



Neutral Citation Number: [2023] UKIPTrib 2

Case No: IPT/18/6/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 5 April 2023

Before:

LORD BOYD OF DUNCANSBY (VICE PRESIDENT)

MR CHRISTOPHER SYMONS KC

and

FRANCESCA DEL MESE

Between:

RICHARD PENDLEBURY

Complainant and Claimant

and

GREATER MANCHESTER POLICE

Respondent

Julian Milford KC, Counsel to the Tribunal

John-Paul Waite (instructed by **Greater Manchester Police**) for the Respondent

Hearing date:

17 January 2023

JUDGMENT

1. This is the judgment of the Tribunal.
2. The claimant has submitted a claim under section 7 of the Human Rights Act (HRA) and a complaint under section 65(5) RIPA arising from the authorisation by a designated officer of the Greater Manchester Police, the respondent, of Application 106960 on 13 March 2015 for the recovery of communications data (CD) from the communications service provider (CSP). The claimant is Richard Pendlebury. Until he was dismissed for gross misconduct on 18 January 2018 he was a police officer with the respondent. In 2014 he held the rank of sergeant and worked as a custody officer based at Bury police station.

Background

3. On 19 September 2014 the claimant was detained by a security guard, Mr Naseen Sher, at an Asda store in Bury for alleged shoplifting. He identified himself as a police officer. The store contacted the police. Officers arrived at the store, arrested the claimant, and took him to Ashton police station. The respondent's position is that when they arrived at Ashton police station the arresting officers were approached by the claimant's commanding officer Inspector Marie Donaldson, and instructed to release the claimant on the basis that the matter was best dealt with by way of summons.
4. On 31 October 2014, the claimant and his partner, Ms Wilkinson, made a formal complaint to the respondent that they had been involved in a "road rage" incident with Mr Sher, in which Mr Sher had followed his car and made threatening gestures towards them. The claimant says that he telephoned Inspector Donaldson following this incident. The respondent appears to have been informed (or to have understood) that this incident had occurred at 14:45 on that day. Mr Sher said the incident did not occur, and he was elsewhere.
5. In October 2014, Natalie Leicester, a friend of Ms Wilkinson, informed the respondent that she had seen Mr Sher assault the claimant while detaining him at the Asda store on 19 September 2014. The respondent says that cell site billing data showed that Ms

Leicester's mobile phone was not at the store at the time of the 19 September incident, but at her shop.

6. On 7 December 2014, the claimant claimed that another "road rage" incident had taken place, in which Mr Sher had gestured threateningly at him and Ms Wilkinson. He reported this alleged incident to the police. Mr Sher said the incident did not occur, and he was elsewhere.
7. On 28 December 2014, the claimant and Mr Sher encountered each other at a Tesco store in Bury. Each of them called the police alleging that the other had threatened him. The claimant said to the police that he had telephoned Inspector Donaldson, who had advised him to ring control.
8. Investigating officers suspected that there was an attempt by the claimant and others, including other police officers, to pervert the course of justice. In the course of the police investigation a number of authorisations were granted for the recovery of CD from CSP's. Only one of these (Application 106960) is the subject of this claim.

Application 106960

9. Application 106960 was made on 11 March 2015 and authorised by the designated officer, Chief Superintendent (now Assistant Chief Constable) Christopher Sykes on 13 March 2015.

The information sought in Application 106960 comprised:

(1) Traffic data for the claimant's phone from 00:00 on 19 August 2014 to 23.59 on 31 October 2014, and from 00.00 on 7 December 2014 to 23.59 on 6 March 2015. (That was on the basis that service use data between 31 October 2014 and 7 December had already been obtained under Application 10588322). That included the type of call events; the time of call events; their duration; what numbers they were from and to; where the calling party was located at the beginning and end of the call; and where the receiving party was located at the beginning and end of the call.

(2) Traffic data for Ms Wilkinson's phone for the whole period between 00:00 on 19 August 2014 and 23:59 on 11 March 2015.

(3) Subscriber information for the claimant's and Ms Wilkinson's phones covering the same time periods as for traffic data (to the extent that such information had not been obtained under earlier authorisations).

10. The Application was said to be related to a "conspiracy to pervert the course of justice investigation which has come to light following an arrest of a serving police officer for theft".

The authorisation said *inter alia*:

(1) In relation to the justification for obtaining information regarding the claimant's handset:

"Inspecting the incoming billing may identify co-conspirators who contact him whilst he is detained by security guard Sher. These conspirators may continue to contact Pendlebury up until the end of the requested period..."

Outgoing billing – will be inspected in a bid to identify potential co-conspirators telephoned on the 19th September 2014 by Pendlebury. The outgoing billing will naturally be inspected across the full duration of the requested period in order to establish if call patterns to co-conspirators changed pre and post offence, along with inspected call data when Pendlebury claims incidents have occurred against Sher. The call to Inspector Donaldson on 28th December will also be searched for in the outgoing billing (corroboration).

Cell site data – 19th September 2014 will be inspected in order to establish if the telephone number police hold for Pendlebury, was the one he had on him on 19th September 2014, and if the handset has then been in a location with the other conspiracy handsets post offence (i.e. meetings/discussions)

Time parameters – pre offence – will show call patterns, post arrest will show if call patterns have altered (patterns to co-conspirators)..."

(2) In relation to the justification for obtaining Ms Wilkinson's data:

"Outgoing billing will show who Zoe Wilkinson contacted when her partner Pendlebury was arrested on 19th September 2014. Call data around key times

will be inspected to see who was contacted (key times being incidents when Wilkinson and Pendlebury have stated that Sher has harassed them). Outgoing billing will also show call patterns between known conspirators.

Cell site data – Cell site data will corroborate what Wilkinson has said in her MG11 statements in regard to location. The data will also indicate where she went following Pendlebury’s arrest. Cell site data will also indicate if the co-conspirators have been together in a location (meeting).

IMEI data – is requested in order to see if her handset has actually been lost, or if it is being withheld from the police i.e. – her mobile number is still active in the same handset post arrest.

...

Subscriber details – will definitively show who is the registered person, this will be used in evidence.

Time parameters – pre offence – will show call patterns, post arrest will show if call patterns have altered (patterns to co-conspirators). The requested time frames cover the conspiracy period. As mentioned above, the timeframe goes beyond Wilkinson’s arrest date in order to see if her mobile phone is still active – i.e. obstructing police.”

(3) In relation to collateral intrusion, the following was stated:

“It is believed that collateral intrusion in this case will be minimum. The numbers in the request are those of suspects in a pervert the course of justice investigation and therefore the majority of the data obtained will relate mainly to them.

It is expected that other telephone numbers will be obtained as part of the results. These numbers will be checked against other known numbers in the case and eliminated where possible...”

11. There were three other relevant authorisations for CD. Application 109492 was authorised on about 13 February 2015 by Chief Superintendent Sykes. The data requested included subscriber information and service use data for two phones, Mr

Pendlebury's and Mr Sher's. The avowed justification arose out of the allegations of road rage incidents on 31 October and 7 December 2014. The data requested included subscriber information for Mr Pendlebury's phone for the period 31 October 2014 00:00 to 7 December 2014 23:59 and Service Use Data for the period 31 October 2014 14.45 to 7 December 2014 15:45. The end time on 7 December is an error as the alleged incident was said to have occurred between 21.00 and 22.00 on that date. (The error was rectified by a subsequent application 105883, which extended the period sought for 7 December 2014 to 23:59).

12. Application 10494214, dated 13 February 2015 sought CD (subscriber information and service use data) in respect of the claimant and Mr Sher. The justification was that an initial subscriber check followed by a cell site check would be able to establish their locations on 31 October and 7 December 2014, and data from the claimant's phone would be able to establish whether he had contacted Inspector Donaldson to tell her of the incidents.
13. Application 105883, dated 26 February 2015 again sought CD in respect of the claimant and Mr Sher (service use data for both men), from 14.00 on 31 October 2014 until 23.59 on 7 December 2014.
14. No complaints are made about these other authorisations but in each case the applications contained errors and the requested data does not match the justification in a number of respects. We understand that although application 109492 did not actually request cell site data it was in fact provided by the CSP.

Events following Application 106960

15. The claimant and Ms Wilkinson were arrested on 5 March 2015 on suspicion of perverting the course of justice. The police conducted a search of the property. Using powers under PACE officers seized the claimant's mobile phone (which the claimant had surrendered). Ms Leicester and Ms Wilkinson were subsequently convicted of attempting to pervert the course of justice. The claimant was found not guilty on all charges, including the original theft charge.

16. As a result of the examination of the claimant's mobile phone officers uncovered evidence of unrelated misconduct by the claimant. Phone records indicated that on 13 September 2014, the claimant had texted Ms Wilkinson the registration number and model details of a surveillance vehicle used by the DWP, after accessing Force Wide Incident Number ("FWIN") records. Ms Wilkinson subsequently passed that information to a neighbour. That further investigation led to the respondent commencing a new initial assessment of the claimant's conduct on 8 March 2017.
17. On 18 January 2018, the claimant was dismissed from the respondent for gross misconduct in connection with accessing and passing sensitive police information to his partner for an improper purpose. The claimant appealed to the Police Appeal Tribunal, but his appeal was rejected on 18 May 2018.

Designated Person (DP)

18. Chief Superintendent Chris Sykes was the designated person (DP) who authorised Application 106960. In a witness statement he explained that he was at the time the territorial commander for the Rochdale and Bury area, in overall charge of policing in these areas and responsible for a wide range of functions. There were at the time in the region of 1400 outstanding criminal investigations. In the more complex cases a Senior Investigating Officer (SIO) was appointed to lead the investigation. At the time of this investigation the respondent's practice was for the designated person to be one of the three Superintendents for the territorial area, of which Mr Sykes was one. The Code of Practice at the time implied that the DP should be sufficiently impartial from the investigation. The informal test applied at the time was, "Does the DP have control of the investigation?" His belief at the time, to which he still adheres, was that he was not directly involved in the investigation. He did not interfere with the SIO's decisions as to the proposed direction of investigation, including planned lines of enquiry being pursued. He considered these to be matters for the SIO and his team. He had not held detective qualifications since 2004; almost all of his career had been as a uniformed officer.
19. CS Sykes was the Gold commander in respect of the investigation. In September 2014 he allocated managerial oversight of the investigation to DI Aston who subsequently

became SIO. CS Sykes received briefings from the SIO on the conduct of the investigations because of the involvement of a police sergeant and concerns about the claimant's welfare. The SIO briefed CS Sykes on 2 March 2015 and "obtained permission to proceed". CS Sykes chaired a Gold meeting on 18 March 2015. Among those present were the SIO. At the meeting he instructed Detective Superintendent Jackson to conduct an independent review of the quality of the investigation. DS Jackson reported by email on 8 April. He recommended that DI Aston and his team continue with the investigation. He noted that additional telephony evidence was required, as not all the material had yet been recovered.

The law

20. At the time of the relevant authorisations, the acquisition of CD from CSPs was governed by Part 1 Chapter 2 RIPA.

S.21 RIPA (in the version in force as at March 2013) provided, as relevant:

(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 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.

...

(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 transmitted;

(b) Any information which includes none of the contents of a communication (apart from any information falling within paragraph (a)) and is about the use by any person.

Of any postal service of telecommunications service; or ii. In connection with the provision to or use by any person of any telecommunications service, or any part of a telecommunication system;

(c) Any information not falling within paragraph (a) or (b) that is held or obtained, in relation to persons to whom he provides the service, by a person providing a postal service or telecommunications service...

(5) ...

(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...”

21. CD within s.21(4)(b) RIPA corresponds to “service use information”. CD within s.21(4)(c) corresponds to “subscriber information”.

By s.22 RIPA, as relevant:

“22 Obtaining and disclosing communications data

(1) This section applies where a person designated for the purposes of this Chapter³⁰ 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 preventing disorder...

...

(3) Subject to subsection (5), the designated person may grant an authorisation for persons holding offices, ranks or positions with the same relevant public authority³¹ as the designated person to engage in any conduct to which this Chapter applies.

(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...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.”

22. At the material time, the relevant CD Code, to which the respondent was statutorily required to have regard under s.72 RIPA, was the 2008 version. (It was replaced by the 2015 version. A new CD Code was published in 2018, which takes account of the legislative changes brought about by the Investigatory Powers Act 2016.)

As material, the CD Code provided:

(1) In Chapter 2, under the rubric “Scope of Powers, Necessity and Proportionality”:

“2.1 The acquisition of communications data under the Act will be a justifiable interference with an individual’s human rights under Article 8 ECHR only if the conduct being authorised or required to take place is both necessary and proportionate and in accordance with law.

2.5 The designated person must believe that the conduct required by any authorisation or notice is necessary. He or she must also believe that conduct to be proportionate to what is sought to be achieved by obtaining the specified communications data – that the conduct is no more than is required in the circumstances. This involves balancing the extent of the intrusiveness with an individual’s right of respect for their private life against a specific benefit to the investigation or operation being undertaken by a relevant public authority in the public interest.

2.6 Consideration must also be given to any actual or potential infringement of the privacy of individuals who are not the subject of the investigation or operation. An application for the acquisition of communications data should draw attention to any circumstances which give rise to a meaningful degree of collateral intrusion.

2.7 Taking all these considerations into account in a particular case, an interference with the right to respect of individual privacy may still not be justified because the adverse effect on the privacy of an individual or group of individuals is too severe.

2.8 Any conduct that is excessive in the circumstances of both the interference and the aim of the investigation or operation, or is in any way arbitrary will not be proportionate...”

(2) In Chapter 2, under the rubric “Communications Data”:

“2.13 The term “communications data” embraces the “who”, “when” and “where” of a communication but not the content, not what was said or written. It includes the manner in which, and by what method, a person or machine communicates with another person or machine...”

...

Traffic Data

...

2.21 *Examples of traffic data, within the definition in section 21(6) [RIPA], include:*

- *Information tracing the origin or destination of a communication that is, or has been, in transmission (including incoming call records);*
- *Information identifying the location of equipment when a communication is, has been or may be made or received (such as the location of a mobile phone);*
- *Information identifying the sender or recipient (including copy recipients) of a communication from data comprised in or attached to the communication;*
- *Routing information identifying equipment through which a communication is or has been transmitted (for example, dynamic IP address allocation, file transfer logs and e-mail headers – to the extent that the subject of a communication, such as the subject line of an email, is not disclosed);*
- *Web browsing information to the extent that only a host machine, server, domain name or IP address is disclosed...*

...

Service Use Information

...

2.24 *Service use information is, or can be, routinely made available by a CSP to the person who uses or subscribes to the service to show the use of a service or services and to account for service charges over a given period of time.*

Examples of data within the definition at section 21(4)(b) include:

- *Itemised telephone call records (numbers called);*

- *Itemised records of connections to internet services;*
- *Itemised timing and duration of service usage...*

Subscriber Information

....

2.26 *Examples of [subscriber information] within the definition at section 21(4)(c) include:*

- *“subscriber checks” (also known as “reverse look ups”) such as “who is the subscriber of phone number 012 345 6789?”...*
- *Subscribers’ or account holders’ account information, including names and addresses for installation, and billing including payment method(s), details of payments...*
- *Information about the connection, disconnection and reconnection of services...*

2.27 *It can be appropriate to undertake the acquisition of subscriber information before obtaining related traffic data or service use information to confirm information within the investigation or operation...”*

(3) *Chapter 3 at §3.5 sets out the information that applications for CD must contain.*

(4) *By §3.11:*

“Designated persons should not be responsible for granting authorisations or giving notices in relation to investigations or operations in which they are directly involved, although it is recognised that this may sometimes be unavoidable, especially in the case of small organisations or where it is necessary to act urgently or for security reasons. Where a designated person is directly involved in the investigation or operation their involvement and their justification for undertaking the role of the designated person must be explicit in their recorded considerations”.

3.25 *The decision of a designated person whether to grant an authorisation shall be based upon information presented to them in an application.”*

The hearing and grounds of complaint

23. We held a hearing in public. The claimant was unrepresented but had submitted evidence and representations. He elected not to make any oral submissions at the hearing. We heard submissions from counsel to the Tribunal, Mr Milford KC and counsel for the respondents, Mr Waite. At the conclusion of the hearing we invited supplementary submissions on remedy from the respondents in writing. The claimant subsequently sought, and was granted leave, to make further submissions on remedy.
24. The submissions from the claimant also included cell site data, in answer, he said in response to evidence given in the hearing, to the effect that Mr Sher was not at the location on occasions where the claimant reported, that he was following and harassing him. We have not taken account of this evidence since it was not before the Tribunal at the hearing. In any event we do not consider that anything turns on this in our analysis of the lawfulness of the RIPA application.
25. The claimant's written submissions were to the effect that the respondents had deliberately abused the RIPA process. They had failed to comply with the RIPA legislation and the authorisation process. He believed that this was not a mistake or oversight but a calculated and premeditated attempt to circumvent the law. The RIPA authority was not completed correctly. They had recovered seven years of private information including private messages and photographs for which they had no authority.
26. Mr Milford KC, counsel to the Tribunal, accurately summarised the complaints in respect of application 106960 as follows;
- (1) The respondent had misused the application process by obtaining information from his mobile phone going far beyond the parameters of Application 106960.
 - (2) The respondent had CD showing that Mr Sher's mobile phone and the claimant's own mobile were in the same location on 31 October 2014 (the date of the first alleged "road rage" incident). In light of that information, the

respondent should have known (or did know) that there was no basis to seek Application 106960.

(3) The scope of the CD sought in Application 106960 was disproportionate. It could not be justified to seek approximately 6 months' worth of data.

(4) The reasoning in Application 106960 was inadequate in respect of justification and collateral intrusion.

(5) The "designated person" authorising Application 106960 (Detective Superintendent Chris Sykes) was the "Gold commander" (i.e. overall strategic lead) for the investigation into conspiracy to pervert the course of justice. That breached the requirement in the Acquisition and Disclosure of Communications Data Code of Practice under RIPA ("the CD Code") that designated persons should not be responsible for granting authorisations in relation to investigations in which they are directly involved.

CTT submissions

27. Mr Milford KC provided written submissions and assisted the Tribunal with oral submissions. He supported the claimant's case insofar as it related to grounds (3) and (5).

28. Ground (1) was unfounded. The extensive data, including personal photographs and messages, that had been obtained from the claimant's phone was obtained from the seizure of his phone under section 32 of the Police and Criminal Evidence Act 1984 (PACE) when he was arrested on 5 March 2015.

29. So far as ground (2) was concerned the respondent appears to have understood the time of the alleged "road rage" incident to have been around 14.45 on 31 October 2014, at which point data shows the complainant's phone and that of Mr Sher were not co-located; (ii) there were several stated reasons for seeking Application 106960, of which events on 31 October 2014 were only one; and (iii) there is no clear evidence of bad faith as regards the authorisation.

30. Application 106960 was a disproportionate invasion into the privacy of the claimant and Ms Wilkinson. The ECtHR in *Big Brother Watch v United Kingdom* (2022) 74 EHRR 17 (para 342) had explained why the collection of CD might be no less intrusive to individual's privacy rights than the interception of communications themselves. Similar points had been made by the CJEU in relation to traffic and location data within the meaning of Article 2 of e-Privacy directive. The mere retention of such data is itself an interference with article 8 rights, irrespective of whether any subsequent use is made of it; *La Quadrature du Net v Premier Ministre* C-511/18 [2021] 1 WLR 4457 (para 117 per Grand Chamber).
31. The Application sought data indicating the time of every call event, whether SMS or voice call was made, the telephone numbers of the calling and called parties, the duration of the calls and the location of the parties during the call events. The claimant was a frequent user of his phone. Such data enable precise conclusions to be drawn about where he was at any one time, their habits of everyday life, daily movements, activities carried out and social relationships. This intrusion was amplified by the length of time, (five and a half months in respect of the claimant) over which such data was obtained.
32. In *Bank Mellat v HMT* (no 2) [2014] AC 700 Lord Sumption set out the criteria for assessing whether an interference in Convention rights was justified (para 20). The question depended on an:
- “exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community”*,
33. Application 106960 failed criteria (iii) and (iv) even allowing for latitude to the decision maker.
34. First, the stated reason of identifying potential co-conspirators and seeking to make a comparison of call patterns pre and post offence could not justify over five months of

traffic data if the respondent did not know whether the claimant had been in touch with potential co-conspirators on 19 September. A less intrusive measure could have been used.

35. Secondly, none of the other reasons could justify over five months of data. The justification that the claimant's "*call to Inspector Donaldson on 28th December will also be searched for in the outgoing billing (corroboration)*". That aim could not have justified obtaining the claimant's service use data outside a short period on 28 December 2014. The claimant's call data would be inspected against the times when "*Pendlebury claims incidents have occurred against Sher*". That aim could not have justified obtaining data beyond short periods on the relevant dates (31 October, 7 December, 28 December), to the extent that the respondent did not already have that data. It was reasoned that cell site data would be inspected in order to establish if the telephone number the respondent held for the claimant was the telephone claimant had on him on 19 September. That aim could not have justified obtaining cell site data beyond a short period on 19 September 2014.

36. Thirdly none of the reasoning justified obtaining the claimant's cell site data between 19 August and 19 September 2014. The only justification offered for obtaining the claimant's cell site data related to post the alleged offence and not to the period before 19 September.

37. Fourthly, the application stated that "*collateral intrusion will be minimum*" because "*the numbers in the request are those of suspects...and therefore the majority of the data obtained will relate mainly to them*". The data sought however did not relate only to the claimant or other suspects but to every person who contacted or was contacted by the claimant. This intruded into the privacy of non-suspects.

38. Fifthly, the respondent, in their letter to the Tribunal dated 15 July 2019, had set out somewhat different reasoning to that contained in the application. It should be treated with considerable caution. In any event none of the reasoning could justify obtaining the claimant's traffic data over a period of more than five months.

39. The complaint that the respondent had obtained extensive data from the claimant's mobile phone including private personal photographs and messages could not be sustained as that was not obtained as a result of the Authorisation 106960 but from an examination of the phone following its seizure on 5 March 2015. That seizure was under s 32 PACE and thus outside the jurisdiction of the Tribunal.
40. The claimant complained that the respondent knew that the claimant and Mr Sher were co-located at the time of the alleged road rage incident on 31 October 2014. According to the claimant the contrary was stated in the application in order to justify obtaining the claimant's data. This appeared to be based a digital forensic survey dated 19 May 2016. That report states that the available traffic data was consistent with Ms Wilkinson's and Mr Sher's mobile phones being in the same location at around 13.43 on 31 October 2014.
41. The respondent however understood that the time of the alleged incident was about 14:45 on 31 October, not 13:43. That appears in the application 106960 and the other applications. It was also consistent with the basis upon which a Telecommunications Liaison Officer completed a radio frequency propagation survey. The time of the alleged incident was stated to be at or around the time of 14:45 and it indicated that the claimant and Mr Sher were not in the same location at around 14:45 on that date. He did not analyse data from before 14:00.
42. On that basis it was not possible to conclude that Application 106960 was made in bad faith. Moreover the question of the claimant's location on 31 October 2014 was only one part of a complicated factual background to the application which concerned a number of different incidents under investigation.
43. The information contained in the Application conformed to the requirements set out in the CD code. Accordingly, no reasons challenge arose separate from the claimant's challenge to the proportionality of the authorisation.
44. The evidence showed that Chief Superintendent Sykes had direct involvement in the investigation. He was the Gold commander. He chaired a Gold meeting on 18 March 2015 at which the SIO was present. He had given the SIO permission to proceed. He

had instructed a review of the investigation by Detective Superintendent Jackson. He had commented in an email to CS Sykes dated 8 April 2015 that DI Ashton and his team continue with the investigation but that further telephony work was required.

45. CS Sykes position as Gold commander and the evidence of his involvement in the investigation demonstrated that he was “directly involved” in the investigation and should not have acted as the designated officer without an explanation; para 3.11 of the CD Code. A public body must have good reasons for departing from a statutory code; *Nzolameso v Westminster CC* [2015] UKSC 22, per Lady Hale paras 31, 36). No explanation had been given. In those circumstances there was an unanswerable case of domestic unlawfulness.

Submissions for respondent

46. Mr Waite submitted that the test in *Bank Mellat* could be distilled down to a question of what was necessary for a fair and effective investigation, bearing in mind that such an investigation can yield exculpatory material as well as evidence of wrongdoing. The claimant was suspected of having committed very serious offences. Given that background it was necessary to drill down into the evidence. Obtaining CD for a single date was not sufficient. It was necessary to have a broad understanding of the nature of the claimant’s relationships before and after the allegation of shoplifting on 4 September 2014. A long period of time was necessary to identify what role if any the claimant had in the production of the false statement by Ms Leicester. CD and text messages together can give an overall picture. The timeframe was not long. It was permissible to look for third party involvement. The intrusion into the claimant’s privacy had to be assessed in the context of the intrusion that had already taken place following the seizure of his phone under PACE. CD provided context and corroboration of that material.

47. The material sought was potentially relevant and necessary for a fair and effective investigation. In applying Lord Sumption’s test in *Bank Mellat* it was necessary to remember that it arose from very different circumstances. Lord Sumption had recognised that the court could not take on the function of the decision maker (para 21). Addressing the test however the Application’s objective was sufficiently important to

justify the limitation of the fundamental right. It was rationally connected to the objective. In considering whether or not a less intrusive measure could have been used and whether a fair balance had been struck between the rights of the individual and the interests of the community the question was whether it was necessary for a fair investigation.

48. A fair investigation of a factual issue frequently involved what was potentially relevant with what was known to be relevant. Mr Waite described the process as legitimate foraging for an explanation of the nature of the communications by and between those under investigation to obtain a reliable answer to the issue in the case. It was important to obtain reliable answers to the issues. What was at stake was the liberty of the person under investigation. It had to take account the public interest and the standard and burden of proof in any criminal trial.
49. The Application contained a detailed description of suspected wrong-doing. It was necessary to use the CD gathered along with the text messages recovered from the mobile seized under PACE powers to give a complete picture. “Material” had a wide meaning under s8 PACE and a warrant will be granted for recovery of material in a hard disk even although it was likely that it would contain material which was not relevant for the investigation; *R (Faiseltex Ltd) v Preston Crown Court* [2008] EWHC 2832 (Admin). By analogy, it was legitimate to obtain CD over a longer period of time even if some of the material was clearly not relevant if it was necessary to obtain such information for the purpose of the investigation.
50. The involvement of CS Sykes as a designated officer was a good example of why the code had to change. “Direct involvement” meant that he manifestly had to be capable of being part of the investigation. The fact that he was not part of the investigation but a line manager led CS Sykes to believe that he was not part of the investigation. The phrase was open to interpretation. There were a range of reasonable beliefs open to him. There was no breach of the Code if CS Sykes reasonably believed that he had no direct involvement.

Discussion and decision

The scope of Application 106960

51. There is little doubt that the respondent was entitled to seek authorisation for the recovery from CSP's of CD relating to the claimant. He had been arrested on a charge of shoplifting. He had made serious allegations of road rage, harassment and assault against the security guard who had detained him. It was suspected that he had induced Ms Leicester to make a false statement in an effort to exonerate him from the shoplifting charge. It appears that the respondent suspected that at least one other officer may have assisted him and sought to interfere in the course of justice. These were serious charges, particularly since the claimant was a serving police officer.
52. For these reasons the condition in section 22(2)(b) RIPA was satisfied; the authorisation was necessary for the purpose of preventing or detecting crime. Two issues arise. First, whether the scope of the authorisation was proportionate to what was sought to be achieved. Secondly, whether Chief Superintendent Sykes should have acted as the designated officer.
53. We agree with Counsel to the Tribunal that the justification for interference in the claimant's article 8 rights has to be assessed under reference to Lord Sumption's test in *Bank Mellat* (para 20).
54. We reject the submission that the test can be distilled down to a question of what was necessary for a fair investigation. We do not consider it appropriate to innovate on what is now a well established formula for judging the justification for the interference in a person's article 8 rights. We accept, however, that it is not for the Tribunal to take over the role of the designated officer. This was a criminal investigation and the designated officer is entitled to a margin of judgment; *Bank Mellat* para 21.
55. Mr Waite sought to persuade us that the degree of intrusion into the claimant's private life had to be judged against the very considerable intrusion that had already taken place following the respondent's seizure of his mobile phone under section 32 PACE. The respondent had been able to analyse the claimant's phone and read his text messages. It was this that had led the respondent to the investigation ultimately leading to the claimant's dismissal on the ground of gross misconduct.

56. We do not find that argument to be attractive for three reasons. First, the proportionality of the intrusion has to be judged against the purpose of the intrusion, not what went before. Secondly, justifying intrusion into private life in incremental stages on the basis that each further intrusion is minor compared to the last may ultimately lead to a gross abuse of power. Thirdly, in any event this argument underestimates the nature of the intrusion that is sought by an authorisation for CD. That point was illustrated by the ECtHR in considering the acquisition of bulk data in *Big Brother Watch v United Kingdom* (para 342) and by the CJEU in *La Quadrature du Net v Premier Ministre C-511/18* [2021] 1 WLR 4457. The Grand Chamber in discussing “traffic data” and “location data” within the meaning of Article 2 of the e-Privacy Directive 2002/58/EC observed (para 117);

“Taken as a whole, [traffic and location] data may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them. In particular, that data provides the means of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications...”

57. The objective behind Application 106960 was sufficiently important to justify the intrusion into the claimant’s private life and it was rationally connected to the objective. The Application, however, went beyond what was necessary and proportionate for two reasons. First, the time period over which CD was sought, being over five months commencing a month prior to the alleged shoplifting offence was excessive. The justification for this length of time was “in order to establish if call patterns to co-conspirators changed pre and post offence”. This logic could not justify seeking many months’ worth of traffic data at a point when the respondent did not know whether the claimant had been in contact with potential co-conspirators on 19 September. Indeed, other than impliedly Inspector Donaldson, the respondent appeared not to know who the potential co-conspirators might be. In the absence of specification of who the

alleged co-conspirators might be the only conclusion that can be reached was that this was a fishing expedition or, as Mr Waite described it, evidential foraging.

58. Less intrusive measures could have been taken. Service use data for 19 September could have ascertained whether the claimant had been in contact with other co—conspirators and identified them. The respondent could then have considered what further measures might be appropriate. There were specific dates which were of significance. Apart from 19 September these were the dates of the alleged incidents with Mr Sher; 31 October, 7 December and 28 December 2014. The latter date is also of significance because of the alleged phone call between the claimant and Inspector Donaldson. Traffic data could have been sought for these dates without the further intrusion into the claimant’s private life.

59. Inadequate consideration was given to the degree of collateral intrusion. In particular the respondent appeared to assume that the majority of the data obtained would relate to those who were suspected of perverting the course of justice. Given the length of time over which the CD was sought it is very likely that a large number of pieces of CD completely unrelated to the inquiry would have been recovered. While it would no doubt have been edited out in any disclosure it nevertheless acts as a further intrusion into the claimant’s private life.

60. For these reasons we hold that the claimant’s article 8 rights were infringed by the scope of Application 106960.

Designated Person

61. Chief Superintendent Chris Sykes was the designated person who authorised the application. The 2008 CD Code states that designated persons should not be responsible for granting authorisations in relation to investigations or operations in which they are directly involved. Where a designated person is directly involved their justification for undertaking the role must be explicit in their recorded considerations; para 3.11.

62. It appears that the respondent’s practice at the time was that a territorial superintendent would act as the designated person. CS Sykes was a territorial superintendent responsible for a large number of criminal investigations in his area. In undertaking the

role of designated person he asked himself the question whether he had control of the investigation. He believed that he did not.

63. Mr Waite sought to persuade us that so long as the designated person held an honest belief that he was not directly involved in the investigation that was sufficient. We reject that submission. The test as to whether the designated person is directly involved in an investigation is an objective one and not one that is based on the designated person's own belief or assessment.
64. Whether or not a designated person is directly involved in the investigation must depend on the facts and circumstances of each case. The respondent appears to have interpreted the phrase as meaning someone who was involved in the day-to-day investigation. In our opinion the phrase cannot be read in such a narrow way; it must include those who are in direct line of command and can, by virtue of their seniority or position, direct or influence the investigation.
65. CS Sykes was the Gold commander. He chaired at least one Gold meeting concerning the Pendlebury investigation. He appointed an officer to oversee the investigation who became SIO. He gave the SIO permission to proceed with the investigation. He received briefings from the SIO and did so only a matter of days before he was requested to authorise the application. He established a review of the investigation. He could intervene in the investigation and did so on one occasion by ensuring that the team recovered CCTV footage. An Initial Assessment of Conduct by Superintendent Egerton of the Professional Standards Branch found that CS Sykes was fully apprised of the investigation and directed appropriate Gold meetings, an SCD review and associated activity in support of the investigation.
66. In granting the authorisation CS Sykes noted that he had spoken personally to DI Aston about this matter and he had briefed him on the full circumstances. The Code is clear that authorisations should be granted on the information presented to the DP in the application (para 3.25). Off the record briefings should not be part of the process.
67. We are satisfied that CS Sykes acted in good faith and in the mistaken belief that he was entitled to act as the designated person in authorising the Application. We accept

that some of his concerns were for the welfare of officers under his command. Nevertheless we are satisfied that as Gold commander he was directly involved in the investigation and should not have acted as designated person. No justification appears on the face of the Application for so acting and accordingly we find that CS Sykes acted unlawfully.

68. In passing we note that the practice of a territorial superintendent acting as designated person was changed in line with the revised 2015 CD Code.

Remedy

69. The claimant seeks compensation for family suffering and a quashing of the original RIPA authorisation, thus making the subsequent use of RIPA illegal. He submitted that the respondent had seriously breached RIPA guidelines. They had access to his movements on a day to day basis. He was followed. His wife and family were subject to surveillance resulting in them not wanting to leave home as they did not feel safe. This can be evidenced from the medical and other records. The effects on his children were particularly severe. The RIPA evidence was used to bring charges of attempting to pervert the course of justice. The respondent's actions caused the claimant's psychological injury. He is still on medication for the PTSD and depression brought on by the respondent's actions. The intrusive data included the collection of photographs and videos going back a number of years and including material showing the claimant's wife giving birth. It was not necessary to demonstrate that a case is exceptional for compensation to be awarded; *Anufrijeva v Southwark LBC* [2004] QB 1124 per Lord Woolf CJ at para 66.

70. The respondent has no objection to the destruction of all primary records of the communications data supplied to it under the RIPA application. It asks that any order be expressed in those terms. Secondary records, which include consideration of CD in conjunction with a wide range of other evidence (including data stored on the claimant's mobile phone, which was seized under PACE) as part of the analysis of the overall strength of the case against the claimant should be gathered together and disposed of in accordance with standard policies. This included material generated as part of the disciplinary proceedings as well as the analysis as part of the criminal proceedings

against the claimant. The respondent submitted that it would be disproportionate to require a search to be undertaken for all secondary material.

71. We agree with the respondent that it not be in the public interest to require what it terms secondary material to be deleted or destroyed. It formed part of legitimate proceedings against the claimant. In one instance the claimant was dismissed from the police for gross misconduct. In the other the evidence supported the case going to the jury. The claimant's co-accused were both convicted.
72. Quashing of the authorisation would serve no purpose given that it has now lapsed. The wider public interest can be served by the making of a declaration that the Authorisation of the application was unlawful as a disproportionate intrusion into the claimant's article 8 rights and contrary to the Communications Data Code at paragraph 3.11.
73. The principles upon when compensation will be awarded were discussed in *Andrew & Andrew v Commissioner of Police for the Metropolis* IPT/390/16/CH; IPT/29/17/CH. In determining whether to award compensation, and if so how much, can be stated as follows. First, the Tribunal will place reliance on the decisions and practice of the European Court of Human Rights; *Chatwani and others v National Crime Agency* [2015] UKIPTrib 15_84_88_CH at para 10, *Belhadj & Ors v Security Service* [2015] UKIPTrib 13_132_H, para 23. Secondly, any award of damages should be just and equitable and necessary to afford just satisfaction; *Anufrijeva v Southwark LBC*. Thirdly, it is not necessary to demonstrate that a case is exceptional for compensation to be awarded. The seriousness of the infringement and its impact on the claimant may be taken into account; *Anufrijeva* para 66; *Andrew* para 23. Fourthly a flexible approach has been taken to the issue of causation in awarding damages for distress. In *Greenfield v SSHD* Lord Bingham (para 15) observed:

“Wisely in my opinion the court has not sought to lay down hard and fast rules in a field which pre-eminently calls for a case by case judgment, and the court's language may be taken to reflect its assessment of the differing levels of probability held to attach to the causal connection found in individual cases.”

74. The claimant has lodged a number of medical reports in support of his claim that he has suffered psychological damage as a result of the authorisation. A letter from Ian Donnerly, Cognitive Behavioural Therapist, dated 28 July 2017 states that the claimant experienced psychological distress as a result of being arrested, investigated and tried for a serious crime. It then details some of the psychological effects that the claimant has suffered. An independent psychological report by Dr R Hensman, dated 31 August 2017 gives a slightly different picture. Dr Hensman reports that;

“[The claimant] explained that his current difficulties developed after he had been brutally attacked (from behind by a police sergeant) in the presence of his children and his partner (9th April 2015).”

75. The report is based on the alleged attack on 9 April 2015 as the index event. This is after the claimant’s arrest and appears unrelated to the authorisation of application 106960. A page of a report from Health Work Working Well records that in April 2015 the claimant was assaulted by another police officer and since then has experienced psychological ill health.

76. Even allowing for a flexible approach to causation we are not satisfied on the basis of the claimant’s own account to Dr Hensman that the psychological trauma he has suffered can be attributed to the acquisition of CD, rather than to the assault which he reports occurred in April 2015.

77. The claimant has also submitted a report on a child. Since the child is not a claimant it is not relevant to the assessment of compensation for the claimant.

78. That leaves the question of whether or not, in the circumstances of this case, the declaration that the authorisation of Application 106960 was unlawful is sufficient as just satisfaction or whether it should also be marked by an award of monetary compensation.

79. We are not persuaded that we should make an award of compensation in this case. The evidence used in the misconduct case against the claimant, and which resulted in his dismissal, was obtained from an examination of his mobile phone which was lawfully seized and examined by police officers using their powers under PACE. While it is true

that the CD collected under the authorisation was wide in its scope and more than was justified, we are satisfied that there was no malice in the granting of the authorisations, some more limited authorisation would have been justified and the evidence was admitted in evidence in a trial which resulted in his acquittal. For these reasons we consider that a declaration that the authorisation was in breach of the claimant's Article 8 rights and unlawful is just satisfaction, along with an order for the destruction of material recovered by the respondent under the authorisation.

80. We shall invite counsel to the Tribunal to liaise with the respondent and claimant on the drafting of an appropriate order.

81. The order shall specify the relevant appellate court for the purposes of an appeal under section 67A as the Court of Appeal of England and Wales.