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**IPT/24/466/CH (MR KEARNEY) &
IPT/24/467/CH(BBC)**

IPT/24/771/H (MOORE)

Date: 23 July 2026

IN THE INVESTIGATORY POWERS TRIBUNAL

**BEFORE THE PRESIDENT, LADY CARMICHAEL, MR JUSTICE
CHAMBERLAIN AND MR STEPHEN SHAW KC**

B E T W E E N:

**(1) MR VINCENT KEARNEY
(2) BRITISH BROADCASTING CORPORATION**

Claimants

-and-

Respondents

(1) CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

(2) CHIEF CONSTABLE OF THE DURHAM CONSTABULARY

(3) SECURITY SERVICE

(4) GOVERNMENT COMMUNICATIONS HEADQUARTERS

(5) SECRETARY OF STATE FOR NORTHERN IRELAND

(6) SECRETARY OF STATE FOR THE HOME DEPARTMENT

**(7) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND
DEVELOPMENT AFFAIRS**

(8) COMMISSIONER OF POLICE FOR THE METROPOLIS

-and-

MR CHRISTOPHER DAVID SAMUEL MOORE

Claimant

-and-

(1) CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

(2) CHIEF CONSTABLE OF THE DURHAM CONSTABULARY

(3) SECURITY SERVICE

(4) SECRETARY OF STATE FOR NORTHERN IRELAND

(5) SECRETARY OF STATE FOR THE HOME DEPARTMENT

**(6) SECRETARY OF STATE FOR FOREIGN COMMONWEALTH AND
DEVELOPMENT OFFICE**

(7) COMMISSIONER OF POLICE FOR THE METROPOLIS

Respondents

Mr Jude Bunting KC and Mr Jonathan Scherbel-Ball for BBC/Kearney

Mr Mark Vinall for Mr Moore

Ms Cathryn McGahey KC and Mr David Reid BL for the PSNI

Mr Aaron Rathmell for Durham

Mr Richard O'Brien KC and Mr Andrew Byass for the NCRs (Security Service, GCHQ,
SoSNI, SSHD, SSFCDA)

Mr James Berry KC and Ms Chloe Hill for the MPS (instructed but not appearing)

Mr Jonathan Glasson KC and Ms Rachel Toney as CTT

Hearing date: 25 - 26 February 2026

OPEN Judgment

OPEN JUDGMENT

Introduction

- 1 Vincent Kearney was between 2006 and 2019 BBC Northern Ireland's Home Affairs Correspondent. His work focussed on politics and security. It is not in dispute that his journalism has made an important contribution to the debate on matters of public importance in Northern Ireland.
- 2 Disclosure in another claim before this Tribunal revealed interferences by public authorities with Mr Kearney's journalistic data. This prompted the BBC and Mr Kearney to file human rights claims with the Tribunal on 17 May 2024.
- 3 Since then, the respondents have given OPEN disclosure, as a result of which the claims have been amended. The issues now in dispute in OPEN are relatively narrow in compass, because of concessions made by the respondents. Nonetheless, some issues of importance remain to be determined. In particular, we have to determine:
 - (a) the correct characterisation of the violations of ECHR rights of Mr Kearney and the BBC (in particular whether the respondents' concessions go far enough or whether the Tribunal should find that the interferences were not only unlawful but also substantively disproportionate); and
 - (b) the appropriate remedy (in particular whether the Tribunal should make an award of compensation to Mr Kearney and if so in what amount).

The law

Protection for journalists' sources

- 4 Article 10 ECHR guarantees the right to freedom of expression, including the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority".
- 5 In *Goodwin v UK* (1996) 22 EHRR 123, at [39], the European Court of Human Rights ("the Strasbourg Court") held that protection of journalistic sources is "one of the basic conditions for press freedom", without which "sources may be deterred from assisting the press on matters of public interest", and that "the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected". That being so, a measure which interferes with the confidentiality of journalistic sources cannot be compatible with Article 10 unless it is "justified by an overriding requirement in the public interest". The necessity for any such measure must be "convincingly established": see at [40].

- 6 The requirement for an “overriding requirement in the public interest” and the need for it to be “convincingly established” have been cited and repeated so as to become part of the liturgy of the Strasbourg Court in this area: see e.g. *Ernst v Belgium* (2004) 39 EHRR 35, [91]-[93]; *Financial Times v UK* (2010) 50 EHRR 46, [59]-[60]; *Sanoma Uitgevers BV v Netherlands*, App. No. 38224/03, [2011] EMLR 4, [51]; *Tillack v Belgium* (2012) 55 EHRR 25, [53]-[55]; *Sorokin v Russia*, App. No. 52808/09, judgment 30 August 2022, [40].
- 7 A review of the case law shows that, if the public authority cannot show that there are no other ways of achieving the measure’s objective, a measure which interferes with journalistic sources is likely to be disproportionate: *Goodwin*, [42]; *Ernst*, [102]; and *Financial Times*, [69]. However, establishing that there was no other way of achieving the measure’s objective will not be enough on its own to show that the measure was proportionate: *Goodwin*, [45]; *Financial Times*, [64]; *Sedletska v Ukraine*, App. No. 42634/18, judgment of 1 April 2021, [71]. Some objectives will be insufficiently important to outweigh the vital public interest in protection of a journalist’s sources. In *Goodwin* (at [45]) and *Financial Times* (at [71]), the private interests advanced there (the desire to eliminate damage through further leaks and unmask a disloyal employee) were insufficient. The fact that a source may have acted unlawfully in conveying the information is not enough on its own to justify interference with journalistic sources: *Financial Times*, [63]; *Tillack*, [65]; *Nagla v Latvia*, App. No. 73469/10, judgment of 16 July 2013; *Sedletska*, [62].
- 8 The importance of the protection of journalistic sources gives rise to procedural as well as substantive requirements. An authorisation of interference with journalistic sources must be reviewed by a judge or another independent or impartial body either before it takes place or, in urgent cases, immediately after the fact and in any event before the obtained materials are accessed or used: *Sanoma*, [90]-[92]; *Nagla*, [101].
- 9 When setting out the substantive and procedural requirements for measures liable to interfere with the confidentiality of journalistic sources, the Strasbourg authorities do not distinguish between interferences with the content of journalistic communications and interferences with communications data. In principle, communications data—taken together with other information in the possession of a relevant authority—may be all that is needed to enable the authority to identify a journalistic source. *Sedletska* was a case about a measure designed to access communications data. At [63], the Court noted that the principles applicable to measures seeking access to “material used by the journalists in discharging their professional functions” had also been applied to communications data.

Burden of proof and evidential rules in human rights claims

- 10 The allocation of the burden of proof in human rights cases is well established. The claimant must establish that a public authority has interfered with one or more of his ECHR rights. The burden then passes to the respondent public authority to show that the interference was in accordance with the law, pursued a legitimate aim and was proportionate in the sense of being necessary to achieve that aim. If the public authority is unable to show any one or more of these things, the claimant will have established a violation of his ECHR rights.

- 11 As noted above, in the context of interference with journalistic source material, the authorities set a heightened test: there must be an overriding requirement in the public interest to justify the interference. If the public authority fails convincingly to establish this overriding requirement, it will have failed to show that the interference was proportionate; and the court or tribunal will proceed to consider remedy on that basis.
- 12 In many cases before this Tribunal, an interference with ECHR rights must as a matter of domestic law be authorised in advance (or in urgent cases immediately afterwards). In most of these cases, the evidence relied upon by the public authority to establish the proportionality of the interference is likely to consist of the contemporaneous documents or information considered by the person who gave the authorisation. But, unlike in judicial review proceedings before the courts of England & Wales, Scotland or Northern Ireland, in a human rights claim there is no restriction on the admission of evidence that post-dates the decision. This is because the task of the court or tribunal when assessing a human rights claim is not to “mark the homework” of the original decision-maker, but to decide for itself whether the decision was lawful (including whether any interference with Convention rights was proportionate): *R(Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100; *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.

The interferences with Mr Kearney’s journalistic sources

MI5’s authorisations in 2006

- 13 In 2006, MI5 made the following applications for communications data in relation to Mr Kearney and the BBC:
 - (a) an application for subscriber name and address in respect of Mr Kearney’s mobile phone number;
 - (b) an application for billing data in respect of Mr Kearney’s mobile phone number; and;
 - (c) multiple applications for subscriber names and address details in respect of telephone numbers that had been in contact with Mr Kearney.
- 14 By a letter from the Government Legal Department dated 9 September 2025, MI5 indicated that the authorisations for the acquisition of communications data were granted under the Regulation of Investigatory Powers Act 2000 (“RIPA 2000”). It conceded that the authorisations “did not make express reference to the fact that Mr Kearney was a journalist or that the purpose was to determine his journalistic source(s) and accordingly did not apply a stricter test or more heightened scrutiny of the justification for accessing journalistic material” and that, following the decision of this Tribunal in *News Group Newspapers Ltd v Metropolitan Police Commissioner* [2015] UKIPTrib 14_176-H, this was insufficient to meet Article 10 standards “because the Code did not apply a stricter test or more heightened scrutiny of the justification for accessing journalistic material”. MI5 accordingly accepts that “while acting in good faith” it breached Mr Kearney’s Article 8 and/or Article 10 ECHR rights.

- 15 At the CLOSED hearing, Counsel for MI5 complained that CTT had not raised the question of substantive proportionality, and so MI5 had been deprived of the opportunity to address it, if necessary by producing evidence. The BBC and Mr Kearney had raised it only in a skeleton argument filed in January 2026. At a very late stage in the CLOSED hearing, counsel applied for time to produce evidence directed at demonstrating that the measures were proportionate. For the following reasons, we refused that application. First, the application came very late in the day. On the hypothesis that the matter was one for CTT or the complainants to raise, the BBC and Mr Kearney had done so on 30 January 2026, some weeks before the hearing commenced on 25 February 2026. Second, the notion that it was a matter for CTT or the complainants to raise is misconceived for the reasons we give below. The onus is on the state to justify interferences with qualified rights protected by the ECHR. It was for MI5 to raise the matter, if so advised, in defending the proceedings. Finally, given the documentation available to MI5 relating to events nearly 20 years earlier, we considered that the prospect of their providing evidence that would satisfy the Tribunal that the decision were justified and proportionate was very remote indeed.
- 16 In the light of our rejection of Mr O'Brien's application, advanced in CLOSED, for permission to file evidence, we proceed to consider how to characterise the unlawfulness of the 2006 interferences on the basis of the contemporaneous documents alone. As can be seen from the OPEN gists of these authorisations, none of them identifies that Mr Kearney is a journalist, nor that the data sought will reveal journalistic sources, nor that any heightened test applies as a consequence of these things. The authorisations do not explain why the data sought cannot be obtained by other means, nor why the public interest requires interference with journalistic sources. We have considered carefully the original, CLOSED, versions of these documents and conclude that they share the same defects.
- 17 We therefore proceed on the basis that the authorisations were (a) not in accordance with the law and (b) disproportionate.

MI5's authorisation in 2009

- 18 In 2009, an application was made under s. 21(4) of RIPA 2000 on grounds of national security for all call-related data from Mr Kearney's mobile phone number. The OPEN gist of the request for authorisation did, on this occasion, identify that Mr Kearney was a journalist and made clear that the intention was to identify his journalistic sources. The request identified the risk of collateral intrusion, as Mr Kearney may not be the sole user of the telephone, but offered the assessment that "this risk" was justified by the expected intelligence dividend, given that the full range of data about the target (the source) could not be obtained "in a sufficiently efficient manner" by other means.
- 19 The request here at least drew attention to the fact that Mr Kearney was a journalist. It did not, however, recognise that a measure designed (as this one was) to identify journalistic sources had to be justified by an overriding requirement in the public interest. This was not merely a failure to recite the right legal mantra. The error was one of substance. The requester and authoriser were aware of the risk of collateral intrusion but failed to recognise the significance of the intrusion into Mr Kearney's own rights as a

journalist. Accordingly, there was no indication that the requester or authoriser had undertaken the necessary balancing exercise. We have carefully considered the original, CLOSED version of the request. It shares these defects. There is no subsequent evidence to cure them.

- 20 The legal consequence is the same as for the 2006 interferences. MI5 has failed to establish that the interference was proportionate. Having refused the non-core respondents' application, advanced in CLOSED, to file evidence, we proceed on the basis that the interference was (a) not in accordance with the law and (b) disproportionate.

PSNI's authorisations in respect of the murder of PC Carroll

- 21 On 10 March 2009, PC Stephen Carroll of the PSNI was murdered. On the same day, Mr Kearney received a call from an individual claiming to represent the Continuity IRA claiming responsibility for the murder. He promptly notified the PSNI but declined to give a witness statement.
- 22 Between 10 and 14 March 2009, and again on 7 October 2009, the PSNI made applications for Mr Kearney's and the BBC's communications data. PSNI accepts that each of these authorisations was unlawful because it did not ask whether there was an "overriding requirement in the public interest" for the interference with the confidentiality of Mr Kearney's journalistic sources.
- 23 In light of the acceptance that the authorisations were unlawful, we can express our findings about them briefly and collectively. The intrusions were limited in scope and there was on each occasion an attempt to explain why the interference was thought to be necessary for the purpose of investigating what was, on any view, a very serious crime. However, as Ms McGahey for PSNI fairly accepted, she could not go beyond the evidence contained in the contemporaneous documents. Those documents do not apply the correct test and do not include material capable of showing that that test is satisfied. Although we think it quite possible that the authorisations could have been justified applying the correct legal test, the materials available at the time do not enable PSNI to establish that. We therefore proceed on the footing that the interferences were (a) not in accordance with the law and (b) disproportionate.

MPS authorisations in respect of Operation Erewhon in 2011

- 24 On 18 October 2011, the BBC broadcast a Spotlight programme on which Mr Kearney had worked. It contained allegations that the independence of the Office of the Police Ombudsman for Northern Ireland ("OPONI") had been compromised. In response the PSNI commissioned the Metropolitan Police Service ("MPS") to investigate Mr Kearney's journalism.
- 25 The MPS obtained Mr Kearney's communications data for a period of more than 3 months from early June 2011 to mid-October 2011. It has not retained the authorisation, but has conceded that it was likely to be in similar form to that made in parallel for data from another journalist, Mr McCaffrey. It has retained the product of the authorisations

for Mr Kearney, which consists of outgoing and incoming call data, cell site data, IMEI, MMS and GRPRS data relating to Mr Kearney's work mobile telephone.

- 26 The application for Mr McCaffrey's communications data contained no recognition at all that Mr McCaffrey was a journalist or of the legal significance of that fact. In light of the MPS's concession, we infer that the same was true of the authorisation for Mr Kearney's communications data. The interference with Mr Kearney's rights under Articles 8 and 10 was substantial. The collection of geographical data about Mr Kearney's movements over this period involved a serious interference with his right to respect for his private life. We have seen nothing to suggest that there was any overriding public interest remotely sufficient to justify either this intrusion or the wide interference, for such an extended period, with the confidentiality of his journalistic sources.
- 27 We proceed on the basis that the obtaining of Mr Kearney's and the BBC's communications data in this way was an interference with Mr Kearney's rights under Articles 8 and 10 ECHR which was (a) not in accordance with the law and (b) disproportionate.

Operation Samarium in 2013

- 28 Operation Samarium was an investigation into an allegation that a senior member of PSNI's management had received corrupt payments. In the context of this investigation PSNI made applications for call data and account subscriber information on 7 and 24 September 2013. Both applications identified Mr Kearney as a journalist. The authorisations did not, however, apply the correct test; they did not contain material capable of showing that that test would have been satisfied; and they did not establish any justification, let alone an "overriding requirement", for obtaining such a large amount of data. One of the authorisations appeared to proceed on the footing that the user of Mr Kearney's telephone (i.e. Mr Kearney) was himself a suspect in the investigation, when he was not.
- 29 We proceed on the footing that these interferences with Mr Kearney's Article 8 and 10 rights were (a) not in accordance with law and (b) disproportionate.

Operation Basanti in 2014

- 30 Operation Basanti was an investigation into allegations that a member of PSNI had been providing sensitive police information to Mr Kearney. As part of this investigation, PSNI made four applications in respect of an individual suspected of being a journalistic source of Mr Kearney's. The first, on 22 July 2014, was for subscriber information. The second and third, on 28 July 2014, were for outgoing and incoming call data covering a period of some 34 days. The fourth was for subscriber information for telephone numbers obtained from the earlier authorisations.
- 31 Although these authorisations made clear that Mr Kearney was a journalist, they did not grapple with the legal significance of that fact, nor did they apply the correct test or contain material capable of showing that that test was met.

- 32 We proceed on the basis that these authorisations were (a) not in accordance with law and (b) disproportionate.

Operation Yurta

- 33 Operation Yurta followed the broadcast of the documentary *No Stone Unturned*, which examined allegations of police collusion into terrorist murders at Loughinisland in 1984. It was an investigation carried out by Durham Constabulary (“Durham”) at the instigation of PSNI into alleged leaks by staff at OPONI of information to journalists. It began in 2017.
- 34 As part of Operation Yurta, Durham obtained from the MPS a spreadsheet and attribution list containing communications data which had been obtained in 2012 during Operation Erewhon.
- 35 Aaron Rathmell for Durham submitted that Durham’s involvement in Operation Yurta was limited. Its personnel were acting not under the direction of the Chief Constable of Durham, but as delegates or agents of the PSNI, which is accordingly liable for any unlawful conduct undertaken in the performance or purported performance of functions in connection with Operation Yurta.
- 36 The MPS has accepted that it breached Mr Kearney’s rights under Articles 8 and 10 and the BBC’s rights under Article 10 by: (a) obtaining Mr Kearney’s communications data in 2012 as part of Operation Erewhon; (b) storing those data; and (c) providing parts of those data to Durham in 2018.
- 37 Mr Rathmell accepts that he cannot go behind these concessions. He submitted, however, that there is a key difference between obtaining and retaining communications data. The latter may be lawful even if the former is not. In this case, Mr Rathmell submitted that Durham acted lawfully in retaining the data because it was relevant to actual or anticipated legal proceedings, namely the proceedings which it was anticipated might flow from Operation Yurta itself, the judicial review and Tribunal proceedings brought by Messrs McCaffrey and Birney and the present claim.
- 38 In our judgment, the justification advanced by Mr Rathmell for retaining the data must be considered in two parts. In temporal terms, the first covers the retention and use of the data as part of Operation Yurta. We are sympathetic to Mr Rathmell’s submission that jumping from a conclusion that data has been unlawfully obtained to a conclusion that it is unlawful to retain or use it might be inconsistent with the well-established rejection of the “fruit of the poisoned tree” doctrine (that illegally obtained evidence is ipso facto inadmissible): see e.g. *JJ Management Consulting LLP v HMRC* [2020] EWCA Civ 784, [2021] QB 257, [70] (Simler LJ).
- 39 But we do not need to decide whether it could ever be lawful for Durham officers to retain and use data emanating from the MPS in circumstances where (as both the MPS and Durham admit) MPS acted unlawfully in providing it. This is because the retention and use of Mr Kearney’s data was a separate interference with Mr Kearney’s and the BBC’s rights. This required, at minimum, that the authority retaining and using it could

establish an overriding requirement in the public interest for doing so. It seems to us that, where the provision of the data is itself unlawful, there would need to be, at minimum, a lawful consideration of the reasons why retention and use were nonetheless justified. It is not suggested that there was anything of that kind here. It follows that the retention and use of the data by Durham as part of Operation Yurta were unlawful in that they were (a) not in accordance with the law and (b) disproportionate.

- 40 In the light of Durham's and PSNI's agreed position that the retention and use was undertaken by Durham officers as delegates or agents of PSNI, we find that the illegality is attributable to PSNI.

Remedy

Submissions for Mr Kearney

- 41 Jude Bunting KC for Mr Kearney submitted that two lines of authority were potentially relevant to the assessment of damages. The first was from the Court of Appeal as to how to approach quantification of damages where there had been an unlawful interference with the contents of a telephone: *Gulati v MGN Ltd* [2017] QB 149. That case related to damages awarded for the tort of misuse of private information, which had been introduced into domestic law to give effect to Article 8 of the ECHR. The true nature of the wrong was the same as that involved in a breach of Article 8.
- 42 The second was from the Strasbourg Court. The Tribunal should be guided by any clear and consistent practice of that Court: *Faulkner v Parole Board and another* [2013] 2 AC 254. Awards should be translated into sterling applying inflation and historic exchange rates, and, where appropriate, an uplift to reflect the differing standards of living in Council of Europe States: *DSD v Commissioner of Police of the Metropolis* [2015] 1 WLR 1833.
- 43 There was no clear and consistent practice from the Strasbourg Court, because it had not been faced with "such an extreme and long-lasting series of interferences with personal and journalistic rights". The jurisprudence was concerned with cases where there had been a one-off interference with a journalist's material, rather than "repeated and consistent interferences by multiple public authorities over multiple years". Mr Bunting invited us to consider the approach of the court in *Goodwin v United Kingdom* (1996) 22 EHRR 123; *Ernst v Belgium* (2004) 29 EHRR 35; *Financial Times v United Kingdom* (2010) 50 EHRR 46; *Tillack v Belgium* (2012) 55 EHRR 25; *Nagla v Latvia* (App. no. 73469/10) and *Sedletska v Ukraine* (App. no. 42634/18).
- 44 The award made by this Tribunal in *McCaffrey and Birney* was of limited assistance because the interference in the present case was of a different nature from the directed surveillance authority in that case, and because the Tribunal had not been referred to *Gulati*.

Discussion

45 In 2013, in *Faulkner*, Lord Reed wrote, at [13.3] and [13.4]:

“3. At the present stage of the development of the remedy of damages under section 8 of the 1998 Act, courts should be guided ... primarily by any clear and consistent practice of the European court.

4. In particular, the quantum of awards under section 8 should broadly reflect the level of awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living.”

46 Notwithstanding the reference to the “present stage of development of the remedy of damages”, and the expectation, expressed in [29], that the domestic courts would, over time, come to develop their own case law under section 8, that guidance remains authoritative. At [27] and following, Lord Reed analysed the approach taken by the House of Lords to damages under s. 8 of the Human Rights Act 1998 (“the HRA”) in *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673. The following propositions emerge from that analysis:

- (a) Domestic courts are not bound by the principles applied by the Strasbourg Court in awarding compensation under Article 41 of ECHR, but it must take those principles into account.
- (b) Awards made by the courts of England and Wales in tort are not an appropriate comparator. That is because, first, the 1998 Act is not a tort statute; second, the purpose of incorporating ECHR was not to give victims better remedies domestically than they could recover in Strasbourg; and, third, s. 8(4) required a domestic court to take into account the principles applied by the Strasbourg Court under Article 41 in deciding both whether to award damages and the amount of any award.
- (c) The levels of Strasbourg awards are not “principles”. Statements of principle by the Strasbourg Court in relation to just satisfaction are uncommon. The statutory expression “principles” in s. 8(4) of the HRA has to be understood in a broad sense. Courts should aim to pitch their awards at the general level indicated by Strasbourg awards in comparable cases, so far as that can be estimated.
- (d) The over-arching duty of a court under s. 8(1) is to grant such relief or remedy as it considers just and appropriate, and that duty applies even where no clear or consistent European practice can be discerned.
- (e) The awards made by the Strasbourg Court, including those made in respect of non-pecuniary loss, reflect the value of money in the contracting states. It is therefore necessary to focus on awards made to applicants from the UK or from other countries with a comparable cost of living.

- 47 *DSD* is a first instance decision relating to claims by victims of sexual assaults for failures to conduct an effective investigation into their allegations. Green J noted that there was some symbiosis between the Strasbourg court and domestic courts in relation to damages: [33]-[35]. In *Z v United Kingdom* 34 EHRR 97, the Strasbourg Court stated that it had regard to quantum figures in comparable domestic cases as relevant but not decisive. The Court would take into account local economic circumstances, suggesting that in quantification of damages it would take into account the purchasing power of money in the contracting state concerned.
- 48 Other points of note from the decision in *DSD* include the need to take into account the state's overall conduct. Relevant factors would include whether the violation was deliberate and/or in bad faith; whether the state had drawn the necessary lessons and whether there was a need to include a deterrent element in an award; whether there was a need to encourage others to bring claims against the state by increasing the award; and whether the violation was systemic or operational: [40]. At [41], Green J discussed the overall need for "modest" awards and to consider totality:

"The exhortation to modesty is, in truth, more a reflection of the principle that the Strasbourg court has long endorsed, which is that the paramount object of the law is to bring violations to an end and that compensation is a secondary factor. It is manifestly not the intention of the law to create a "get rich quick" litigation culture. When all individual factors are taken into account the final stage in the quantum exercise is to consider "totality" ie whether – standing back – the final sum arrived at is a reasonable one in all the circumstances. The notion of "totality" (which is well known and understood in the context of criminal law sentencing) is a safeguard to ensure that a court does not apply an overly mechanistic approach by totting up relevant considerations adding values to each and arriving at a final figure which may then be divorced from the overall context."

- 49 We do not consider that the case of *Gulati* provides helpful guidance as to the appropriate level of any award of damages for just satisfaction in Mr Kearney's case. It relates to proceedings brought in respect of the tort of misuse of private information where voicemails were hacked. Mann J made awards ranging from £72,500 to £260,250. The awards contained components for (i) damages for each published article; (ii) damages for hacking or related activities which did not result in the publication of an article; and (iii) damages for distress resulting from hacking. He took into account matters such as the nature of the disclosure in question and the degree of privacy that various categories of information attracted: [32]. The Court of Appeal dismissed MGN's appeal. That court accepted that the claimants were entitled to be compensated for the loss of control over their private information, and not just for distress and hurt feelings. Damages in consequence of a breach of private rights were not the same as damages to vindicate a constitutional right: [48]. The court was not proceeding under Article 8 of the ECHR, and the measure of damages was more naturally a question for English domestic law: [89].
- 50 To approach damages in the way that the court did in *Gulati* would be to disregard the guidance provided by Lord Reed in *Faulkner*, summarised at paragraph [45] above. It would provide a victim with a remedy that he would not receive from the Strasbourg court. It would elide the distinction between the HRA and the law of tort. Even if

damages awarded for the tort of misuse of private information could in principle provide any guidance in the present context, it would not be straightforward to equate the collection of communications data with the publication in daily newspapers of, for example, sensitive financial or medical information about an individual. We note also that the activities in *Gulati* were undertaken for commercial gain by private actors, whereas the activities in this case were carried out unlawfully, but apparently in good faith, by public authorities.

- 51 We turn to the various Strasbourg authorities cited in Mr Kearney's case.
- 52 In *Goodwin*, the journalist was the recipient of information from a person who wished to remain anonymous. The information appeared to come from a corporate plan which was marked confidential, and a copy of which had disappeared from the premises of Tetra, a company. Tetra obtained an injunction against publication of information from the plan. The High Court issued two orders requiring the journalist to disclose his source. The House of Lords found the journalist in contempt of court for failing to disclose his source and fined him £5,000. The Strasbourg Court found that the orders for disclosure and the fine for contempt were violations of Article 10. The orders for disclosure and the fine had a basis in national law. Tetra's interests in identifying the source were not, however, sufficient to outweigh the public interest in the protection of the journalist's source. The applicant claimed £15,000 for non-pecuniary damage. He had suffered anguish, shock, dismay and anxiety and had been at risk of imprisonment for contempt. He had acquired a conviction for contempt which would not be expunged by the finding of a breach of his Article 10 rights. The court declined to make an award of damages, on the basis that the finding of breach constituted just satisfaction.
- 53 *Ernst* related to applications by journalists and journalists' associations. The Belgian Serious Crimes Squad searched the premises of three publications, a broadcaster, and also the homes of the journalists. The investigation related to the prosecution of members of the state legal service following leaks in sensitive criminal cases. A total of eight searches, involving 160 police officers, took place, during which officers seized various documents as well as floppy disks and the hard disks of the applicants' computers. The Strasbourg Court noted, at [103], that there was a "fundamental difference" between the circumstances of the case and those of *Goodwin*, by reason of the wide scale simultaneous searches carried out. It noted that even unproductive searches constituted a more serious measure than an order to divulge the source's identity, because the searches would provide access to all the documentation held by the journalists, and so would have had a more significant impact on the protection of journalistic sources than in *Goodwin*: [103]. The Court awarded €2,000 to each applicant by way of non-pecuniary damage.
- 54 *Tillack* is, like *Ernst*, a case in which the journalist applicant's home and workplace were searched, with papers, files, computers and mobiles being seized. He claimed €25,000 by way of non-pecuniary damage, in respect both that he had been deprived of his working documents and information media, and that he had lost credibility in the eyes of the public, and of those who might provide him with information. The Court found that the searches and seizures had caused the applicant anxiety and distress, and awarded €10,000.
- 55 In *Nagla v Latvia*, the applicant was a producer, reporter and host of a weekly investigative news television programme. She received an email from a person calling

himself “Neo” and claiming that there were security flaws in the database maintained by the state revenue service. She proceeded to inform the service of a possible security breach. When interviewed by police in February 2010, the applicant declined to disclose the identity of her source. On 11 May 2010, the investigating authorities identified a suspect who had used two IP addresses to connect to the state revenue service’s system, and who had also made several phone calls to the applicant. On the same day, the police sought a warrant to search the applicant’s home on the basis of the information they had about the suspect. They searched the applicant’s home and seized a laptop, a hard drive, a memory card and four flash drives. According to the applicant, these contained her personal data as well as most of her work-related material. The search was carried out after the public prosecutor authorised the warrant (see [20]) but before the investigating judge retrospectively approved it (see [24]).

- 56 The Court found that the interference was prescribed by law. It was unnecessary to examine the role of the supervising prosecutor in authorising urgent searches, where the investigating judge had power, after the search, to revoke the warrant, declare evidence recovered under it to be inadmissible, and withhold the identity of journalistic sources: [85]-[91]. In relation to proportionality, the court noted that a search conducted with a view to identifying a source was a more drastic measure than an order to divulge the source’s identity: [95]. Any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives raised an issue of the journalist’s freedom of expression, including source protection. The judicial authorities who scrutinised the interference had not identified reasons sufficient to justify the interference in question. The applicant claimed €50,000 and received €10,000 in respect of non-pecuniary damage.
- 57 *Sedletska v Ukraine* is a decision of the Fifth Section, dated 1 April 2021. The applicant was a radio and television journalist. The head of the national anti-corruption bureau, S, briefed journalists about criminal investigations into the conduct of a prosecutor. It was apparent from a published article that journalists had listened to a taped conversation between the prosecutor’s partner and another person. Criminal proceedings were commenced against S in relation to the disclosure of that material to the journalists. The applicant was summoned for questioning and refused to disclose her source. An investigator applied for access to the applicant’s communications data from 19 July 2016 until 16 November 2017. That application was authorised on 27 August 2018: [15] and [16]. On 4 September 2018 the investigator wrote to the mobile service provider referring to the authorisation, but saying that data for that 16-month period were required only about the dates, times and locations of the mobile telephones of the applicant and another person near six specified streets and places in Kyiv: [17].
- 58 On 18 September 2018, the Strasbourg Court, on an application for interim measures under rule 39 of the Rules of Court, indicated to the state that they should ensure that the public authorities abstain from accessing any of the data specified in the order of 27 August 2018. On 27 September 2018 the prosecutor general stated that no data had been received from the mobile telephone operator. The court extended the interim measure, and the state complied with it: [24]-[28]. The court does not appear to have found it necessary to reach a concluded view about whether the interference was in accordance with the law: [59]-[60].

- 59 The Court, citing *Goodwin and Ressiot and others v France* (App. nos. 15054/07 and 15066/07) found that the interference was not proportionate (see [71]):

“Firstly, this ruling authorised access to the applicant’s protected geolocation data over a sixteen-month period. In view of the length of that period and the size of the geographical area of the city centre of Kyiv in respect of which the geolocation data was sought, the applicant’s telephone could have been registered there on a number of occasions which had no relevance to the case under investigation by the PGO. Secondly, by way of justifying the pressing social need for the interference with the applicant’s rights, the Court of Appeal referred only to the purpose of “achieving efficiency” in a criminal investigation and establishing “more exactly the time and place” of the purported confidential meeting ... without providing any indication why these considerations outweighed the public interest in non-disclosure of the applicant’s protected geolocation data. Thirdly, based on the case file, at the relevant time there remained considerable uncertainty that any information pertinent to the proceedings against S. would be retrieved from the applicant’s communications data. ... Fourthly, it does not appear that the Court of Appeal delved into the question whether there were other more targeted means of obtaining the information which the investigative authority had hoped to retrieve from the applicant’s communications data”.

- 60 A footnote records that, according to maps before the court, one specified avenue in the city centre of Kyiv alone extended for more than six kilometres. The applicant claimed non-pecuniary damage of €10,000, and was awarded €4,500. Counsel submitted that after allowing for exchange rates and inflation, the award was worth about £5,000, but would require to be doubled in order to reflect the differing costs of living in Ukraine and the United Kingdom respectively.
- 61 We are persuaded that we should make an award of damages to Mr Kearney in respect of the interferences with his communications data by PSNI by way of four authorisations in 2009, two authorisations in 2012, two authorisations in 2013 and four authorisations in 2014. By contrast with the situation in *McCaffrey and Birney*, where Mr McCaffrey’s communications data were obtained on a single occasion following an application made on 26 September 2013, the interferences in this case were numerous, and took place over a period of years, and many years after the decision of the Strasbourg Court in *Goodwin*. Mr Kearney has provided a witness statement setting out in some detail the impact of the interferences on him, and on the trust that he can expect potential sources to place in the confidentiality of their communications with him. That is an important factor, bearing in mind that the heightened protection provided to journalists is not for the benefit of the journalist personally, but for the public interest in the ability of his readers or audience to receive information from him: *R (Miranda) v Secretary of State for the Home Department* [2014] 1 WLR 3140, [46] (Laws LJ).
- 62 There is no clear and consistent practice in Strasbourg of awarding damages in relation to unlawful interferences with journalists’ Article 10 rights, other than where physical searches of their premises have occurred. We must, however, grant such relief as we think appropriate, even if we are not satisfied that there is such a settled or consistent practice. We consider that the decision in *Sedletska* provides helpful guidance. We were addressed in more detail about the circumstances of that case than was the Tribunal in

McCaffrey and Birney. In particular, we note that an award of damages was made notwithstanding that no data were actually recovered, and that no physical search took place. Adjusting the award in that case for inflation and the cost of living in Ukraine and the United Kingdom, we consider that an award of £10,000 is necessary to provide just satisfaction. Looking at the matter broadly, we see no reason to distinguish between the conduct of the PSNI and that of MI5, and make an award of £10,000 in Mr Kearney's favour against MI5 also.

Mr Kearney's and the BBC's case against GCHQ, The Northern Ireland Office, The Secretary of State for the Home Department and the Secretary of State for the Foreign, Commonwealth and Development Office

- 63 We make no determination in favour of Mr Kearney or of the BBC against any of these respondents.

Individuals named in the BBC's Confidential Schedule

- 64 We make no determination in favour of the BBC so far as any of the named individuals is concerned.

Mr Moore's case

- 65 There was no OPEN material in relation to Mr Moore's case, and we were required to consider in CLOSED whether there was evidence of any unlawful conduct towards him on the part of a public authority. We are satisfied that we should make no determination in favour of Mr Moore.

Section 67A(2) of RIPA

- 66 For the purposes of section 67A(2) of RIPA we specify that the relevant appellate court is the Court of Appeal in England and Wales.