence material generally. I further accept the reasons given in the Tudway statement for gathering and retaining information regarding Mr. Catt and his Smash EDO associations. To my mind, the justification for such intelligence gathering is obvious; indeed had the Defendants not

sought and retained intelligence of this nature, they could well have been vulnerable to criticism.

65. With respect to Mr. Owen, I am not deterred from this conclusion by the various arguments he urged on the Court:

i) The concerns expressed by the (HMIC) Review are of obvious importance but are not, save at most tangentially, directed at the overt policing involved here.

ii) For the reasons given by Mr. Johnson, which I accept and need not repeat, it does not follow from the deletion of the photograph of Mr. Catt that deletion of the (intelligence) reports was likewise required.

iii) I regard as wholly unworkable the suggestion that the Defendants (or individual police forces) are required to make repeated trawls through intelligence reports of the kind encountered here and to consider each individual referred to in isolation. Again with respect, that is to press the claims of Art. 8.1 to “unreal and unreasonable” lengths, to echo once more the words of Laws LJ in *Wood (supra)*. In any event and notwithstanding the fact that Mr. Catt has not committed any criminal offences and is not suspected of having done so, his associations are of intelligence value as already outlined.

66. I record the Defendants’ indication that as and when the Smash EDO campaign comes to an end they will review the information held on Mr. Catt. To my mind, that would be an appropriate and proper course to follow; I do not, however, pre-judge the outcome of any such review and agree with the observations of Irwin J in this regard (at [73] below).

67. It follows that, on the assumption it arises, I would answer Issue (II), “yes”. It follows further that Mr. Catt’s claim for Judicial Review fails on this ground as well.

Mr Justice Irwin:

68. I have had the advantage of reading the judgment of Gross LJ in draft. I agree with his reasoning and his conclusions. I add a few words only.

69. On the Issue (I), (“whether the collation and retention of the reports addressed by this case engage Art 8.1, and, if yes, interfere with Mr Catt’s Art 8.1 rights”) it appears to me quite impossible to say that, in the language of Lord Nicholls of Birkenhead in *Campbell v MGN Ltd (supra),* the Claimant had “a reasonable expectation of privacy” in relation to material recorded in the course of public demonstration, or its collation with other such material. The very essence of public demonstration is to mark, in public, the views and feelings of the demonstrators.

70. Different questions might arise if material recorded in that context were collated with material which was private in its nature. That does not arise in this case.

71. Nor in my view is it easy to see how it can affect the engagement of Art 8.1 that the material is recorded by police officers as opposed, say, to journalists; or collated and held within the National Extremism Database, as opposed to a local history archive in the town where the demonstrations have been held. The latter distinction was

advanced by Mr Owen ("the entries were not recorded on *any* database…"). The issue is not whether the individual concerned likes or dislikes the thought of the data being held by this or that body: the issue is whether a reasonable expectation of privacy arises. In my judgment, it does not arise in respect of any of the information in this case.

72. In relation to Issue (II), if I am wrong about Issue (I), then I too agree that the recording, collation, and retention of information which has taken place here is justified, for the reasons given by Gross LJ.

73. I add this in relation to retention: even when the Smash EDO campaign ends, it may yet be justifiable to retain some or all of this information. The picture here is that there are connections between this group and parts of the animal rights movement, active before this group was formed. It may be a legitimate function of intelligence to keep records of this group after it has ceased to be active, the better to understand the risks associated with after-coming groups with overlapping membership. To my mind, there is no expectation that a review at a suitable point in the future will conclude otherwise.

74. For these reasons, I too would dismiss this claim.