PUBLIC LAW PROJECT: PRIVATE LAW FOR PUBLIC LAW PRACTITIONERS
RAGE AGAINST THE MACHINE: REMEDIES FOR PROTESTERS

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24 JUNE 2015

Conditions on protests

Processions

Section 11 of the Public Order Act 1986 provides for a requirement to give written notice of most public processions. There are exceptions where the procession is one which is commonly or customarily held (see ***Kay v The Commissioner of Police of the Metropolis* [2008] UKHL 69)** or it was not reasonably practicable to give notice.

Section 12 of the Public Order Act 1986 allows conditions to be imposed on a procession if a senior officer reasonably believes that:

a) it may result in a serious public disorder;
b) it may result in serious damage to property;
c) it may result in serious disruption to the life of the community; or
d) the purpose of persons organising is the intimidation of others with a view to compelling them not to do an act they have a right to do or to do an act they have a right not to do.

In ***Powlesland v DPP [2013] EWHC 3846 (Admin***) the Court held that the police were entitled to impose conditions on the Critical Mass Cycle Ride under s.12 of the Public Order Act 1986 even though there was no proposed route decided in advance.

Section 13 of the Public Order Act deals with banning processions if a chief officer reasonably believes that because of particular circumstances the powers under Section 12 won't be sufficient to prevent the holding of a public procession in that district or area from resulting in serious public disorder, he is required to put in motion the procedure for a banning order.

Public Assemblies

Section 14 Public Order Act 1986 put in place the framework of controls which the police are allowed to impose over public assemblies. Essentially conditions can be imposed in the same circumstances as Section 12 conditions can be imposed. For an assembly being held a senior police officer is the most senior rank of police officers present at the scene. In relation to an assembly intended to be held, it is the chief officer of the police. There are no notice requirements for assemblies or power to ban.

Protests in Parliament Square

Protests in Parliament Square can be subject to Section 12 and Section 14 conditions but there are additional powers conferred by the **Police and Social Responsibility Act 2011** and local byelaws.

A variety of different officers can enforce the Act: Police officers, authorised officers of Westminster City Council and the Greater London Authority (GLA). The byelaws can be enforced by any authorised person, i.e. those working on behalf of the GLA, the Deputy Mayor and any local authority.

The Act sets out prohibited activities within designated areas: Parliament Square Gardens (and the surrounding pathways), Bridge Street, etc. The Act prohibits: the operation of amplified noise equipment without prior authorisation; erecting, keeping erected or using a tent or other structure that is designated or adapted mainly to facilitate sleeping or staying in place for any period, placing or keeping in place or using any sleeping equipment, sleeping bags, mattresses etc. Police or authorised officers can direct individuals to stop using equipment before they arrest. Police officers can seize items and are allowed to use reasonable force to do so. This legislation has been used to confiscate tarpaulin which protesters have been using to sit on.

Under the local byelaws, permission must be obtained from the Mayor to hold an assembly or rally. Attaching a banner or article to trees, railings, fences, statues is prohibited as is collecting money, making a speech, playing a musical instrument, lighting a fire or barbeque and feeding birds. It is also an offence not to leave the area if directed to do so by an authorised person or to obstruct an authorised person. Authorised officers can take the name and address of an individual who has breached the byelaws.

In **R (Gallastegui) v Westminster City Council [2012] EWHC 1123 (Admin)** a peace campaigner and resident of the East pavement of Parliament Square since 2006 challenged the Police and Social Responsibility Act 2011, particularly the sections conferring the powers to stop "prescribed activities" such as using tents (and other structures) to sleep and to seize items used for these prescribed purposes i.e. the tents. Her challenge was on the basis that the Act breached her Article 10 & 11 rights. The Court found that the provisions did not destroy the right of the claimant to freedom of expression, rather they imposed limits on how that freedom could be exercised which were proportionate and lawful.

In recent mass arrests involving protesters such as the Anti-BNP in June 2013, Critical Mass in July 2012, Anti-EDL in September 2013 and Colnbrook, the mass arrests were all due to a breach of the s12 or s14 conditions imposed. In these cases we need to look carefully at what the conditions were, who imposed them and how they were disseminated. For example, in the Anti-EDL protests, the conditions imposed don't appear to have been communicated at any stage to the protesters. So the 160 people kettled and arrested could not have been in knowing breach of the conditions and therefore there are is an issue over the legality of those arrests. In Critical Mass, whilst there were attempts to communicate the conditions at South Bank at the start these were very poorly executed.

Misuse of Bail Conditions

Pre-Charge Bail Conditions

Increasingly, where mass arrests are made, those arrested are granted pre-charge bail with stringent bail conditions despite the fact that there are only a small minority, if any, who actually go on to be charged.

In July 2012, on the opening day of the Olympic Games, 182 cyclists were kettled and arrested near the stadium for breaching Section 12 conditions. Conditions had been imposed under Section 12 of the Public Order Act 1986 to prevent serious disruption to the life of the community and the opening ceremony of the Olympic Games. The majority of those arrested were made subject to bail conditions preventing them from:

1. entering the London Borough of Newham in possession of a bicycle;

2. going within 100 metres of the Olympic venue;

3. entering any Olympic only carriageway, unless that carriageway is open to all traffic at that specific time;

4. taking part in any activity that disrupts the intended or anticipated official activities of the 2012 Olympic Games; and

5. obstructing the movement or passage of any Olympic participant between their residence, practice venue or place of work and venues being used for Olympic competition or cultural purposes.

In this way they were prevented for the duration of the Olympics from going anywhere near the games, even though ultimately the majority were not charged with any criminal offence. (It should be noted that 9 of the 182 arrested were prosecuted, 5 of those were convicted with 2 of those convictions overturned on appeal.)

The use of stringent bail conditions imposes serious restrictions on the public lives and freedom of movement of individuals and can cause serious disruption to personal lives. It can also have a profound effect on protest activity. The growing use of strict pre-charge bail conditions in the protest context is a worrying trend and has been condemned by campaign groups and by a UN Special Rapporteur on the rights to freedom of peaceful assembly and of association.

We represented 7 claimants who were arrested for the obstruction of a bailiff contrary to Section 178 of the Town & Country Planning Act (a non-imprisonable offence) at the Dale Farm eviction in 2011. After being interviewed the Claimants were bailed for two months pending a charging decision (in one case, the period was extended) and all given strict bail conditions including a prohibition from entering the entire county of Essex. The bail conditions appear to have been applied indiscriminately to those arrested and released on bail and constituted a serious restriction on the Claimants' freedom of movement and in some cases the right to freedom of expression and/or assembly. As a result, a number were caused particular difficulty such as being prevented from: acting as legal observers; offering practical support to the travellers; from posting meaningful updates on social media; and in the case of one protester, from returning to his address. (He had been living at Dale Farm and did not have an alternative address.)

Protesters can remain on bail for several months under severe restriction. Bearing in mind that these restrictions often apply to large groups of activists, the ability to protest can effectively be removed for a period, as was seen in the protests against the British National Party and English Defence League in 2013. The first of these saw a number of protesters bailed on the condition that they were not to organise or participate in any protests or demonstrations and would not enter Parliament Square, Trafalgar Square, Whitehall or Millbank, while the second saw restrictions on, the 160 or so arrested, engaging in any demonstrations within the M25 where a number of named far-right groups were present.

Protesters can attempt to challenge their bail conditions where they are considered unreasonably wide or strict by directly contacting the police in the first instance or applying to the Magistrates' Court for a variation if this is refused. Many protesters are not aware of this mechanism.

The over-use of strict bail conditions in the protest context suggests that rather than being used in situations where there are genuine reasons to suspect the individual will fail to surrender, commit further offences on bail or interfere with witnesses, they are instead, being used to prevent further participation in protests. This suggests a worrying conflation of protest with criminality.

Remand decisions

In one case bail was refused to a group of protesters, who were protesting about the deportation of Ghanaian asylum seekers, on the basis that they would commit further offences whilst on bail. The protesters had been arrested for breach of Section 14 conditions imposed on the protest and despite this being a non-imprisonable offence and the representations made by their criminal solicitors, bail was refused. The reason for the refusal was that the protesters had been arrested for an imprisonable offence and detention was necessary to prevent the commission of further offences whilst on bail, namely further protests. As part of the justification for this the police recorded that they were aware of a week of demonstrations organised by "No Borders". Again this was used to prevent further participation in protest and is a conflation of protest with criminality.

Potential Civil Actions Arising from Arrest

There are a large number of potential claims open to protesters depending on the specific facts of their case. The most commons causes of action are summarised below: -

Assault & Battery

Battery is the intentional or reckless use of force following direct contact. It is not necessary for the claimant to sustain physical injury.

Assault does not require physical contact, but the reasonably apprehension that a battery is imminent.

Battery includes the pushing of a protester into a containment/ kettle, handcuffing, physical touching arising from unlawful arrest and/ or an unlawful search, the taking of DNA and fingerprints at the police station, a baton strike, CS/ Pepper spray, water cannons, the use of police dogs or charging at protesters on horses etc.

The use of force will be unlawful if at the time the police were not acting within their powers or the force applied was excessive in all the circumstances.

Limitation

Court proceedings must be issued within three years of the assault/ battery.

False Imprisonment

The protester must establish on the balance of probabilities that they were detained; this does not tend to be difficult in protest cases as they have been arrested or are in a kettle/ containment.

Once detention has been established, the burden shifts to the Defendant to establish there was lawful authority to detain.

Even if detention is initially lawful, it can become unlawful if the police fail to inform the protester of the reason for their arrest as soon as practicable under s.28 of PACE 1984 or if the detention becomes excessive.

Alternatively, the police may fail to consider the 'necessity test' to arrest under s.24(5) PACE 1984. For example, could the claimant have been street bailed or were they willing to attend the police station voluntarily?

Key Cases

O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286, [1997] 2 WLR 1, HL is potentially relevant in protest cases when acting on information provided by senior officers when arresting an alleged suspect/ protester.

O'Hara found that the arresting officer had reasonable grounds to arrest and detention was not unlawful. A police officer cannot just follow orders, but he can rely on what he has been told by other officers, and information from other sources (even if it later turns out to be wrong).

Davidson v Chief Constable of North Wales and another [1994] 2 ALL ER 597: A third party could be liable for false imprisonment is they directed, procured, directly requested or directly encouraged the arrest. This may be relevant is you have multiple police forces involved with a particular protest.

Limitation

Court proceedings must be issued within six years, unless there is a personal injury (i.e. psychiatric claim) then limitation reduces to three years.

Malicious Prosecution

To succeed in a malicious prosecution claim, a protester will have to show that: -

- the police brought a claim maliciously (this can include in bad faith);
- without reasonable and probable cause; &
- Court proceedings concluded in their favour (i.e. discontinued, acquitted etc);
- Damage or loss suffered.

Key Recent Case

Copeland v Commissioner of Police of the Metropolis [2014] EWCA Civ 1014 was an important recent ruling on the identity of the appropriate prosecutor in a malicious prosecution claim. The court considered the correct test was whether they were '*instrumental in the bringing of the prosecution.'*

Limitation

Court proceedings must be issued within six years following the conclusion of proceedings in the claimant's favour, unless there is a personal injury (i.e. psychiatric claim) then limitation reduces to three years.

Misfeasance in Public Office

This often overlaps with malicious prosecution claims, but ultimately it depends on the circumstances of the case.

In ***Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1 HL****,* the House of Lords clarified the elements required to establish misfeasance in public office: -

- Conduct must be that of a public officer, exercising power in that capacity; this is not normally difficult to establish in actions against the police;

- The officer either intended to injure the claimant by their acts or knowingly or recklessly acted beyond their powers;
- Caused damage to the claimant;
- In the circumstances where they should have known the act would probably cause damage of this kind.

Limitation

Court proceedings must be issued within six years, unless there is a personal injury (i.e. psychiatric claim) then limitation reduces to three years.

Claims under the Human Rights Act 1998 for breaches of the European Convention on Human Rights 1998

Article 3 ECHR:

Article 3 ECHR is an absolute right and states:

> *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

> There is potential overlap with assault and there is a high threshold to establish an Article 3 ECHR claim. For example, tasering is likely to reach the Article 3 ECHR threshold and possibly conditions of imprisonment.

Article 5 ECHR: The right to liberty and security of person

Article 5 ECHR is an absolute right and states:

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedures prescribed by law:

(a) the lawful detention of a person after conviction by a competent court
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

(3) *Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

(4) *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

(5) *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

Article 5 ECHR often overlaps with false imprisonment, although may cover factual scenarios not previously tested or considered under common law. Article 5 ECHR is particularly relevant to kettling/ containment cases.

Article 8 ECHR: The right to respect for private and family life

Article 8 ECHR is a qualified right and states: -

(1) *Everyone has the right to respect for his private and family life, his home and his correspondence.*
(2) *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 8 ECHR overlaps with conditions of imprisonment, the Data Protection Act 1998 and retention of data.

Article 10 ECHR: Freedom of Expression

Article 10 ECHR is a qualified right and states: -

(1) *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
(2) *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Article 11: Right to Freedom of Assembly and Association

Article 11 ECHR is a qualified right and states: -

(1) *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
(2) *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police, or of the administration of the State.*

Limitation

Under section 7 of the Human Rights Act 1998, a claim should be brought within one year or such longer period as the court considers equitable having regard to all the circumstances.

Relevant Considerations

- The interplay and developments of ECHR and domestic law.
- Traditionally domestic compensation awards tend to be higher than under the HRA.
- There is a possibility of claiming aggravated and exemplary damages in assault, false imprisonment, malicious prosecution & misfeasance claims.
- Under the HRA, there is a possibility of a declaration of incompatibility.

Judicial Review v Private Law Claims

The decision whether to challenge a decision by way of judicial review or private law proceedings is not always easy. The advantages of judicial review are that it is quicker and cheaper. The disadvantage, however, is that the claimants ordinarily have to accept the defendants' account, so it is unsuited to cases where there is significant factual dispute. In the case of ***Sher v the Chief Constable of Greater Manchester and Others*** **[2010] EWHC 1859 (Admin**) it was said that the JR process did not ordinarily involve any cross-examination or fact finding at all. Increasingly, protesters have been favouring judicial review over private law claims because they are more interested in bringing about a change in policing tactics than in obtaining declarations and/or compensation.

The case of ***R (Hicks) v The Commissioner of Police of the Metropolis*** **[2014] EWCA Civ 3** was brought by way of JR but equally could have been brought in private law proceedings. The Claimants had been pre-emptively arrested on the day of the royal wedding to prevent anticipated breaches of the peace. It was accepted that in the case of the majority of these claimants that they would not themselves act violently but rather their actions would provoke others to commit violence against them. The Divisional Court dismissed their claim for judicial review and the majority of claimants appealed but were granted permission in respect of one ground only, namely whether their arrests and detention had been compatible with ECHR Article 5. Ultimately the Court of Appeal found against them.

Contrast that with the case of ***Ahmadi v The Commissioner of Police for the Metropolis*****.** This was a case which arose out of similar circumstances. Mr Ahmadi was in Soho whilst on his way to a Republican tea party on the day of the Royal Wedding. Following a Section 60 CJPOA search, he was arrested. He was wearing a T-shirt with the question "Are the royal

family better than yours?" He was also wearing a comedic half-face cat mask with whiskers. He was arrested to prevent anticipated breaches of the peace and detained for three hours. He brought a private law claim for technical assault, i.e. the handcuffing, false imprisonment and breaches of Articles 10 & 11 of ECHR on the basis that there were no reasonable grounds to suspect he was about to commit breaches of the peace or provoke breaches of the peace and therefore his arrest was unlawful. The case settled post issue but prior to service of Particulars of Claim for £5,000.

In the case of ***R (Pearce & Golsirat) v the Commissioner of Police of the Metropolis***, the claimants were arrested on the day before the royal wedding in squats in Camberwell. The police had obtained search warrants for the squats on the basis of intelligence relating to suspected stolen goods. The timing of the execution of the warrants was influenced by concern to prevent disruption of the royal wedding. It was accepted by all parties that the police did not have royal wedding related intelligence to justify entering the squats. The issue was whether prevention of disruption was a dominant or collateral purpose in executing the warrants. Whilst the Divisional Court found that the police were motivated by avoiding disruption to the royal wedding, in their view this did not render the execution of the warrant for a different purpose unlawful. The claimants appealed and their appeal was dismissed.

By contrast, two claimants brought private law actions arising out of the same circumstances. Their claims were for technical assault, false imprisonment and breaches of Articles 8, 10 & 11 ECHR. The claims settled post issue prior to service of proceedings for £7,750 each.

These cases illustrate that the Courts are reluctant to interfere with operational policing decisions in the context of public order and this ought to be a consideration when deciding which process to use.

Kettling

In January 2012 the Court of Appeal overturned the decision of the Divisional Court in ***R (on the application of Moos) v Commissioner of Police for the Metropolis*** **[2012] EWCA Civ 12** and upheld the police containment of protesters at Climate Camp during the G20 demonstrations in 2009. The court confirmed that the role of the courts in scrutinising police actions of this nature is not to reach its own view on the imminence of the anticipated breach of the peace, but to assess whether, in light of what the officer directing the containment knew and perceived at the time, it was reasonable to fear an imminent breach of the peace.

This was followed in March 2012 by the decision of the European Court of Human Rights ***Austin & Ors v UK*** **[2012] ECHR 459.** The ECHR agreed with the House of Lords that the use of "kettling" or "containment" does not constitute a deprivation of liberty for the purposes of Art 5 provided its use is "*unavoidable as a result of circumstances beyond the control of the authorities...necessary to avert a real risk of serious injury or damage and...kept to the minimum required for that purpose".*

On a more positive note in ***Mengesha v Commissioner of Police for the Metropolis [2013] EWHC 1965 (Admin)*** the claimant law graduate attended a public sector trade union march and was lawfully contained by the police as a result of a perceived risk of an imminent breach of the peace. She was also subjected to a lawful search pursuant to s.60 CJPOA 1994. However, the police determined that a controlled and disciplined release from containment should take place and that those being released would be filmed and asked to provide their name, address and date of birth. The claimant queried what police power was relied upon authorising the police to film and request such details, but those questions were

not answered until after she had been filmed and had given her details. The claimant brought judicial review proceedings. By the time of the JR hearing the Defendant accepted that he police had no such powers but alleged that the protesters had not been required to provide the information, only asked to volunteer it. This was strongly contested by the claimant.

The Divisional Court, granted the application for judicial review. The Court held that it had not been lawful for the police to maintain the containment for the purposes of obtaining identification, whether by questioning or by filming, and that, on the facts of the case, the Claimant had not submitted to the process of identification voluntarily. The taking and retention of images and personal details had not been in accordance with the law and, given that the police has no power to obtain the data in the first place, its retention was equally unlawful. A further ground of illegality was that the defendant has no published policy for the retention of personal data in such circumstances. This case is a useful reminder that the police use of cordons is a serious interference with individual rights and should be scrutinised with care.

Data Retention

DNA & Fingerprints

The Protection of Freedoms Act 2012 introduced a new regime governing the retention of biometric data (fingerprints and DNA). The Act came about as a consequence of ***S & Marper v the UK [2008] ECHR 1581***.

The Marper case involved two claimants who went to court to get their DNA destroyed, and their records removed from the relevant databases. One was a juvenile who was charged with attempted robbery but acquitted. He was aged 11 when he was arrested. The other was an adult, Michael Marper, who was charged with harassment but whose case did not go to court as the charges were dropped.

The ECHR found that there had been a violation of Article 8 ECHR, stating:

"*In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society*"

Section 4 of the Protection of Freedoms Act inserts a new Section 63H into PACE which deals with those who are arrested or charged but not convicted of a minor offence. (Most of the offences which protesters are arrested for are minor offences). When a person is arrested or charged with a minor offence their DNA and fingerprints are automatically deleted on conclusion of the proceedings.

Those arrested but not charged with a qualifying offence, i.e. serious offences, will also have their biometric data deleted automatically unless the force applies to the Biometrics Commissioner for retention of that material for three years. In those circumstances, the individual can make representations to the Biometrics Commissioner for deletion.

This leaves two situations in which applications for early deletion of data can be made. The first is where biometric data is held and a person (with no convictions) is given a penalty

notice for disorder (which is not a conviction under PACE). Second is where material is held from a person arrested and charged with a qualifying offence and the application for early deletion is made within the normal three year period for retaining that data. Grounds for deletion in these circumstances are difficult to establish. (See National Police Chiefs' Council - Deletion of Records from National Police Systems - Annex A)

Photographs and PNC Records

The retention of custody photographs and entries on the police national computer are not covered by the Protection of Freedoms Act 2012. However, there is a record deletion process and individuals can apply to chief officers.

Ordinarily PNC records are retained until a person is deemed to have reached 100 years of age. However, chief officers can exercise their discretion in exceptional circumstances to delete conviction records as well as any event history owned by them on the PNC, but only where grounds for doing so have been examined and agreed. Individuals who are clearly not linked to any crime must evidence their grounds for making an application. There are a list of grounds in the guidance on this issue that chief officers are obliged to consider. However, the list is indicative and allows chief officers to exercise professional judgment in deciding whether the early deletion of the PNC record is reasonable based on all the information available.

In ***R (on the application of RMC and FJ) v Metropolitan Police Commissioner and others*** **[2012] EWHC 1681 (Admin)** the Court held that it was disproportionate for the Metropolitan Police to retain photographs taken on arrest in the police station for long periods of time (at least six years before a review) in cases where the individual was subsequently not charged and/or not convicted of any offence. The Defendant had argued that it was applying a code of practice and guidance drawn up by the Home Office for the management of information by the police. But the court declared that approach was incompatible with the claimants' rights to respect for private life pursuant to the ECHR, Article 8. However, it did not order that the photographs be destroyed on the basis that the Defendant said it was revising the policy, but the Court made it clear that a new policy would be expected within months rather than years.

Other police databases

On 4 March 2015, the Supreme Court handed down judgment in ***R (Catt) v Commissioner of Police of the Metropolis and ACPO and R (T) v Commissioner of Police of the Metropolis***, two linked appeals concerning the police's retention of data.

Mr Catt is a 91 year old man of good character who had been active in the peace movement since 1948 and had been a regular attender at public demonstrations. The police had retained information about him in a large number of intelligence reports held on the police national special branch intelligence system database about political protests he had attended. In Ms T's case the information challenged was a copy of a letter that was sent to Ms T informing her that an allegation of harassment had been made against her by a neighbour along with the record of the police investigation.

The issue in both appeals was whether the retention of the information breached the Respondent's rights to respect for private life under Article 8 of the European Convention on Human Rights. The Court of Appeal had found a breach in both cases, holding that the retention of the data was a disproportionate interference with the right protected by Article 8.

The Supreme Court found that the state's systematic collection and storage of data about an individual in retrievable form is an interference with the individual's right to respect for private life and must be justified under Article 8(2). The Court went on to find that the legal regime governing the police's retention of data satisfied the legality requirement of Article 8 and thus is compatible with the Convention. Therefore, there was no breach of either Mr Catt's or Ms T's rights and the appeals were allowed. (Mr Catt has stated he is planning to appeal to the ECHR).

It was suggested by Lord Sumption who gave the lead judgment (at paras 14, 34 & 45) that the way to challenge information held is by way of a subject access request and then to raise objections with the Information Commissioner. We are yet to see whether this will prove to be an adequate remedy.

As a consequence of **Catt** (not to mention the activities of Red Watch) many protest groups have been promoting the use of face coverings to thwart data collection. The Defendant in **Catt** suggested that he could cover his face to prevent his identity being known. However, although it is not unlawful to use face coverings (unless there is a s60AA CJPOA 1994 authorisation in force), it can have unintended consequences. The DPP's guidance for prosecutors, used for example in the Fortnum's mass arrest for aggravated trespass, included face coverings as a reason to prosecute. In addition in **Hicks** (Royal Wedding Case) the Court accepted that make up and costumes which concealed identities were factors which supported the reasonableness of the police's apprehension of an intention to commit breach of the peace.

<u>Practicalities</u>

- Group Litigation Order (Part 19.11 CPR) v normal court case management powers?
- How to test the generic/ common themes in the cases? Lead Claimants?
- Funding – LAA still available, but Conditional Fee Agreements increasingly difficult to secure with After the Event Insurance following Jackson Reforms on 1 April 2013. Furthermore, premiums are now deductible from compensation rather than recoverable from the Defendant;
- Since 1 April 2013 – the new proportionality test under CPR 44.
- Cost Case Management.

<u>Police Complaints</u>

A police complaint can be made against anyone employed by the police force whether a police officer or a member of staff

<u>Relevant Legislation</u>

Key legislation linked with police complaints includes:

- Police Reform Act 2002
- Police (Conduct) Regulations 2008/ 2864
- Police Reform & Social Responsibility Act 2011
- Police (Conduct) Regulations 2012

- Police (Complaints and Misconduct) Regulations 2012
- The Police (Conduct) (Amendment) Regulations 2015 (2015/626)
- The IPCC (Complaints & Misconduct) 9Contractors) Regulations 2015

This is not an exhaustive list.

Revision of Statutory Guidance to Police Service on Handling of Complaint in May 2015 - https://www.ipcc.gov.uk/page/statutory-guidance

Time Limits

A police complaint must normally be pursued within one year of the protest or act complained of.

A Letter of Claim should trigger a 'misconduct review' under the Police Reform Act 2002 even when more than one year has passed (though the client may lose his appeal rights via this route).

Process

The Independent Police Complaints Commissioner (IPCC) oversees the police complaints system in England & Wales.

How Are Complaints Dealt With

1. *Locally by the police force's own complaint department;*

2. *Local investigation with terms of reference;*

   Investigation by police force's own Professional Standards Department (PSD).

3. *Supervised IPCC Investigations:*

   Investigation carried out by police forces' Professional Standards Department (PSD) under their own direction and control. The IPCC will set out what the investigation should look at and receive the report when it is complete. There is a right to appeal to the IPCC following a supervised investigation;

4. *Managed IPCC Investigation:*

   Investigation carried out by police force PSDs under the direction and control of the IPCC. No right of appeal to IPCC.

5. *Independent IPCC Investigation:*

   Investigation carried out by IPCC and overseen by IPCC Commissioner. There is no right of appeal.

When must a matter be referred to the IPCC?

The following complaints and conduct matters must be referred to the IPCC:

- All death and serious injury (DSI) matters must be referred to the IPCC;

- Serious assault;
- Serious sexual offence;
- Serious corruption;
- Criminal offence or behaviour that would led to misconduct proceedings and that is aggravated by discriminatory behaviour on the grounds of a person's race, sex, religion or other status identified in the IPCC Statutory Guidance;
- Certain types of criminal offence.

Direction & Control

A direction and control complaint concerns the way a chief officer (or someone carrying out the chief officer's functions) carries out any of the following:

1. Operational management decisions including making general strategic decisions about how certain police powers should be exercised;
2. Drafting operational policing policies and the process leading to their approval;
3. Organisational decisions including how police resources are configured and organised, where officers or police staff should be located, how they should be managed;
4. General policing standards in the force.

A direction and control decision should be recorded, but are excluded from general appeal rights, with the exception of appeals made about of non-recording of the complaint.

Key Case

R (on the application of North Yorkshire Police Authority) v IPCC [2010] EWHC 1690 (Admin): Judgment provides guidance on what is direction and control.

Outcomes Following Police Complaint

1. *No action* – complaint not upheld;

2. *Management action (non-disciplinary);*

    a. Show how behaviour fell short of expectations set out in the Standards of Professional Standards;
    b. Identify expectations for future conduct;
    c. Create an improvement plan;
    d. Address any underlying causes of misconduct

3. *Misconduct Meeting*: Case to answer for misconduct

    Outcomes
    a. No action;
    b. Management advice – specific advice given by supervisory or senior officer;
    c. Written warning (if further proven misconduct in preceding 12 months it will lead to (at least) a final written warning;
    d. Final written warning. Further proven misconduct in preceding 18 months leading to more than management advice will result in dismissal.

    Max sanction – final written warning

4. *Misconduct Hearing:* Case to answer for gross misconduct;

   Outcomes
   Same as misconduct meeting above plus:-

   a. Dismissal with notice;
   b. Dismissal without notice

   Max Sanction: Dismissal without notice

5. *Unsatisfactory Performance Procedure (UPP):* This may be recommended or directed by IPCC if inability or failure to perform role to a satisfactory level, but no breach of Standards of Professional Behaviour.

6. *Learning*: learning outcome or recommendations for the police force.

7. *Referral to the CPS* to investigate criminal case against officer.

Appeals

Appeals will either be dealt with by Chief Officer of the relevant Police Force or the Independent Police Complaints Commission (IPCC).

An appeal must be made within 28 days. This deadline is non extendable and is from date of decision NOT the date of receipt.

There is no right of appeal if it is a direction or control issue and following a managed or independent investigation.

Judicial Reviews

Relevant police forces and the IPCC can be challenged via judicial review in relation to their complaints procedure after all other avenues exhausted.

Recent Key Cases

***R (on the application of Ben Hoare Bell Solicitors and others) v The Lord Chancellor [2015] EWHC 523 (Admin)*:** Challenging legislation regarding the recoverability of pre-permissions JR costs. After the claimants successful challenged the amendment to the legal aid scheme by the Civil Legal Aid (Remuneration) (Amendments) (No 3) Regulations 2014 SI 2014 No 607, the government rushed through on 27 March 2015, The Civil Legal Aid (Remuneration) (Amendments) Regulations 2015 providing payment at the pre-permissions stage in circumstances identified in the Court's judgment only.

R (oao CC of West Yorkshire Police) v IPCC [2014] EWCA Civ 1367: the Court of Appeal upheld the quashing of the report, confirming that when the IPCC is reporting on a 'special requirements' investigation, it should confine its conclusions to whether there is a case to answer against the officer rather than whether the officer's actions were substantively unlawful.

Pros & Cons of Police Complaint

Pros	**Cons**
A complaint may assist with civil action. A	It is extremely rare disciplinary action to be

helpful outcome, although not determinative, may assist with the claim.	taken following a complaint.
Could lead to disciplinary action being taken and an apology	How independent and effective is the complaints process? At a local level, you have the police investigating the police. Under Labour Election Manifesto, they advocated a 'new Police Standards Authority will replace the discredited IPCC.'
	Investigators often still appear to be looking for reasons not to uphold complaints with some investigators trying to undermine credibility of complainant/ witnesses
	The quality of the reports varies greatly. Often complaints are referred back for re-investigation on appeal.
	Depending on nature of complaint it may come under 'direction and control 'criteria and therefore the complainants' appeal rights are limited. Is a police complaint system, the best mechanism to challenge the overall operational policing decisions at a protest?
	You and your client have less control over the police complaints process than civil proceedings.
	The complainant may be asked to provide a section 9 statement without full disclosure.
	Lodging a police complaint could delay the civil action for compensation. Often the civil action will be stayed pending the outcome of the police complaint, although there is authority to suggest that a complaint and civil action can run in tandem if there is no prejudice ***Jefferson v Bhetcha [1979] 2 ALL ER 1119*** followed in ***Abraham & Reid v Commissioner of Police of the Metropolis, unreported 18.01.04)***
	Historically resignations during the complaints process to avoid misconduct proceedings.

Police Complaint Costs

There is conflicting decisions from the Supreme Court Cost Office on whether police complaint costs recoverable in a subsequent civil action:

Kerr and others v The Commissioner of Police of the Metropolis SCC0DOR500414, unreported

Mullan v Chief Constable of Thames Valley Police [2009] 90140 (Costs): 7EC00188

Proportionality – the new proportionality test?

Since 1 April 2013, Part 44.3(2)(a) of the CPR states: -

> *'…only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred'.*

This is potentially a relevant consideration for both you and your client. It is still too early to determine how the court will determine what is proportionate in action against the police cases.

Data Protection Act (DPA) 1998

The Data Protection Act 1998 came into force on 1 March 2000 (mandatory right to see manual records came into force on 24 October 2011). The Data Protection Act controls how personal information is used by the relevant police force. This is a useful mechanism for a protester to ascertain what information the relevant police force holds on them.

The DPA regulates the means by which personal and sensitive data is processed by the police.

Personal Data

The Act widely defines 'personal data': -
Section 1(1)…

> *"[D]ata which relate to a living individual who can be identified—*
>
> *(a) from those data, or*
>
> *(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
>
> *and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;*

However, the Court of Appeal in ***Durant v Financial Services Authority [2004] FSR 28*****,** have sought to narrow the definition of personal data.

Sensitive Personal Data

This is particular relevant for protest cases.

> *Section 2 'sensitive personal data' means personal data consisting of information as to –*
>
> *(a) the racial or ethnic origin of the data subject,*
>
> *(b) his political opinions,*
>
> *(c) his religious beliefs or other beliefs of a similar nature,*

(d) *whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),*

(e) *his physical or mental health or condition,*

(f) *his sexual life,*

(g) *the commission or alleged commission by him of any offence, or*

(h) *any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.*

Data Protection Act Principles

Section 4(4) imposes a duty on the relevant police force to comply with the 8 Data Protection Act Principles set out in Schedule 1. They include: -

1 FAIR & LAWFUL: *Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

(a) *at least one of the conditions in Schedule 2 is met, and*

(b) *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

2 PURPOSES: *Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.*

3 ADEQUACY: *Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.*

4 ACCURACY: *Personal data shall be accurate and, where necessary, kept up to date.*

5 RETENTION: *Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.*

6 RIGHTS: *Personal data shall be processed in accordance with the rights of data subjects under this Act.*

7 SECURITY: *Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.*

8 INTERNATIONAL: *Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.*

Rights of Access to Personal Data

Section 7 governs the right of access to personal data held by the police. A DPA request should also be made to ACRO Criminal Records Office, who provide subject access disclosures from the Police National Computer (PNC) on behalf of most police forces in England and Wales (including British Transport Police) - https://www.acro.police.uk/subject_access.aspx

The Process

Under the DPA an individual is entitled upon written application and payment of a £10 fee to be informed if any personal data is being processed. If such information is being processed (and subject to certain exemptions), the individual is entitled to know: -

- Description of the data being processed;
- Purpose of which they are being processed;
- The identity of the person(s) to whom the information is or may be disclosed to.

This information should be provided within 40 days of the request.

The police force can refuse to disclose information that may lead to the identification of a third party. In such circumstances, the police force can only disclose such information with the consent of the third party or if it is deemed reasonable to comply without seeking their consent.

If a DPA subject access request is refused under section 7, the individual can make an application to the court.

Exemptions

Under Part IV processing of personal data for certain purposes are exempt from some of the principles set out in Schedule 1 and from disclosure under section 7. The section 28 exemption is in relation to national security.

Under section 29, the police are exempt from the first data protection principle if the purpose of processing the data is for: -

- Prevention or detection of crime;
- Apprehension or prosecution of offenders

Although the police still need to fulfil the conditions in Schedule 2 and/ or 3.

Under Schedule 2, the police are most likely to rely on: -

- For the administration of justice;
- For the exercise of any function conferred on a person by an enactment;
- For the exercise of any functions of a public nature exercised in the public interest;
- Apprehension or prosecution of offenders

Under Schedule 3, the police are most likely to rely on:

- In order to protect the vital interests of the data subject or another person, in a case where:

    - Consent cannot be given by or on behalf of the data subject; or
    - The police cannot be reasonably expected to obtain the consent of the data subject (i.e. third party);
- In order to protect the vital interests of another person.

Compensation

Under section 13 DPA 1998: -

(1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.

(2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if—

(a) the individual also suffers damage by reason of the contravention, or

(b) the contravention relates to the processing of personal data for the special purposes.

(3) In proceedings brought against a person by virtue of this section it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned.

A distinction is drawn between a breach of a requirement which causes damage and a breach that causes distress. Most claimants are unlikely to recover compensation for distress under s.13(2)(b) since this only covers contraventions relating to journalism, artistic and literary purposes (section 3).

In ***Johnson v MDU [2006] EWHC 321 (Ch),*** it was held that s.13(1) was only intended to cover pecuniary loss arising from a DPA breach. However if pecuniary losses can be established this enables non pecuniary losses to be claimed too.

Interplay with DPA and Article 8 ECHR

There is overlap with DPA and Article 8 ECHR right to private and family life. If both an Article 8 ECHR and DPA claim pursued in parallel it may not necessary to establish a financial loss to pursue a successful claim.

Limitation

A DPA claim should be brought within six years of the breach unless there is a personal injury (i.e. psychiatric) claim and limitation reduces to three years.

A Human Rights Act claim should be brought within one year or such longer period as the court considers equitable having regard to all the circumstances.

Rectification, Blocking, Erasure and Destruction

Under section 14 DPA, where the court is satisfied that the data is inaccurate, the court may order the data to be rectified, blocked, erased or destroyed.

Information Commissioner’s Office (ICO)

Concerns regarding data protection breaches can be reported to the Information Commissioner's Office (ICO). This should normally be done within three months.

The ICO cannot pay out compensation but under section 55A to 55E of the DPA 1998, introduced by the Criminal Justice & Immigration Act 2008, the Information Commissioner, may, in certain circumstances, serve a monetary penalty notice on a data controller. This will not exceed £500,000 and payment is made to the Consolidated Fund owned by HM Treasury.

For the ICO's guidance about the issue of monetary penalties - https://ico.org.uk/media/for-organisations/documents/1043720/ico-guidance-on-monetary-penalties.pdf.

The ICO can also issue undertakings, enforcement notices and prosecutions in relation to DPA breaches and monitors data breach trends each quarter including police and criminal records.

Relevant & Recent Case Law

On 18 May 2015, the ICO issued South Wales Police with a £160,000 fine for losing a video recording which formed part of the evidence in a sexual abuse case. For further information including the monetary penalty notice - https://ico.org.uk/action-weve-taken/enforcement/south-wales-police/

***Anthony Crook v Chief Constable of Essex Police [2015] EWHC 988 (QB*)**:** DPA and Art 8 ECHR claim for compensation after Essex Police issued a press release of 10 most wanted suspects including a photo of the claimant, against whom rape allegations had been made. The Court found this was not necessary nor proportionate. The proportionate response would have been to release the claimant's name and say that the police wanted to contact him. The claimant was awarded £67,750 compromising of £57,750 loss of earnings over an 18 month period in the financial sector, £5,000 psychiatric claim, £2,000 basic damages for the breach and £3,000 aggravated damages. This may be potential relevant to how police circulate information on protesters in the future.

R (on the application of Catt) v Commissioner of the Metropolis & Anor: R (on the application of T) v Commissioner of Police of the Metropolis [2015] UKSC 9*:* See above.

Freedom of Information Act (FOIA) 2000

The Freedom of Information Act 2000 was passed on 30 November 2000 and came into force on 1 January 2005. It creates a general right of access to information held by public authorities including the police.

Any person can make a request for information and there is a presumption of disclosure.

> *s.1(1) Any person making a request for information to a public authority is entitled*
>
> *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
>
> *(b) if that is the case, to have that information communicated to him.*

In the Upper Tribunal decision *in* ***Independent Parliamentary Standards Authority (IPSA) v Information Commissioner and Leapman UKUT 0033 (ACC) (23.01.2014*)** there was a

broad interpretation of what constituted 'recorded information.' This is reflected in the Information Commissioner's Offices Guidance – www.ico.org.uk.

Refusal to provide information

A request under FOI can be refused on following grounds:

- Proportionality: It would cost too much or take too much staff time to deal with the request;

- The request is vexatious;

- The request repeats a previous request from the same person.

Exemptions

- Part II FOIA 2012 – lists exempt information including:

    - 21: Information accessible to applicant by other means (i.e. civil litigation);
    - 24: National Security;
    - 30: Investigation and proceedings conducted by public authorities – this includes criminal and civil court proceedings;
    - 31: Law Enforcement.
- Exemptions tend to be 'class based' (i.e. a specific types of categories or information) or prejudice-based (i.e. prejudicing law enforcement/ ongoing criminal proceedings);

  S.2(1) states that: -

  Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either –

  (a) The provision confers absolute exemption; or

  (b) In all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.

Neither Confirm nor Deny Response

- 'Neither Confirm nor Deny' – if it would lead to sensitive or potentially damaging information being released that falls under an exemption under the FOIA.

Fee

The police can charge a fee for complying with a FOIA request – s.9 FOIA 2000

Failure to comply with FOIA

The Information Commissioner's Office (ICO) has a general duty to investigate complaints from members of the public who believes an authority such as the police has failed to respond correctly to a request for information.

If the complaint is not resolved informally, the ICO will issue a decision note. If it is found that the relevant police force has breached the Act a decision notice will be issued. The ICO appears to have more powers conferred to it under the DPA than the FOIA.

Reform?

Financial Times 21.06.15: Gove plans freedom of information crackdown
http://www.ft.com/cms/s/0/3e10b852-15d2-11e5-a58d-00144feabdc0.html#axzz3dtdwoKjW

Now and the Future

Undercover Policing of Protest Groups

- Critical HMIC Report 14 October 2014: An inspection of undercover policing in England and Wales - http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/an-inspection-of-undercover-policing-in-england-and-wales.pdf;

- Ongoing litigation relating to undercover police infiltrating protest groups;

- Public Enquiry in relation to undercover policing (Lawrence Family and others).

Further Funding Cuts?

- The Conservatives Manifesto
  '*We will continue to review our legal aid systems, so they can continue to provide access to justice in an efficient way.'*

- Prior the Election the Conservatives announced £12bn welfare cuts – further information – The Independent 21.06.15: Welfare cuts of £12bn to be announced in the next Budget –
  http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CEEQFjAG&url=http%3A%2F%2Fwww.independent.co.uk%2Fnews%2Fuk%2Fpolitics%2Fwelfare-cuts-of-12bn-to-be-announced-in-the-next-budget-10334565.html&ei=A3GJVbyhIYSzsQGhr4CQBg&usg=AFQjCNGUQY7af9nNkwE8aAc-I5nevb5q_Q&bvm=bv.96339352,d.bGg

- 21 June 2015 'end austerity now' march in Central London – more protests?

Scrapping the Human Rights Act

- The Conservative Manifesto:
  'We will scrap Labour's Human Rights Act and introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK. The Bill will remain faithful to the basic principles of human rights, which we signed up to the original European Convention on Human Rights.'

  'Curtail the role of the European Court of Human Rights, so that foreign criminals can be more easily deported from Britain.'

- Queen's Speech 27.05.15 – '*my government will bring forward proposals for a British Bill of Rights.'*

- Law Gazette 01.06.15: *'Breaking with Convention. - '* *http://www.lawgazette.co.uk/analysis/comment-and-opinion/breaking-with-convention/5049081.fullarticle*

Stop & Search

- The Conservative Manifesto:
  '*We will legislate to mandate change in police practice if stop and search does not become more targeted and stop to arrest ratios do not improve.'*

Strike Laws

- Queen's Speech 27.05.15: *'My government will bring forward legislation to reform trade unions and to protect essential public services against strikes.'*

- Proposals from the Department of Business to the strike ballot rules are likely to include:

  - A 50% turnout threshold for ballots on industrial action. Currently balloting rules do not require any specific level of participation by union members;

  - 40% of those eligible to vote must back action for strikes in core public services. Currently a simple majority is required for strike action;

  - Removal of restrictions actions on using temporary workers to cover for striking staff. A ban has been in place since 1973;

  - Tightening rules on ballot mandates to prevent unions undertaking action based on historic strike ballots;

  - Tackling intimidation on non-striking workers.