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Case Nos: IPT/15/602/CH, IPT/15/603 CH,
IPT/15/613/CH, IPT/16/263/CH,
IPT/16/264/CH, IPT/16/387/CH,

IN THE INVESTIGATORY POWERS TRIBUNAL

Sitting at
Employment Appeal Tribunal
Melville Street
Edinburgh EH3 7HF
On Friday July 22 2016

Date: 8 August 2016

Before:

MR JUSTICE BURTON (PRESIDENT)

SUSAN O'BRIEN QC

SIR RICHARD MCLAUGHLIN

Between:

(1) DAVID MORAN
(2) STEVEN ADAMS
(3) MR O
(4) MRS O
(5) GERARD GALLACHER
(6) MARJORIE GALLACHER

Complainants

- and -

POLICE SCOTLAND

Respondent

Craig Sandison QC (instructed by PBW Law) for the **First, Second, Third & Fourth Complainants**
Fifth & Sixth Complainants Litigants in Person
Jeremy Johnson QC (instructed by Legal Services Department, Police Scotland) for the **Respondent**

Hearing date: 22 July 2016

APPROVED JUDGMENT

Mr Justice Burton:

1. This is the judgment of the Tribunal.
2. Six Complainants, Gerard Gallacher, an ex-police officer and now a journalist, and his wife, Mrs Marjorie Gallacher, Mr O, also an ex-police officer, and his wife Mrs O, and two serving police officers, David Moran and Steven Adams have brought proceedings before this Tribunal against Police Scotland, and this has been the remedies hearing.
3. These complaints arose out of the obtaining by the Respondent, Police Scotland, of four relevant authorisations under Part 1 Chapter 2 (Acquisition and Disclosure of Communications Data) (ss 21-25) of the Regulation of Investigatory Powers Act (RIPA), in circumstances which we shall describe. The Interception of Communications Commissioner, arising out of his scrutiny, pursuant to s.57 of RIPA, of Police Scotland concluded, and wrote to the Complainants to notify them, that they may have been adversely affected by a contravention of RIPA and/or of the Acquisition of Data Communications Code of Practice. By paragraph 8.3 of the Code :-

“Should the Commissioner establish that an individual has been adversely affected by any wilful or reckless failure by any person within a relevant public authority exercising or complying with the powers and duties under RIPA in relation to the acquisition or disclosure of communications data, he shall, subject to safeguarding national security, inform the affected individual of the existence of the Tribunal and its role. The Commissioner should disclose sufficient information to the affected individual to enable them to engage the Tribunal effectively.”

4. Hence the applications to this Tribunal, by the four officers, or ex-officers, as the main Complainants, and by the wives of two of them who are entitled to complain of the collateral interference with their privacy in respect of the

telephone lines which they also used. The circumstances which led to the RIPA authorisations can be summarised as follows from the history provided by Mr Gallacher.

5. On 5 April 2005 a 27 year old Glasgow woman, Emma Caldwell, disappeared, last seen leaving a hostel. Her parents reported her to the police as missing several days later. Her naked body was discovered by a dogwalker, in woods at a remote location 40 miles from Glasgow, some six weeks later. Her most likely cause of death, following a post-mortem examination, was given as manual strangulation. The then Strathclyde Police was responsible for the ensuing murder inquiry.
6. The inquiry, which received nationwide publicity, ran for over 30 months: approximately 100 officers were involved in the investigation, some 8000 interviews were conducted, extensive covert techniques were utilised including intrusive and conventional surveillance, and the deployment of both English and German undercover officers, at a cost which Mr Gallacher suggests to have been over £4 million, said to have been the most expensive murder inquiry in Scottish history.
7. Eventually on 31 August 2007, four Turkish immigrants were detained, interviewed, arrested and charged with the murder of Emma Caldwell. They appeared in court and were remanded in custody. They remained in custody until December 2007, when the Prosecution concluded that there was insufficient evidence to proceed to trial. A story was circulated that the case had collapsed due to mistakes made by a Scottish officer, born in Turkey, in

the translation of covertly obtained audio tapes; the content of these tapes had allegedly been crucial to the Crown case, due to their incriminating content.

8. The family of Emma Caldwell was led to believe that the reason why the Crown could not continue proceedings was that mistakes had supposedly been made in translating the covert tapes. They were assured that should further evidence emerge then proceedings could be re-instigated. No further inquiries were carried out, and the inquiry languished.

9. In 2013 Mr Gallacher learned that officers who had worked on the murder inquiry were said to have serious concerns over the handling of it. This led him to conduct his own reexamination, which is accepted by the Respondent to have been a journalistic investigation, which lasted for some 18 months. His investigations revealed the existence of a Scottish male, who had been interviewed by Strathclyde Police (now absorbed by Police Scotland) on six occasions during the murder inquiry, who, when interviewed on the last occasion, led detectives to within 70 yards of the site where Emma Caldwell's remains had been discovered. According to Mr Gallacher, this individual admitted during a police interview to having discovered the isolated location while out driving with Emma, seeking a place to indulge his predilection for naked outdoor sex. He is further said to have admitted driving the 40 miles to this location with Emma on another five or six occasions. Mr Gallacher's account is that the detectives conducting the interviews with him formed the opinion that he was the murderer, to such an extent that they contacted the Senior Investigating Officer to inform him of their suspicions, and of the

suspect's admissions, notwithstanding which the officers are said to have been instructed to cease any further interrogation and to release the suspect.

10. This final interview of this suspect took place in March 2007, some 7 months prior to the arrest and charging of the Turks. Following his release, no further enquiries were conducted as to this suspect. The family of the deceased was never made aware of his existence.
11. At the conclusion of his investigation, Mr Gallacher contacted the Editor of the Scottish Sunday Mail, which published articles revealing this "*Forgotten Suspect*", on the 5, 12 and 19 April 2015. Very shortly after these articles, and, as Mr Gallacher believes, as a result of them, the Scottish Crown Office instructed the Respondent to reopen the inquiry into the murder of Emma Caldwell.
12. According to the Report from the Interception of Communications Commissioner's Office (IOCCO), which led to the subsequent notification to the Complainants, it was on 7 April 2015, just after the first article in the Sunday Mail, that a covert criminal investigation was commenced by the Counter Corruption Unit (CCU) of the Respondent, in an effort to identify serving police officers, police staff and ex- employees who may have made unauthorised disclosure of sensitive/restricted information that appeared in the articles.
13. The Report records that the applications led to the acquisition of 9 subscriber data sets and 32 days worth of communications traffic data. The data was reviewed and considered during the CCU investigation, but in the event no direct action followed.

14. There were 4 relevant authorisations seeking and obtaining communications data in respect of (1) Messrs Gallacher, Moran and O, (2) Messrs O and Adams, and then a further two in respect of Mr Gallacher: the first three were authorised by Detective Superintendent Donaldson and the fourth by Detective Inspector Grant. The applications recorded (inter alia) that Mr Gallacher was known to be conducting a private enquiry into the unsolved murders of prostitutes in the Glasgow area as research for a forthcoming book of which he was to be the author, and that *“the CCU investigation strongly assesses at this time that Gerard Gallacher is being provided with information from persons who fit the ... criteria [of being an officer who worked directly on the investigation, or with access to police systems containing information about the investigation] which is thereafter being passed to journalists involved.”*
15. The IOCCO Report concluded, and it is clearly the case (and not now denied by the Respondent) that *“the clear purpose of these applications was to determine either a journalist source or the communications of those suspected to have been acting as intermediaries between a journalist and a suspected source. This purpose was clear on the face of the applications.”*
16. There are in any event requirements which must be complied with by those compiling, making and granting application for the acquisition and disclosure of communications data pursuant to ss21-25 of RIPA and the Code, and this Tribunal addressed them in **News Group Newspapers Ltd v Metropolitan Police Commissioner** [2016] 2 AER 483. In addition (and not relevant in **News Group**, because the applications being considered in that case antedated the new Code which introduced the additional requirement), the 2015 Code

introduces a new requirement that, if what is sought is communications data in order to determine either a journalist source or the communications of those suspected to have been acting as intermediaries between a journalist and a suspected source, judicial pre-approval must be obtained. It was no longer therefore legitimate in such circumstances to use the provisions of RIPA, since it was now necessary to follow the judicial approval route. This new Code, which applied in Scotland, came into force on 25 March 2015.

17. On 24 February 2015 an email was sent by Detective Superintendent Brenda Smith (the senior responsible officer for RIPA within the Respondent) to various senior officers, drawing attention to the amendment made to s.71 of RIPA by s.83 of the Serious Crime Act 2015, which introduced into the new Code of Practice the specific provision to protect the public interest in the confidentiality of journalistic sources. She drew attention to the fact that “*law enforcement agencies in Scotland must use the appropriate legislation to ensure judicial authorisation for communications data applications to determine journalistic sources*”, a direct quotation from para 3.78 of the new Code.
18. The applications the subject matter of these complaints were all issued thereafter, and did not follow that course pursuant to the new Code now introduced; but followed the RIPA route, without judicial pre-approval. The IOCCO Report also identified a substantial number of areas in which the applications failed to comply with RIPA and the Code, but of course, in particular, the failure to comply with the judicial authorisation provision of the new Code.

19. After receiving notification from IOCCO, the Complainants brought proceedings before this Tribunal, and the Respondent very speedily conceded that it had acted unlawfully, and formally stated that it would not be defending the Complainants' applications. The hearing before us in Edinburgh was fixed as the remedy hearing. We had the benefit of persuasive and helpful submissions from Mr Gallacher on behalf of himself and his wife, Mr Sandison QC on behalf of the other Complainants and Mr Johnson QC on behalf of the Respondent.

20. It was clear to the Tribunal that it was not sufficient simply to rely on the concession by the Respondent, but that it was necessary for there to be, over and above the history we have set out above, a stratum of facts. The following facts have been discussed between Counsel for the parties as facts forming the basis of this determination, by reference to the contents of Mr Moran's submissions, prepared as we understand it by Professor Watson of PBW Law on his behalf, and insofar as there are minor disagreements we have resolved them. We recite them below, and a Schedule to this judgment contains the slightly different set of facts relevant to Messrs O and Adams. All the facts are also relevant to consideration of the position of Mr Gallacher. They are as follows:-
 - (a) On 7 April 2015 the Respondent determined to have its CCU attempt to identify any of its current or former officers who might have been involved in the disclosure of the information that had appeared in the press about the Emma Caldwell matter. This was not a case of the Respondent investigating some matter in which it had no interest of its own.

- (b) The Respondent made no sufficient attempt to assess the proportionality in all the circumstances of seeking to access communications data in support of that enquiry.
- (c) The Respondent had no coherent view as to what, if any, crime might have been committed by any person. It nonetheless determined to seek to acquire the communications data it desired by using s.22(2)(b) of RIPA.
- (d) The Respondent had no intelligence case suggesting that the Claimant was involved in the disclosure of material to Mr Gallacher, not even that he had access to the material thought to have been disclosed. It nonetheless resolved to seek to acquire his communications data.
- (e) The Respondent, and in particular its CCU, had been made aware by its own RIPA SRO in February 2015 of the relevant content of the new Code which was to come into force the following month.
- (f) Mr Donaldson, one of the Respondent's Designated Persons for the purposes of s.22(2)(b) of RIPA, had been made fully aware of the relevant content of the Code as recently as 7 April 2015.
- (g) Mr Donaldson was, according to IOCCO, "a knowledgeable and experienced officer".
- (h) Consistently with that description, he recalled having been made aware of the relevant content of the Code when approached for advice by Mr Stitt of the CCU as to a prospective application for the acquisition of communications data on 16 April, and provided that content, and relative advice, to Mr Stitt.

- (i) The Head of the Respondent's CCU was approached by Ms Smith, the RIPA SRO, on 16 April, she having been made aware that Mr Donaldson had been approached in relation to the acquisition of material which might attract the relevant provisions of the Code, and was told by him that the matter was under consideration and she would be reverted to for further advice.
- (j) She was not reverted to before any of the applications was authorised and implemented.
- (k) Mr Donaldson sought and received accurate advice from the CIU SPoC as to the ambit of the Code during the afternoon of 16 April.
- (l) He sought clarification of the application of that advice to circumstances in which the investigation was aware of the likely source of information, and received (the correct) advice that that made no difference to the application of the Code.
- (m) The clear purpose of the application relating to the Claimant which Mr Donaldson approved was to determine a journalist's source or the communications of those suspected to have been acting as intermediaries between a journalist and a suspected source.
- (n) He did not acknowledge any of the obvious deficiencies present in the application, in particular in relation to its necessity and proportionality.
- (o) He did not acknowledge that his involvement in advising how applications relating to the same enquiry should be worded and presented rendered him other than independent of the enquiry for the purposes of the Code.

(p) Without known reference to any other advice, Mr Donaldson approved the application for the acquisition of the Claimant's communication data on 17 April.

21. The IOCCO Report concluded that the Commissioner had "*found no evidence suggesting that there has been an intentional act by any employee of Police Scotland to avoid the requirements of RIPA or the Code.*" However it determined that the failures could be described as "*reckless*" within the provisions of para 8.3 of the Code, and hence the Commissioner disclosed matters to the Complainants as affected individuals. All the Complainants submit, in the words of the Submissions of Messrs Moran, Adams and O, that, on the basis of the agreed facts set out above, "*a clear and very strong inference arises that the Respondent (in particular, but not exclusively, through Mr Donaldson) wilfully breached the terms of the Code.*"

22. Mr Sandison, on behalf of the Complainants whom he represents, did not pursue any claim for compensation for interference with their Article 8 rights (or Article 10, if, not themselves being journalists they have any), for which this hearing was primarily fixed, with the opportunities for each of the Complainants to make submissions, and if necessary give evidence as to the basis for any such compensation: such claim was abandoned. However he directed his submissions to the need for this Tribunal to grant an *effective remedy* (see e.g. **Kudla v Poland** 2002 35 EHRR 11) other than compensation. Mr and Mrs Gallacher have pursued their case for compensation, but otherwise associated themselves with Mr Sandison's arguments.

23. Mr Johnson submitted that:-

i) There is no case for compensation, in the light of the authorities of this Tribunal, and the Strasbourg authorities to which we have previously referred. He reminded us of our decisions in **Mr and Mrs B v Department for Social Development** IPT/09/11/C, **Chatwani and Ors v National Crime Agency** [2015] UKIPTrib 15_84_88 and the remedy decision in **News Group Newspapers** [2016] UKIPTRib 14_176, in which we made reference to a number of relevant authorities, and he also referred us to the small awards in **Ernst v Belgium** [2004] 39 EHRR 35.

ii) Judgment for a declaration that the obtaining of the Complainants' communications data was unlawful, as being contrary to s.6 of the Human Rights Act 1998, as read with Article 8 and 10 of the European Convention on Human Rights, with consequent judgment for the Complainants, and an order that the authorisations in each of the Complainant's cases be quashed, was an effective remedy, and would "*afford just satisfaction*": it is clearly no small thing that there would be a public declaration that Police Scotland had acted unlawfully. In addition, the Respondent would either destroy all the data obtained as a result of the authorisations, or, insofar as further complaints or proceedings are to continue, retain them in safe custody for such purpose and delete them on subsequent written request.

24. Mr Sandison put his case on the following two bases, in order of priority:-

i) The only way for this Tribunal to give an effective remedy for the Complainants is to hold its own hearing to resolve the question of whether the conduct of the Respondent was wilful or reckless, and to make full findings as to what occurred.

ii) Alternatively in any case it would not be sufficient for the Complainants to be left only with the complaints that have presently been made by them to Police Scotland (which have been adjourned or stayed pending this hearing). Particularly as Police Scotland is now all one body, even if at the time when Mr Gallacher had been investigating only Strathclyde Police was involved, the Complainants cannot be confident of an independent inquiry. There is a remedy available after such an inquiry, of a complaint to the Police Investigations & Review Commissioner (“PIRC”), but this, he submits, would be limited to an investigation by the PIRC as to how the complaints had been handled by Police Scotland (s35 of the Police Public Order and Criminal Justice (Scotland) Act 2006 as amended (the 2006 Act)), which, he submitted, would not enable the complaints to be reinvestigated; although the public website of the PIRC represents that on a review “*the Commissioner will then examine all the evidence and reach a view whether the complaint was dealt with to a reasonable standard*” and by s 35(7) and (11) the PIRC can require reconsideration, and, if so ordered, under her supervision. Given that the PIRC does not, on the face of it, have an originating jurisdiction, although she can, by s.33A(d) of the 2006 Act, “*investigate other matters relating to the Authority or the Police Service where the Commissioner considers that it would be in the public interest to do so*”, Mr Sandison submitted that if the Tribunal was not able or willing to carry out its own enquiry then it should make an order directing the PIRC to carry out such an investigation. This, he submitted, was within the power of the Tribunal pursuant to s.67(7) of RIPA which reads:-

“... The Tribunal on determining any proceedings, complaint or reference shall have power to make any such award of compensation or other order as they think fit; and, without prejudice to the power to make rules under s.69(2)(h), the other orders that may be made by the Tribunal include-

- a) an order quashing or cancelling any warrant or authorisation; and*
- b) an order requiring the destruction of any records of information which –*
 - (i) has been obtained in exercise of any power conferred by a warrant or authorisation;*
 - (ii) is held by any public authority in relation to any person.”*

25. So far as his first submission is concerned, Mr Sandison contended that (as appears from s.67(7), which we have just recited) the powers of the Tribunal to give an effective remedy where there has been a breach of the Convention of Human Rights, is unfettered, and should extend to holding its own inquiry, in which the Complainants could call evidence and the Respondents would give their own evidence, and be capable of being cross-examined. The complaints which the Complainants have made to Police Scotland, and which have been stayed or adjourned pending the outcome of this hearing, will be no substitute for an inter partes court hearing. The Complainants do not accept the conclusion of IOCCO that the conduct of the Respondents was merely reckless and not wilful.

26. Mr Johnson submits that the jurisdiction of the Tribunal does not extend to holding a hearing when the matters that were to be investigated have been investigated, and the task for this Tribunal is, within s.65(2)(b), to *“consider and determine any complaints made”* to us, which we are hereby doing.

27. We are not persuaded that in order to grant the Claimants an effective remedy they require or are entitled in these circumstances to the holding of a full factual hearing before this Tribunal:-
- i) The question of whether the conduct of the Respondents was wilful or reckless is not relevant to this Tribunal. It was necessary for the Commissioner, in order for him to reach such a conclusion before the hurdle or trigger was met, by which IOCCO was obliged to notify the Complainants. The task for this Tribunal is to conclude whether there have been unlawful acts by the Respondents.
 - ii) The fact that IOCCO has itself carried out an investigation is relevant, not least because this Tribunal does have power under s.68(2) to require the Commissioner to provide the Tribunal with all such assistance as the Tribunal thinks fit (including that Commissioner's opinion as to any issue falling to be determined by the Tribunal). But in any event the Complainants, who are not content with the limited conclusion by IOCCO, are not prevented from pursuing their complaints, e.g. within the Police Scotland complaints system, to which we shall refer further below.
 - iii) Mr Sandison's submission is that the Tribunal should nevertheless proceed with a factual hearing, notwithstanding that the Tribunal is in the position, not least in the light of the facts set out in paragraph 20 above, to make, without further evidence or examination, a determination as to the unlawful conduct of the Respondent. This, in our judgment, is as unrealistic as it would be in the High Court if, after the bringing of a claim by a claimant, the defendant conceded the case and admitted liability. The claimant would in that case, as

the Complainants have in this case, have succeeded. No further examination by the Tribunal is required. Our conclusion is that the Respondent acted unlawfully and in breach of the Code; and the Respondent is a public body, liable for the acts and omissions of its officers.

28. We turn to Mr Sandison's alternative submission, and consider it in the context of whether the Complainants will have an effective remedy by pursuing their complaints to the body which will in fact be best placed to hear their complaints, once this Tribunal has decided that the Respondents behaved unlawfully. If the Complainants wish to achieve a result, in the context of the police authority itself, then it seems to us that that is where an effective remedy can and does lie. As to the suggestion that this Tribunal could direct the PIRC to carry out an investigation, whatever the breadth of the orders that we might be able to consider as falling within s.67, we are satisfied that they do not extend to directing the PIRC, who has an express power, which she can exercise at her own discretion "*where the Commissioner considers that it would be in the public interest to do so*", to fetter that discretion, and carry out an investigation because this Tribunal thinks she ought to.

29. The Tribunal is however satisfied that there are powers that we have, pursuant to s.67(7), which can facilitate an effective remedy in relation to the carrying out of an inquiry by the body which does have a further role to play in relation to conduct by the Respondent which we have found to be unlawful. Mr Johnson has agreed to undertake (because his instructions are that it would occur anyway) on behalf of the Respondent that there will be a reasoned decision from Police Scotland on the determination of the investigation.

That is one concern which the Complainants understandably have, which this Tribunal can thus resolve. The other is a concern or a belief that the inquiry will not be carried out by an independent person. We have indicated, and although Mr Johnson was not in a position to agree (there being no previous precedent since unification of Scotland's police forces) he did not vigorously oppose, that we will direct that the inquiry be held by an appropriately senior officer (and by this we mean someone who will have sufficient seniority to be in a position to reach decisions about the conduct of inter alios Superintendents within Police Scotland) from another police force in the United Kingdom other than Scotland, and without any previous relevant connection with Police Scotland. If for some reason the inquiry were flawed, there is then the route to the PIRC under s35 of the 2006 Act.

30. That is an effective remedy.
31. The other matter in relation to which the Tribunal has been minded to make an order, which was met with cooperation by Mr Johnson, is that not only should there be the promised destruction (or secure retention until later destruction) of the authorisations themselves, but that there should be suitable deletions or emendations to the personnel records of the police officers to reflect the decision made by this Tribunal. We understand that since the hearing ongoing discussions are taking place in this regard.
32. We turn finally to the question of compensation which, as we have said, only Mr and Mrs Gallacher now claim. The authorities to which we have referred above indicate that the quantum of compensation will not be large, and that economic loss would ordinarily require to be proved, and medical conditions

said to have resulted from the breach would normally be expected to be established by reference to medical evidence. It also goes without saying that the Tribunal must be satisfied that the stress or other consequences said to have flowed have really flowed from the breaches, as opposed to, for example, irritation or aggravation such as perhaps Mrs Gallacher is referring to when she refers to the trouble and stress brought upon her and her family, which does not appear to us to arise out of the bugging of her phone (rather than her concern about her husband). The interference with Mr Gallacher's Article 10 rights is of course serious in respect of the obtaining of more than 32 days of communications data (Mr Gallacher submits 90), but then, as Mr Johnson points out, the protection of a journalist's Article 10 rights is, as Laws LJ said in **R (Miranda) v Secretary of State for the Home Department** [2014] 1 WLR 3140, not a "*heightened protection for his own sake but only for the sake of his readers or his audience*". We must finally bear in mind that within the terms of s.8(4) of the Human Rights Act 1998 an award of damages or compensation must be "necessary to afford just satisfaction to the person in whose favour it is made" (our underlining).

33. Mr Gallacher was a persuasive advocate before us, and put before us orally and in writing his case as to the invasion of privacy, familial strife, personal stress and strain and loss of long-standing friendships which he alleged to result from the Respondents' unlawful acts. Nevertheless the circumstances of this case are, as Mr Johnson has pointed out by reference to other cases, a long way from the more serious breaches of Articles 8 and 10 which have merited substantial awards. We are however persuaded that there is likely to be some, as Mr Gallacher calls it, "*stultification of earning potential*", and he referred

to three stories which he had begun to research and which had what he calls “*tangential earning capacity*”. It is to be hoped that in fact his active participation in the disclosure of matters relating to the Caldwell murder, together with his robust defence of himself in these proceedings, will not lead to any material loss. But we propose, notwithstanding the absence of any detailed financial evidence, to reflect the stress he has suffered and his loss of earning capacity by an award of £10,000.

34. Consistent with the authorities to which we have referred, we consider in relation to Mrs Gallacher, as we did with regard to the Fourth Claimant in Newsgroup, that an award of compensation was not “*necessary to afford just satisfaction*”, and that just satisfaction is provided in her case by the declaration we make as to the infringement of her rights.

SCHEDULE (see paragraph 20)

(1) STATEMENT OF FACTS IN RESPECT OF STEVEN ADAMS

- (a) On 7 April 2015 the Respondent determined to have its CCU attempt to identify any of its current or former officers who might have been involved in the disclosure of the information that had appeared in the press about the Emma Caldwell matter. This was not a case of the Respondent investigating some matter in which it had no interest of its own.
- (b) The Respondent made no sufficient attempt to assess the proportionality in all the circumstances of seeking to access communications data in support of that enquiry.

- (c) The Respondent had no coherent view as to what, if any, crime might have been committed by any person. It nonetheless determined to seek to acquire the communications data it desired by using s.22(2)(b) of RIPA.
- (d) The Respondent had no colourable intelligence case suggesting that the Claimant was involved in the direct or indirect disclosure of material to any journalist, not even that he had access to the material thought to have been disclosed. It nonetheless resolved to seek to acquire his communications data.
- (e) The Respondent, and in particular its CCU, had been made aware by its own RIPA SRO in February 2015 of the relevant content of the new Code which was to come into force the following month.
- (f) Mr Donaldson, one of the Respondent's Designated Persons for the purposes of s.22(2)(b) of RIPA, had been made fully aware of the relevant content of the Code as recently as 7 April 2015.
- (g) Mr Donaldson was, according to the IoCC, "a knowledgeable and experienced officer".
- (h) Consistently with that description, he recalled having been made aware of the relevant content of the Code when approached for advice by Mr Stitt of the CCU as to a prospective application for the acquisition of communications data on 16 April, and provided that content, and relative advice, to Mr Stitt.
- (i) The Head of the Respondent's CCU was approached by Ms Smith, the RIPA SRO, on 16 April, she having been made aware that Mr Donaldson had been approached in relation to the acquisition of material which might attract the relevant provisions of the Code, and was told by him that the matter was under consideration and she would be reverted to for further advice.
- (j) She was not reverted to before any of the applications was authorised and implemented.

- (k) Mr Donaldson sought and received accurate advice from the CIU SPoC as to the ambit of the Code during the afternoon of 16 April.
- (l) He sought clarification of the application of that advice to circumstances in which the investigation was aware of the likely source of information, and received (the correct) advice that that made no difference to the application of the Code.
- (m) The clear purpose of the application relating to the Claimant which Mr Donaldson approved was to determine a journalist's source or the communications of those suspected to have been acting as intermediaries between a journalist and a suspected source.
- (n) He did not acknowledge any of the obvious deficiencies present in the application, in particular in relation to its necessity and proportionality.
- (o) He did not acknowledge that his involvement in advising how applications relating to the same enquiry should be worded and presented rendered him other than independent of the enquiry for the purposes of the Code.
- (p) Without known reference to any other advice, Mr Donaldson approved the application for the acquisition of the Claimant's communication data on 22 April.

(2) STATEMENT OF FACTS IN RESPECT OF MR "O"

- (a) On 7 April 2015 the Respondent determined to have its CCU attempt to identify any of its current or former officers who might have been involved in the disclosure of the information that had appeared in the press about the Emma Caldwell matter. This was not a case of the Respondent investigating some matter in which it had no interest of its own.

- (b) The Respondent made no sufficient attempt to assess the proportionality in all the circumstances of seeking to access communications data in support of that enquiry.
- (c) The Respondent had no coherent view as to what, if any, crime might have been committed by any person. It nonetheless determined to seek to acquire the communications data it desired by using s.22(2)(b) of RIPA.
- (d) The Respondent had no colourable intelligence case suggesting that the Claimant was involved in the direct or indirect disclosure of material to any journalist. It nonetheless resolved to seek to acquire his communications data.
- (e) The Respondent, and in particular its CCU, had been made aware of the relevant content of the new Code by its own RIPA SRO in February 2015.
- (f) Mr Donaldson, one of the Respondent's Designated Persons for the purposes of s.22(2)(b) of RIPA, had been made fully aware of the relevant content of the Code as recently as 7 April 2015.
- (g) Mr Donaldson was, according to the IoCC, "a knowledgeable and experienced officer".
- (h) Consistently with that description, he recalled having been made aware of the relevant content of the Code when approached for advice by Mr Stitt of the CCU as to a prospective application for the acquisition of communications data on 16 April, and provided that content, and relative advice, to Mr Stitt.
- (i) The Head of the Respondent's CCU was approached by Ms Smith, the RIPA SRO, on 16 April, she having been made aware that Mr Donaldson had been approached in relation to the acquisition of material which might attract the relevant provisions of the Code, and was told by him that the matter was under consideration and she would be reverted to for further advice.

- (j) She was not reverted to before any of the applications was authorised and implemented.
- (k) Mr Donaldson sought and received accurate advice from the CIU SPoC as to the ambit of the Code during the afternoon of 16 April.
- (l) He sought clarification of the application of that advice to circumstances in which the investigation was aware of the likely source of information, and received (the correct) advice that that made no difference to the application of the Code.
- (m) The clear purpose of the application relating to the Claimant which Mr Donaldson approved was to determine a journalist's source or the communications of those suspected to have been acting as intermediaries between a journalist and a suspected source.
- (n) He did not acknowledge any of the obvious deficiencies present in the application, in particular in relation to its necessity and proportionality.
- (o) He did not acknowledge that his involvement in advising how applications relating to the same enquiry should be worded and presented rendered him other than independent of the enquiry for the purposes of the Code.
- (p) Without known reference to any other advice, Mr Donaldson approved applications for the acquisition of the Claimant's communication data on 17 and 22 April.