Case No: IPT/15/586/CH

IPT/16/448/CH

IPT/17/18,19,21&41/CH

# IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 9th August 2017

Before:

**THE PRESIDENT (SIR MICHAEL BURTON)**

**MR JUSTICE EDIS**

**MR CHARLES FLINT QC**

**PROFESSOR GRAHAM ZELLICK CBE QC**

**SIR RICHARD McLAUGHLIN**

**BETWEEN**

(1) MARK DIAS

(2) STEPHEN MATTHEWS

(3) JULIA BREEN

(4) GRAEME HETHERINGTON

(5) ALAN SAMUELS

(6) ABDUL SHAKEEL

**Claimants**

- and –

THE CHIEF CONSTABLE OF CLEVELAND POLICE

**Respondent**

- - - - - - - - - - - - - - - - - - - -

APPROVED JUDGMENT

- - - - - - - - - - - - - - - - - - - -

1. On 31st January 2017 the Tribunal handed down its reserved decision on the applications of the First and Second Claimants ("the first judgment") and quashed the first and second Communications Data Authorisations (CDA) made by the Respondent in this case and declared that the fourth, fifth and seventh were also unlawful, see [35]. This judgment now deals with the issue of remedies in respect of the First and Second Claimants. It also addresses the claims of the Third, Fourth, Fifth and Sixth Claimants which have been issued since the first judgment and which arise out of the same facts.

2. The Tribunal has dealt with this stage of the proceedings brought by the First and Second Claimants and with the new claims in their entirety on the basis of written submissions submitted by counsel or solicitors. We have received some new evidence which we will describe below and considered all this material without a hearing. This was as a result of a variation of the directions given in the IPT Order of 6th February 2017 which directed a hearing. It appeared that the issues were such that no hearing was necessary and fresh directions given accordingly. We now give our decision.

3. The first judgment is in the public domain and we proceed on the basis of the facts and findings there set out without repeating them. It is only necessary to set out some material relevant to the claims of the Third-Sixth Claimants and to deal with events since the hearing which preceded the first judgment.

**The New Claims**

4. The Third Claimant is a journalist, as is the Fourth Claimant. They were referred to as Ms. B and Mr. H in the first judgment. The Fifth Claimant is a solicitor who was referred to as Mr. S in the first judgment. His firm (he was then with Russell Jones & Walker) acted frequently on behalf of the Police Federation. Their involvement is fully described in paragraphs [9]-[12] of the first judgment. The Sixth Claimant is a former Sergeant with the

Respondent police force who by May 2012 was a private investigator. His situation is not described in the first judgment at all. Certain conduct by him was revealed to the police by the communications data secured under the 5 CDAs which the Tribunal has held were unlawful and a further CDA was granted in respect of his data for a 4 day period as part of the investigation into the Interim Equality Report. It is unnecessary for the purposes of this judgment to identify that conduct in detail and to do so would further widen the breach of his right to privacy in his professional life. It follows that the CDA in his case was also unlawful for the same reasons given in the first judgment. This only came to light because he made a subject access request under the Data Protection Act 1998 on 23rd February 2017 which revealed a further CDA in relation to his communications data which had been granted at the time of the original investigation but which had not been disclosed prior to that date. This disclosure failure by the Respondent is a matter of concern and we will return to it.

**Events since the hearing before the IPT**

5. The First Claimant supplied a Skeleton Argument on Remedy drafted by Mr. Aaron Rathmell, counsel on his behalf, and dated the 27th February 2017. He seeks an order for compensation and for destruction of documents unlawfully obtained by the Respondent. Mr. Rathmell informs the Tribunal that the First Claimant intends to bring other claims in relation to events touched on in these proceedings which, if successful would have the potential to result in an award of damages. It casts doubt on whether the Respondent has disclosed all the CDAs which were granted and whether the Tribunal has been misled in this regard. A few days before the date of these submissions documents had been disclosed by the Respondent, in circumstances we describe below, which are not referred to in them, but which will no doubt have reinforced that doubt.

6. **Disclosure Failure 1: 22nd February 2017**. On this date a further document was disclosed to the first five Claimants. It referred to "data received from this request on 4/05/2012" which is odd because the first CDA of which we know was dated 17th May 2012. The document concerns the "trigger emails" dealt with at paragraph 12(x) of the first judgment. The only new information it contains is the suggestion that data had been received from a request before the first CDA had been granted.

7. **Disclosure Failure 2: 24th February 2017**. This failure is described in a witness statement by Iain Spittal, the Chief Constable of Cleveland dated 26th May 2017. He joined Cleveland Police on 24th June 2013 and served a period as temporary Chief Constable between 26th December 2015 and 7th July 2016 before being appointed to that substantive rank at the end of that time. He says that he first became aware of specific issues in relation to the use of RIPA powers to access the First Claimant's communications data on

27th October 2015, and subsequently was notified of the First Claimant's complaint to the Tribunal. He appointed the Deputy Chief Constable to take responsibility for dealing with that complaint between 20th January 2016 and 1st March 2017 and took personal responsibility when the outcome of the proceedings was published in the first judgment. He explains how the Respondent came to disclose nine applications for CDAs to the Tribunal on 16th March 2016, and how it failed to disclose the tenth, that concerning the Sixth Claimant, to which we have already referred. It appears that Detective Constable Donovan who was appointed to investigate the position when the Tribunal proceedings assumed that an earlier investigation had included a search of a system called Pegasus when it had not. He therefore believed that all connected CDAs had been supplied to him when that was not the case. He therefore supplied false information to the Respondent's Head of Legal Services (Ms. Hatton), but did not intend to do so. There was a document in the possession of the legal team which referred to this further CDA. More thorough work on their part prior to the December hearing before the Tribunal would have revealed it. When that search was finally done a further five draft applications were identified and disclosed. The Respondent therefore failed to comply with its disclosure obligation to the Tribunal until after the first judgment. Mr. Spittal apologises to the Tribunal, its President and the Claimants for the fact that they have been placed in this unfortunate and avoidable situation. He sets out various steps which he has taken to ensure that disclosure is now complete, including a physical search of all storage areas of the Professional Standards Department by a Police Search Adviser (PolSA) led team which was 70% complete at the date of his witness statement. It had not produced anything of relevance. The Tribunal has now been informed that this search is now complete and has produced nothing which is of relevance.

8. On 1st March 2017 the Second Claimant submitted submissions by Mr. Hugh Tomlinson, Q.C. in which he seeks an order for compensation and destruction of the documents and records containing any information obtained as a result of the CDAs, and an order for costs. He also sought an order for a further witness statement which was prompted by Disclosure Failures 1 and 2 and which was granted by a direction from the Tribunal dated 20th March 2017. This is what resulted in the witness statement of Mr. Spittal summarised at [7] above.

9. On 7th March 2017 the Respondent submitted his written submissions on remedy drafted by Mr. Matthew Holdcroft, counsel. It records that the Respondent has agreed to destroy all of the data recovered as a result of the authorisations and submits that no award of compensation or costs should be made. It refers to letters of apology written by the Chief Constable to the first five Claimants on 22nd December 2016, and to the fact that he has

met the first two Claimants on two occasions. He has instructed Weightmans, a firm of solicitors, to carry out a review of all Cleveland Police's applications for authorisations under s.22 of RIPA since 1st January 2011 and undertakes to publish its results. He has also commissioned a review of the Cleveland Police Professional Standards Department. Mr. Holdcroft attaches two pre-action letters dated 28th April 2016 in which the First and Second Claimants intimate their intention to bring legal proceedings. Both letters refer to the investigations into leaks involving the Northern Echo and the facts of these complaints are therefore an important part of the factual background to these proposed proceedings.

10. **The submissions of Claimants on 30th June 2017.** At this stage these documents are dealt with to explain what issues remain live. The submissions on law will be dealt with below comprehensively since the legal principles on which the Tribunal should act are clear and agreed except in one respect which will become apparent. The facts relevant to what order in just satisfaction is necessary will also be briefly summarised later in the judgment:-

    a. By supplemental submissions Mr. Rathmell informs the Tribunal that the Respondent and the First Claimant have entered into an ADR process in respect of his proposed claims in the Employment Tribunal and the High Court. This process has not yet reached any conclusion, but it does indicate that the Respondent has begun to negotiate with the First Claimant.

    b. The Second Claimant supplied further submissions by Mr. Hugh Tomlinson, Q.C.. He relies on the failure of Mr. Spittal to explain clearly what has happened to the data and how it was used as being relevant to remedy. He advances further submissions in support of the application for compensation, destruction and costs.

    c. The Third and Fourth Claimants submitted submissions drafted by Mr. Scott Taylor of Taylor Law. They also seek an award of compensation and destruction, and rely on the First Disclosure Failure which they say is an issue of concern which has not been addressed.

    d. The Fifth Claimant supplied submissions on remedy drafted by Taylor Law. He seeks further disclosure and a further witness statement covering a wide range of matters, and claims an award of compensation and costs.

    e. The Sixth Claimant submitted submissions drafted by Mr. Scott Taylor of Taylor Law. He seeks an award of compensation and costs, and an order that the Respondent should confirm that all disclosure has been supplied. He adopts the submissions of Mr. Tomlinson QC.

11. On 17th July 2017 the Respondent submitted some further submissions by counsel. This confirms that the Respondent will disclose any documents revealed by the PolSA search and that it is expected that it will conclude imminently. A submission is made that because the material obtained was communications data which did not involve the content of the communications no violation of Legal Professional Privilege or journalistic privilege could be involved in the CDAs relating to the Third and Fourth, and Fifth Claimants. It is pointed out that the Third and Fourth Claimants (who complain of damage by publicity of the intrusion into their privacy) were not named in the proceedings but have themselves published material about it after the hearing in their own names. The Third Claimant published an article before the hearing naming both her and the Fourth Claimant.

**Disclosure Applications**

12. The Tribunal has considered whether to make any further order for disclosure or any further witness statement. The suspicion which attaches to the Respondent's conduct of the proceedings is soundly based, given the First and Second Disclosure failures and the deeply unsatisfactory series of events described in [12(iv)] and [25]-[28] of the first judgment. The Respondent defended these proceedings in part in reliance on legal advice which was never given. That assertion, made in evidence and in written submissions by counsel, was inconsistent with the documents. Having relied on legal advice in this way, the Respondent sought to resist disclosure of those documents, presumably hoping that the Tribunal would arrive at a false conclusion as to the facts. The resistance was unavailing because of the obvious waiver of privilege in the advice which had plainly occurred. The Tribunal finds this series of events very disappointing and it is hardly surprising that the Claimants are deeply suspicious of the reliability of assertions of fact contained in witness statements and written submissions.

13. It is, however, important to appreciate that the CDAs concerning the Third-Sixth Claimants will be quashed following the decision in the first judgment and that the live issues which remain concern remedy. We are not persuaded that any further procedural steps will have any impact on the order which we will make. The position is fairly clear and although it remains possible that there may be documents which would suggest that the intrusion was more wide-ranging than it presently appears, this is a speculative possibility largely fuelled by suspicion. Mr. Samuels submits that it might be relevant to remedy in his case if another solicitor was also subject to an unlawful RIPA CDA. We do not accept this as a proposition and, in any event, there is no reason to suppose that any other solicitor was involved in this way.

14. Further, the Tribunal has no evidence which would justify rejecting Mr. Spittal's witness statement. He has set out in detail the steps which he has taken to ensure that everything

which ought to be disclosed is disclosed and we are prepared to act on the basis that this is so.

15. A further reason for our acceptance of the evidence of Mr. Spittal on this question is that a consequence of the first judgment, see [36], is that the matter has been referred to the Police and Crime Commissioner for Cleveland, HM Inspector of Constabulary, the Independent Police Complaints Commission and the Interception of Communications Commissioner. The Tribunal takes this step in the expectation that it will have consequences. What those consequences are is for those different public bodies to decide. The likelihood of legal proceedings by some or all of the Claimants is also a relevant factor. In this situation, it would be a high risk strategy for the Respondent to seek to mislead the Tribunal and to fail to give the disclosure required. The Tribunal proceeds on the basis that it has all the disclosure required and if it transpires that this confidence is misplaced significant consequences may be expected to follow for those responsible.

16. In these circumstances, the Tribunal considers that it can resolve the issues which remain on the basis identified above and that further delay and procedural steps are not required.

**The Legal Principles**

17. Before considering the issue of compensation on the papers, the Tribunal circulated to the parties for their information a decision on remedy handed down on 19th July 2017 in *Andrew & Andrew v. Commissioner of Police of the Metropolis* IPT/390/16/CH, IPT/29/17/CH. That decision of the Tribunal (Mr. Charles Flint, Q.C., and Professor Graham Zellick, C.B.E, Q.C.) summarises at [19]-[25] the approach of the Tribunal to monetary awards of compensation in a way which we adopt. The Tribunal recorded and acted on a concession by counsel at [24] as to aggravated damages and we will examine this issue further below. Save for that question, the law is now well settled and does not benefit from constant repetition in slightly different language.

18. The principles may be further distilled (but not changed) for the purposes of explaining this decision as follows

    a. Damages will be awarded where such an award is necessary to achieve just satisfaction and where it is equitable and fair in the circumstances of the case.

    b. There are many cases before the Tribunal where just satisfaction is achieved by the investigation which the Tribunal carries out whereby the facts are established and a determination made as to the legality of the conduct under review. This is especially so where the outcome is a reasoned and published judgment in favour of the victim of the unlawful conduct. As we indicate at [15] above, such a decision is likely to result in other investigatory and regulatory bodies considering whether

they need to take action. Where appropriate, disciplinary, regulatory or criminal action against wrongdoers is a real form of just satisfaction, as is the knowledge that a public body has taken steps to prevent recurrence and to acknowledge the unlawfulness. *Liberty v. United Kingdom* (2009) 48 EHRR 1 at [77] establishes that it is lawful to regard the finding of violation as sufficient just satisfaction in many cases involving covert surveillance.

c. Compensation may be awarded where the loss or damage is pecuniary or non-pecuniary in the sense of those terms explained in the ECHR Practice Direction "Just Satisfaction Claims" issued by the President of the Court on 19th September 2016 ("the Practice Direction").

d. Where non-pecuniary damage can be clearly shown to have been caused by the unlawful conduct found by the Tribunal an award may be more readily made than where that is not so, but this is not a hard and fast rule. Medical evidence in support of a claim for psychiatric harm will be highly relevant when available, but there is no rule that it is required. There must be some causal relation between the infringement and the distress or injury.

e. Damages are awarded to compensate the victim and not to punish the Respondent. The seriousness of the infringement can be taken into account.

f. Investigatory powers may often be used, and abused, in circumstances where the victim of unlawfulness is already subjected to a stressful situation. The award of damages focusses not on the adverse effects of the whole situation, but only on the unlawfulness which has been found.

19. The single area where we wish to examine the law further relates to [18(e)] above. The prime sources of law are as follows:-

a. *R (Greenfield) v. SSHD* [2005] 1 WLR 675 per Lord Bingham at [19] acknowledges that damages for Article 6 violations are not required in order to encourage high standards of compliance by members states "although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official".

b. *R (Anufrijeva) v. London Borough of Southwark* [2003] EWCA Civ 1406 at [66]-[68] per Lord Woolf CJ refers to the willingness of the European Court to award "moral damages". The scale and manner of violation can be taken into account and, where the manner or way in which the violation took place is sufficiently serious, this may lead to an award of damages. The Law Commission had observed, in a phrase approved by Lord Woolf, that the ECtHR in awarding

damages took account of "a range of factors including the character and conduct of the parties, to an extent which is hitherto unknown in English law." This is what allows the scale and manner of the violation to be taken into account.

c. *The Practice Direction* at paragraph 9 says

"The purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting Party responsible. The Court has therefore, until now, considered it inappropriate to accept claims for damages with labels such as "punitive", "aggravated" or "exemplary".

This may reflect what the ECtHR said in *Wainwright v. United Kingdom* (2007) 44 EHRR 40 at [60]. That observation, like the Practice Direction is not reasoned. The Court simply refers in a footnote to paragraph 38 of *Akdivar v. Turkey* (1997) 23 EHRR 143. This does not illuminate the reasoning.

d. *Belhadj v. Security Service and Others* [2015] UKIPTrib 13-132H at [23] the Tribunal interpreted paragraph 9 of the Practice Direction as making it "plain" that "the manner of the Respondent's handling of the proceedings would not have been appropriate considerations in any event".

20. Lord Bingham and the Practice Direction therefore both say that the practice of the ECtHR is not to punish "member states" or "the Contracting Party Responsible". That is no doubt partly because an award of damages to an individual is not a useful method of changing the behaviour of a nation state, and partly because the signatories to the Convention are under Treaty Obligations which have their own enforcement mechanisms. Judgments of the ECtHR are enforced through complex arrangements via the Council of Ministers. The situation of the Tribunal is quite different. The United Kingdom will never be the Respondent. The Respondent will usually be a public body which has acted through identifiable individuals under the supervision of other identifiable individuals operating within a system which is designed to ensure that the law is observed. The Tribunal will, therefore, usually be dealing with the second situation identified by Lord Bingham where an award of damages may properly be used to encourage high standards of compliance. "Compliance" in this context, in our judgment, includes compliance with the requirements of the Tribunal when a complaint is being investigated and considered. Compliance with these requirements is one of the conditions on which powers which are within the jurisdiction of the Tribunal are conferred. The proceedings of the Tribunal are not akin to adversarial litigation but include an investigation by the Tribunal. A failure to co-operate with such an investigation by a responsible public body is a serious matter. The statutory

duty imposed by s.68(6) of the Regulation of Investigatory Powers Act 2000 makes this clear

> "(6) It shall be the duty of the persons specified in subsection (7) to disclose or provide to the Tribunal all such documents and information as the Tribunal may require for the purpose of enabling them–
>
> (a) to exercise the jurisdiction conferred on them by or under section 65; or
>
> (b) otherwise to exercise or perform any power or duty conferred or imposed on them by or under this Act.

21. In *Cyprus v. Turkey* (2014) 59 EHRR SE4 the ECtHR cited with approval at [56] the following passage from *Varnava v. Turkey* (2010) 50 EHRR 21, showing that the passages from Lord Bingham, Lord Woolf and the Law Commission cited above accurately state the position. The concurring opinion in *Cyprus v. Turkey* of Judge de Albuquerque joined by Judge Vucinic at Part III, OII-12 to OII-19 shows that the position even on punitive damages taken by the Practice Direction is not uncontroversial within the ECtHR.

> "In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned."

22. To an English lawyer, paragraph 9 of the Practice Direction reads somewhat oddly. Three types of damages are listed as if the words used to describe them were synonymous. In the case of two of them, "punitive" and "exemplary" this is right, but the third "aggravated" it is not. The reason given for excluding aggravated damages is that they are not compensatory but punitive. As a matter of English law this is simply wrong. Aggravated damages are compensatory. They are awarded where the conduct of the tortfeasor at the time of the commission of the tort and afterwards has increased the suffering of the victim of the tort. *Clerk & Lindsell on Tort* 21st Edition deals with this issue in the context of

defamation claims. The vindication of a reputation and the vindication of a convention right where reputational damage may be involved are not wholly different judicial exercises. It is perhaps instructive to see how English law has addressed the former question:-

> 22-221
> General damages may be aggravated by evidence of the circumstances of the publication, of the motives and conduct of the defendant and of the effect which it has actually produced. These aggravated damages, however, are still compensatory and should be distinguished from exemplary damages, the purpose of which is punitive. Aggravated damages are awarded for added injury to feelings and as such are not available to a corporate claimant. In *Rantzen v Mirror Group Newspapers*, the Court of Appeal stated that there is an "undoubted rule" that persistence by the defendant in a plea of justification or honest opinion may increase the damages awarded to the claimant, and robust cross-examination of the claimant where a plea of justification is persisted in may also serve to aggravate the damages. The proper defence of a libel action is not to be taken into account as an aggravating factor. In *Garcia v Associated Newspapers Ltd [2014] EWHC 3137 (QB)*, at [303] Dingemans J considered that the defence and cross-examination in the case were carried out fairly and properly and therefore did not award any aggravated damages: "Any other approach would be an impermissible interference with the vital right of the free press to defend itself, and would therefore be wrong.

More generally in relation to other areas, the same work says:-

> 28-133
> Where the manner of commission of the tort was such as to injure the claimant's proper feelings of dignity and pride, higher damages than would otherwise have been justified may be awarded. Such aggravated damages, as they are known, have been awarded for several different types of tort, but they have featured most typically in defamation cases and have already been considered in that context. From the defendant's point of view the award may appear to incorporate an element of punishment imposed by the court for his bad conduct, but the intention is rather to compensate the claimant for injury to his feelings and the amount payable should reflect this.

23. Aggravated but compensatory damages as so defined appear close in their concept to Lord Woolf's description of "moral damages" awarded by the ECtHR.

24. Further, it is important to recall that the Investigatory Powers Tribunal is essentially a costs free jurisdiction, unlike the European Court of Human Rights. There is no statutory power to award costs, and none appears in the Rules of the Tribunal. There is a plausible explanation for this. For obvious reasons claimants frequently do not know how strong their claim is when they issue it, and it is strongly in their private interest but also in the public interest that complaints to the Tribunal should not be deterred by the possibility of an adverse order for costs. The function of the Tribunal cannot be performed if no complaints are made. If no costs are to be awarded against a claimant then the same result should follow in respect of a respondent, or the "costs-free" jurisdiction would be skewed

in favour of the claimant. The position was affirmed in *Chatwani and others v. National Crime Agency* [2015] UKIPTrib 15-84-88-CH. Ironically, at a later stage of those proceedings an order for costs was made, but that was at a time when the Respondent repeatedly failed to comply with the Tribunal's orders and the Tribunal concluded that it had no other means of enforcement. It is clear that orders for costs will be highly unusual in this jurisdiction. Thus, where the conduct of a respondent in the proceedings can plausibly be said to have aggravated the injury to the victim the better way in which an acknowledgement of that fact can be made is by taking it into account in deciding whether to make an award of damages and, if so, at what level.

25. For all of these reasons the Tribunal concludes that the approach to damages should reflect the dicta of Lord Bingham and Lord Woolf CJ referred to above and that damages should reflect the seriousness of the violation and should take into account any additional misconduct after the violation which it finds has added to the compensatable injury sustained by the victim. In our judgment, *Belhadj* should not be understood as excluding this approach. No submissions about this issue appear to have been addressed to the Tribunal at that time, and the Tribunal decided not to award compensation on other grounds. We accept that the respondent's handling of the proceedings will not sound in damages unless it is found that it amounts to conduct which has increased the compensatable damage to the claimant. In English law damage of that kind is called aggravated damages. For the reasons we have explained we consider that the Practice Direction in its apparent sense should not be followed in this respect by this Tribunal. If that results in a different practice in the Tribunal from that in the ECtHR, that difference is justifiable by the different context in which the Tribunal functions. The relevant differences are those identified at [20] and [24] above. The Tribunal does not, however, read paragraph 9 of the Practice Direction as preventing an award of damages which includes aggravated damages as properly understood in English law. On the contrary, such an award reflects the principle which is that an award is made only when necessary to afford just satisfaction. Where a respondent has apologised, admitted fault to the Tribunal, and taken remedial steps to prevent recurrence, that conduct will have contributed substantially to just satisfaction. Where it has done none of those things, until fault is found by the Tribunal, and instead conducted the proceedings in a way which prolongs and adds to the injury inflicted by the unlawful conduct then an award of compensation is much more likely to be necessary.

26. The consequences of this approach will not be the same as if a costs order were made. The size of awards of damages for non-pecuniary losses in this jurisdiction is modest because they will always reflect the fact that the finding of a violation in this context is itself a very

substantial element of just satisfaction, for the reasons explained above. The conduct of the Respondent in the investigation and proceedings may tip the balance in favour of making an award and may lead to a somewhat greater award than otherwise would be the case but the sums awarded by the Tribunal will continue to reflect the approach of the ECtHR rather than the levels of damages awarded in domestic tort claims.

**The Claims**

27. The CDAs authorised the obtaining of communications data which is not as intrusive as the interception of communications in which messages are listened to. However, it is material from which very strong inferences as to content can sometimes be drawn when the times and durations of calls between known individuals are compared with other known events. That form of inference has been a staple of criminal investigation for many years. Some communications data is also able to locate the mobile phone at the time of making or receiving a call which can also generate an inference about why the call was made and therefore what was said. The frequency, location and timing of calls between two numbers may also reveal the nature of their users' relationship. On its own it may not reveal anything which might be protected by legal professional privilege but taken together with other material it might. This kind of material has in fact been used in very high profile investigations to reveal the identity of a journalistic source.

28. It is therefore surprising to read that no consideration was given by the authorising officer to the Article 10 rights of the journalists and their sources, or to the question of Legal Professional Privilege. That error appears to be still prevalent in the Respondent's police force since Mr. Holdcroft has submitted on his behalf that communications data of this kind could not have involved any violation of either legal professional privilege or journalistic privilege. We reject that submission for the reasons given.

29. The CDAs taken together involved a large volume of communications data. The first and second CDAs are described in the first judgment at 12(xi). They involved the data relating to 6 people, including the first 5 Claimants, over a period of 4 months. The subjects included 2 journalists and a solicitor. The remaining CDAs are dealt with at 12(xiv) of the first judgment.

30. All Claimants allege that they suffered stress and distress as a result of the intrusion into their privacy which the CDAs involved. No Claimant has advanced any claim for pecuniary loss. We accept that the intrusions were distressing and act on the basis that what we have been told about that subject is correct.

31. The issue is whether an award of compensation is necessary for just satisfaction. We start from the position that in each case a substantial degree of just satisfaction has already been

achieved. In the case of the First and Second Claimant that was achieved in the face of an unmeritorious defence advanced by the Respondent. In our judgment this was an indefensible claim which ought not to have been defended. In the cases of the other Claimants it was achieved without the necessity of legal proceedings until the issue had been resolved in their favour by the first judgment.

32. The just satisfaction which that judgment provides is substantial because of the clear findings and the lack of any ambiguity in the result which is a matter of public record. Each of these Claimants was the victim of the unlawful use of investigatory powers. It is also substantial because the judgments taken together are critical of

    a. The conduct of the Respondent in defending the case.

    b. The conduct of the Respondent in relying before the Tribunal on legal advice which was never given, and attempting to use Legal Professional Privilege in a way which, if successful, would have misled the Tribunal as to an important fact.

    c. As a consequence of (b) it is clear that the Respondent's officers embarked on a criminal investigation where the law was not clear without taking any legal advice at all. Where the subjects of CDA applications included a solicitor and journalists this was conduct verging on the reckless.

    d. The conduct of the Respondent in failing to co-operate in the investigation by giving complete disclosure. We have identified two disclosure failures above.

33. The Claimants know that the Respondent has issued an apology to them. It is true that this process only started after the hearing before the Tribunal in December 2016 at which it was clear that the Respondent had lost. Moreover, Mr. Spittal has put in place remedial steps which should ensure that this behaviour is not repeated. The Claimants in their different ways express scepticism in this respect. The First Claimant says that the Cleveland Police force is "recalcitrant" and refers to other cases involving its treatment of Asian officers. That complaint goes beyond the jurisdiction of the Tribunal and will have to be determined in other proceedings. However, we accept that it is not unreasonable for the Claimants to harbour doubts about the remedial steps proposed. For our part we have said in relation to disclosure that we have no proper basis to reject the evidence of Mr. Spittal who should be in no doubt that he has a serious issue to resolve and that, if it is not resolved, further similar complaints to the Tribunal are likely and the consequences of that for the Force are likely to be profound.

34. Against that background we turn to the Claimants individually. We consider that awards of compensation are necessary in the cases of the First and Second Complainants but that the vindication of the rights of the Third, Fourth, Fifth and Sixth Claimants by the decision

of the Tribunal is in these circumstances such that no award of money is necessary in their cases. The reasons for this distinction are

a. The First and Second Claimants were, at the material time, serving police officers. There never was anything to associate them with the leaks in relation to the murder enquiry, but the leaks in relation to the Interim Equality Report and the grievance procedure were associated with the First Claimant. There was much less to associate them with the Second Claimant. The First Claimant acted as he did because he was concerned about racism in the Police Force and with certain public statements on that subject which were being made on behalf of the Force. The Second Claimant was the Federation representative with heavy responsibilities for representing the interests of its members. These were difficult circumstances for both Claimants and the fact of being subjected to a criminal investigation with the use of intrusive powers is a matter which went directly to their entire future careers and reputations. The knowledge that their employer acted unlawfully in taking this step was a very significant matter.

b. The Tribunal accepts that the unlawfulness found was capable of affecting every aspect of the professional lives of the First and Second Claimants in a way which was not true of the other Claimants. Although we accept that the invasion of privacy was in each case a serious and distressing matter, we do not think that it had the potential to terminate the careers of any of them, and conclude therefore that that discovery that it had happened, though a serious matter, was not so substantial that an award of compensation is necessary. That is particularly the case with the Sixth Claimant whose records were only recovered for four days. In the case of the journalists and the solicitor the decision of the Tribunal entirely vindicates their professional reputations and removes any suspicion that any client or source of theirs may have held that they acted in breach of any duty of confidence in respect of the subject of these proceedings.

c. There is no medical evidence before us, but we are prepared to conclude that in these circumstances the First and Second Claimants suffered stress that was out of the ordinary, but we do not so conclude in respect of the other Claimants.

d. We also take into account, as we have held above is appropriate, the fact that the First and Second Claimants were required to embark on contested litigation to achieve the vindication of their rights. This fact tips the balance in their favour in the decision to make an award. The award, though modest, is a tangible expression of the seriousness of the way in which the Respondent has behaved towards them and of the effect which we find it had.

35. For these reasons we make an award in the cases of the First and Second Claimant of £3,000 each and decline to make any such award in the other cases.

**Costs**

36. We have explained above that awards of costs in the Tribunal are very rare. There has only ever been one. There are good reasons for this.

37. We see no reason to depart from the normal practice of the Tribunal in this regard and make no award of costs.

**Destruction**

38. In the end the documents containing the data and any documents reflecting its use and processing will have to be destroyed. However, we decline to make such an order now. This is because it would be quite wrong to permit, still less to require, the Respondent to destroy any documents which may be relevant in litigation which is actively being proposed. Further, if any further investigations are to be conducted by any of the bodies to whom these judgments have been referred they will need access to all of the material. Where doubts have been expressed about disclosure it would not be right to allow destruction of any of the material. Orders have been made in the past for retention of a single copy for similar purposes but we consider that this is not the right course in this case.

39. We will direct that all the material must be collected by the Respondent and removed from the normal archiving systems where it is now stored. It must be listed and a list supplied to each of the Complainants. It must then be retained and dealt with strictly in accordance with the order we will make. Except in accordance with the terms of that order, no person must be allowed access to it. We invite the parties to agree a suitable form of order which will protect future investigations and proceedings while at the same time providing full protection to the privacy of the Claimants. In default of agreement by 4pm on 7th September 2017 the Tribunal will make an order in its own terms.

40. Pursuant to section 68(3) of the Regulation of Investigatory Powers Act 2000 a copy of this judgment shall be sent to the Interception of Communications Commissioner.