Neutral Citation Number: [2015] UKIPTrib 14_176-H

Case No: IPT/14/176/H

IN THE INVESTIGATORY POWERS TRIBUNAL

P.O. Box 33220
London
SW1H 9ZQ

Date: 17/12/2015

Before :

MR JUSTICE BURTON
(President)
MRS JUSTICE CARR
MR FLINT QC
MS O'BRIEN QC
PROFESSOR ZELLICK CBE QC

Between :

(1) News Group Newspapers Limited **(2) Tom Newton Dunn** **(3) Anthony France** **(4) Craig Woodhouse**	**Complainants**
- and -	
The Commissioner of Police of the Metropolis	**Respondent**

Gavin Millar QC and Aaron Watkins (instructed by **Simons Muirhead & Burton**) for the **Complainants**

Jeremy Johnson QC and Jonathan Dixey (instructed by **Directorate of Legal Services**) for the **Respondent**

Robert Palmer (instructed by Government Legal Department) made written submissions for **The Secretary of State for the Home Department**

Hearing dates: 20 & 21st July 2015

- -

Approved Judgment

1. This claim is brought against the Commissioner of Police of the Metropolis by News Group Newspapers and three journalists employed by The Sun newspaper, Mr Tom Newton Dunn, the political editor, Mr Anthony France and Mr Craig Woodhouse in respect of four authorisations issued under s 22 of the Regulation of Investigatory Powers Act 2000 ("RIPA"). The purpose of the authorisations was to enable the police to obtain communications data which might reveal the sources of information obtained by the journalists. The communications data was sought and obtained by the police in the course of an investigation into allegations arising out of an incident which took place on 19th September 2012 when Mr Andrew Mitchell MP, then the Government Chief Whip, was prevented by police officers of the Diplomatic Protection Group ("DPG") from leaving Downing Street on his bicycle through the main gate. The incident (colloquially described as "Plebgate") subsequently attracted considerable publicity on account of the abusive language alleged to have been used by Mr. Mitchell, including the phrase referring to the police officers on duty as "plebs".

2. This is a claim under s 7 of the Human Rights Act 2000 ("HRA") for breach of Convention rights, in particular under Article 10 which protects freedom of expression, and thus the right of journalists to protect the confidentiality of their sources. The main issues are whether s 22 of RIPA, which gives power to a police force to obtain communications data from a telecommunications operator, adequately safeguards the confidentiality of journalists' sources and whether the use of the power under s 22 was in the circumstances of this case both necessary and proportionate.

Facts

3. The four authorisations in issue in this case were granted for the purpose of an investigation, known as Operation Alice, conducted by the Directorate of Professional Standards of the Metropolitan Police. The investigation, as set out below, was initially concerned with the disclosure of confidential information to The Sun newspaper, but that investigation was closed in October 2012. The investigation was re-opened on 15th December 2012 into suspected offences of misconduct in a public office by one or more members of the DPG. The First and Second Authorisations were issued on 23rd December 2012, the Third Authorisation on 14th March 2013 and the Fourth Authorisation on 6th June 2013. All the authorisations were made by Detective Superintendent Hudson as the person designated by the Metropolitan Police to perform that function under s 22.

4. Shortly after the altercation with Mr. Mitchell on 19th September 2012, PC Rowland wrote an email to his superiors, copied to two DPG officers, PC Weatherley and PC Watson. The email, which became known as the "Police Log", set out a detailed account of the incident, including verbatim the three "toxic phrases" which subsequently acquired such notoriety.

5. At around 10 pm on that same evening a source, later identified (in the circumstances set out below at paragraph 25) as PC Glanville of the DPG, telephoned The Sun's news desk telephone line to report the incident.

6. On 20th September Mr. France made enquiries of the Metropolitan Police about the incident. Meanwhile Mr. Newton Dunn spoke to PC Glanville by telephone and they exchanged text messages and an email including one in which PC Glanville attached a screenshot of the police log.

7. On 20th September an email was sent to Sir John Randall, the Deputy Chief Whip, complaining in strong terms about the conduct of Mr. Mitchell. The sender was a Mr. Wallis who described himself as a constituent of Sir John Randall who had happened to be sightseeing with his nephew in Westminster when the incident occurred. The existence of this email was not known to the Respondent until 13th December. In fact, as later emerged, Mr. Wallis was a police officer serving with the DPG who had not witnessed the incident.

8. On 21st September the story of the incident was published on the front page of The Sun, written by Mr Newton Dunn, reporting PC Rowland's account of the words used by Mr Mitchell. Mr. Newton Dunn and Mr. France and Ms Emily Ashton were credited with a longer article on page 5.

9. On 22nd September PC Glanville informed Mr. Newton Dunn that the Police Log could be published. On the same day Mr Woodhouse, also a journalist with The Sun, contacted PC John Tully, Chairman of the Metropolitan Police Federation, during which Mr. Woodhouse read out the content of the Police Log. Detective Superintendent Williams of the DPS was informed by senior management of the DPG that they had been told that the Metropolitan Police Federation had been notified by The Sun that it was in possession of the Police Log. On that same day an investigation was commenced by the DPS, under the name Operation Alice, for the purpose of investigating the source of the leaked Police Log.

10. On 23rd September Mr. Newton Dunn contacted PC Tully and emailed him a transcription of the Police Log. On 24th September The Sun published an article containing extracts from it. The article stated that The Sun had not paid any money for the information. There were also articles in the Daily Telegraph, and on 25th September The Sun published an article containing substantially the full text of the Police Log.

11. The investigation by the DPS involved obtaining statements from the officers on duty on 19th September at the gates to Downing Street, and all other police officers who were in receipt of the Police Log. An examination of the police communication systems was conducted to establish whether the Police Log had been disclosed outside the Metropolitan Police, but such enquiries did not evidence any such disclosure.

12. On 2nd October an investigating officer sent an email to Mr Mockridge at News International asking to discuss the leak of the information contained in the Police Log. Mr Mockridge replied, having spoken to the editor of The Sun, that the journalists had a professional and moral obligation to protect their sources and therefore did not wish to discuss where the information came from.

13. At this stage of the investigation no application had been made for the obtaining of communications data relating to any police officers or any journalists. As set out in the witness statements of the senior investigating officer, Detective Superintendent Williams, and Detective Chief Inspector Neligan the matter under investigation did not meet the evidential threshold for a criminal offence. In evidence Detective Chief Inspector Neligan said that the leak of a restricted document to the press, although amounting to gross misconduct by a police officer, would arguably not amount to a criminal offence, by virtue of the availability of a public interest defence to the officer. Having failed to discover the source of the leak, the Operation Alice investigation was closed in October.

14. On 19th October, Mr Mitchell resigned from the Government. It subsequently emerged that Sir John Randall had raised with the Prime Minister the contents of emails received from Mr Wallis, which had been forwarded to the Cabinet Office. At that stage the email sent on 20th September by Mr. Wallis was assumed to be true.

15. In early December as a result of press investigations doubts arose as to the veracity of the email sent to Sir John Randall. On 13th December the Cabinet Office forwarded to the Metropolitan Police CCTV footage of the entrance to Downing Street and the emails between Mr. Wallis and Sir John Randall. On 15th December Operation Alice was re-opened. The investigation team quickly ascertained that Mr. Wallis was a DPG officer who could not have witnessed the incident as he had stated in his email sent to Sir John Randall. The decision was taken to arrest PC Wallis on suspicion of misconduct in a public office.

16. On his arrest the mobile phone and computer of PC Wallis were taken for examination. He was interviewed under caution on 16th December. He initially maintained that he had witnessed the incident but when shown the CCTV footage he confirmed that he had been lying. He said that when he had gone into work on the following day he had overheard officers talking about the incident. His arrest was publicised, and Mr Mitchell made a statement to ITV news on 17th December that "*I'd just like to reiterate once again that it is the contents of the alleged Police Log which are false, they are false and I want to make that very clear*".

17. On 17th December an application for communications data from Mr Wallis's telephone was made under RIPA. Preliminary examination of the communications data did not reveal any contact between PC Wallis and the press on or around 20 September, but what was revealed was that on 20th September he had been in email contact with PC Suzie Johnson, another DPG officer, about whether or not to send the email to Sir John Randall. In an email response PC Johnson had encouraged him to do so. Detective Superintendent Williams decided that PC Johnson should be interviewed.

18. On 17th December the Metropolitan Police referred the case to the Independent Police Complaints Commission ("IPCC"). The IPCC decided that the DPS should conduct an investigation, supervised by the IPCC. The agreed terms of reference were to investigate the allegations made by Andrew Mitchell MP, and identify what, if any, criminal or misconduct offences were apparent. The first steps set out in the revised terms of reference were to "*Identify the source of the information to The Sun and The Telegraph newspapers and whether this emanated from the* [Metropolitan Police]", and if the source of the information did emanate from the Metropolitan Police establish who leaked the information, and how it was done.

19. Between 17th and 21st December statements were taken from various DPG officers who had been stationed in Downing Street on the day of the incident. PC Watson gave evidence of an occurrence on 18th September, the day before the incident, when Mr Mitchell had similarly requested to be allowed to leave through the Downing Street main gate on his bicycle. PC Johnson was interviewed under caution. The Metropolitan Police Commissioner in an interview on 18th December stated that "*there is a suspicion of a criminal offence . . . the offence for which the officer* [PC Wallis] *was arrested was about potential misconduct in a public office . . . it's critical that we get to the bottom of this* [because] *it affects the confidence in the Met*".

20. The arrest of PC Wallis led to particular interest by Channel 4, which broadcast an edition of "Dispatches" on 18th December, in which Mr Mitchell said "*that email . . .* [was] *clearly designed to stand up a story that is false. I knew it was false when I saw it, but it was clearly very destabilising for me with my colleagues and it was clearly used to destabilise me with Downing Street*". After a good deal of further publicity, there was a statement on 19th December from Downing Street that "*any allegations that a serving police officer posed as a member of the public and fabricated evidence against a Cabinet Minister are exceptionally serious*".

21. By 22nd December the investigation into a serious criminal offence had gathered momentum. The decision of the senior investigating officer, Detective Superintendent Williams, made on the previous day, had been to cause an analysis to be carried out of the mobile phone of PC Wallis "*in order to* (identify) *if there is a conspiracy between Wallis and any other officer*". There were clearly reasonable grounds for that suspicion and the acquisition of communications data was an essential tool in investigating whether there was evidence of any such conspiracy. The forensic examination of the digital media seized from PC Wallis and PC Johnson had established the contact between them, but not all of the considerable amount of digital media had been examined. Detective Chief Inspector Neligan explained to us that such examination was a large task, and that by that time, with Mr Mitchell having publicly stated that the leaked Police Log was in fact false, the Respondent was unable to rule out the very serious allegation that police officers had "*fitted up Andrew Mitchell and leaked the story to the press*". Mr Jeremy Johnson QC for the Respondent stated (Day 2/61) that "*at the outset in September it was unthinkable that DPG officers would put their careers and liberty on the line by making up false accounts to undermine Mr Mitchell . . . but once you have Wallis the unthinkable suddenly becomes very uncomfortably thinkable*".

22. As set out above, the first step of the revised terms of reference of the investigation laid down by the IPCC was to identify whether the source of the information to The Sun and the Telegraph newspapers was an officer or officers in the Metropolitan Police. The logic of approaching the investigation in this way was clear. If the source was established to be another member of the DPG then that would considerably strengthen the suspicion that there had been a conspiracy between a number of police officers in the DPG to discredit Mr. Mitchell. The obtaining of communications data would not be sufficient to prove such a conspiracy, but it was an essential first step towards investigating the allegation. In his witness statement at paragraph 13, Detective Superintendent Williams states:

> "*Clearly this was a serious matter that required the investigation to establish the extent of the suspected criminal conspiracy which appeared to have as its target an attempt to discredit a Cabinet Minister and potentially destabilise the Government.*"

23. It was on that basis that on 22nd December Detective Superintendent Williams made the decision, recorded in Decision 30, to request the phone data of the journalists' phones, the journalists referred to being Mr. France and Mr. Newton Dunn.

24. The details of the process under which the authorisations were made under s 22 of RIPA will be set out later in this judgment. Before dealing with the authorisations it is necessary to set out in summary form the course of the investigation after 22nd December and its eventual outcome.

25. On 23rd December the First and Second Authorisations were granted in respect of the communications data of the mobile phones of Mr. Newton Dunn and Mr. France respectively. The First Authorisation enabled PC Glanville, another officer in DPG, to be identified as the source of the leak to The Sun newspaper. He had made a statement on 22nd December denying that he had had any contact with the media about the incident. On 31st January PC Glanville was arrested on suspicion of committing the offences of misconduct in a public office and perverting the course of justice. That was the result of an analysis of his mobile phone records and of the mobile phone records of Mr. Newton Dunn which had been obtained under the First Authorisation. In interview PC Glanville admitted that he had been in contact with Mr. Newton Dunn, but refused to answer any questions about the Police Log. After the arrest of PC Weatherley, one of the recipients of the Police Log, PC Glanville was re-interviewed and provided a prepared statement in which he admitted he had asked PC Weatherley to send him a copy, which he had then forwarded to Mr. Newton Dunn.

26. A second Dispatches programme was broadcast on 4 February in which the presenter Michael Crick stated "*tonight Dispatches asks, was a Government Minister brought down by a conspiracy?*"

27. On 14th February Detective Superintendent Williams invited Mr. Newton Dunn to an interview under caution. Mr. Newton Dunn declined that invitation but on 6th March produced a prepared statement. In this statement, after emphasising the confidentiality of his source and the public interest in favour of publication of the information and against disclosure of the circumstances of its acquisition, he stated that there had been no payment for the information, that this was in his opinion an example of good faith whistle blowing about misconduct by a senior politician, and that neither PC Rowland nor PC Weatherley were the source of his story.

28. On 14th March the Third Authorisation was granted in respect of the communications data relating to Craig Woodhouse. That application had been prepared and submitted on 14th January, but for some reason was not authorised until 14th March. Mr. Woodhouse was identified on the basis that he had spoken to the Police Federation and appeared to have had sight of the Police Log.

29. Operation Alice continued during April 2013, with further statements being taken. On 4th June the investigating team was informed, at a meeting between Detective Superintendent Williams and Detective Chief Inspector Neligan and Mr Mitchell and David Davis MP, that it was pleaded in The Sun's defence to Mr Mitchell's defamation claim that a female claiming to be a tourist had spoken to a journalist at The Sun between 0800 and 0845 on 20th September, the day after the incident, claiming that the word "morons" had been used by Mr. Mitchell. On the following day an application was issued requesting incoming call data and subscriber checks for the period 0730 to 0900 for calls made to the news desk of The Sun. On 6th June the Fourth Authorisation was issued. Communications data in respect of 5 telephone numbers was obtained which revealed that one of those numbers was that of a hospital at which the partner of PC Suzie Johnson was employed. That person was arrested on 3rd July.

30. On 26th November 2013 the CPS announced its decisions in Operation Alice. It was decided to charge one officer, PC Wallis, with misconduct in a public office in respect of his false claim to have witnessed the incident with Mr. Mitchell. The CPS stated that there was insufficient evidence to show that the gate officer, PC Rowland, had

lied in his account of the incident. There was evidence that one officer, PC Glanville, had leaked the gate officer's email to the media, but there was no evidence that he had requested or received any payment or reward. As a jury was likely to conclude that it was in the public interest for the events at the gate to be made public it followed that there was insufficient evidence to prosecute that officer.

31. On 6th February 2014 the IPCC published its overview of the Operation Alice investigation. The IPCC Commissioner stated that at the heart of the case was not only what happened during a short altercation between Mr. Mitchell and the gate officer but also whether that incident led to a conspiracy by police officers to bring down a Cabinet Minister. The investigation that began in December 2012 was supervised by an IPCC senior investigator. The most complex aspect of the investigation was to prove or disprove a conspiracy. This had involved amongst other things over 700 statements from members of the DPG as well as forensic analysis of mobile phones and computers of those who were directly implicated. The patchwork of evidence from emails, text messages and telephone calls did not suggest an organised conspiracy to bring down a Cabinet Minister, but there was clearly collusion between some police officers to "blow the whistle", as they saw it, on bad behaviour towards one of their own, which ultimately had the effect of bringing down Mr. Mitchell. The actions of certain police officers had brought shame on the police service, and the Metropolitan Police Service should proceed as quickly as possible to misconduct hearings. The Commissioner stated in response to questions raised as to the length of the investigation:

> "*these were very serious allegations – with serious consequences not only for Mr. Mitchell but for public confidence in the police – that needed to be robustly investigated*".

32. In September 2014 the Metropolitan Police published its closing report on Operation Alice. It was that report which made public for the first time that the police had obtained access, under the First Authorisation, to mobile telephone records of Mr. Newton Dunn which disclosed a series of contacts by text and voice calls with PC Glanville over several days. PC Glanville had made a statement denying that he had contacted The Sun, but later admitted that his statement was false. The report also revealed that an application had been made for the records of incoming calls to The Sun news desk for a period of 90 minutes on 20 September 2012 (the Fourth Authorisation). That application had produced 5 telephone numbers, one of which was the switchboard number of a hospital at which the partner of an officer of the DPG was employed.

33. The report also summarised the disciplinary proceedings taken against officers of the DPG arising out of the incident with Mr. Mitchell. PC Wallis had pleaded guilty to misconduct in a public office in falsely claiming to have witnessed the incident, and was sentenced to 12 months imprisonment. PC Glanville, the source of the leak to The Sun, pleaded guilty to a gross misconduct charge and was dismissed from the police. Two other police officers were dismissed, and two other officers were given final written warnings. All these officers had been assigned to the DPG.

34. The lawfulness of the authorisations to obtain communications data must be judged on the basis of the information known to the investigation team at the time when the authorisations were issued, not in hindsight. It has subsequently been established in a judgment of Mitting J in *Andrew Mitchell v News Group Newspapers Limited*

delivered on 27th November 2014 [2014] EWHC 4014/5 (QB) that the account of the gate officer which recorded the toxic phrases which were so damaging to Mr. Mitchell was substantially accurate. But at the time of the authorisations the investigative team did not have that knowledge and had to proceed on the basis that the Police Log might not be true. So although after a lengthy and thorough investigation no evidence was found to support the allegation of an organised conspiracy to discredit a Cabinet Minister there can be no doubt that the matters being investigated in Operation Alice were most serious in their potential impact on the democratic process and in undermining confidence in the police. It is in that context that the lawfulness of the authorisations to obtain communications data must be judged.

The statutory framework

35. The relevant sections of Chapter II of RIPA read as follows:

> "***21 Lawful acquisition and disclosure of communications data***
>
> *(1) This Chapter applies to -*
>
> *(a) any conduct in relation to a postal service or telecommunication system for obtaining communications data, other than conduct consisting in the interception of communications in the course of their transmission by means of such a service or system; and*
>
> *(b) the disclosure to any person of communications data.*
>
> *(2) Conduct to which this Chapter applies shall be lawful for all purposes if -*
>
> *(a) it is conduct in which any person is authorised or required to engage by an authorisation or notice granted or given under this Chapter; and*
>
> *(b) the conduct is in accordance with, or in pursuance of, the authorisation or requirement.*
>
> *(3) A person shall not be subject to any civil liability in respect of any conduct of his which—*
>
> *(a) is incidental to any conduct that is lawful by virtue of subsection (2); and*
>
> *(b) is not itself conduct an authorisation or warrant for which is capable of being granted under a relevant enactment and might reasonably have been expected to have been sought in the case in question.*
>
> *(4) In this Chapter "communications data" means any of the following -*
>
> *(a) any traffic data comprised in or attached to a communication (whether by the sender or otherwise) for the purposes of any postal service or telecommunication system by means of which it is being or may be transmitted;*
>
> . . .

(6) In this section "traffic data", in relation to any communication, means -

(a) any data identifying, or purporting to identify, any person, apparatus or location to or from which the communication is or may be transmitted,

(b) any data identifying or selecting, or purporting to identify or select, apparatus through which, or by means of which, the communication is or may be transmitted,

(c) any data comprising signals for the actuation of apparatus used for the purposes of a telecommunication system for effecting (in whole or in part) the transmission of any communication, and

(d) any data identifying the data or other data as data comprised in or attached to a particular communication, but that expression includes data identifying a computer file or computer program access to which is obtained, or which is run, by means of the communication to the extent only that the file or program is identified by reference to the apparatus in which it is stored.

. . .

22 Obtaining and disclosing communications data

(1) This section applies where a person designated for the purposes of this Chapter believes that it is necessary on grounds falling within subsection (2) to obtain any communications data.

(2) It is necessary on grounds falling within this subsection to obtain communications data if it is necessary -

. . .

(b) for the purpose of preventing or detecting crime or of preventing disorder;

. . .

4) Subject to subsection (5), where it appears to the designated person that a postal or telecommunications operator is or may be in possession of, or be capable of obtaining, any communications data, the designated person may, by notice to the postal or telecommunications operator, require the operator -

(a) if the operator is not already in possession of the data, to obtain the data; and

(b) in any case, to disclose all of the data in his possession or subsequently obtained by him.

(5) The designated person shall not grant an authorisation under subsection (3), (3B) or (3F), or give a notice under subsection (4), unless he believes that obtaining the data in

> *question by the conduct authorised or required by the authorisation or notice is proportionate to what is sought to be achieved by so obtaining the data.*
>
> *(6) It shall be the duty of the postal or telecommunications operator to comply with the requirements of any notice given to him under subsection (4).*"

36. Under regulations made under s 25 (2) a designated person exercising that function for a police force is required, in respect of the data referred to in s 24 (1) (a) and (b), to have the rank of Superintendent.

37. Under s 71 the Secretary of State is required to issue a Code of Practice relating to the exercise, inter alia, of the power conferred by s 22. Under s 72(1) a person exercising any power must have regard to the applicable provisions of the Code of Practice in force. This Tribunal is under s 72(4) required to take such relevant provisions into account in determining any question in these proceedings.

38. The relevant Code of Practice in force at the time of the four authorisations was entitled Acquisition and Disclosure of Communications Data and had been issued in 2007 ("the 2007 Code"). It required that a designated person should have a current working knowledge of human rights principles (paragraph 3.8) and should not as a general principle be responsible for authorisations in relation to investigations in which he is directly involved (paragraph 3.11). Paragraph 3.28 requires an authorisation to be issued in writing and contain certain information, including specifying the purpose for which the conduct is authorised, but there is no requirement for reasons for the authorisation to be recorded.

39. It is important to note that the 2007 Code did not make any particular provision for protecting communications data involving information relating to journalists. In a revised Code of Practice made in March 2015 ("the 2015 Code") that position has changed. Paragraphs 3.78 to 3.84 now require that an application for communications data by a police force or law enforcement agency which is designed to identify a journalist's source should not be made under s 22 of RIPA but should be made under the Police and Criminal Evidence Act 1984 ("PACE") which requires judicial authorisation. There is an exception for cases where there is believed to be an immediate threat of loss of life, in which case the internal authorisation process of s 22 may be used, provided that such authorisations are notified to the Interception of Communications Commissioner as soon as reasonably practicable. Since March 2015 the Metropolitan Police has sought judicial authorisation under PACE for any application for communications data which is made in order to identify a journalist's source.

<u>The authorisations</u>

40. The applications for authorisation were prepared by a detective constable who was involved in the investigation. The applications were assessed by an employee of the Metropolitan Police who had the function, as described in the 2007 Code, of Single Point of Contact. He was trained to facilitate the lawful acquisition of communications data and to ensure effective cooperation with communication service providers, the telephone companies who hold subscriber and call data.

41. As defined in s 21(4), communications data does not include any information about the contents of a communication. In this case the relevant communications data was subscriber data, which showed the identity of the person to whom a mobile or landline

phone was registered, and call data, which showed the number called and the date, time and length of the call. Communications data may also include cell site and GPRS data, which will reveal the approximate location of a mobile phone at the time a call is made or received. So communications data obtained under s 22 would not reveal the content of any telephone call or of any text messages. However, having seized the mobile phones of some police officers, the investigating team would be able to view or recover text messages, without using the power in s 22.

42. The designated person was Detective Superintendent Hudson. As required by paragraph 3.8 of the 2007 Code, he had a working knowledge of human rights principles, and had several years of experience of working within the framework of RIPA. He was generally aware of Article 10 and the requirement to protect a journalist's sources, but he did not have a clear appreciation of the extent of the legal duty to protect journalistic sources. He had not previously dealt with an application for disclosure of communications data intended to reveal a journalist's source. He had not received any legal advice or training in dealing with such applications, and he did not take legal advice on the four applications made in this case. He was not directly involved in the Operation Alice investigation, but as a member of the senior management team of the DPS he was aware of the course of that investigation, but not of the operational details. Detective Superintendent Hudson gave a written witness statement in which he explained his reasons for granting each of the four authorisations, and he was cross-examined on that statement.

The First and Second Authorisations

43. The First and Second Authorisations were in substantially the same form. The applications sought incoming and outgoing call data, including cell site and GPRS data, for a 7 day period starting at 19.00 on 19th September 2012, that is 35 minutes before the time of the altercation recorded in the Police Log. The First Application was in respect of the mobile phone used by Mr. Newton Dunn, and the second in respect of the mobile phone used by Mr. France. In the first application Mr. Newton Dunn was incorrectly referred to as Tom Newton-Dodd, but this was corrected when assessed by the Single Point of Contact. There were other significant errors in the applications. The roles of Mr. Newton Dunn and Mr. France were confused, and it was incorrectly stated that Mr. France had made the call to PC Tully of the Metropolitan Police Federation, when that call was in fact made by Mr. Woodhouse.

44. The material parts of the applications for the First and Second Authorisations, which were submitted on 22nd December, read as follows:

> "**10 – Necessity**
>
> . . .
>
> *This is a further application made in relation to Operation Alice.*
>
> *This matter under investigation is that of misconduct in a public office whereby it is suspected that police officers have disclosed information to the media.*
>
> *The matter has attracted substantial national media attention and has resulted in the resignation of MP Andrew MITCHELL.*

The media continue to show a keen interest in this matter since the arrest of PC Keith WALLIS.

A police email dated the 19th September has been leaked to the media and the origin of this disclosure is under investigation by DPS SI.

This request relates to The Sun journalist Tom NEWTON-DODD. Mr NEWTON-DODD contacted the DMC on the 20th September at 1000HRS requesting further information into the apparent verbal altercation between police and MP Andrew MITCHELL. The original incident occurred on the 19th [September] at 1935 HRS. Mr NEWTON-DODD has been informed of this incident prior to the police making any disclosures around it. He is potentially the first journalist to be contacted around this incident.

This application is necessary as the results may indeed show that the original leak came from an [alternative] *source other than the police. This of course would direct any further potential investigation strategies set by the SIO.*

. . .

12 – Proportionality

. . .

Full consideration has been given to the Human Rights Act, in particular Article 8 (Right to a Private Life) and Article 10 (Freedom of Expression).

Misconduct in a public office is a serious offence and in this case could cause serious harm to the reputation of the MPS. This matter has gone to the highest levels and it is essential that damage limitation is undertaken. The intrusion into the privacy of potential subjects identified has been considered, but deemed justified when balanced against the seriousness of the allegation (if proved) of misconduct in a public office.

With regards to this specific allegation, full consideration has been given to the examination of a journalist[*'s*] *mobile phone. This application is now made as all other lines of enquiry have been exhausted around suspected persons.*

The original incident occurred on the 19th September 2012 and the request for data is from that day until the present. This application is proportionate as the date requested will show whether a police officer has made contact with a journalist, or indeed whether a journalist has approached police for information. The application also seeks to determine whether the 'leak' came from an alternative source other than the police.

Cell site data is requested in order to ascertain the whereabouts of the subjects at particular times relevant to the

investigation. This may prove useful when mapping the whereabouts of the subjects and proving any 'face to face' meetings. GPRS data is requested as this may prove useful in providing call site details if the user has a smart phone and accesses the internet at the location, even if a telephone cell was not made.

If data and subsequential subscribers provide what we are looking for then it will provide investigators with further lines of enquiry and enable the DPS to make further arrests of police officers involved in the conspiracy to commit misconduct in a public office. Consequential subscriber data is also requested. Prior authorisation assists the enquiry by reducing the need for multiple applications and [therefore] is less time consuming. All data obtained will be thoroughly researched before being submitted for consequential subscriber checks.

13 – Collateral Intrusion

. . .

Incoming & Outgoing call data is likely to include a lot of family and friends numbers; it may also include details of high profile people including those whom have spoken to the press expecting journalistic privilege. Full consideration has been given to this by the SIO – the only details of relevant to this application are those of interest to the original enquiry.

There are several numbers already known to this investigation and will be easily identifiable. There will be a level of intrusion if subscribers need to be carried out on numbers that are unidentified and there is likely to be a relatively large amount of data returned due to the time periods requested. The level of intrusion will be in order to either prove or disprove the involvement in the offence and also show if any other leaks have been made to journalists or other media sources.

All data will be fully researched and any data relating to an innocent party will be disregarded and will not be subject to any further scrutiny.

14 – Results Timescale

. . .

This is an urgent application as we need to identify other offenders and preserve evidence in relation to this investigation."

45. The applications were approved by Detective Superintendent Hudson on 23rd December. The material part of his decision is recorded as follows:

"*I have read the attached application. I authorise the methodology requested. This is necessary under the Act S22(2)(B) on this occasion to detect crime. I am [satisfied]*

with the proportionality test. There is no less intrusive way to gather the information, intelligence and evidence required to prove or disprove the allegations at hand. This is a high profile investigation seeking evidence relating to corruption between the MPS officers and the press that resulted in the resignation of a Government Minister. I am satisfied with how any collateral material will be managed and dealt with in line with the codes. I also note the reference made to articles 10 and 8 of the HR Act and am satisfied that they are addressed in sufficient manner by the investigation team."

46. As set out in paragraph 25 above, as a result of the First Authorisation it was discovered that PC Glanville of the DPG had communicated with Mr. Newton Dunn between 20th and 22nd September.

The Third Authorisation

47. On 14th January the application for communications data in respect of the mobile phone used by Mr. Woodhouse was prepared. The application sought incoming and outgoing call data, including cell site and GPRS data, for a 9 day period starting at 0600 on 18th September, that is the morning of the day before the altercation recorded in the Police Log. The basis on which an application was made in respect of the communications of Mr. Woodhouse was that it was he who made the calls to PC Tully of the Police Federation on 22nd September which disclosed that The Sun was in possession of the Police Log. The time period covered by the application was justified on the basis that there had been an occurrence involving Mr. Mitchell and his bicycle the day before the incident on 19th September (by reference to the information from PC Watson referred to in paragraph 19 above).

48. The material parts of this application read as follows:

"***10 – Necessity***

This matter under investigation is that of misconduct in a public office whereby it is suspected that police officers have disclosed information to the media .. A police email dated the 19th September has been leaked to the media and the origin of this disclosure is under investigation by the DPS-SI. It remains unknown how the media obtained the original email. Police are aware that Craig WOODHOUSE of The Sun Newspaper spoke to Federation Representative PC John TULLY requesting further information about the incident on the 19th September. This contact was made prior to PC TULLY being contacted by the journalist Tom NEWTON DUNN who went on to say that he had a copy of the police email. …"

. . .

12 – Proportionality

. . . The original incident involving a DPG officer and Mr. Andrew MITCHELL [occurred] *on the 19 September 2012 however it is now known that there was a similar incident the previous evening at the gates of Downing Street. This request*

> *for data is* [from] *18th September for one week only. The application also seeks to determine whether the leak came from an alternative source other than the police. The dates selected will assist in determining whether there was a conspiracy* [against] *MP Andrew MITCHELL which potentially began on 18th September when it is alleged that Mr MITCHELL had his first "run-in" with police officers at the gates of Downing Strret. "*
>
> ***14 – Result(s) Timescale***
>
> *. . . This is an urgent application as we need to identify other offenders and preserve evidence in relation to the investigation.."*

49. The Single Point of Contact added:

> "*as with other delayed Alice applications the team have recently confirmed this is a valid line* [of] *enquiry for them and as such* [the] *data is still required*".

50. The reason for the delay in making the application has not been explained but it was not considered by Detective Superintendent Hudson until 14th March. He recorded his authorisation as follows:

> "*I have read the attached application. I am aware of operation Alice it holds a high media profile and is a significant critical incident within the MPS. Officers leaking stories regarding of members of parliament not only undermines the relationship between the Police and Parliament but also the confidence and trust of the public we serve. I believe this data is necessary, it supports the strategy of the SIO in identifying the extent of the misconduct and by whom it was committed, importantly whether this was an act of conspiracy focused against a member of parliament to oust him,* [ultimately] *undermining the rule of law (S.22(2)(b)). I believe the application is proportionate it is the only way to achieve the data required whilst not alerting as yet suspects unknown. It will provide the required evidence and all other avenues to manage this have been considered by the IO. I note the comments regarding A10 HRA and I am satisfied they are appropriately considered. This request is authorised.*"

51. At the time the authorisation was granted, the statement in the application that the police did not know how the media had obtained the Police Log was incorrect. By mid January the investigating team had established that there had been an email from PC Glanville disclosing the contents of the Police Log to Mr. Newton Dunn.

52. It does not appear from the evidence that any further material relevant to the investigation was discovered as a result of the Third Authorisation.

The Fourth Authorisation

53. As set out above, on 4th June 2013 the investigating team had been informed that a female claiming to be a tourist had spoken to a journalist at The Sun between 0800 and 0845 on 20th September 2012 claiming that the word "morons" had been used by Mr. Mitchell. That information was obviously untrue because the CCTV records showed no member of the public in earshot of the altercation which had occurred, and there was no evidence, in the Police Log or from other sources, that Mr. Mitchell had used that word.

54. On 5th June an application was issued requesting incoming call data and subscriber checks for the period 0730 to 0900 for calls made to the news desk of The Sun. The material parts of the application read:

> "***10 – Necessity***
>
> . . .
>
> *Operation Alice is an Investigation into information leakage to the press. At this time, PC James GLANVILLE and PC Gillian WEATHERLEY have been arrested for misconduct in a public office. This application seeks to determine whether any other police officers are involved in information leakage.*
>
> *The Sun newspaper is currently subject to a civil claim with MP Andrew MITCHELL with regards to the 'Plebgate' incident.*
>
> *In The Sun's defence statement, it is claimed that a second caller made a call to their hotline purporting to be a tourist who witnessed the incident. She alleges that she heard Mr MITCHELL say 'You're fucking morons – you think you run the country, well you don't.' The female did not leave any contact details and he did not accept any payment according to The Sun.*
>
> *The Op Alice Team know through viewing CCTV that there was not a female tourist present during the incident at the gates of Downing Street on the 19th September 2012.*
>
> *This application is necessary to determine the identity of this female and thus determine whether the female is in actual fact a serving member of the MPS.*
>
> . . .
>
> ***12 – Proportionality***
>
> . . .
>
> *It has now come to light that there was in fact a further 'tip-off' to the press by an unknown female. The identity of this female is currently unknown and it is believed that the female is in fact a serving police officer – she has given information that was known to just a handful of people.*
>
> *Full consideration has been given to the Human Rights Act, in particular Article 8 (Right to a Private Life) and Article 10*

(Freedom of Expression). The allegation that a number of police officers have conspired together to reveal the incident involving MP Andrew MITCHELL to the press is very serious. The allegations made by Mr MITCHELL continue to be placed under scrutiny in the press. Both the Prime Minister and the MPS Commissioner have commented that this issue must be resolved as it brings into doubt the integrity of not only the individual police officers concerned but the MPS itself and with it, public confidence in the organisation.

This application also considers journalist privilege. The intrusion into the privacy of potential subjects identified has been considered, but deemed justified when balanced against the seriousness of the allegation (if proved) of misconduct in a public office. All other enquiries that could reveal the identity of the female have been exhausted – phone records of three other journalists have been examined and no other police officers have been identified.

The Operation Alice have been given specific information around the date and times that the call was made and this application will request incoming data on the 20th September between 0800-0845HRS.

13 – Collateral Intrusion

. . .

Incoming call data to a press phone line may include details of general members of the public as well as high profiled persons. In any case, it is highly likely that whoever contacted this number is expecting journalistic [privilege]. *Full consideration has been given to this by the SIO – the only details of relevance to this application are in relation to the one female caller. Consequential subscribers checks should assist the investigation in identifying this person.*

It may well be that some of the numbers identified are already known to this investigation and these will be easily identifiable. There will be a level of intrusion if subscribers need to be carried out on numbers that are unidentified, this enquiry does need to be completed in order to eliminate any innocent party from the investigation. A request for 2 hours worth of incoming call data should help to minimise any intrusion.

All data will be fully researched and any data relating to an innocent party will be disregarded and will not be subject to any further scrutiny. There will be no additional checks completed on males identified as calling the helpline unless they are identified as being police officers.

All data that is obtained will be stored on a secure system with restricted access and will continually be reviewed by the IO/SIO throughout the investigation in accordance with CPIA guidelines."

55. On 6th June the Fourth Authorisation was issued. In approving the application Detective Superintendent Hudson stated as follows:

> "*I have read the attached application and the notes of SPoC. I am aware of operation ALICE, I am not the SIO and have no influence in strategy or tactics. Operation ALICE is extremely critical. The subject matter has undermined the faith and confidence the public has in the Police and Parliament. This application is requesting information from the hotline of The Sun newspaper. My belief is that this number is set for use by persons who wish to whistle blow to the press and there is a statement of confidentiality expected by those callers. The call in question is purported by The Sun to belong to a white female tourist. Information in this application identifies that at the time the information gleaned would have taken place there was no such persons visible on the CCTV which covered the event in question which brings into doubt the legitimacy of the caller. From other applications and my awareness of this case a Police officer has already purported to be an innocent passer by to pass sensitive information. If similar has occurred here that level of privacy is reduced and journalistic privilege does not apply. The application is thus necessary as it will identify whether such call took place at the time specified and potentially by whom (S22 (2) (b)). The fear that it is by a Police Officer with criminal motive or potentially a fabrication of defence by The Sun in the civil claim are real possibilities. I note the comments in box 12 the comments relating to proportionality. Information given was known at that time to only a handful of people thus increasing the suggestion that crime has taken place and lie made to The Sun. This further erodes the A8 rights of the caller and that access to A10 and protection through journalistic privilege. I am still cognoscente that the number from which data is being requested is a hot line – The comments of the applicant regarding CI are concerns of mine also. I believe the actions described regarding management of the data and numbers provides protection for legitimate callers whilst providing a plan to identify numbers for further research that may be suspect. I note close supervision of the SIO described in box 12, I have read the comments relating to management of the data and compliance with CPIA, revelation to only those that need to know and disclosure only when required by law. The timescales requested, a 90 minute period at the target time, further protects the rights of innocent callers whilst providing a adequate window of opportunity based on the intelligence at hand to discover the identity of the caller. I believe this application is proportionate, it is the least intrusive methodology available to discover the true identity of the caller and thus prove or disprove the involvement of a serving Police officer as suspected. I authorise the acquisition of the data as described by the SPoC in box 17.*"

56. As set out in paragraph 29 above, as a result of the Fourth Authorisation communications data in respect of 5 telephone numbers was obtained which revealed that one of those numbers was that of a hospital at which the partner of PC Suzie Johnson worked.

The proceedings

57. The First and Second Complainants lodged complaints in this Tribunal on 1st October 2014. In the course of disclosure, the existence of the Second and Third Authorisations was disclosed by the Respondent, as a result of which the Third and Fourth Complainants lodged complaints, and on 27th February all four complaints were directed to be joined, and they were heard together.

58. In their evidence the Second, Third and Fourth Complainants set out the harm that has been caused to them as journalists by the steps taken by the Respondent, without their knowledge, to obtain and review a considerable quantity of their confidential telephone records, thus enabling the Respondent to identify those persons who might have disclosed information to the press.

59. These are proceedings under s 7(1) (a) of the HRA for actions by the Respondent which are incompatible with the Convention rights of the Complainants under Articles 8 and 10.

60. The Tribunal heard oral evidence from Detective Superintendent Williams, the senior investigating officer for Operation Alice, Detective Superintendent Hudson, the designated person who granted the authorisations and Detective Chief Inspector Neligan who managed the Operation Alice investigation. Each of these officers was cross-examined on his written witness statement.

The Issues

61. The general issue raised by the Complainants was whether the obtaining of the communications data under the authorisations was prescribed by law and necessary in a democratic society so as to comply with the requirements of Article 10, and Article 8. It was not suggested that the reference to Article 8 adds any point of substance to the argument, so in this judgment we refer only to Article 10.

62. Following the hearing we invited further written submissions from the parties, and from the Secretary of State for the Home Department, on the principles of judicial review to be applied, the safeguards required under Article 10, and the effect of s 6 of the HRA.

63. The submissions made by Mr. Gavin Millar QC on behalf of the Complainants may be summarised as follows:

(1) Under the jurisprudence of the ECtHR judicial pre-authorisation is required for the lawful acquisition of communications data which might reveal a journalist's source (Submission 1);

(2) The authorisations under s 22 were not necessary nor proportionate in a democratic society because:

(a) there were other alternative measures which could have been adopted to obtain the communications data, namely an application under the Police and Criminal Evidence Act 1984 ("PACE") or for a Norwich Pharmacal order (Submission 2(a));

(b) there was a failure to make proper prior enquiries of the journalists before resorting to an authorisation (Submission 2(b));

(c) there was a failure to complete other investigations before resorting to an authorisation under s 22 (Submission 2(c));

(d) there was "*no pressing social need*" (**Goodwin v United Kingdom** [1996] 22 EHRR 123 at paragraph 140) for the authorisation, because a sufficiently grave offence had not been established and the evidence was inconsistent with a malicious conspiracy to damage Mr. Mitchell (Submission 2(d);

(e) the measures taken were disproportionate in their extent in time (Submission 2(e));

(f) The authorisations were supported by inadequate reasoning (Submission 2(f)).

64. There is an overlap between the point of principle at Submission 1 as to whether judicial authorisation is a requirement for compliance with Article 10, and the argument at Submission 2(a) to the effect that an application should have been made under PACE, which requires an application to a judge. This Judgment will deal first with the other arguments in the context of s 22, and then address the issue of principle whether s 22 complies with Article 10 as a measure prescribed by law.

65. The question for this Tribunal is whether the Article 10 rights of the journalists have in law and fact been infringed. That is an issue to be decided by the Tribunal, and it is an objective question, which does not depend on the procedural propriety of the decision making process or the adequacy of reasoning of the designated person who granted the authorisations. This approach is established in **Belfast City Council v Miss Behavin' Limited** [2007] 1 WLR 1420 following **R(SB) v Governors of Denbigh High School** [2007]1 AC 100. The point is clearly made by Lady Hale in **Miss Behavin'** at paragraph 31:

> "*The first, and most straightforward, question is who decides whether or not a claimant's Convention rights have been infringed. The answer is that it is the court before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account.*"

In **Denbigh High School** at paragraph 30 Lord Bingham said:

> "*The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time … Proportionality must be judged objectively, by the court.*"

66. On the basis of those authorities we do not accept Submission 2(f) above to the effect that inadequacy of reasoning in itself constitutes a breach of a Convention right.

Necessity and proportionality

67. There are criticisms that can properly be made of the process under which the authorisations were granted. The reasoning was not entirely clear in some respects, there were some material errors and the important principle of the need for an overriding interest to justify the obtaining of data which would reveal a journalist's sources was not properly articulated. However Detective Superintendent Hudson explained his reasoning more fully in his witness statement and the tribunal is satisfied that he approached these applications conscientiously and exercised his own independent judgment in granting the authorisations. For the reasons given at paragraph 65 above criticisms of the reasoning of the designated person are not in any event relevant to a claim for breach of Convention rights.

68. The Tribunal is satisfied that it was necessary, within the meaning of s 22(2), to obtain communications data directed to identifying the source of the information disclosed to The Sun. The applications were made for the purpose of investigation of a serious criminal offence, namely a conspiracy by a number of police officers in the DPG to discredit a government minister. From 22nd December 2012 there were reasonable grounds to suspect such a conspiracy. PC Wallis had clearly lied in the email he had sent to Sir John Randall, a communication obviously designed to damage the position of Mr. Mitchell in the Government, and there were grounds to believe that he had not acted alone. The authorisations pursued a legitimate aim.

69. We reject Submission 2(d) that there was not a sufficiently serious offence under investigation to justify the use of the power under s 22. The suspected offence of misconduct in a public office was particularly serious, given the allegation that a group of police officers had lied, and lied for the purpose of damaging the democratic process by discrediting a Government Minister. The seriousness of the investigation is made plain by the referral of the investigation to the IPCC and the statement made by the IPCC at the conclusion of the investigation.

70. This case is distinguishable from **Tillack v Belgium** (2012) 55 EHRR 25 where the suspicion was based on "*mere rumours*" (paragraph 63). The authorisations are justifiable in this case under the principles expressed in ***R*** (**Malik) v Manchester Crown Court** [2008] EWHC 1362 (Admin) at paragraph 56:

> "*it is relevant to the balancing exercise to have in mind the gravity of the activities that are the subject of the investigation, the benefit likely to accrue to the investigation and the weight to be accorded to the need to protect sources. .. the judge was entitled to conclude on the material before him that there were reasonable grounds for believing that the material in the possession of the claimant ... was likely to be of substantial value to the investigations.*"

71. Nor can we accept the argument that the evidence was inconsistent with an allegation that there had been a malicious conspiracy to damage Mr. Mitchell. The reverse is the case. It is correct that there was no evidence to contradict the veracity of the Police Log written by PC Rowland, apart from the assertions of Mr. Mitchell, but the investigating team could not proceed on the assumption that PC Rowland's account would be proved to be true. There were good reasons to believe that at least two other officers in the DPG must have told lies about the incident or about communicating with the press. The information gained by the investigating team by 23rd December did not prove the conspiracy under investigation, but it supported the allegation. The

fact that PC Wallis had admitted having told lies in his email was a compelling reason for suspecting that a serious criminal offence might have been committed. There were more than adequate grounds for suspecting that a number of DPG officers had conspired to discredit Mr. Mitchell.

72. It was also submitted that there was *no pressing social need* for the Fourth Authorisation as it was likely that the caller was passing on information in good faith. That argument is unreal on the evidence available to the investigative team at the time. It could have been very important to identify the female in case she turned out to be or connected with a DPG officer, as turned out to be the case. The investigating team had every reason to believe that the call was entirely false, and thus could provide evidence of conspiracy within the DPG. There was no female tourist who had witnessed the incident, so the call had to be a fabrication. There is no basis for the submission, contrary to the evidence, that any such call to The Sun should have been assumed to have been made by a truthful whistle-blower acting in the public interest.

73. The main thrust of the argument advanced by leading counsel for the Complainants was that the authorisations were not proportionate to the purpose of obtaining the communications data which might reveal the sources of information received by the journalists. We accept the evidence of Detective Superintendent Williams and Detective Chief Inspector Neligan that the new information about PC Wallis and PC Johnson led them to conclude that there was a reasonable suspicion that PC Rowland's integrity could be in question, and that there were other officers involved both in falsification and in leaking. Detective Chief Inspector Neligan persuasively insisted when cross-examined by Mr Millar that the next step was not to complete the examination of the digital media but that (Day 1/31) "*the glaring obvious question that needed to be answered was who was the unknown officer that leaked this document in these circumstances*", and that such a conspiracy was (as was obvious, but was only made the more evident by the amount of publicity) putting at risk the public confidence in the police, unless and until it was fully investigated.

74. It was in our judgment honestly and reasonably believed by Detective Superintendent Williams and Detective Chief Inspector Neligan, when they caused the application to be made, and by Detective Superintendent Hudson, when he approved it, that there were reasonable grounds for suspicion of the commission of a serious offence; and that it was reasonable to take steps to identify the source of the leak for that purpose, in the light of the circumstances which had so dramatically changed since September, and in particular since the arrest of PC Wallis.

75. In considering Submission 2(e) above, it is necessary to bear in mind that the only way in which the suspected conspiracy could be proved was by obtaining, by one means or another, the communications data which might evidence communications between a police officer and a journalist. It would be practically impossible to prove a conspiracy which in part consisted of the disclosure of false information to the press without evidence from communications data. It was not only logical to obtain that data at an early stage of the investigation, but essential in order to assess whether the offence alleged might have taken place. The leaking of information to the journalist was an essential element of the criminal offence under investigation, rather than just corroborative evidence as to whether an offence had been committed. In the event it is now known that PC Glanville had provided true information to Mr. Newton Dunn, so that his action did not support the conspiracy allegation. But on the other hand it is also now evident that another DPG officer had caused false information to be

provided to The Sun news desk which in itself might have constituted a criminal offence. Without the communications data the investigation could not be effective. The balancing exercise thus starts from a different point than in other cases to which we refer below.

76. As set out in Submission 2(b) above, it is argued that prior enquiry should have been made of the journalists before considering the use of powers under s 22. However if enquiries had been made of News Group Newspapers it is clear that the journalists would, quite properly, have declined to disclose their sources. That stance had already been made clear by Mr. Mockridge in his email sent on 2nd October 2012, and it is the course followed when the statement from Mr. Newton Dunn dated 6th March 2013 was given to the police. The statement made by him that neither PC Rowland nor PC Weatherley was the source does not in any way contradict the suspicion that another officer in the DPG might have been.

77. For the reasons given above at paragraph 22, we also do not accept the argument referred to in Submission 2(c) that other means of investigation should have been completed before an authorisation was sought under s 22. There are no proper grounds on which to question the investigative judgement that obtaining the communications data at an early stage was essential. That judgement was supported by the IPCC terms of reference, which required the communications data to be obtained.

78. Nor do we accept Submission 2(e) above, that the authorisations were too extensive in time. The discovery that the source was PC Glanville was not attributable to any excess of scope in the First Authorisation, and the same is true of the Fourth Authorisation revealing that the informant was the partner of a DPG officer. In respect of the First and Second Authorisations, the 7 day period from the occurrence of the incident was justifiable because there might have been further calls between the source and the journalist after the initial call. In respect of the Third Authorisation there were proper grounds for going back one day before the incident because a witness had said there had been an incident involving Mr. Mitchell the day before 19th September. In respect of the Fourth Authorisation the 90 minute window was justifiable to allow a margin for error when the call was said to have occurred within a 45 minute period.

79. It is in respect of the Third Authorisation that the submissions made by Mr. Millar have more force. There is a distinction between this authorisation and the others. Before the Third Authorisation was made the police had already discovered that the source was PC Glanville. In contrast the First and Second Authorisations were essential in order to discover the source of the story published by The Sun. It was also necessary to grant the Fourth Authorisation to discover whether another officer of the DPG was implicated in the provision of false information to The Sun.

80. The Third Authorisation was not supported by a compelling case that disclosure of the communications data of Mr. Woodhouse was necessary to make the investigation effective. It was already known that the source of the Police Log held by The Sun was PC Glanville, yet the application form stated incorrectly (Box 10 in paragraph 48 above) that it remained unknown how the media had obtained a copy of the Police Log. PC Glanville had by that time been arrested, as had PC Weatherley, who had supplied him with the Police Log. There was no substantial basis for a belief that another DPG officer might have disclosed the contents of the same document to Mr.

Woodhouse, and in the event the communications data disclosed nothing of value to the investigation.

81. An applicant for authorisation or for a warrant has a duty to include in the application the necessary material to enable the authorising officer to be satisfied that the statutory conditions are met, and must also make full and accurate disclosure, including disclosure of anything that might militate against the grant of an authorisation. In **Chatwani v National Crime Agency** [2015] UKIPTrib 15_84_88-CH this Tribunal made clear the duty to disclose clear and accurate information in any application for an authorisation under RIPA. The fact that the identity of the source which had led to the story in The Sun had already been obtained was not disclosed in this application. The picture presented was as if the situation had been frozen in time since December, when in fact much that was material had occurred, as set out above, all of which rendered it the less necessary to obtain access to the communications data of Mr. Woodhouse.

82. The delay in processing the Third Authorisation may indicate that it was designed to complete the investigative process and exhaust all lines of enquiry in relation to Sun journalists. That may have been a proper investigative purpose, but it did not justify the serious step of obtaining access to communications data which might identify a journalist's source. There was *no pressing social need* for the purpose of the detection of a serious crime. As is made clear by Lord Bingham in **Denbigh**, this Tribunal is required to conduct its own evaluation of the proportionality of the measure in issue, and we are not satisfied that it was necessary or proportionate under the Third Authorisation to require disclosure of communications data which might reveal the source of information held by Mr. Woodhouse.

83. For these reasons we hold that the First, Second and Fourth Authorisations were both necessary and proportionate. In our judgment the Third Authorisation was neither necessary nor proportionate to the legitimate aim sought to be achieved.

The requirement for judicial authorisation

84. This argument has two aspects. The first to be considered is whether the Metropolitan Police should, instead of obtaining authorisations under s 22 of RIPA, have made an application to a judge under s 9 of PACE for the communications data. The second is the more fundamental point that the use of s 22 of RIPA to obtain information disclosing a journalist's source was a breach of the journalist's Convention rights, either because s 22 avoided the need for judicial authorisation or because there were not adequate safeguards to ensure that authorisations were prescribed by law.

85. S 9 of PACE permits a constable to apply under Schedule 1 to a Circuit Judge for an order that access be given to material, including journalistic material acquired or created for the purposes of journalism and held in confidence and including material in electronic form.

86. It is not necessary to set out the detailed provisions of PACE governing applications under s 9, because in the course of argument it was accepted that it would have been open to the Metropolitan Police to apply under s 9 of PACE against a communications service provider ("CSP") for access to communications data (such as billing records) held by a CSP. Mr Johnson made a powerful case that it would not have been possible or practicable in the circumstances of this case to make such an application against the First Complainant in respect of documents held by it, but it is not necessary to decide that point.

87. As already noted, the 2015 Code does now require a law enforcement agency seeking to obtain information about a journalist's source to apply to a judge under PACE rather than seeking an authorisation under s 22 of RIPA, except in cases involving a risk to life. We refer to a decision of Sweeney J dated 5 May 2015 in relation to three special procedure production orders sought against a CSP under the new regime required by the 2015 Code. That decision shows that such an application may be made against the CSP, but that in a case involving journalistic material the judge is likely to require notice to be given to the newspaper to allow for *inter partes* argument. So in 2013, although not required by the Code then in force, an application under PACE against the CSP would have been practicable and would have ensured judicial authorisation for the obtaining of any communications data which might reveal a journalist's source.

88. Mr Johnson submitted that the fact that an application could in law have been made under PACE was of no relevance to the issue of proportionality, nor necessity; even less so the possibility of a **Norwich Pharmacal** application.

89. We accept the point that RIPA was, at the relevant time and under the provisions of the 2007 Code, reasonably considered to be the appropriate means for the police to obtain communications data. But, as set out at paragraph 65 above, the issue of proportionality is to be judged on an objective basis and the fact that the designated person reasonably considered that RIPA should be used does not answer the Complainants' argument.

90. The main submission of the Respondent was that the Complainants' argument confuses the issue of proportionality with legality. The question is whether the police used the least intrusive measure, and that test focuses on the infringement of rights, not the means by which an order or authorisation is obtained. The intrusion is the obtaining of communications data which might reveal a journalist's source, not the making of an application to a designated person under RIPA or to a judge under PACE. Mr. Johnson submitted that "*if there are two alternative routes achieving the same end and both involve the same degree of intrusion, then the choice between those routes is neutral so far as necessity and proportionality is concerned.*" In principle that point must apply equally to the submission that an application should have been made under PACE, as to the point that a civil action could have commenced seeking a **Norwich Pharmacal** order.

91. We accept those submissions. It is clear from consideration of the cases of **<u>Roemen and Schmidt v Luxembourg</u>** Application No.51772/99 25 May 2003 (at paragraph 57) and **<u>Ernst v Belgium</u>** (2004) 39 EHRR 35 (at paragraph 103) that the issue on proportionality is directed to the effect of the infringement in question, not the procedure by which an authorisation or order is obtained. The communications data obtained, whether from a judge under PACE or from a designated person under s 22 of RIPA, is data which has the same effect of potentially revealing a journalist's source and thus the intrusion on rights is the same. It is that intrusion, not the procedure used to give it legal effect, which must be justified under the principle of proportionality. The alternative measures argument is in our judgment not sustainable.

92. The Complainants relied on Principle 3(b)(ii) of Recommendation No.R(2000) 7 of the Committee of Ministers of the Council of Europe adopted on 8 March 2000 which refers to disclosure of a source not being deemed necessary "*unless it can be convincingly established that . . . reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the*

disclosure". That statement is not directed to reasonable alternative legal procedures which could be taken to obtain the same disclosure.

Legality

93. However the rejection of the submission on alternative measures then raises the underlying question of principle as to whether the procedure sanctioned by s 22 of RIPA, under which a police force may obtain an internal authorisation to obtain communications data which might reveal a journalist's source, adequately safeguards Article 10 rights. The question is whether judicial pre-authorisation is necessary to obtain access to such communications data, or, even if not, s 22 in its effect is sufficiently predictable and subject to adequate safeguards so as to be prescribed by law.

94. In his submissions Mr. Millar stressed the special position accorded to the protection of confidential journalistic sources under the common law and ECtHR jurisprudence. He referred in particular to:

(1) **Goodwin** which reiterated that protection of journalistic sources is one of the basic conditions for press freedom, so that a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest;

(2) Recommendation No.R (2000) 7 of the Committee of Ministers of the Council of Europe adopted on 8 March 2000 which set out the principle that there should be clear and explicit protection in domestic law and practice of the right of journalists not to disclose information identifying a source;

(3) **Voskuil v Netherlands** [2008] EMLR 14 465 in which the Court at paragraph 65 stated:

"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 (see Goodwin v. the United Kingdom, judgment of 27 March 1996, Reports of Judgments and Decisions 1996-II, p. 500, § 39; more recently and mutatis mutandis, Roemen and Schmit v. Luxembourg, no. 51772/99, § 46, ECHR 2003-IV)."

(4) **Sanoma Uitgers v Netherlands** [2011] EMLR 4, a decision of the Grand Chamber on a case concerning an order made by an investigating officer for the surrender of journalistic material, which contained the following general statements of principle:

"*(82) For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any*

such discretion conferred on the competent authorities and the manner of its exercise.

(88) Given the vital importance to press freedom of the protection of journalistic sources and of information that could lead to their identification any interference with the right to protection of such sources must be attended with legal procedura safeguards commensurate with the importance of the principle at stake.

(90) First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. The principle that in cases concerning protection of journalistic sources "the full picture should be before the court" was highlighted in one of the earliest cases of this nature to be considered
by the Convention bodies (British Broadcasting Corporation, quoted above (see [54] above)). The requisite review should be carried out by a body separate from the executive and other interested parties, invested 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.

(92) Given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established if it does not.

(5) ***Telegraaf Media Nederland v Netherlands*** (2012) 34 BHRC 193, a case of targeted surveillance of a journalist in which the power was exercised by the executive, in which the ECtHR found that the law did not provide adequate safeguards appropriate to the use of surveillance against journalists with a view to discovering their journalistic sources.

95. In his submissions, Mr. Johnson did not dispute that particular importance is attached to the freedom of the press under Article 10 in respect of communications between journalists and their sources, but submitted that the confidentiality of journalists' sources is not absolute. Accepting that it must be shown that the obtaining of communications data is prescribed by law, he submitted:

(1) the test of sufficient safeguards is authoritatively laid down by Lord Bingham in **R (Gillan) v Commissioner of Police of the Metropolis** [2006] 2 AC 307 at paragraph 34 as follows:

"*The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public authorities, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials*

acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. That is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."

(2) Chapter 2 of Part 1 of RIPA prescribes clear and publicly accessible rules of law which prohibit interference with Convention rights on an arbitrary basis;

(3) There is no requirement for explicit legal protection to protect journalists' sources, provided there are safeguards to protect against arbitrary interference, which there are;

(4) Article 10 does not require prior judicial authorisation in a case concerning journalists' sources, as explained by Laws LJ in **R (Miranda) v Secretary of State for the Home Department** [2014] 1 WLR 3140 at paragraph 88, a point which was adopted by this Tribunal, but in a different context, in **Liberty (National Council of Civil Liberties) v GCHQ and others** ("**Liberty/Privacy**") 2015 3 AER 142 at paragraph 116.

96. In answer to the latter point Mr. Millar made clear that it was not necessary for his argument to challenge the general statement by Laws LJ to the effect that the ECtHR had not developed a general principle of requiring judicial pre-authorisation in cases which might infringe rights under Article 10. Nor did Mr. Millar challenge the general statement made by Lord Bingham in **Gillan**. that the purpose of the principle of legality is to guard against arbitrariness. His response to both these points is that in a case which concerns the disclosure of journalists' sources then it is necessary for the law to impose special safeguards, which he submitted requires judicial pre-authorisation.

97. Applying the principles set out by Lord Bingham in **Gillan**, and noting paragraph 77 of the judgment of the ECtHR in **Gillan v United Kingdom** [2010] 50 EHRR 1105, s 22 of RIPA does comply with the principle of legal certainty. The discretion granted to a designated person under s 22 is not unfettered. The law does "*indicate with sufficient clarity the scope of the discretion conferred on the designated person and the manner of its exercise*". S 22 requires that the exercise of the power be both necessary and proportionate. As Laws LJ noted in **Miranda** at paragraph 88 the discipline of the proportionality principle is one of the foremost safeguards. The decision of a designated person is subject to review by an independent Commissioner and, if a complaint is made, to a determination by this Tribunal. The power conferred by s 22 is subject to protection against arbitrary use.

98. So the principle of legal certainty is met, but this does not answer the main thrust of the argument put forward by the Complainants that s 22 lacks effective safeguards in a case where an authorisation would disclose a journalist's source.

99. There is a distinction between the power contained in s 22 and the powers in issue in **Sanoma**, which concerned the seizure of journalistic material, and **Telegraaf**, which concerned the targeted surveillance of journalists and the seizure of journalistic material. In the cases of **Roemen** and **Ernst** cited above the ECtHR made clear that searches of a journalist's office or home is a more serious intrusion than a requirement imposed on a journalist to disclose his source. In **Roemen** at paragraph 57 the Court stated:

> "*The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist ...*"

100. In contrast to the powers under consideration in those cases, the power under s 22 does not enable the police to obtain access to journalistic material nor to intercept communications between a source and a journalist. The power is only to obtain communications data, which does not reveal the contents of any communication between the journalist and his source. Nor does the power require the journalist to take any step which would infringe the duty of confidence which he owes to the source, as the information is obtained directly from the CSP. As was stated in **Goodwin** at paragraph 40, limitations on the confidentiality of journalistic sources call for the most careful scrutiny. That careful scrutiny must start by recognising the limits of the power under s 22 and the fact that it neither permits the police to obtain journalistic material nor even, as was the case in **Goodwin**, imposes a legal requirement on a journalist to identify his source.

101. On the other hand each of the four authorisations in this case was clearly intended to enable a source to be identified and it cannot be disputed that the general principles applicable to the protection of a journalist's source are engaged. S 22 enables the police to obtain subscriber information which may directly reveal a source or at least a telephone number from which, in conjunction with other evidence lawfully obtained, it may be possible for the police to identify the source.

102. In the **Miranda** case the power under scrutiny, although more intrusive in that it enabled material held for a journalist to be seized, was not designed to identify the source, because the identity of the source, Edward Snowden, was already known (see the judgment of Laws LJ at paragraphs 48 & 72). So although that case, as this Tribunal has already held in the **Liberty/Privacy** case, does not support a general principle of prior judicial scrutiny for cases involving state interference with journalistic freedom, **Miranda** was not dealing directly with the same issue as arises in this case.

103. We are satisfied that s 22 does contain a number of safeguards for the general run of criminal investigation cases. Those safeguards include those already noted at paragraph 97 above. The designated person, although not independent of the police force, is a senior officer, who is effectively required to exercise an independent judgment. The existence of oversight arrangements, including oversight by the Commissioner, is a strong factor in ensuring that the power under s 22 is properly exercised. The designated person knows that any decision to grant an authorisation, which is recorded in writing, may be subject to later review.

104. However cases directly engaging the freedom of the press require to be treated differently. The case of **Goodwin** makes clear that the protection of journalistic sources is one of the basis conditions for press freedom, and that the necessity for any restriction on press freedom must be convincingly established. So we accept the principle underlying the submissions made for the Complainants that there must be safeguards which are effective to protect this particular freedom.

105. In **Tillack** the ECtHR stated at paragraph 65:

> *"The Court* emphasises *that the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution."*

106. The real difficulty is that the safeguards in place in 2013 did not include any special provisions designed to provide effective safeguards in a case which directly affected the freedom of the press under Article 10. The law, including the 2007 Code, did not at the material time require the designated person to apply any stricter test, or more heightened scrutiny, to a case concerning disclosure of a journalist's source, different from that which would be applied in any criminal investigation.

107. In the absence of a requirement for prior scrutiny by a court, particular regard must be paid to the adequacy of the other safeguards prescribed by the law. The designated person is not independent of the police force, although in practice, properly complying with the requirements of s 22, he will make an independent judgement, as he did in this case. In general the requirement for a decision on necessity and proportionality to be taken by a senior officer who is not involved in the investigation does provide a measure of protection as to process, but the role of the designated person cannot be equated to that of an independent and impartial judge or tribunal.

108. Subsequent oversight by the Commissioner, or, in the event of a complaint, by this Tribunal, cannot after the event prevent the disclosure of a journalist's source. This is in contrast to criminal investigations where a judge at a criminal trial may be able to exclude evidence which has been improperly or unfairly obtained by an authorisation made under s 22. Where an authorisation is made which discloses a journalist's source that disclosure cannot subsequently be reversed, nor the effect of such disclosure mitigated. Nor was there any requirement in the 2007 Code for any use of s 22 powers for the purpose of obtaining disclosure of a journalist's source to be notified to the Commissioner, so in such cases this use of the power might not be subject to any effective review. Furthermore none of the Complainants had any reason to suspect that their data had been accessed until the closing report on Operation Alice was published in September 2014. If the Respondent had not disclosed that information – and it is to his credit that he did – then the Complainants would never have been in a position to bring these proceedings.

109. So in a case involving the disclosure of a journalist's source the safeguards provided for under s 22 and the 2007 Code were limited to requiring a decision as to necessity and proportionality to be made by a senior police officer, who was not directly involved in the investigation and who had a general working knowledge of human rights law. The 2007 Code imposed no substantive or procedural requirement specific to cases affecting the freedom of the press. There was no requirement that an authorisation should only be granted where the need for disclosure was convincingly established, nor that there should be very careful scrutiny balancing the public interest in investigating crime against the protection of the confidentiality of journalistic sources. The effect of s 22 and the 2007 Code was that the designated person was to make his decision on authorisation on the basis of the same general tests of necessity and proportionality which would be applied to an application in any criminal investigation.

110. The argument for the Complainants derives some support from the provisions of the 2015 Code. That Code recognises the need for and practicability of judicial pre-authorisation in respect of communications data which disclose a journalist's source.

Importantly it requires that an authorisation which might reveal a journalist's source is dealt with under PACE, which will ensure that a proper balancing exercise is conducted, wholly independently of the police force which is applying for the authorisation. In his written submissions Robert Palmer, counsel for the Secretary of State for the Home Department, noted that a draft Investigatory Powers Bill, published by HM Government on 4th November 2015, will require all applications by law enforcement agencies to obtain communications data for the purpose of identifying a journalist's source to be authorised by a Judicial Commissioner.

111. So for those reasons we conclude that the legal regime under s 22 of RIPA in place in 2013 when the four authorisations were made 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. Our decision is confined to such a case.

Section 6 of the HRA

112. As we have decided that the legal regime in force in 2013 did not provide effective safeguards to protect against the disclosure of a journalist's source under s 22 of RIPA, then it is necessary to address the arguments put forward by the Respondent under s 6 of the HRA.

113. Under sub-section 6(1) it is unlawful for a public authority such as the Respondent to act in a way which is incompatible with a Convention right. However under sub-section (2), sub-section 1 does not apply to an act if:

> "*(b) In the* case *of one or more provisions of, or made under primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*"

114. Mr. Johnson submits that, if the Tribunal was to determine that there had been an infringement of Convention rights, then sub-section (2) (b) applies because in doing the relevant act, namely requiring disclosure of communications data from the CSP, the Respondent was acting so as to give effect to s 22 and the applicable Code. In contrast to the discussion in **Manchester City Council v Pinnock** [2010] UKSC 21, it is not possible to read s 22 in a way which is compatible with Article 10, if, contrary to his submissions, it was not.

115. Mr. Millar submits that s 22 could be read or applied in a manner which is consistent with Article 10 if the Respondent had, instead of seeking an internal authorisation under s 22, sought judicial authorisation under PACE. To apply under s 22 is a discretionary power, requiring an evaluation of whether it is appropriate and if the Respondent fails to respect Convention rights then he cannot be acting to give effect to s 22.

116. Because of the importance and difficulty of this issue we asked for further written submissions, and have been referred to a number of authorities, including **Doherty v Birmingham City Council** [2008] UKHL 57 and **R (GC) v Commissioner of Police of the Metropolis** [2011] UKSC 21.

117. In **R (GC) v Commissioner of Police of the Metropolis** at paragraph 68 Baroness Hale stated that there are two questions arising under s 6 (2) (b). The first is whether the legislation in question can be read or given effect in a way compatible with Convention rights. The second question is whether the public authority is acting so as

to enforce or give effect the legislation. In analysing the argument it is necessary to keep in mind the distinction between these two issues. The first issue is a matter of construction for the Tribunal. The second issue requires an analysis of whether in fact and law the Respondent was, in the circumstances of this case, giving effect to s 22 of RIPA.

118. It is clear from the authorities referred to above that s 6 (2) (b) must be interpreted in the light of s 3, which imposes the duty to interpret legislation, so far as it is possible to do, in a way which is compatible with Convention rights. S 6(2) focuses on the act of the public authority which is under scrutiny, not the general effect of the legislation in question, still less other statutory powers which may be available to the public authority. The provision which is under consideration is s 22 of RIPA, not s 9 of PACE.

119. S 6 (2) (a) applies to a case in which a public authority could not have acted differently, thus indicating that under s 6 (2) (b) a public authority may be deemed to have given effect to or enforced a provision even where it might have acted differently. So the fact that the Respondent might have acted differently, by making an application under s 9 of PACE rather than under s 22 of RIPA, does not necessarily lead to the conclusion that s 6 (2) (b) could not be applied.

120. The first, and in our view determinative, issue is whether s 22 on its proper construction could be given effect compatibly with Convention rights in the circumstances of this case. The argument for the Complainants is that the power to seek an authorisation under s 22 is discretionary, and there was an alternative statutory power available under PACE which ought to have been employed. The written submissions do not explain how s 22 could be read down or given effect so as to import such a requirement. The focus of s 6 (2) (b) is on the provision in question, namely s 22 of RIPA, which, on the Complainants' argument, has to be read down or given effect so as to import a duty not to employ that statutory power, but instead to make an application under PACE. It is difficult to see how a requirement to that effect could be read into s 22. The purpose of the provision is clearly to give power to the police to obtain communications data, and the reading and effect of s 22 must be judged in relation to the communications data which the police consider to be necessary for an investigation. In such a case it would contradict the purpose of s 22 to read it as requiring the police not to make use of that very provision, for the whole purpose of s 22 is to provide for access to communications data.

121. The central argument for the Complainants was that s 22 was not compatible with the Convention because it failed to provide for judicial authorisation. But s 22 could not be read or given effect as requiring judicial authorisation either in general or for certain classes of authorisation. The Respondent had no power to make an application to a judge under s 22, and a judge would have had no jurisdiction to deal with any such application.

122. In further written submission the Respondent relies on paragraph 143 in **GC** where Lord Brown analysed the effect of s 6 (2) (b) in this way:

> *"A simple illustration of section 6(2)(b) in operation is, of course, where primary legislation confers a power on a public authority and where a decision to exercise that power (or, as the case may be, not to exercise it) would in every case inevitably give rise to an incompatibility. R v Kansal (No 2) [2002] 2 AC 69 was just such a case and in such situations it can readily be understood why*

section 6(2)(b) applies. Otherwise, instead of "giving effect to" a provision conferring a power, the public authority would have to treat the provision (in cases where not to exercise it would give rise to incompati89bility) as if it imposed a duty – or, in cases where any exercise of the power would give rise to incompatibility (as in Kansal (No 2) itself), would have to abstain from ever exercising the power. In either instance, it is obvious, Parliament's will would be thwarted."

123. On the Complainants' argument, and on our findings on legality, every case in which the Respondent sought access to communications data for the purpose of identifying a journalist's source under the regime in place prior to the 2015 Code would give rise to an infringement of Article 10 rights. The logic of the argument is that the Respondent would have to abstain from using the power, thus thwarting the Parliamentary intention that the power should be available. The difficulty in the Complainants' argument is shown by the fact that the 2015 Code cures the incompatibility in the case of access to data disclosing a journalist's source, not by revising the procedures which should apply to an authorisation under s 22, but in effect by directing the law enforcement agency not to use the statutory power, but to apply under PACE.

124. This case is distinguishable from **Pinnock** at paragraphs 97 - 101, in which it was held that the public authority was able to use the statutory power proportionately so that sub-section 6(2)(b) did not apply. That reasoning does not on our findings apply to the s 22 power. S 22 could not under any circumstances lawfully have been applied to a case in which disclosure was sought of the identity of a journalist's source. On the other hand the Respondent was giving effect to the statutory power by employing it.

125. This case is also distinguishable from **Doherty v Birmingham City Council**. At paragraph 153 Lord Mance made the point that it was possible to read the applicable statutory provisions in a way which required the local authority to take into account Convention rights when exercising the power in question. That is not possible in the case of s 22 of RIPA, because it is not possible in this class of case for the law enforcement agency to exercise the power so as not to infringe Convention rights. Nor do we consider that **R (Morris) v Westminster City Council** [2006] 1 WLR 505, on which the Complainants rely, really advances the argument. Paragraphs 70 to 73 of the judgment of Sedley LJ are dealing with a different point, namely whether the exercise of a statutory power in place of another power which is held to infringe Convention rights would be unlawful.

126. It must follow that in the case of the First, Second and Fourth Authorisations we have no power to grant any remedy under s 8(1) of the HRA. However s 6 cannot apply in respect of the Third Authorisation which in our judgment did not comply with the requirements of s 22 of RIPA. In that case the Respondent was not acting so as to give effect to s 22. Consequently s.6(2) of the HRA does not preclude a finding in favour of Mr. Woodhouse, the Fourth Complainant, of unlawfulness in respect of the Third Authorisation.

127. This Tribunal has no jurisdiction to make a declaration of incompatibility under s 4 of the HRA.

Conclusion

128. The Third Authorisation was not, under s 22 of RIPA, necessary nor proportionate to the legitimate aim which it pursued. There was thus an infringement of the

Convention rights of the Fourth Complainant, in that the interference with Article 10 rights was not in accordance with the law.

129. The 2007 Code did not provide effective safeguards in a case in which the purpose of an authorisation made under s 22 of RIPA was to obtain disclosure of the identity of a journalist's source. Accordingly the authorisations were not compatible with the Convention rights of the Complainants under Article 10.

130. Applying s 6 of the HRA we decide that the Respondent did not act unlawfully in making the First, Second and Fourth Authorisations under s 22 of RIPA.

131. The Metropolitan Police cannot be criticised for its decision to use the power granted under s 22 of RIPA in aid of the investigation into a serious criminal offence affecting public confidence in the police. The discovery of serious misconduct by a number of police officers in the DPG shows that it was entirely right to pursue the Operation Alice investigation very thoroughly. We have held that the use of the s 22 power in this investigation was indeed both necessary and proportionate in respect of three out of the four authorisations challenged, but are compelled to hold that the legal regime in place at the relevant time did not adequately safeguard the important public interest in the right of a journalist to protect the identity of his source.

132. We will invite written submissions on remedy.