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Royal Courts of Justice
Strand, London, WC2A 2LL

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
(Lord Justice Gross and Mr. Justice Irwin)
[2012] EWHC 1471 (Admin)

Case No: C1/2012/1747

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE McCOMBE

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Between :

THE QUEEN (on the application of JOHN OLDROYD CATT)	**Claimant/ Appellant**
- and –	
(1) THE ASSOCIATION of CHIEF POLICE OFFICERS of ENGLAND, WALES and NORTHERN IRELAND **(2) THE COMMISSIONER of POLICE of the METROPOLIS**	**Defendants/ Respondents**
and	
(1) EQUALITY AND HUMAN RIGHTS COMMISSION **(2) LIBERTY** **(3) SECRETARY of STATE for the HOME DEPARTMENT**	**Interveners**

And

Case No: C1/2012/1355

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
(Mr. Justice Eady)
[2012] EWHC 1115 (Admin)

Between :

THE QUEEN **(on the application of T)**	**Claimant/ Appellant**
- and –	
THE COMMISSIONER of POLICE of the METROPOLIS	**Defendant/ Respondent**
and	
SECRETARY of STATE FOR the HOME DEPARTMENT	**Intervener**

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Mr. Tim Owen Q.C. and Ms Alison Macdonald (instructed by **Bhatt Murphy**) for **Mr. Catt**
Mr. Paul Bowen Q.C. and Ms Ruth Brander (instructed by **Bindmans LLP**) for **Ms T**
Mr. Martin Westgate Q.C. and Mr. Conor McCarthy for **Liberty**
Ms Elizabeth Prochaska for the **Equality and Human Rights Commission**
Mr. Jason Coppel (instructed by the **Treasury Solicitor)** for the **Secretary of State**
Mr. Jeremy Johnson Q.C. and Ms Georgina Wolfe (instructed by **Metropolitan Police Directorate of Legal Services**) for the Association of **Chief Police Officers of England, Wales and Northern Ireland** and the **Commissioner of Police of the Metropolis**

Hearing dates : 29th & 30th January 2013

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Judgment

Lord Justice Moore-Bick:

1. This is the judgment of the court on these two appeals which raise similar questions relating to the powers of the police to collect and retain information of a personal nature relating to members of the public. The first concerns Mr. John Catt, who over a long lifetime has been an ardent and frequent protestor against what he sees as a variety of forms of injustice. During that time he has attended many public demonstrations, most recently those organised by a group calling itself "Smash EDO", which campaigns against the operations on the outskirts of Brighton of a commercial manufacturer of weapons, EDO Defence Systems. Some of the core supporters of Smash EDO are prone to violence and criminal behaviour, but it is accepted that Mr. Catt has not been convicted of criminal conduct of any kind in connection with any demonstrations that he has attended. He seeks an order requiring the police to remove all references to him from the national database which contains reports on the activities of various protest groups including Smash EDO.

2. The second appeal concerns a lady identified for the purposes of the proceedings as Ms T. She was served with a warning letter following an allegation made to the police by one of her neighbours' friends that she had directed a single homophobic insult towards him. The letter informed her that an allegation of harassment had been made against her and that a repetition of her behaviour could involve the commission of a criminal offence. She hotly denies the allegation and seeks an order that the police destroy their copy of the letter and remove from their records all references to the decision to serve a warning letter on her. (She has also made a claim for damages, but it received little attention either at the hearing below or on the appeal.) However, on 23rd January 2013 the respondent's solicitor wrote to Ms T's solicitor saying that in the course of preparing for the appeal there had been a fresh assessment of the need to retain the information in question and that it had been decided that the record could be expunged. It follows that Ms T has now in substance achieved all that she set out to achieve, but in view of the importance of the issues to which the appeal gives rise we were invited to hear argument and determine them in the usual way and agreed to do so.

3. In support of their claims the appellants rely principally on section 6 of the Human Rights Act 1998 and article 8 of the European Convention on Human Rights, which provides as follows:

> "Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private . . . life . . .
>
> 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 [or] public safety . . . for the prevention of disorder or crime, . . . or for the protection of the rights and freedoms of others."

4. Both appellants say that the material held in the police records is of a personal and private nature and that its retention is unlawful because it involves an interference

with their right under Article 8(1) to respect for their private lives which cannot be justified. Both appellants brought proceedings for judicial review, but their claims failed. In the case of Mr. Catt the Divisional Court (Gross L.J. and Irwin J.) held that the information held by the police was of a public rather than a private nature, having been obtained from observations made at public demonstrations which he attended, and that accordingly there could be no infringement of his rights under article 8(1). Irwin J., who agreed with Gross L.J., expressed the view that there was no real distinction for this purpose between observations and reports compiled by members of the public who might be interested, such as journalists, and observations and reports prepared by the police for their own purposes. The court also expressed the view (obiter) that even if the collection and retention of the data was capable of infringing Mr. Catt's rights it was justified under article 8(2). In the case of Ms T, Eady J. held that there was an interference with her rights under article 8(1), but that it was justified under article 8(2).

5. It has been emphasised on many occasions that cases of this kind turn heavily on their particular facts. It will therefore be necessary to consider in some detail the particular circumstances surrounding the obtaining and retention of the information of which the appellants complain. Before turning to consider the facts of these two cases, however, it is convenient to say something about recent developments in this area of the law, beginning with the interference with the right to respect for private life provided by article 8(1).

Interference - Article 8(1)

6. The Divisional Court took as its starting point the observation of Lord Nicholls of Birkenhead in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457 that the touchstone of private life is

> " . . . whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

7. That concept clearly did underlie the reasoning in some of the earlier decisions of the European Court of Human Rights, for example *X v United Kingdom* (Application No 5877/72) and *Friedl v Austria* (1995) 21 E.H.R.R. 83, both of which concerned information obtained as a result of the claimant's public activities – in X's case her arrest and the consequent taking of her photograph by the police; in Friedl's case his presence at a public demonstration. In neither case could it be said that the claimant had a reasonable expectation of privacy. More recently, however, the courts have recognised that the position is not as simple as that. Even information of a public nature, such as a conviction, may become private over the course of time as memories fade, thereby enabling people to put their past behind them (see *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] 1 A.C. 410); and the storage and use of personal information that has been gathered from open sources (e.g. public observation, media reports etc.) may involve an infringement of a person's rights under article 8(1) if it amounts to an unjustified interference with his personal privacy.

8. It is convenient to begin this brief survey with a mention of *X v United Kingdom* because, although it was decided many years ago and the jurisprudence in this area has since undergone significant developments, it has been referred to in several of the later cases, both in this country and in Strasbourg. In that case the applicant, who had

taken part in a demonstration at a rugby match, was arrested and photographed by the police. She was told that the photographs of her would be retained for future use in case she acted in a similar way at any future matches. Her claim that the taking and retention of her photographs infringed her right to respect for her private life was rejected by the Commission on the grounds that the police had not actively invaded her privacy in order to take them, that the photographs were part of and solely related to her voluntary public activities and that they were retained solely for identification purposes and were not available to the public or for any other purposes.

9. In *Friedl v Austria* photographs of a demonstration taken by the police included pictures of the applicant. He was not the object of surveillance; the photographs were taken for the purposes of recording events in general and he just happened to appear in them. No attempt was made to identify the persons who appeared in the photographs, who therefore remained anonymous, and none of the applicant's personal data nor the photographs themselves were entered on a database. The Commission held that the retention of the photographs did not constitute an interference with the applicant's right to respect for his private life. Although this does not appear clearly from the Commission's decision, it is of some significance that the court in *S v United Kingdom* (2009) 48 E.H.R.R. 50, a case to which it will be necessary to refer in more detail later, explained the decision by reference to the fact that the Commission had attached special weight to the fact that the photographs had not been entered on a data processing system and that the authorities had taken no steps to identify the persons photographed by means of data processing (see paragraph [82]).

10. In *Segerstedt-Wiberg v Sweden* (2007) 44 E.H.H.R. 2 the applicants sought access to records held by the security police. The information held on four of the applicants related to their political activities, including, in the case of the second applicant, his participation in a political meeting in Warsaw in 1967. The decision is of particular importance for Mr. Catt's appeal because the court held that the information related to the applicants' private lives, despite the fact that much of it was publicly available, because it had been systematically collected and stored in police files. In paragraph [71] of its judgment the court described the circumstances under which the information had been obtained as follows:

> "71. The information kept on the *other* [the second to fifth] applicants that was subsequently released to them appeared to a large extent to have emanated from open sources, such as observations made in connection with their public activities (the second applicant's participation in a meeting abroad and the fifth applicant's participation in a demonstration in Stockholm). In addition, the main bulk of the information was already in the public domain since it consisted of newspaper articles (the third, fourth and fifth applicants), radio programmes (the fifth applicant) or of decisions by public authorities (decision by the Parliamentary Ombudspersons with regard to the third applicant). None of them had alleged that the released information was false or incorrect."

11. It continued:

> "72. The Court, having regard to the scope of the notion of "private life" as interpreted in its case law, finds that the information about the applicants that was stored on the Secret Police register and was released to them clearly constituted data pertaining to their "private life". Indeed, this embraces even those parts of the information that were public since the information had been systematically collected and stored in files held by the authorities. Accordingly, Art.8(1) of the Convention is applicable to the impugned storage of the information in question.
>
> 73. The Court further considers, and this has not been disputed, that it follows from its established case law that the storage of the information at issue amounted to interference with the applicants' right to respect for private life as secured by Art.8(1) of the Convention."

12. The position of the second to fifth applicants in that case may have differed from that of the applicant in *Friedl* to the extent that each of them had been the specific target of police information gathering, as opposed to having been identified in the context of a general report on political activities. Whether that was the case or not is not entirely clear from the report, but in any event it does not appear to have played any significant part in the court's reasoning. The case therefore goes some way to support the proposition that the use to which the state puts publicly available information may involve an interference with the right to respect for private life, particularly if that information is entered on and held in a searchable database which has been systematically compiled.

13. *PG v United Kingdom* (2008) 46 E.H.R.R. 51 concerned the recording by covert means of the applicants' voices for subsequent use as speech samples for identification purposes. In order to obtain voice samples the police fitted covert listening devices in, among other places, the cells where the applicants were being held and also attached covert recording devices to the officers who were present when they were charged. The court recognised that some aspects of public activities may fall within the scope of private life. It described the position as follows:

> "57. There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private-life considerations may arise, however, once any systematic or permanent record comes into

> existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Art.8, even where the information has not been gathered by any intrusive or covert method [citing *Rotaru v Romania*]."

14. It is interesting to note that the court held (paragraph [59]) that although the applicants' response to being charged occurred in a place where police officers were present (so that there was no reasonable expectation of privacy), the covert recording and subsequent analysis of their voices involved the processing of personal data and therefore an infringement of their right to respect for their private lives.

15. In *S v United Kingdom* the applicants challenged the retention by the police of their fingerprints, cellular samples and DNA profiles following the termination of criminal proceedings against them without conviction. In paragraphs [66-67] of its judgment the court provided a valuable summary of the general principles relating to interference with the right to respect for private life through the acquisition and processing of personal data of this kind. Since these principles were relied on by all parties to these appeals it is worth citing them in full:

> "66. The Court recalls that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by art.8. Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family. Information about the person's health is an important element of private life. The Court furthermore considers that an individual's ethnic identity must be regarded as another such element. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. The concept of private life moreover includes elements relating to a person's right to their image.
>
> 67. The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of art.8. The subsequent use of the stored information has no bearing on that finding. However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained."

Perhaps not surprisingly, the court held that the retention of the applicants' cellular samples, DNA profiles, and fingerprints on searchable databases constituted an interference with the right to respect for private life.

16. It is convenient to refer to four domestic authorities which illustrate the application of these principles. The first in time is *R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 W.L.R. 123. In that case the claimant, who was employed by an association which campaigned against the arms trade, had attended the annual general meeting of a company which organised trade fairs for the arms industry. The police were concerned that there might be demonstrations at the meeting, or at a later trade fair, and decided to deploy a number of officers around the hotel where the meeting was taking place. A number of photographs were taken of the claimant in the street as he was leaving the hotel with a companion after the meeting. The police followed the claimant and his companion to the underground railway station where they sought the assistance of the staff in obtaining the claimant's identity from his travel document, apparently without success. The photographs were stored in electronic form in various police databases. Laws L.J., with whom Dyson L.J. and Lord Collins of Mapesbury agreed on this question, held that the mere taking of a person's photograph in a public place is not capable of amounting to an interference with the right to respect for private life (paragraph [36]). However, he considered that the police operation, from the taking of the pictures to their actual and intended retention and use, was to be judged as a whole. Having referred to the cases of *X* and *Friedl* he said:

> "43. The claimant . . . found himself being photographed by the police, and he could not and did not know why they were doing it and what use they might make of the pictures. The case is in my judgment quite different from the *X* case, in which the photographs were taken on and after the applicant's arrest, when the police might well have been expected to do just that. It is possibly closer to the *Friedl* case, but in that case there had been a demonstration—a sit-in—where again the taking of police photographs could readily have been expected. In *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 A.C. 307, para 28, which I have cited at para 23, Lord Bingham referred to: "an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports": another instance in which the putative violation of article 8 (if any violation were suggested) consists in something familiar and expected. In cases of that kind, where the police or other public authority are acting just as the public would expect them to act, it would ordinarily no doubt be artificial and unreal for the courts to find a prima facie breach of article 8 and call on the state to justify the action taken by reference to article 8(2).
>
> 44. I do not of course suggest that there is a rigid class of case in which, once it is shown that the state actions

> complained of (such as taking photographs) are expected and unsurprising, article 8 cannot be engaged; nor likewise that where they are surprising and unexpected, article 8 will necessarily be applicable. The Strasbourg court has always been sensitive to each case's particular facts, and the particular facts must always be examined. And the first two limiting factors affecting article 8's application—a certain level of seriousness and a reasonable expectation of privacy—are not sharp-edged."

17. He held that in that case the element of surprise and the claimant's uncertainty about the purposes of the police in taking his photograph and the use to which it might be put meant that article 8 was engaged.

18. In *L* the claimant challenged the disclosure in response to a request for an enhanced criminal record certificate of the fact that her son X had been placed on the child protection register on the ground of neglect because she had insufficient control over his behaviour and X had subsequently been convicted of an offence for which he received a custodial sentence. The Supreme Court held that information about a person's convictions, which had been systematically collected and stored in central records and was available for disclosure long after the events recorded had receded into the past, could fall within the scope of private life for the purposes of article 8(1). Accordingly, the release of the information could interfere with that person's right to respect for his private life and, although her son's conviction could be regarded as public information, since the fact that the claimant was his mother and the allegations recorded in the social services' files were not in the public domain, her rights under article 8 were engaged when the question arose whether to disclose the information.

19. *Kinloch v Lord Advocate*[2012] UKSC 62, [2013] 2 W.L.R. 141 is another case which concerned the question whether the collection and retention by the police of publicly available information engaged the claimant's rights under article 8. Police officers watching the movements of the appellant, whom they suspected of handling the proceeds of crime, observed him in various public places at a number of locations, leaving premises, entering cars and carrying a bag which, when he was searched, was found to contain large sums of money. The officers made notes of their observations which were retained for use as evidence. The appellant was indicted on charges of converting and transferring criminal property. In the course of the proceedings he objected to the introduction of the officers' evidence on the grounds that its collection and subsequent use involved an interference with his right to respect for his private life. The Supreme Court rejected that submission, holding that, when determining whether there had been an interference with article 8 rights, it was necessary to have regard both to the extent of the particular intrusion into the individual's private space and to the use made of any evidence resulting from it. Observations made in a public place or on occasions when the person concerned knowingly or intentionally engaged in activities which might be publicly recorded in circumstances where he did not have a reasonable expectation of privacy, would not, without more, amount to such an interference. The appellant did not have a reasonable expectation of privacy while he was in public view and engaged in activities in places which were open to the public and where he had taken the risk of being seen and having his movements recorded. The court also held that the criminal nature of any activity in which he was suspected

of being engaged was not an aspect of his private life which he was entitled to keep private. Accordingly, the actions of the police had not infringed his article 8 rights. Lord Hope put it like this:

> "19. There is a zone of interaction with others, even in a public context, which may fall within the scope of private life: *PG v United Kingdom* 46 EHRR 1272, para 56. But measures effected in a public place outside the person's home or private premises will not, without more, be regarded as interfering with his right to respect for his private life. Occasions when a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy, will fall into that category: *PG v United Kingdom*, para 57. A person who walks down a street has to expect that he will be visible to any member of the public who happens also to be present. So too if he crosses a pavement and gets into a motor car. He can also expect to be the subject of monitoring on closed circuit television in public areas where he may go, as it is a familiar feature in places that the public frequent. The exposure of a person to measures of that kind will not amount to a breach of his rights under article 8.
>
> 20. The Strasbourg court has not had occasion to consider situations such as that illustrated by the present case, where a person's movements in a public place are noted down by the police as part of their investigations when they suspect the person of criminal activity. But it could not reasonably be suggested that a police officer who came upon a person who has committed a crime in a public place and simply noted down his observations in his notebook was interfering with the person's right to respect for his private life. The question is whether it makes any difference that notes of his movements in public are kept by the police over a period of hours in a covert manner as part of a planned operation, as happened in this case.
>
> 21. I think that the answer to it is to be found by considering whether the appellant had a reasonable expectation of privacy while he was in public view as he moved between his car and the block of flats where he lived and engaged in his other activities that day in places that were open to the public. . . . There is nothing in the present case to suggest that the appellant could reasonably have had any such expectation of privacy. He engaged in these activities in places where he was open to public view by neighbours, by persons in the street or by anyone else

> who happened to be watching what was going on. He took the risk of being seen and of his movements being noted down. The criminal nature of what he was doing, if that was what it was found to be, was not an aspect of his private life that he was entitled to keep private. I do not think that there are grounds for holding that the actions of the police amounted to an infringement of his rights under article 8."

20. Finally, it is necessary to refer to the recent decision of the Divisional Court in *R (C) v Comr of Police of the Metropolis* [2012] EWHC 1681 (Admin), [2012] 1 W.L.R. 3007. That part of C's claim for which permission to proceed was granted related to the retention of photographs taken by the police after she had been arrested on suspicion of assault. After the decision had been taken not to prosecute her she sought to have the photographs destroyed, but the police declined to do so. A second claimant, J, had been arrested on suspicion of rape and his photograph had been taken (as might be expected). In the event it was decided to take no further action against him and he also asked, unsuccessfully, for his photographs to be destroyed. The court (Richards L.J. and Kenneth Parker J.) considered the line of authorities which includes *X*, *Friedl* and *S* and cited paragraphs [66-67] of the latter decision (see paragraph 15 above). Having then cited paragraphs [78-86] of the judgment, Richards L.J., with whom Kenneth Parker J. agreed, expressed the view that, whatever the earlier cases may have said, the Strasbourg court considered that the retention of photographs engaged article 8. In the light of the court's conclusion that the retention of fingerprints constituted an interference with the right to respect for private life, he found it difficult to see how a different conclusion could apply to the retention of photographs. He rejected a submission on behalf of the Commissioner that the decision was explicable by reference to the fact that the fingerprints were recorded on a national database, were intended to be retained permanently and were intended to be regularly processed by automated means for criminal identification purposes. The court was also influenced by the decision of the Strasbourg court in *Reklos v Greece* [2009] EMLR 16 and of the High Court of Northern Ireland in *JR 27's Application* [2010] NIQB 143, in both of which the court emphasised that a person's physical appearance forms a vital part of the personal sphere protected by article 8. Applying the authorities to which he had referred, Richards L.J. held that the retention of the claimants' photographs constituted an interference with their right to respect for their private lives under article 8(1) so as to require justification under article 8(2).

Justification – Article 8(2)

21. Interference with the right to respect for private life may be justified if it is in accordance with the law and necessary in a democratic society in the interests of various beneficial aims which are conducive to the well-being of society as a whole. These include the prevention of disorder or crime and the protection of the rights and freedoms of others. It was not in dispute that in order to justify an interference with article 8(1) rights the state must demonstrate that the conduct in question satisfies three requirements:

i) that it is in accordance with the law;

ii) that it is carried out in pursuit of a legitimate aim; and

iii) that the interference is proportionate to the aim sought to be achieved.

22. It is clear that in both cases now before the court the action of which complaint is made was undertaken in pursuance of a legitimate aim, namely, the prevention of disorder or crime and the protection of the rights and freedoms of others. The real debate therefore centres on the first and third requirements, namely legality and proportionality. The question of legality depends on an analysis of the rules of law, non-statutory guidance and published policy that govern the actions of which complaint is made. These are best considered in the context of individual cases, but in broad terms it is common ground that in order to satisfy this requirement it must be shown that the law is sufficiently accessible and certain, in the sense that it is formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate his conduct, and must therefore indicate with sufficient clarity the scope of any discretion conferred on the relevant authorities: see *S v United Kingdom*, paragraph [95]. In *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 A.C. 307 Lord Bingham expressed the principle as follows:

> "34. The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."

23. However, it was also recognised in *S*, that in cases which concern the collection and retention of personal information relating to private individuals the issue of legality turns to a large extent on the circumstances and manner in which that information is collected, processed, stored and ultimately destroyed. Questions of that kind are closely related to the broader issue of whether the interference with the right to respect for private life is necessary in a democratic society (see paragraph [99]). In *S* itself the court found it unnecessary to consider the question of legality having held that the retention of the information was disproportionate to the aim sought to be achieved and in those circumstances we turn to the question of proportionality.

24. It is worth noting at the outset that the Strasbourg court has repeatedly emphasised that this question, almost more than any other, is to be judged by reference to the facts of the particular case. Nonetheless, it is possible to derive from the authorities certain broad principles which guide the decision. The overriding principle is the need to strike a fair balance between the personal interest of the claimant in maintaining respect for his private life and the pursuit of a legitimate aim in the interests of the public at large: see, for example, *S*, paragraph [118]. In order to justify the collection, processing and retention of personal information the state must be able to satisfy the court that each of those steps is governed by clear rules of law or policy which are

both accessible and intelligible and do not give the authorities an excessively broad discretion over the manner of their implementation. In such cases it is therefore necessary for the court to pay careful attention to the nature of the information in question, the circumstances under which it can be obtained, the ways in which it can be processed and by whom, the period for which it can be retained (together with any arrangements for interim review) and the arrangements for its destruction.

25. With these principles in mind we turn to consider the two appeals before us.

The case of Mr. Catt

(a) Article 8(1) – interference

26. Personal information relating to Mr. Catt is currently held on the National Domestic Extremism Database ("the Database") maintained by the National Public Order Intelligence Unit, originally under the supervision of the first respondent and now under the supervision of the second respondent. The database represents a compilation of written and photographic reports made by police officers who have attended demonstrations and protests organised by groups thought to have a propensity for violence and other kinds of criminal behaviour. The vast majority of the information held on him takes the form of reports made by police officers attending demonstrations and protests organised by Smash EDO. Mr. Catt has not himself been the specific target of any observations; he is merely referred to incidentally in the course of narrative descriptions of what the police at the scene observed. An example of the reports to which reference was made in the course of argument contained a description of a protest at Brighton 19th January 2008. After a description of events it reads:

> "The following protestors were identified as attending:
>
> John CATT (frame 63. Elderly male with grey hair and glasses)."

This is typical of the entries relating to Mr. Catt.

27. Smash EDO has carried on a long-running campaign which seeks to bring about the closure of EDO. It stages regular protests and although many of those who attend conduct themselves peacefully, some have a tendency to resort to disorderly behaviour and crime. The police have been concerned that the organisation has begun to adopt tactics similar to those used by animal rights protesters. On one occasion damage estimated at more than £300,000 was caused. Harassment of staff has also been a feature of the campaign. As a result, EDO has spent over £1 million on security measures.

28. In the course of monitoring and controlling demonstrations and protests attended by Mr. Catt, mainly, though not exclusively, those organised by Smash EDO, the police have routinely obtained information relating to the manner in which the activities have been carried out and the presence of persons of whose identities they are aware or whose appearance they can describe. This information consists of reports made by officers at the scene supplemented in some cases by photographs and video recordings. Such information is available to any member of the public who chooses to

attend the demonstration and none of those present can have had a reasonable expectation of privacy. Indeed, they did not seek it. As Gross L.J. pointed out below, it is of the essence of such activity that it is of a public nature; its very object is to make others aware of the protestor's views and the cause to which he lends his support. Since some (but not all) of those associated with Smash EDO have shown a willingness to resort to violence and criminality in support of their cause, we agree with Gross L.J. that it is only to be expected that its activities will attract a significant police presence. We also agree that the police can be expected to watch what takes place at demonstrations of that kind and to compile reports, photographic and written, for retention as part of their routine intelligence-gathering activities, which are an important aid in carrying out their function of preventing crime and disorder. To that extent it can properly be said that they are doing no more than is to be expected of them.

29. Having regard to the public nature of his activities the Divisional Court was of the view that, unless constrained by authority to hold otherwise, Mr. Catt's right to respect for his private life was not engaged, let alone subjected to any unjustified interference. The court considered in some detail the decision in *Wood*, laying emphasis on the reference by Laws L.J. to the police acting just as the public would expect them to act, but it distinguished the present case on a number of grounds; in particular, it relied on the public nature of Mr. Catt's actions, the absence of any intrusive conduct on the part of the police, the fact that the police had acted in a way that was to be expected and the continuing threat posed by the Smash EDO campaign. This last factor was considered to justify the retention of information collected at demonstrations until the protest movement had ceased to be active, and possibly thereafter. However, the court did not consider the recent decisions of the Strasbourg court, in particular *S*, to which we referred earlier.

30. Although a reasonable expectation of privacy is still the starting point for deciding whether the right under article 8 to respect for private life is engaged, we agree with the observation of Richards L.J. in *C* (paragraph [36]) that that was not the test applied in *S* and that other considerations come into play in relation to the collection and retention of personal data by public authorities. One factor of particular importance is whether those data have been subjected to systematic processing and entry on a database capable of being searched in a way that enables the authorities to recover information by reference to a particular person. As the cases show (see in particular *Segerstedt-Wiberg* and *PG*), the processing and retention of even publicly available information may involve an interference with the subject's article 8 rights.

31. The information about Mr. Catt which the police obtained and entered on the Database included his name, his age, his appearance and his history of attending political demonstrations. One photograph of him was taken and retained, but has since been destroyed. That is all information falling within the scope of his personal autonomy over which he is entitled to retain control. The fact that the public may expect the police to gather and process intelligence relating to violent protest movements in that way does not lead to the conclusion that his article 8 rights are not engaged, though it may suggest that an interference with those rights is justified. The case differs from that of *Kinloch*, not only because Mr. Catt was not thought to have been engaged in criminality of any kind (there is no evidence that he has ever been interviewed by the police in connection with violence at Smash EDO or any similar

demonstrations), but also because of the different use to which the information about him was put. In *Kinloch* the notes of the officers' observations were retained for the purposes of giving evidence at trial, a period of some months at most. In Mr. Catt's case it is proposed to retain the records of his attendance at demonstrations at least until Smash EDO has ceased to function and possibly indefinitely. In our view, although Mr. Catt was not the specific object of any of the reports, the inclusion of personal information relating to him on the Database does involve an interference with his right to respect for his private life which requires justification.

(b) Article 8(2) – Justification

(i) Legality

32. The Database was originally established by the National Public Order Intelligence Unit, an organisation formed by the Association of Chief Police Officers ("ACPO") to collect and manage information from across the country and make available to local police forces intelligence that might assist them in combating crime and maintaining public order. It is one of the units under the command of the National Co-ordinator for Domestic Extremism ("NCDE"). On 1st June 2011 the post of NCDE was transferred to the Metropolitan Police and responsibility for its operation therefore rests with the respondent. The Database therefore has no statutory foundation but is based on the common law powers of the police to obtain and store information likely to be of assistance in carrying out their duties.

33. The collection and management of data which makes up the Database is regulated by the Data Protection Act 1998. It is also subject to the Code of Practice issued by the Home Secretary under the Police Acts 1996 and 1997 and the Guidance on the Management of Police Information published by the National Policing Improvement Agency (together known as "MoPI"). Before the Divisional Court Mr. Catt accepted that the Data Protection Act added little or nothing to the determination of his claim under article 8 and accordingly little time was devoted to it either in argument or the judgments (see paragraph [6(iv)]. Before us the parties adopted a similar approach and although Mr. Johnson Q.C. submitted that the legal safeguards provided by the Act fully satisfied the requirements of the Convention, neither he nor Mr. Owen Q.C. developed a separate argument based on its provisions.

34. For the reasons mentioned earlier this is a case in which there is a close relationship between the question of legality and that of proportionality. In those circumstances it is convenient in our view to adopt the course taken by the Strasbourg court in *S* and to defer consideration of the question of legality until we have considered that of proportionality.

(ii) Pursuit of a legitimate aim

35. Before doing so, however, it is convenient to mention briefly the question of pursuit of a legitimate aim. It was not disputed that the Database was created and maintained with a view to sharing intelligence about the composition, organisation and tactics of violent protest groups among the various local police forces. The purpose of so doing is to help the police understand the way in which such groups operate and thus provide better control over their activities when that becomes necessary. It is unnecessary, therefore, to discuss whether the storage and retention of the information

held on the database is carried out in pursuit of a legitimate aim. It plainly is, since the object is to assist in preventing disorder and crime and safeguarding the rights and freedoms of others.

(iii) Proportionality

36. Mr. Catt's complaints are that his personal information has been placed for an indefinite period on a database whose title suggests that he is an extremist who actively associates with people who have a propensity to commit crime and cause disorder, despite the fact that he has never been convicted of such behaviour. Moreover, he says the rules, such as they are, governing the maintenance and operation of the Database do not make it clear what criteria are adopted for deciding whose details are to be included or when and under what circumstances they are to be removed. A photograph of Mr. Catt taken in 2007 was removed in July 2010 on the grounds that it was unnecessary to retain it, but it is said that the other information about him will be retained indefinitely. Why that should be necessary when it is unnecessary to retain his photograph has not been satisfactorily explained.

37. The purpose of creating and maintaining the Database, which is in any event largely self-evident, is explained in a statement made for the purposes of the proceedings by Detective Chief Superintendent Tudway, a serving officer with the Metropolitan Police, who was at the time NCDE. It is unnecessary to describe at length what he says about the value of intelligence to the police in anticipating and combatting crime and public disorder of the kind associated with Smash EDO, as well as in many other aspects of policing. In general terms that is accepted by all parties. However, when striking a balance between the rights of Mr. Catt and the interests of the public in the creation and maintenance of the Database by the police it is necessary to have regard to the nature of the information held on Mr. Catt. As one can see, it is of a very limited nature, consisting of little more than the fact of his attendance at protests organised by Smash EDO. There is nothing in the information disclosed in response to his subject access request to suggest that he has done anything beyond lend his general support by his presence. There is nothing to suggest that he actively encourages criminality or public disorder, much less that he has engaged in behaviour of that kind himself. As against that it may be said that the information, although of a personal nature, is not of a sensitive kind.

38. Mr. Tudway says that there is value to the police in knowing the identities of those who attend protests organised by Smash EDO and similar groups, even if they have not themselves been convicted of any offence. He accepts that in general only a small proportion of those attending protests of this kind resort to unlawful behaviour, but he nonetheless asserts that it is necessary for the police to retain information about potential witnesses and associates of those involved in unlawful activity for planning purpose and also for the purposes of eliminating law-abiding persons from the need for particular police attention. As far as Mr. Catt is concerned, he says that even though he has not been convicted of any offence he "associates closely with violent members of Smash EDO and knowledge of this association is of intelligence value". However, he does not elaborate on the nature of that association, apart from saying that Mr. Catt is frequently seen at Smash EDO events, or how the information is of value. He does not suggest that Mr. Catt is an organiser of the group, or that he actively assists either the organisers or those who have a propensity to violence.

39. Mr. Tudway has also provided information about the way in which the Database is created and maintained pursuant to the MoPI rules. Paragraph 1.1.5 of the Code recognises a duty to review the need for the retention of information and to ensure its destruction when it is no longer required. That is dealt with more fully in paragraphs 4.5 and 4.6. The Guidance deals with these matters in greater detail. Section 7 is devoted to the review, retention and disposal of information. Paragraph 7.4 provides that all records which are accurate, up to date and necessary for policing purposes should be held for a minimum of six years to assist forces in identifying offending patterns over time. After that there should be a review in order to determine whether it is still necessary to keep the record for policing purposes. Various factors that should be considered when deciding whether to retain records are set out; they mainly relate to offenders who pose a particular risk of re-offending and causing harm to the public. There remains a general discretion to retain records if that is thought necessary.

40. Paragraph 7.6 deals with the review of records. It provides for the retention of records for an initial six year period and a presumption in favour of the retention of information, provided that it is not excessive, is necessary for a policing purpose and is up to date. A review is intended to comprise a "full person record review" which focuses on an individual and any other records linked to them. "Necessary" for these purposes means that the record should hold some value for the police in their effort to fulfil a policing purpose. Paragraph 7.6.1 of the Guidance calls for an initial review to be conducted at the point of input into the relevant database. After that there should be "triggered reviews" when certain steps are taken in relation to the record (such as a subject access request) and "scheduled" reviews at defined intervals. Records relating to the lowest level of offending (Group 3, which would also include records such as those relating to Mr. Catt) may be the subject of automatic disposal after a defined period rather than being made the subject of review.

41. Having seen copies of various reports in which Mr. Catt is mentioned and the information provided in response to his subject access request, we are left with the clear impression that police officers who attend protests organised by Smash EDO for the purpose of gathering intelligence record the names of any persons whom they can identify, regardless of the particular nature of their participation.

42. The Divisional Court held that the continued retention on the Database of information relating to Mr. Catt was in accordance with the law and proportionate to the aim sought to be achieved. As to the latter, the court held that any interference with Mr. Catt's rights was minimal since the reports did no more than record his public activities, the object of which was to convey his views, or at any rate his general support for the protestors, to as wide an audience as possible. The information was processed and held in accordance with the MoPI Code and Guidance for the purposes of enabling the police to respond to a campaign which involved criminality and public disorder. The court accepted the need for the police to obtain intelligence material generally and also the particular justification put forward by Mr. Tudway for gathering and retaining information on Mr. Catt and his association with Smash EDO. The court regarded as "wholly unworkable" the suggestion that the respondent should be required to trawl through reports in order to consider each person named in them in isolation with a view to weeding out information no longer of value. In any event, it accepted that even though Mr. Catt had not committed any criminal offences, his associations were of intelligence value. Both Gross L.J. and Irwin J. envisaged that

the information held on Mr. Catt should be reviewed when Smash EDO ceased to function, but might be retained beyond that date.

43. Proportionality involves striking a fair balance between the rights of the individual and the interests of the wider community. In paragraph [83] of his judgment in *Wood* Dyson L.J. drew attention to the fact that in striking that balance the court must have regard to the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. He continued:

> "84. In other words, the court is required to carry out a careful exercise of weighing the legitimate aim to be pursued, the importance of the right which is the subject of the interference and the extent of the interference. Thus an interference whose object is to protect the community from the danger of terrorism is more readily justified as proportionate than an interference whose object is to protect the community from the risk of low level crime and disorder."

44. We do not doubt the importance to modern policing of detailed intelligence gathering and we accept the need for caution before overriding the judgment of the police themselves about what information is likely to assist them in their task. For present purposes that task is to obtain a better understanding of how Smash EDO is organised, to be in a position to forecast the place and nature of its next protest and to anticipate the number of people likely to attend and the tactics they are likely to adopt. It is not easy to understand how the information currently held on Mr. Catt can provide any assistance in relation to any of those matters. Mr. Tudway states in general terms that it is valuable to have information about Mr. Catt's attendance at protests because he associates with those who have a propensity to violence and crime, but he does not explain why that is so, given that Mr. Catt has been attending similar protests for many years without its being suggested that he indulges in criminal activity or actively encourages those that do. The systematic collection, processing and retention on a searchable database of personal information, even of a relatively routine kind, involves a significant interference with the right to respect for private life. It can be justified by showing that it serves the public interest in a sufficiently important way, but in this case the respondent has not in our view shown that the value of the information is sufficient to justify its continued retention. It is striking that Mr. Tudway does not say that the information held on Mr. Catt over many years has in fact been of any assistance to the police at all. The Divisional Court considered that it was not practically possible to weed out from time to time information held on particular individuals. There is, however, no evidence to support this conclusion and we are not satisfied that it is correct. It should not be overlooked that the burden of proving that the interference with Mr. Catt's article 8 rights is justified rests on the respondent.

45. That leaves the question whether the interference with Mr. Catt's rights is in accordance with the law. This is very much a live issue given the relatively vague nature of some aspects of the regime contained in the MoPI Code and Guidance and the criticisms voiced by the Divisional Court in *C* (paragraph [54]) and by the Strasbourg court in *MM v United Kingdom* (2012) (Application No. 24029/07).

However, in the light of the conclusion to which we have come on the question of proportionality it is unnecessary for us to reach a final decision on the point.

46. For these reasons we have reached the conclusion that the interference with Mr. Catt's right to respect for his private life has not been justified and that the appeal must therefore be allowed.

The case of Ms T

47. The following description of the circumstances giving rise to Ms T's claim are taken from the judgment of Eady J., to whom we are grateful:

> "3. . . . [T] lives in a block of flats in which she is a close neighbour of a man whom I shall refer to as Mr B. In the summer of 2009, T had complained to the anti-social behaviour team attached to the housing association which manages the block. She claimed to have suffered from excessive noise emanating from Mr B's flat over a number of weeks. She felt vulnerable because, after the complaint, the noise appeared to increase. Again she complained to the anti-social behaviour team.
>
> 4. An incident seems to have occurred on 20 July 2010, when T was leaving her flat. She saw Mr S, a friend of Mr B, on the balcony outside his flat and he said something to her which she interpreted as "black bitch". On her account of the matter, she "tutted" her disapproval and Mr S "tutted" back. T thought his behaviour insulting and on 21 July 2010 reported the matter to the anti-social behaviour team. At that point she was informed that Mr S had also reported the incident and made a complaint against her. He had even reported the matter to the police.
>
> 5. According to the evidence of a detective sergeant in the Community Safety Unit, a complaint was made at 8.00 a.m. on 20 July 2010 to the effect that T came out of her front door and blew him a kiss with the comment "you faggot". This appeared to cause Mr S some distress. Mr B had also stated that he had experienced insulting remarks on earlier occasions from T, relating to his sexuality, but had never troubled to report it before. The police crime report recorded that "this is a homophobic crime and he is extremely distressed by it". It also recorded that police officers had apparently attended T's home address but had failed to make contact."

48. On 21st July the police went to visit Ms T, but she was out and they were unable to speak to her. The upshot was that a decision was taken that day to serve her with a letter variously described as a "first instance harassment warning" or "police information notice". The letter looked very official. It was written on Metropolitan

Police writing paper and bore the heading "Prevention of Harassment Letter" in large bold type. It was addressed to Ms T and stated:

> "**An allegation of harassment has been made against you:**
>
> . . .
>
> On the 20/07/2010 you went outside Flat 5 and told a visitor who was making a phone call "YOU FAGGOT"
>
> **HARASSMENT IS A CRIMINAL OFFENCE** under the Protection from Harassment Act 1997.
>
> . . .
>
> It is important that you understand that should you commit any act or acts either directly or indirectly that amount to harassment, you may be liable to arrest and prosecution. A copy of this letter which has been served on you will be retained by police . . . a copy could be disclosed in any subsequent criminal proceedings against you as proof that police have spoken to you about this allegation . . . "

49. The police tried to serve the letter personally on Ms T on 12th August 2010 and a number of subsequent occasions, but their attempts were all unsuccessful and eventually on 7th October 2010 they pushed it through her letter box. The Crime Reporting Information System ("CRIS") recorded the fact that a decision had been taken to serve Ms T with a warning letter and the steps taken to do so.

50. Ms T was upset by the letter. She vehemently denies the allegation and says that to speak in that way would have been entirely out of character. She felt that she had been treated unfairly by being given no opportunity to respond to the allegation. She said that she felt that she had been branded a criminal from the outset. She therefore brought a claim for judicial review seeking an order that the police destroy their copy of the letter and remove from their records all references to it and to the decision to issue it.

(a) Article 8(1) – interference

51. Having considered paragraphs [66-67] of the judgment in *S*, paragraphs [19-22] of the judgment of Laws L.J. in *Wood* and paragraph [27] of the judgment of Lord Hope in *L*, Eady J. held that the issue of a warning letter of this kind was a matter in relation to which there was a reasonable expectation of privacy. He also held that the risk of disclosure gave it the necessary degree of seriousness and that in those circumstances the mere retention of information of that kind had to be justified because it involved an interference with Ms T's rights under article 8(1).

52. The practice of issuing warning letters of the kind given to Ms T in this case is covered by a document entitled *Practice Advice on Investigating Stalking and Harassment* produced by the National Policing Improvement Agency on behalf of the ACPO. Section 3 is headed 'Investigation Development and Further Police Action';

paragraph 3.9 deals with what are called 'police information notices'. It includes the following advice:

> "When the police investigation is complete, there may be circumstances in which a charge, caution or prosecution is not possible. . . . This may be because actions complained of were reasonable and lawful and were adequately explained by the suspect, or the report may be of a single act which does not constitute a course of conduct. . . .
>
> A suspect does not need to be informed by the police that their behaviour may constitute a criminal offence before the P[revention of] H[arassment] A[ct] can be applied. . . . The terminology of 'warnings' and 'orders' should be avoided in the context of police action in relation to harassment. Such terminology may be misinterpreted by victims, suspects and others as constituting formal legal action."

53. In paragraph 3.9.2 one finds the following:

> "There may be situations where there is not a reasonable explanation for the behaviour complained of, or the explanation given is in doubt, and the police will need to consider taking further action by issuing a police information notice. This will usually be at the early stage of a situation when there is no evidence that an offence of harassment has occurred (i.e. a course of conduct has not been proved). . . . Early intervention by using a police intervention notice may prevent the behaviour escalating into harassment."

54. The letter given to Ms T in this case was based on a template made available electronically and contained the information required by the Practice Advice. The copy retained by the respondent indicates that it was to be retained for seven years. Letters of this or a very similar kind appear to be widely used by police forces across the country, but the Advice is not binding and practices relating to them appear to differ between different forces.

55. It is difficult to accept that the action of the police in giving Ms T a warning letter of this kind was sufficient of itself to amount to an interference with her right to respect for her private life. Although the receipt of the letter no doubt caused her a degree of annoyance and distress, its effect was not of a serious nature and in any event it was, and could have remained, essentially a private matter between her and the police. However, although the complainant was not given a copy of the letter, he was told by the police that they were going to visit Ms T later that week to give her a harassment warning letter. To that limited extent, therefore, it entered the public domain. However, in our view the letter cannot be viewed in isolation from the CRIS report and the retention on police files of both a copy of the letter itself and the information describing the allegation and the steps taken in response to it. That was the approach of the court in *Wood* to the taking and retention of the claimant's photograph in that case and we think it applies equally to the present case.

56. Notwithstanding the suggestion in the Practice Advice that the use of the word "warning" should be avoided in police notification letters, (a suggestion carefully followed in this case), the fact is that the tone and content of the letter are unmistakably those of a warning. It is hardly surprising, therefore, that one can find many references to a letter of this kind as a "warning" letter. Similarly, it is referred to in the CRIS report as a "FIHW" – i.e. a first instance harassment warning. This has certain adverse consequences for Ms T. One is that a person reading the letter and the CRIS report would naturally conclude that the police thought there was some truth in the allegation, since, if they did not, they would simply have recorded the fact of the allegation without taking any further action. (The judge did not accept that service of the letter carried the implication that the police have given credence to the allegation, but on this question we respectfully disagree with him.) Another is that information of this kind, clearly falling well short of a conviction, might be disclosed in response to a request for an enhanced criminal record certificate (although it is fair to say that there appears to have been no instance yet in which that has occurred). However, even putting that possibility aside, in the light of the authorities to which we have referred, in particular *Wood* and *S*, we think that the letter and the CRIS report contained information of a personal kind, the systematic processing and retention of which will involve an unlawful interference with the right to respect for private life unless it can be justified. Moreover, even if the information is properly to be regarded as public in nature, it is of a kind which the subject can reasonably expect to be forgotten about over the course of time and so enter the sphere of private life: see *L*, per Lord Hope, paragraph [27]. In our view, therefore, the judge was right to hold that article 8 was engaged.

(b) Article 8(2) – Justification

57. According to the Practice Advice, harassment is a difficult offence for the police to deal with, partly because it comes in so many different guises and partly because conduct of a kind that might be welcome to one person may in different circumstances understandably be viewed as harassment by another. Moreover, it requires a course of conduct, i.e. something more than an isolated act, and that presents additional difficulties. An insult of the kind alleged to have been offered in this case may be no more than an isolated incident or it may be the first act in a course of conduct amounting to harassment. It is understandable, therefore, that the police should wish to respond promptly by drawing the suspect's attention to the law on harassment, hoping thereby to nip any risk of repetition in the bud. It is also understandable that they should wish to retain a record of that response in case further allegations are made by the same complainant against the same person. The question is whether the processing and retention of the information can be justified under article 8(2). That depends on the same three questions as were considered in relation to Mr. Catt's claim.

(i) Legality

58. As in the case of Mr. Catt, the question of legality is closely bound up with the question of proportionality and it is therefore convenient to consider it in that context.

(ii) Pursuit of a legitimate aim

59. The purpose of collecting, processing and retaining the information relating to Ms T is to assist in the prevention of crime and the protection of the rights and freedoms of others. That is a legitimate aim which is clearly capable of justifying the interference with her right to respect for her privacy provided that the measure is proportionate to the object which it seeks to achieve.

(iii) Proportionality

60. Mr. Bowen Q.C. submitted that the failure of the police to speak to Ms T before serving her with a warning letter was unfair and rendered the whole procedure disproportionate. We do not accept that. The letter did not involve a formal determination of any kind; it was not like a formal caution which requires an admission of guilt and might well have to be disclosed to third parties (for example, in response to a request for an enhanced criminal record certificate). Nor did it initiate proceedings of any kind. It simply informed Ms T that an allegation had been made against her and warned her of the possible consequences of behaving in the way it described. In those circumstances, although it would have been better if the police had asked Ms T for her comments before sending her the letter, we do not think that the failure to do so undermines the lawfulness of their action or the lawfulness of including in the CRIS report a record of what had been done. However, the retention of the information is a different matter. The judge held that the mere retention of information of the kind involved in this case was potentially justifiable because it served a useful social purpose (paragraph [98]). To that extent we agree. In paragraph [99] he expressed surprise that the information should need to be retained for as long as seven or twelve years, but considered that the court should be slow to interfere with the expert judgment of the police. In the end he was not satisfied that any illegality was involved in the continued retention of the information.

61. It is at this point that we differ, with respect, from the judge. The respondent's current policy is to retain police information letters and CRIS reports relating to single allegations of conduct of a kind which, if repeated, could constitute harassment, for a period of twelve years. In the case of CRIS reports that is a consequence of a blanket policy which does not discriminate between serious offences, minor offences and conduct that does not amount to an offence at all. There is an obvious justification for retaining a copy of the letter for a limited period, because it may help to identify a course of conduct amounting to harassment and may be useful in providing evidence that the suspect was aware of the nature and consequences of his actions. However, since harassment requires a course of conduct, it is difficult to see how the retention of the letter or the CRIS report for a period of more than a year or so at the most could possibly be of any assistance in connection with a prosecution for that offence. It is also difficult to see what other use it might have, at any rate if no further alleged acts of harassment are committed, and none has been suggested. Although we agree that the court should be slow to interfere with the judgment of the police in matters of this kind, retention of information of this kind for more than a matter of months needs to be justified by evidence. It is telling, in our view, that having looked again at the materials for the purposes of this appeal some two and a half years after the event, the respondent is content for the record to be expunged on the grounds that "there have been no ongoing concerns regarding risk and there are no reports of any further incidents". In our view this makes it only too clear that the continued retention of the information would have been unnecessary, disproportionate and unjustifiable. In those

circumstances it is unnecessary to consider whether the collection, processing and retention of the information was in accordance with the law.

62. As in the case of Mr. Catt, it appears to have been accepted below that it made little difference whether the court looked at the question through the prism of the Data Protection Act or that of article 8 (see the judgment below at paragraph [57]). In any event, in the light of the conclusion to which we have come on the application of article 8 it is not necessary or desirable to add to the length of this judgment by a detailed consideration of the provisions of the Act. Nor is there any need to discuss the submission that by failing to take reasonable steps to obtain Ms T's side of the story before serving the letter on her the police failed to observe common law requirements of fairness and so acted unlawfully. It might be thought, however, that in common fairness a person against whom an allegation of this kind is made should be invited to give his or her side of the story before the police decide whether action of any kind is appropriate.

63. For the reasons we have given we shall allow the appeal.