



Neutral Citation Number: [2025] UKIPTrib 4

Case No: IPT/24/414/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 11 June 2025

Before :

MR JUSTICE CHAMBERLAIN

and

FRANCESCA DEL MESE

Between :

KNZ

Claimant

- and -

COMMISSIONER OF POLICE OF THE METROPOLIS

Respondent

JUDGMENT

Introduction

- 1 This is the judgment of the Tribunal, to which both members of the panel have contributed.
- 2 The claimant has brought proceedings under s. 7 of the Human Rights Act 1998 ('HRA'), which fall within the jurisdiction of the Tribunal under s. 65(2)(a) of the Regulation of Investigatory Powers Act 2000 ('RIPA'), and a complaint under s. 65(2)(b) of RIPA.
- 3 Although there is both a claim and complaint before the Tribunal, for convenience this judgment refers to 'the claim' and 'the claimant'. The person alleged to be the victim of a sexual assault by the claimant is referred to as 'the complainant'.
- 4 This claim concerns the lawfulness of a notice under s. 49 of RIPA ('the Notice') given to the claimant by the respondent on 3 April 2024, with written permission granted under Sch. 2 to RIPA by HHJ Griffith, sitting at Southwark Crown Court. The Notice required the claimant to provide the Personal Identification Number ('PIN') for his iPhone to the respondent by 10 April 2024. The claimant asserts that the giving of the Notice is neither necessary nor proportionate to any legitimate aim and therefore violates his Article 8 rights to respect for his private and family life.
- 5 There was a hearing on 26 February 2025. The hearing was held in public, but the Tribunal has anonymised the claimant as 'KNZ', given that he is currently under investigation for an offence which may in due course result in criminal proceedings.

Background

- 6 The respondent is investigating a complaint that the claimant, who is male, intentionally caused another male to engage in sexual activity without his consent, contrary to section 4 of the Sexual Offences Act 2003 ('SOA').
- 7 The complainant says that he agreed through an app called Feeld to meet a person, who he thought was female, to engage in sexual activity with that person and her husband in a 'threesome'. However, when the complainant arrived at the claimant's address on [REDACTED], there was no female present, just the claimant, who started performing oral sex on him in the communal hallway of the building. The claimant admits sexual activity with the complainant, but maintains that it was consensual.
- 8 The respondent has not, so far, consulted the Crown Prosecution Service about charging the claimant with any offence.

Procedural history

- 9 On [REDACTED] an advisory note under s. 49 of RIPA was served on the claimant during his police interview. This informed him that if he decided not to disclose the relevant information (his PIN) to enable officers to access any relevant digital equipment (his iPhone), the officer may seek a disclosure notice under s. 49 of RIPA. On 14 December 2023 a further s. 49 advisory note was sent to the claimant by email. On 3 January 2024, the claimant's solicitors confirmed receipt of the second Advisory Note and confirmed that the claimant had refused to sign it.

- 10 On 1 March 2024, the respondent made an *ex parte* application to Southwark Crown Court for permission to serve a s. 49 Notice on the claimant. On 3 April 2024, HHJ Griffith granted that permission. The respondent served the Notice on 8 April 2024, which required the claimant to provide the PIN by 10 April 2024.
- 11 On the same day the claimant submitted a claim (T1 Form) and complaint (T2 Form) to the Tribunal. He also applied under s. 67(6) of RIPA for an interim order suspending the Notice for such period as would enable the Tribunal to make its final determination. The purpose of the interim relief sought was to avoid the prospect of the claimant facing prosecution for refusing to provide his PIN while the challenge was before the Tribunal.
- 12 In light of the claimant's application to the Tribunal, the deadline for compliance with the Notice was varied by HHJ Griffith to 2 July 2024.
- 13 In a decision dated 27 June 2024, we refused interim relief. The full reasons for refusal of interim relief are not repeated here but are set out in paragraphs 19-22 of our decision. At paragraph 20, we said:

“In the first place, we do not accept that there is a ‘serious question to be tried’.

The legal test when deciding to impose a s.49 RIPA Notice is whether or not the person with appropriate permission has “reasonable grounds” to believe that the criteria set out in s.49(2) are fulfilled.

As the respondent says, the claimant has been accused of a serious sexual offence, the sentence of which can (in principle) attract a maximum term of life imprisonment. Information held on the claimant's phone could be highly relevant to the investigation. The obtaining of mobile telephone data in cases where electronic communication is a feature is a routine component of police investigations.

Applying the principles relevant to judicial review applications, and given the circumstances of this case, we are not persuaded that it is arguable that the respondent has acted irrationally in making the decision to impose the Notice. The claimant's application therefore falls at the first hurdle and no further consideration from the Tribunal is necessary.”

- 14 We went on to outline in [22] of our decision that there would not be irreversible prejudice to the claimant in refusing interim relief and that the safeguards in place would (it must be assumed) ensure that the protected material would be accessed, handled and kept in a secure way. This being so, we noted that:

“Any intrusion into the claimant's private and family life would be subject to the safeguards which apply to the handling of protected material, as set out in the Investigation of Electronic Information Revised Code of Practice 2018 (pursuant to s.71(4) of RIPA). This Code obliges those who handle protected material to do so within the bounds of necessity and proportionality, having particular regard to any human rights affected. The respondent has also stated that the search will not involve a ‘general trawl’, as it will be time limited in scope and restricted in nature. If a criminal prosecution is later brought

against the claimant, any admission of telephone evidence will be a matter for the court to decide, with all the safeguards that are in place relating to the consideration and any limitation or exclusion (if relevant) of such evidence. If by that time the claim before this Tribunal had succeeded, that would be a matter on which the claimant would be entitled to rely in any application before the Crown Court.”

- 15 On 1 July 2024 the claimant made a further application in Southwark Crown Court for an extension of time to comply with the s. 49 order. This was refused by HHJ Griffith in a private hearing.
- 16 On 2 July 2024, the claimant provided the PIN to the respondent. The claimant nonetheless pursues his claim to the Tribunal, because, as we had said in our decision refusing interim relief, if the claim before the Tribunal were to succeed, “*that would be a matter on which the claimant would be entitled to rely in any application before the Crown Court*” should a prosecution to be commenced.
- 17 On 5 December 2024, having considered written submissions, we gave directions for a hearing on 26 February 2025 in the event that the Tribunal could not decide the matter on the papers. In the light of the further written submissions, we decided to hold this hearing.

The respondent’s evidence

- 18 DC Davies is the Officer in the Case. He works for the respondent’s Central West Rape and Serious Sexual Offences (‘RaSSO’) Unit. His four witness statements are dated 22 December 2024, 1 January 2025, 10 January 2025, and 20 February 2025.
- 19 The first witness statement (dated 22 December 2024) outlines DC Davies’ justification for issuing the Notice, stating it was both necessary and proportionate in line with the Criminal Procedure and Investigations Act 1996 Code of Practice (‘the CoP’) because, *inter alia*, the digital material is relevant to the investigation (see section 2.1 of the CoP). Issuing a Notice was also considered to be a reasonable line of enquiry (see section 3.5 of the CoP), as digital extraction of the claimant’s iPhone would yield information/material that cannot be obtained via any other reasonable means.
- 20 DC Davies made clear that no admissions had been made by the claimant about key elements of the encounter, including as to whether the complainant knew or ought to have known that the claimant was portraying himself as a fictitious female; whether the complainant knew or ought to have known that this female did not exist; and what, if any, were the parameters of any agreed sexual encounters. This information was considered by DC Davies to be key to understanding the surrounding circumstances of the case, and he therefore considered it a reasonable line of enquiry to pursue obtaining relevant information from the iPhone.
- 21 The following factors are set out in DC Davies’ first statement as a justification for issuing the Notice:

“(a) The complainant asserted that KNZ was using a voice changing application, as he believed he was speaking with an American-sounding female on a WhatsApp voice call prior to meeting the claimant. DC Davies considered it a reasonable line of enquiry to confirm or negate if a voice changer application was present on the iPhone, or whether internet searches had been made to evidence KNZ’s use of such an application.

(b) A number of images were sent to the complainant via Feeld, which self-deleted after viewing and are described as being a female in underwear. Access to the iPhone would determine if the images used on the claimant’s Feeld account are present.

(c) Material provided to the respondent shows that KNZ made attempts to continue his deception by sending WhatsApp messages to the complainant after the alleged sexual assault. Subsequently, ‘AS’ was blocked by the complainant. DC Davies asserts that it is reasonable to suspect that further communications would have been sent after the complainant has blocked ‘AS’.

(d) Material from KNZ’s internet history and access to KNZ’s files and media, namely relevant data whereby KNZ searched for images of the blonde female used on the Feeld profile would demonstrate a level of premeditation, and may also identify a clear pattern of behaviour.”

- 22 DC Davies’s first witness statement also refers to ‘catfishing’ (the use of a false online identity to induce someone to do something). He says this:

“I accept that the act of catfishing is not a criminal offence in itself, however, I strongly argue that in these circumstances this was used as a means to facilitate the crime. I believe that to not investigate the preceding circumstances that led to the alleged offence would be a failure to comply with my duty as an investigator. The College of Policing national operating model for RaSSO offences states that investigators must be victim-centred, suspect-focused and context-led”.

- 23 DC Davies’s second witness statement dated 1 January 2025 seeks to clarify the use of the term ‘catfishing’ in his first statement:

“The Cambridge dictionary describes the meaning of ‘catfishing’ as ‘**the practice of pretending on social media to be someone different, in order to trick or attract another person**’. In this case there is clear deception demonstrated via KNZ. The complainant did not know that the female user known as ‘AS’ was fictitious. The complainant makes clear in his video recorded interview that he believed any sexual encounter with a male participant would be done in the presence of ‘AS’ and that it would be done in a group scenario. It has never been the position of the police or the complainant that a sexual act with a male participant was not discussed prior to the encounter. However, the complainant was clearly deceived as to the true nature of this encounter... The complainant asks ‘AS’ if both participants would be present whilst the male is performing oral sex and ‘AS’ responds stating “Yesss x”....

This deception removed the complainant's free choice to consent. It is not reasonable to believe that the consenting of a group sexual encounter which involves male and female participants extends to receiving oral sex from a male in a communal stairwell. In any case, the complainant makes clear that this encounter was not consented to. He clearly tells KNZ to stop and makes attempts to push KNZ away, however, the complainant describes how KNZ kept pushing back and continued the acts.

The resulting sexual offence in this case was wholly brought about by the deception of KNZ and the preceding surrounding circumstances of the event. KNZ used this deception to lure the complainant to his address for a sexual encounter which he otherwise would have never consented to. I believe that it is reasonable, proportionate, and necessary for these surrounding circumstances to be fully investigated."

- 24 The third witness statement of DC Davies (dated 10th January 2025) exhibits screenshots showing an exchange between the claimant and the complainant on the app Feeld, as well as a transcript of a WhatsApp exchange.
- 25 The fourth witness statement of DC Davies (dated 20th February 2025) addresses various issues including an understanding of the offence:

"The complainant alleged in an ABE account that he has tried on multiple occasions to stop the claimant from continuing the act. The complaint says that he was saying 'no' and had to physically hold the claimant back because he just kept trying to carry on... This conduct was preceded by messaging during which (on the complainant's account) the complainant was led to believe that he was communicating with a woman who wished to participate in a threesome. The complainant agreed that he would travel to the property for the purposes of the threesome. In the application, I termed this deception to be 'catfishing'... I am aware from my experience as a sexual offences officer that having sex whilst [making] such a deception does not constitute a sexual offence.

For the avoidance of doubt, in making the application to the Crown Court and, in issuing the section 49 notice, I was not under the impression that consent to oral sex had been given and vitiated by deception in the messaging, rather the offence that I am investigating is that the complainant was simply not consenting which is why he was pushing the claimant away and saying no. It has always been my position that the messaging was relevant to the conduct in the hallway and could aggravate the offence....

- (1) By the phrase "the deception removed the complainant's free choice to consent", I did not mean that the complainant had in fact consented to oral sex and that consent was vitiated. Rather, by "consent", I was referring to the agreement to attend the address for the purposes of the then planned threesome and that the complainant was not aware of the true circumstances.

(2) By the phrase “KNZ used this deception to lure the complainant to his address for a sexual encounter which he otherwise would have never consented to”, again I did not mean that the complainant’s consent was vitiated, but rather that if the complainant was aware of the true circumstances he never would have agreed to attend the address. However, I explain that “in any case, the complainant makes clear that this encounter was not consented to”.

(3) I continue to regard the evidence as to the deception (that a threesome was on offer) as part of the “surrounding circumstances” of the offence, as is clear from the final paragraph of the section headed “catfishing.”

The analysis of the deception under the heading “catfishing” represents my efforts, on 1 January 2025, to explain the catfishing/ deception in the case, and was not an attempt to describe my understanding of the criminal offence at the time of issuing the notice.”

26 On 21 February 2025, the claimant sent a letter to the Tribunal about DC Davies’ fourth statement. The claimant commented on the regrettable timing of its submission (the statement was submitted less than one week before the hearing) and stated that its contents are inconsistent with DC Davies’ previous evidence and with the contemporaneous documentary material before the Tribunal. The claimant therefore requested that the Tribunal exercise its powers, pursuant to rule 13(2) of the Investigatory Powers Tribunal Rules 2018, to require DC Davies to attend to give evidence on oath.

27 On 24 February 2025, we requested that DC Davies should attend the hearing if possible, noting that we had not determined whether to grant the application to cross-examine and would not do so before hearing submissions at the hearing.

28 After hearing arguments from the claimant and the respondent, we refused permission to cross-examine DC Davies and explained that we would give our reasons with this judgment.

Jurisdiction

29 It is accepted by the parties that the Tribunal has jurisdiction to consider both the claimant’s human rights claim and his complaint: see s. 65(2), (5)(e) and (7ZB) and the decision of the President in *CLS v Commissioner of police for the Metropolis* [2021] UK IPT/20/89/CH, [34]. We explained this in greater detail at [8]-[11] of our decision to refuse interim relief.

The law

30 Sections 67(2) and 67(3)(c) oblige the Tribunal to apply the same principles as would be applied by a court on an application for judicial review.

31 Section 49(2) of RIPA specifies the conditions for the giving of a notice:

“If any person with the appropriate permission under Schedule 2 believes, on reasonable grounds –

(a) that a key to the protected information is in the possession of any person,
(b) that the imposition of a disclosure requirement in respect of the protection information is –

- (i) necessary on grounds falling within subsection (3) or
- (ii) necessary for the purpose of securing the effective exercise or proper performance by any public authority of any statutory power or statutory duty,

(c) that the imposition of such a requirement is proportionate to what is sought to be achieved by its imposition, and

(d) that it is not reasonably practicable for the person with the appropriate permission to obtain possession of the protected information in an intelligible form without the giving of a notice under this section,

the person with that permission may, by notice to the person whom he believes to have possession of the key, impose a disclosure requirement in respect of the protected information.”

32 Grounds for obtaining protecting material falling within subsection (3) include “(b) for the purpose of preventing or detecting crime...”. The other two grounds for obtaining protected material are the interests of national security and the interests of the economic well-being of the United Kingdom, neither of which is relevant to this claim.

33 The phrase “detecting crime” is not exhaustively defined in RIPA. However, s. 81(5) provides:

“For the purposes of this Act detecting crime shall be taken to include –

(a) establishing by whom, for what purpose, by what means and generally in what circumstances any crime was committed; and

(b) the apprehension of the person by whom any crime was committed; and any reference in this Act to preventing or detecting serious crime shall be construed accordingly.”

34 The *Investigation of Protected Electronic Information Code of Practice* states at paragraph 3.15, fn 7:

“Detecting crime includes establishing by whom, for what purpose, by what means and generally in what circumstances any crime was committed, the gathering of evidence for use in any legal proceedings and the apprehension of the person (or persons) by whom any crime was committed.”

35 Section 49(2) of RIPA imposes two requirements on the person considering imposing a disclosure requirement. First, the appropriate person must believe the matters set out in s. 49(2)(a) to (c). Secondly, there must be reasonable grounds for those beliefs.

- 36 There is no detailed case-law on the correct approach to the review of the imposition of a s. 49 notice. However, the approach to other statutory police powers may be considered by analogy.
- 37 In the case of an arrest without warrant under s. 24 of PACE, for example, the Divisional Court has held that it is not for the court to decide for itself as a question of primary fact whether the claimant's arrest had been necessary. The proper approach is to ask (i) whether the arresting officer had an honest belief that the arrest was necessary for one or more of the statutorily permissible reasons and (ii) whether the officer's decision was one which, objectively reviewed according to the information known to the officer at the time, had been made on reasonable grounds. The question is not whether any officer could rationally have made the decision under challenge; the focus is on the particular decision-maker and his grounds: see *R (L) v Chief Constable of Surrey* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [39] (Lloyd Jones LJ and Jay J), citing *R (B) v Chief Constable of the Police Service of Northern Ireland* [2015] EWHC 3691 (Admin) at [22]-[23] (Lord Thomas CJ). At [40], it was emphasised the underlying concept is that of necessity. An arrest cannot be carried out simply because it is "desirable" or "convenient".
- 38 *Bater-James & Another* [2020] EWCA Crim 790, [2021] 1 WLR 725 concerned investigators' access to digital material of complainants and witnesses (not the material of suspects or defendants). Fulford LJ, giving the judgment of the Court, said this at [70]:

"It is not a reasonable line of enquiry if the investigator pursues fanciful or inherently speculative searches. Instead, there needs to be an identifiable basis that justifies taking steps in this context. This is not dependent on formal evidence in the sense of witness statement or documentary material, but there must be a reasonable foundation for the enquiry."

The application to cross-examine

- 39 The application to cross-examine arose because of the contents of DC Davies's fourth witness statement. We noted at the hearing that, if we were able to resolve the issues without considering that witness statement, it was unlikely to be necessary to accede to that application. We understood the parties to agree. We have reached the view that, even without considering the fourth witness statement, none of the grounds of challenge succeeds. Accordingly, we proceed without taking that statement into account. In those circumstances, it is unnecessary to consider further the application to cross-examine.

Ground 1: necessity

Submissions for the claimant

- 40 The claimant's first ground of complaint is that the s. 49 notice was unlawful because DC Davies did not believe, on reasonable grounds, that the imposition of a disclosure requirement in respect of the protected information was necessary on grounds falling within s. 49(3).
- 41 Tim James-Matthews for the claimant submitted that it is no part of the complainant's allegations that at the time he engaged in oral sex with the claimant he believed the claimant to be other than what he is – a male. This is not a case where there was any

deception as to identity or gender at the time of the sexual act. The notice was not “necessary” because the criminal offence which was being investigated was not a crime at all. DC Davies’s evidence reveals an error of law, because only a very narrow class of deceptions (as to the nature of purpose of the sexual act or the identity of the perpetrator or matters closely connected with the nature or purpose of the sexual act) are capable of vitiating consent: *R (‘Monica’) v Director of Public Prosecutions* [2018] EWHC 3508, [2019] QB 1019.

- 42 Insofar as it is suggested that it was necessary to access the claimant’s iPhone to investigate other potential offending, this is entirely speculative.

Submissions for the respondent

- 43 Nicholas Yeo for the respondent submitted that the statutory purpose condition was met. The Notice was necessary for the purpose of detecting crime. In particular, it was necessary to investigate whether any sexual offence had been committed. Whilst there is evidence to establish a possible serious sexual offence had been committed, and hence the purpose of detecting crime is met, there was no requirement under s. 49 of RIPa that such an offence be proven to any particular threshold (cf s. 8 of PACE).
- 44 Mr Yeo submitted that there was and is direct evidence from the complainant that the sexual contact was non-consensual: on his account, he pushed the claimant away, but the claimant did not stop. The messaging is relevant to the assessment of the complainant’s evidence that he did not consent.
- 45 Ground 1 is therefore not made out because the claimant has not established that it was irrational to conclude that there were reasonable grounds for the belief that the statutory purpose condition is met.

Discussion

- 46 By s. 49(2), the lawfulness of a notice given under s. 49 depends on two things. First, the person who gives the notice must believe that the preconditions in sub-paragraphs (a)-(d) are met. Second, in the case of each precondition, the belief must be reasonable. The first requires a focus on the subjective belief of the authorising officer. The second requires the court to consider whether, on the facts known to the person giving the notice, the belief was reasonable.
- 47 In our view, the analogy with the power of arrest without warrant under s. 24 is a good one. This means, applying the approach in *L’s* case at [39], that the lawfulness of a s. 49 notice cannot be established *ex post facto* by reference to reasons which were not those the person giving the notice had at the time.
- 48 There were elements of Mr Yeo’s submissions which seemed to us to offend against this principle. At one point, for example, he suggested that the circumstances in which the complainant had been induced to attend the claimant’s address might indicate a fraud offence. There was no evidence that such a possibility played any part in DC Davies’s

reasoning, so it cannot in principle be relevant to the lawfulness or otherwise of the notice.

- 49 Equally, there are passages in DC Davies’s evidence which indicate a confusion about the legal relevance of the messaging leading to the complainant’s visit to the claimant’s home. Although the first witness statement indicates DC Davies’s understanding that “catfishing” is not itself illegal, the second paragraph quoted at paragraph 23 above, from DC Davies’s second witness statement, shows that he thought the earlier messaging “removed the complainant’s free choice to consent”. This might be taken to suggest that DC Davies did not appreciate that, following the decision in *Monica’s* case, a deception of the kind alleged by the complainant would, on its own, be incapable of vitiating consent.
- 50 Mr James-Matthews submitted that, if it could be shown that DC Davies’s reasoning involved an error of law, his decision to give the notice cannot stand. We do not consider that this submission is correct. In the very same paragraph relied upon by Mr James-Matthews to found an error of law, DC Davies went on to say that “[i]n any event”, the complainant’s account (that he had pushed the claimant away) was to the effect that had not, in fact, consented. DC Davies plainly believed the circumstances in which the complainant had been induced to go to the claimant’s home as relevant to the veracity of this account.
- 51 In our view, the evidence – read as a whole – makes clear that this latter basis for the decision to give the Notice was a freestanding one. That being so, we conclude that any error as to the legal significance of the earlier deception was not material to the decision to give the Notice. If it is necessary to say so, we would also conclude that, having considered the entirety of DC Davies’s reasons, that the decision would inevitably have been the same irrespective of any such error (applying the common law test for refusing relief in public law cases: *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P&CR 306, 325 (Purchas LJ)).
- 52 That being so, the central question for us is the reasonableness of DC Davies’s belief that the Notice was necessary to assist in disclosing the circumstances of the alleged offence was reasonable. In our view, the answer to this question is “Yes”.
- 53 First, s. 81(5) makes clear that the purpose of preventing or detecting crime includes “establishing by whom, for what purpose, by what means and generally in what circumstances any crime was committed” (emphasis added). This is a deliberately broad formulation – and for good reason. A s. 49 notice is likely to be given at a relatively early stage in a criminal investigation. The investigating officer cannot give such a notice simply because he or she hopes that something might come up; there must be a “reasonable foundation” for the enquiry: see by analogy *Bater-James* at [70]. But nor can the investigating officer be expected to predict precisely what the material he is seeking will show. It is sufficient that there is reason to think that the information to be downloaded from the device will cast relevant light on the elements of the alleged offence so as to assist in confirming or undermining one or more of those elements.
- 54 Secondly, whilst the circumstances in which the complainant was induced to go to the claimant’s home were not capable of vitiating consent, they were certainly capable of being relevant to the question whether the complainant did, in fact, consent to the sexual act which (it is common ground) took place. If, as he said, the complainant had attended

believing that the sexual act would take place with a woman present, that might support the case that he had pushed the claimant away when it became clear that there was and would be no woman present. Equally, the contents of the iPhone might undermine the complainant's account (for example, if it showed that his main interest in attending was to participate in a sexual act with a man).

- 55 Thirdly, whilst the complainant had already provided the police with some of the messaging which preceded the sexual act, the investigating officer was entitled to conclude that there may be more on the claimant's iPhone which would cast light on the complainant's intentions when he attended the claimant's home. At this early stage in the investigation, DC Davies's decision was made in the context of all the information before him about the offence. It was sufficient to say that there was good reason to believe that the messaging might be relevant to what appeared at that stage to be the key question in the case, namely whether the complainant had consented to the sexual act.
- 56 We therefore conclude that DC Davies both believed and had reasonable grounds for believing that the imposition of a disclosure requirement was necessary for the purpose of detecting crime. We would reach the same view whether it is for us to decide the reasonableness of the disclosure requirement ourselves or whether reasonableness falls to be assessed on the *Wednesbury* basis.

Ground 2: proportionality

The claimant's submissions

- 57 The claimant submits that the imposition of a disclosure requirement was unlawful because DC Davies did not believe, on reasonable grounds, that the imposition of a disclosure requirement was proportionate to what would be achieved by the imposition.
- 58 Mr James-Matthews submitted, first, that the complainant's allegations, taken at their highest, do not amount as a matter of law to an allegation of sexual activity without consent. Even if some allegation of non-consent survives the legal analysis, the contents of the claimant's phone are only marginally relevant to those allegations, if at all. Secondly, what is envisaged is an open-ended trawl, over three months ([REDACTED]).

The respondent's submissions

- 59 The respondent submitted that the proportionality condition is met. The requirement to provide a PIN is proportionate to what is sought to be achieved by its imposition. The information sought is rationally connected with the purpose of preventing and detecting crime: the information on the claimant's phone could be highly relevant to the

investigation. In any event, it is evidence of the circumstances in which the alleged offence was committed, as contemplated by s. 81 and the guidance.

- 60 In analysing whether the interference with the claimant's right under Article 8 ECHR is proportionate, it is important to bear in mind the gravity of the allegation. The offence under s. 4(4) of the 2003 Act can in principle attract a term of life imprisonment.
- 61 The obtaining of mobile telephone data in cases where electronic communication is a feature is a routine component of police investigations (as recognised in the Tribunal's judgment refusing interim relief at [20(b)]).

Discussion

- 62 In our view, Mr Yeo was correct to start from the proposition that the offence being investigated here was a serious sexual offence. The maximum sentence (life imprisonment) is a reflection of that. For the reasons we have given in relation to Ground 1, the contents of the claimant's iPhone might well include material relevant to what appeared to be the key issue in relation to the alleged offence – consent. There was no reason to suppose that the material would be of marginal relevance only. It might well be centrally relevant. The proposal to search material over the three-month period immediately preceding the offence was in our view a proportionate one in all the circumstances. We bear in mind that what is proposed is not a general trawl of the material on the iPhone, but a focussed search using keywords, in accordance with the relevant code. The conclusion holds whether the question of proportionality is one for the Court (as it would normally be under Article 8 ECHR) or one to be considered applying *Wednesbury* principles.

Ground 3: reasonably practicable to obtain the information without the giving of a notice

The claimant's submissions

- 63 Mr James-Matthews submitted that all the information identified by the respondent identifies as being only accessible on the claimant's phone is material relevant to proving, or bolstering, the respondent's case to the alleged deception; and, for the reasons set out under Grounds 1 and 2, the deception is irrelevant as a matter of law. He further submitted that DC Davies has not explained what other steps he took to assist Feeld to identify the profile of the claimant, or in relation to WhatsApp, what other steps he took to obtain the relevant data.

The respondent's submissions

- 64 DC Davies's evidence is that he has attempted to obtain the material and was unsuccessful. The full WhatsApp chat is only available on the mobile telephone. The existence or use of a voice changer app can also only be obtained from the claimant's phone, as can information about the claimant's Feeld profile and his relevant search history.
- 65 Ground 3 is therefore not made out because the claimant has not established that it was irrational to conclude that there were reasonable grounds for belief that the condition was met.

Discussion

- 66 It is important to note that s. 49(2)(d) requires the officer giving the notice to believe, on reasonable grounds, that it is “not reasonably practicable” to obtain the information sought by other means. This should not be elevated into a requirement to show that it would be completely impossible to do so.
- 67 In our view, given the efforts made to obtain material from Feeld, and the additional information which DC Davies considered would likely be found on claimant’s iPhone, the circumstances of the present case amply support the reasonableness of DC Davies’s conclusion that it was not “reasonably practicable” to obtain the information sought by other means. Again, this conclusion holds good whether the matter is considered objectively by the court or on a *Wednesbury* basis.

Ground 4: Article 8 ECHR

The claimant’s submissions

- 68 The claimant submitted, first, that, for all the reasons given under Grounds 1-3, the interference with the claimant’s Article 8 ECHR rights is not in accordance with the law. Secondly, the Notice constitutes a disproportionate interference with the claimant’s Article 8 rights because the allegations do not amount to sexual activity without consent; the contents of the claimant’s phone are not relevant (or are, at best, of marginal relevance); and the Notice is disproportionately broad.

The respondent’s submissions

- 69 Ground 4 cannot succeed as an independent and freestanding ground. Article 8 is engaged, but the interference is in accordance with s.49 of RIPA, and provided the criteria are met, it is necessary in the interests of the prevention or detection of crime and is proportionate to that aim.

Discussion

- 70 There is no doubt that, by giving the notice, the respondent interfered with the claimant’s right under Article 8 ECHR to respect for his private life. Given our rejection of grounds 1-3, however, that interference was fully in accordance with domestic law. It is not suggested that that law fails to meet Convention standards of certainty and foreseeability. The interference was therefore “in accordance with the law” for the purpose of Article 8(2). It is unnecessary to consider whether there could ever be a case in which a s. 49 notice met the criteria for legality under domestic law but were nonetheless not “necessary in a democratic society” in pursuit of one of the legitimate aims specified in Article 8(2). In this case at least, the Notice plainly served a legitimate aim (detecting crime) and authorised an interference which was no more than necessary for that purpose (see our conclusion under grounds 2 and 3).
- 71 We would add that, as we made plain in our interim judgment, the material derived from the claimant’s iPhone will be held and used subject to legal protections. There is no reason to suppose that those protections will be ineffective.

- 72 In all the circumstances, the interference is justified and proportionate. Ground 4 therefore fails.

Conclusion

- 73 For the reasons set out in this judgment, in relation to both the claim and the complaint, we have made no determination in the claimant's favour.
- 74 The relevant appellate court for the purposes of an appeal under s. 67A(2) of RIPA is the Court of Appeal of England and Wales.