



Neutral Citation Number: [2022] UKTrib 5

Case No: IPT/18/24/C

**IN THE INVESTIGATORY POWERS TRIBUNAL**

Date: 14<sup>th</sup> December 2022

**Before:**

**LORD JUSTICE SINGH (PRESIDENT)**

**LADY CARMICHAEL**

**and**

**DESMOND BROWNE K.C.**

**Between:**

**JAMES WILSON**

**Complainant and Claimant**

**and**

**POLICE SCOTLAND**

**Respondent**

Catherine Smith KC, Counsel to the Tribunal

Ian Duguid KC (instructed by Legal Services Department, Police Scotland) for the  
Respondent

## JUDGMENT

### Lady Carmichael:

1. This is the judgment of the Tribunal.
2. Mr James Wilson has presented both a claim under section 65(2)(a) and a complaint under section 65(2)(b) of the Regulation of Investigatory Powers Act 2000 (“RIPA”) in relation to the conduct of the Police Service of Scotland (“Police Scotland”).
3. In 2005 Strathclyde Police began a murder inquiry in relation to the death of Emma Caldwell. In August 2007 four suspects were detained, interviewed and arrested. They were remanded in custody, but in December 2007 the Crown concluded that there was insufficient evidence to proceed to trial, and they were released.
4. In 2013, Mr Gerard Gallacher, an ex-police officer, learned that officers who had worked on the murder inquiry were said to have serious concerns over the handling of it. This led him to conduct investigations himself. As a result he came to the view that there was an individual whose significance had been missed by the police during their investigations.
5. Mr Gallacher contacted the Editor of the *Sunday Mail*. On 5 and 12 April 2015, and on 19 April 2015, the newspaper published articles revealing that a suspect had been identified. They also made significant criticisms of the police inquiry.
6. By that time the Police and Fire Reform (Scotland) Act 2012 had come into force. Strathclyde Police no longer existed, and it and other police forces had been replaced by Police Scotland. After the first article in the *Sunday Mail*, the Counter Corruption Unit (CCU) of Police Scotland started a covert criminal investigation. Its purpose was

to identify serving police officers, police staff and ex- employees who might have made unauthorised disclosure of the information that appeared in the articles.

7. In the course of the investigation, on 16 April 2015, Kenneth Pike, at that time a detective constable in Police Scotland, prepared a number of applications under Part 1 Chapter 2 (Acquisition and Disclosure of Communications Data) (sections 21-25) of RIPA 2000 for the period 3 April to 13 April 2015, seeking communications data in respect of Mr Gallacher and others. Communications data were obtained in relation to a number of individuals, including Mr Gallacher. It is common ground that the purpose of the applications was to determine either a journalist's source or the communications of those suspected to have been acting as intermediaries between a journalist and a suspected source, although that intention was disavowed in the text of the applications. It is also common ground that the applications were made contrary to the 2015 Code of Practice.
8. The matter is referred to in the Report from the Interception of Communications Commissioner's Office (IOCCO) published in November 2015. The Commissioner disclosed those matters to Mr Gallacher and to a number of others and advised them that they may have been affected adversely. Mr Gallacher and others brought proceedings in the Tribunal: *Moran and others v Police Scotland* [2016] UKIPTrib 15\_602-CH. The Tribunal held that a further independent investigation was required. Police Scotland referred the matter to the Chief Constable of Durham Constabulary. He produced two reports, named *Operation Seastorm* and *Operation Botanic* which were published in redacted form in late December 2017. Mr Wilson learned from these reports that there had been an attempt to obtain call traffic from his personal mobile number.
9. Only one of the applications that Mr Pike prepared sought communications data in respect of Mr Wilson in these proceedings. It was numbered 122054. It sought traffic data for Mr Wilson's mobile phone number from 3 April 2015 to 13 April 2015.

It is dated 16/04/2015 13:30:50, but at the foot of each page of the document there is an entry in the following terms "Form created electronically – 17/04/2015 07:53:02". It contains the following:

"On Sunday 5<sup>th</sup> April and Sunday 12<sup>th</sup> April 2015 respectively articles relating to the murder investigation of Emma Caldwell appeared in the national press and were published by the Sunday Mail newspaper, journalists Jim WILSON and Brendan MCGINTY. WILSON is documented as the user of mobile phone number [...] on the Vodafone network. There is no known current mobile telephone for MCGINTY.

The only police officer directly mentioned in the articles is that of retired Detective Sergeant Gerard GALLACHER who is known to be conducting a private inquiry into the unsolved murders of prostitutes in the Glasgow area as research for a forthcoming book which he will be the author of.

Ex DS GALLACHER did not work directly on the murder investigation in question. The only phone number currently attributable to GALLACHER is [...]

The published articles in the press contain specific information in respect of the investigation that could only be known to

- a) a police officer who worked directly on the investigation
- b) a police officer or member of staff with access to police systems containing this information

The CCU investigation strongly assesses at this time that Gerard GALLACHER is being provided information from persons who fit the above criteria which is thereafter being passed to the journalists involved.

Following the first publication on 5<sup>th</sup> April 2015 Detective Inspector David MORAN anticipating a CCU Investigation would be initiated, disclosed to his senior management that he had attended at Gerard GALLACHER's home address shortly after the publication and that they are long term associates. This action was unprovoked by any police activity and the disclosure of interest by DI MORAN was completely voluntary.

DI MORAN further disclosed that he believed Gerard GALLACHER does not possess a mobile phone which is an unusual statement to make without provocation.

DI MORAN is documented as having a BT landline [...] at his home address and personal mobile [...] on the T Mobile network.

...

By obtaining the current subscriber and the call data sought for the landline and mobile telephone numbers requested, the CCU investigation will be best placed to

establish any contact between the aforementioned individuals around the dates of the publications and known face to face between GALLACHER and MORAN.

This data will also fill the intelligence gap by potentially identifying other communication addresses being used between Gerard GALLACHER and DI MORAN as well as identifying direct communications between either of these persons and the journalist Jim WILSON which are not currently known to the investigation and may provide a further line of investigation

....

Third party intrusion when requesting traffic data is unavoidable. At this time it is not possible to identify specific individuals who may be affected by such intrusion.

Particularly with WILSON's status as a journalist there may be a specific intrusion through his employment which needs to be considered and it could apply to WILSON's family members, friends, legitimate business contacts and non-criminal associates. It is not the intention of this application to identify any journalistic sources but to identify non-criminal associates. It is not the intention of this application to identify any journalistic sources but to identify contacts with Gerard GALLACHER which may in turn assist in identifying persons who could be assessed as serving police officers that may be providing him with restricted information.

..."

10. That application was not proceeded with. A further application with the same number, 122054, was created not quite 50 minutes later, at 08:42:01 on 17 April 2015. It did not seek traffic data in relation to Mr Wilson's mobile phone. The only mention of Mr Wilson in it is in the following sentence:

"On Sunday 5<sup>th</sup> April and Sunday 12<sup>th</sup> April 2015 respectively articles relating to the murder investigation of Emma Caldwell appeared in the national press and were published by the Sunday Mail newspaper, journalists Jim WILSON and Brendan MCGINTY."

None of the other references to Mr Wilson in the previous iteration of the application appears in the amended application.

11. Application 122054 in its amended form was considered by DC Alasdair Bell in his role as single point of contact. He sent it to David Donaldson, who as designated

person, authorised the acquisition of the data requested in it. Mr Pike prepared a further application on 22 April 2015, numbered 122281. Again, there are two versions of the application. Each mentions Mr Wilson by name, in a passage identical to that quoted in paragraph 10. The application was for traffic data for Mr Gallacher's email address. Amanda Black as single point of contact forwarded it to Mr Donaldson, who authorised the acquisition of the data. It is a matter of concession that the authorisations were unlawful.

12. We have also been provided with information about applications numbered 122279, 122735 and 122694. Their focus is communications between a serving officer and a former officer. They do not mention Mr Wilson. We have left them out of account.

#### **Summary of issues and conclusions**

13. The scope of the hearing was determined by Lord Boyd of Duncansby, Vice-President of the Tribunal on 23 October 2019:

“Whether Police Scotland obtained Mr Wilson's mobile telephone number legitimately from ex Detective Superintendent Johnstone, who had himself obtained it legitimately, or whether it was obtained by some other means, and if so, how it was obtained, and the legal consequences that flow therefrom”.

14. Mr Wilson was concerned as to how Police Scotland obtained the mobile number that appeared in the application which was not proceeded with. He was concerned that it had come into their possession by covert means, whether authorised or unauthorised. We heard evidence directed at determining the means by which the number had come into the possession of the police. There was no dispute that the onus of proof was on Mr Wilson, and that the standard of proof was on the balance of probabilities. For reasons which are provided more fully below, we were satisfied that Police Scotland obtained Mr Wilson's number from a retired police officer, Colin

Field, who obtained it from another retired officer, William Johnston. We are satisfied that Police Scotland did not obtain the number by any illegitimate means.

15. We have considered also the legal consequences of the agreed facts, namely
- (i) that Police Scotland prepared an application to obtain traffic data relating to Mr Wilson's mobile phone number, although that application was abandoned; and
  - (ii) that Police Scotland authorised applications the purpose of which was to discover Mr Wilson's sources, although they did not succeed in discovering his sources.

## **Evidence**

### *Mr Wilson*

16. Mr Wilson recalled speaking with a retired officer, William Johnston. Mr Wilson was in his office when the conversation took place. He assumed that he had placed the call, but did not remember having done so. Mr Johnston was a former detective superintendent. He had led the murder inquiry in 2005. Mr Wilson's evidence was that he routinely withheld his number when making work calls and that he endeavoured to keep his number in limited circulation to family, friends and trusted contacts. The number did not appear online or in professional directories. He had got into the habit of withholding his number because he suspected that people were more likely to engage with him if he called "unannounced". His work as a crime reporter had reinforced him in the habit of withholding his number. He would do so unless he were "desperately keen" that the other person should call him back, and would do so nine times out of ten. He could not, however, categorically rule out that he had revealed his number to Mr Johnston by calling him. It was possible, though not probable, that he had left a message for Mr Johnston. He had speculated to himself that he might have asked another officer to ask Mr Johnston to call him, but he had no recollection of having done that.

17. The fact that Mr Wilson had not approached Mr Johnston for comment before publishing articles on 5 and 12 April suggested that Mr Johnston was not particularly important to the newspaper's investigation. He accepted that it would not be unusual to ask someone in Mr Johnston's position for comment on the published articles, as they were critical of the investigation he had led.
18. Mr Wilson had tried to obtain his own call data. At the time of his communication with Mr Johnston his employers administered his mobile phone. He had left those employers. He had also stopped using the services of Vodafone. He had made inquiries with the human resources department of his former employer about retrieving call data. They had suggested a "tortuous" process, and indicated that it was unlikely to be successful. He had not made further efforts after that.
19. Mr Johnston had declined to comment or talk about the issues that Mr Wilson had been reporting on in the *Sunday Mail* stories. Mr Wilson suggested an off the record discussion "for background", but Mr Johnston declined, and said that he would speak publicly when the time was right. It had been a short conversation.

***William Johnston***

20. Mr Johnston retired from work as a police officer with Strathclyde Police in 2006. When he retired he held the rank of detective superintendent. He had been the senior investigating officer ("SIO") in the murder investigation arising from the death of Emma Caldwell. He had not remembered any conversation with Mr Wilson when asked about contact with him. He had then been asked to recover his own mobile telephone data. He had done so. It disclosed two calls from his number to Mr Wilson's mobile telephone on 14 April 2015, one at 1432h and the other at 1557h. The first of these was very short, and the other of less than three minutes' duration. He accepted that there must have been a conversation between him and Mr Wilson. He did not know how he had obtained Mr Wilson's number. He must have been given it, or seen it on an incoming call.



21. Although he did not remember a conversation with Mr Wilson, it was possible that it had been in the terms described by Mr Wilson. He had taken a consistent approach to broadcasters who approached him about the Emma Caldwell case at the material time, namely to decline to comment but to say that he might speak at a later time, by which he meant after an individual had been brought to trial, and that trial concluded.
22. He had known Colin Field for many years. Mr Field was involved in the Emma Caldwell case after Mr Johnston retired. Mr Johnston had spoken to Mr Field at around the time of his conversation with Mr Wilson. It was likely that he had done so after the publication of the articles in the *Sunday Mail*. He did not remember giving Mr Field Mr Wilson's number. The conversation with Mr Field was about Mr Gallacher, who had spoken to Mr Johnston and told him he was writing a book comparing investigative procedures in Scotland and the United States. Mr Johnston was given Mr Gallacher's number by a former colleague.
23. Mr Johnston thought he had telephoned Mr Field. Mr Field's concern about the Emma Caldwell case was that the identity of an undercover officer might have been revealed, and whether risk assessments had been carried out regarding the safety of that officer. Around that time Mr Johnston knew that there was a criminal investigation into the source of the information in the articles. He was aware that there was a reasonable chance that the police would investigate the sources of the information provided to Mr Gallacher which had given rise to the *Sunday Mail* articles. He knew that it would be of value to the police to know the journalist's number. He would have had no hesitation in assisting a criminal investigation by passing on Mr Wilson's number. Mr Johnston wanted to tell Mr Field that he had not been the source of the information in the newspaper articles. People had thought that he was.
24. He had been in contact with Ms Caldwell's mother over the years, and it was not unusual for him to speak to her from time to time. He did not, however, remember mentioning his contact with her when he spoke to Mr Field.

*Colin Field*

25. Colin Field was a detective chief superintendent when he retired from Police Scotland in 2014. He had worked in the CCU. He had spoken to Mr Johnston on 5 April 2015. Mr Johnston had contacted him about the article published on 5 April, and following contact with Ms Caldwell's family earlier that day. Mr Johnston called him again two or three weeks after that. He did not recall Mr Johnston passing Mr Wilson's number to him. He did not remember Mr Wilson's name featuring in the conversation.
26. Mr Johnston asked him to pass information to Police Scotland, and he did so. He had passed on all the information that Mr Johnston asked him to. Police Scotland had asked Mr Field to attend a meeting. It was possible he had provided Mr Wilson's number to Police Scotland, but he did not remember doing so. He contacted his former line manager, Ruaraidh Nicolson after his first conversation with Mr Johnston. His next contact with Police Scotland was when they called him to a meeting. They had made it clear to him that they were not prepared to discuss information that they had with him, but were interested in information that he had, particularly in relation to a meeting at Costa Coffee.
27. In re-examination Mr Field indicated that his second conversation with Mr Johnston took place because Mr Johnston wanted to relate that Ms Caldwell's family had been back in touch with him following the second and/or third articles. He could not be sure whether it was prompted by the second article or the third article. It would have been on the Monday or Tuesday after the article in question. He did not recall discussing with Mr Johnston who might have been the source of the information in the articles. His contact with Ruaraidh Nicholson had been at Mr Johnston's instigation. The concern was that family liaison officers had not been in touch with Ms Caldwell's family after the first article. There had still not been contact after the later publications.

*Kenneth Pike*

28. Kenneth Pike retired from Police Scotland in 2019. He was a detective constable in the CCU at the material time. When he made the first application under number 122054 he knew that one of the numbers to which it related belonged to a journalist. It was “sketchy” but he was “led to believe” that the number came from an outside source. He “vaguely” remembered the revised application. At the time he had very little experience of making applications. The first application “went through” and then it was “cascaded down” that the rules had changed and “we weren’t actually allowed to do that”. That information would have come from a supervising officer. It had been Mr Pike’s first application for telecommunications data.

29. Mr Pike explained that there was an officer designated the single point of contact (SPOC). The SPOC could enter a telephone number into a computer system and discover with which network provider it was associated. That information would then be put in the application, because it was important that the request go only to the company in question.

30. Mr Pike was asked about an entry on CCU file 18/15 referred to in the *Operation Seastorm* report, at page 27. The passage in the report reads:

“Also recorded on CCU file 18/15 dated 13<sup>th</sup> May 2015 on an updated action list is an entry which states: “Consider telecoms for journalist (named removed for the purpose of this report) in an attempt to identify the 3 (three) retired officers he had been speaking to” ... This entry is endorsed “complete KP”

This suggests this was a task given to DC Kenneth Pike to complete. It also suggests that the CCU were also considering other suspected leaks and considering applying for communications data in respect of other individuals.

However, a later entry upon CCU 18/15, dated 20<sup>th</sup> May 2015, states:

“Due to new legislation regarding the investigation of journalists, Telecoms billing for journalist (named removed for the purposes of this report) will require a warrant”

31. He said it was a direction from a senior officer. He had not made the entry.

*Detective Constable Alasdair Bell*

32. DC Alasdair Bell is a serving officer with Police Scotland. He was the SPOC in relation to the CCU investigation. The role was one of liaising between the applicant and the designated officer who might come to authorise the application, and liaising with the telecommunications companies to obtain data. One of his tasks was to establish the identity of the service provider as it was necessary to know to which company to send the request. There were cost implications which varied between companies. He used a Home Office system to establish with which provider a number was "live". That system did not permit him to identify the owner of the telephone number. In order to find that out he would have to present a subscriber request to the telephone company.

*Detective Chief Inspector Barbara McGarvie*

33. DCI Barbara McGarvie was asked to carry out investigations in 2018 with a view to discovering how the CCU came to have Mr Wilson's telephone number. She searched a Police Scotland operational management system, which was an intelligence database used by the CCU. She found an item headed "INTELLIGENCE UPDATE 14/4/2015". She explained that the date mentioned was the date on which the information was placed on the database. A screenshot of the entry was produced. It read:

"A further update was received on 14/04/2015 from Colin FIELD who stated that the SIO, Ex Det Supt Willie JOHNSTONE was contacted on 14/04/2015 by one of the articles Sunday Mail journalists Jim WILSON looking for a quote surrounding the article. Mr JOHNSTONE did not engage with WILSON. WILSON was utilising telephone number [...]. He contacted Mr Johnstone on his office number which is readily available on open source."

34. DCI McGarvie found the entry in a folder numbered CCU018/15. She was asked about the passage in the *Operation Seastorm* report already referred to, and whether it was

possible the date of 13 May 2015 might be an error for 13 April 2015. She did not know. She understood the date of 13 May in the report to be the date on which the entry referred to in the report had been entered on the file.

35. She had searched the database using a search tool and entering the mobile telephone number she was interested in and the name of Mr Wilson. She had looked at a period around the date of the 14 April 2015 entry to make sure there was no other information. She would have looked at a few weeks either side of 14 April 2015. If she had seen an entry for 13 April 2015 in the terms narrated in the *Operation Seastorm* report, it would have been of interest to her.

#### ***Temporary Detective Chief Inspector David Bell***

36. Temporary DCI Bell, like DCI McGarvie, had been asked to examine the CCU database to try to find out how the CCU came to have Mr Wilson's telephone number. He had found the same entry, dated 14 April 2015 as had she. The author of the entry was Detective Inspector, now Detective Chief Inspector, Joanne Grant. He was unable to comment on whether the date of 13 May 2015 in the *Operation Seastorm* report was the date the entry referred to was made, or the date of the activity referred to in the entry.

#### **Conclusions on the evidence**

37. Mr Wilson suspected that Police Scotland was in possession of his number before 14 April 2015, the date when there was a record of two telephone calls between him and Mr Johnston. He suspected that because of the CCU file entry referred to in the *Operation Seastorm* report as being dated 13 May 2015. He believed that this was an error, and that the date should have been one month earlier, namely 13 April 2015. It did not make sense that there should be such an entry for 13 May 2015 when the application for traffic data for his number had been abandoned, apparently on the basis of advice that it was unlawful, on 17 April 2015. He asked us to infer that there was an error in the *Operation Seastorm* report; that there had been an entry referring to

a plan to obtain his call data on 13 April 2015; and to infer that his number had been obtained by Police Scotland before his telephone conversation with Mr Johnston. We should also, therefore, infer that Police Scotland had obtained his number by covert means.

38. We have not drawn those inferences.

39. Mr Johnston made two calls to Mr Wilson's number on 14 April 2015. It is clear that Mr Johnston had Mr Wilson's number, as he was able to make outgoing calls to it. One of those calls is of a duration that is consistent with a short telephone conversation. Although Mr Johnston did not remember the conversation, Mr Wilson's account of it is consistent with Mr Johnston's account of what he was in the habit of saying when responding to inquiries from the press at the time. Mr Wilson's own evidence is that a telephone conversation took place between them.

40. Mr Johnston and Mr Field both give accounts that Mr Johnston contacted Mr Field at about the time the *Sunday Mail* published the articles. Their accounts of why he did so vary. Mr Johnston says that he wanted to make it clear that he was not the source of the articles; Mr Field recalls that Mr Johnston spoke to him twice about concerns that Police Scotland had not deployed family liaison officers to support Ms Caldwell's family when the articles were published. Neither remembered Mr Johnston passing Mr Wilson's number to Mr Field, or Mr Field asking for it. Mr Johnston was frank, however, in saying that he would have had no hesitation in assisting the criminal investigation by passing on the number. Mr Field said it was possible that Mr Johnston had passed him the number. Mr Field said that he did contact Police Scotland after each of his conversations with Mr Johnston, and passed information to them at Mr Johnston's request. On the first occasion, the contact was on 5 April, the day when the first article was published. On the second occasion his contact was with Mr Johnston on the Monday or Tuesday after the second or third article was published. The date of Mr Johnston's telephone calls to Mr Wilson was the Tuesday after the publication of the second article.

41. The entry in folder CCU 018/15 which both DCI McGarvie and DCI Bell discovered is not only dated 14 April 2015, but it narrates that a further update was received from Colin Field on 14 April 2015. It also records that the source of Mr Wilson's telephone number was Mr Johnston, and that Mr Johnston had been in contact with Mr Wilson.
42. The suggestion that the entry in the *Operation Seastorm* report was wrongly dated is speculation. It is contrary to the evidence just narrated, all of which supports the proposition that the number came into the possession of Police Scotland from Mr Field on 14 April 2015, following contact between Mr Field and Mr Johnston. That was the same day on which Mr Johnston made two outgoing calls to Mr Wilson's number. We find that that is what occurred.
43. We do not require to make any finding as to how Mr Johnston acquired the number. Mr Johnston is not a public authority. He was not a serving police officer at the material time. If he were to have committed any unlawful act, it would not engage our jurisdiction. There is no evidence that he did so, or that he obtained Mr Wilson's number by any illegitimate or covert means. It is entirely possible that Mr Wilson disclosed his number either in a message or by way of caller ID by telephoning Mr Johnston himself. He did not have an invariable practice of withholding his number. We were not provided with Mr Wilson's outgoing call data, which would have disclosed whether he telephoned Mr Johnston.
44. Mr Field was also at the material time a *retired* officer, and if he were to have committed any unlawful act, again, that would not engage our jurisdiction. We are in any event satisfied, for the reasons already given, that he received it from Mr Johnston.
45. We do not need to determine precisely to what the entry dated 13 May 2015 referred to the *Operation Seastorm* report relates. There is no evidence about that. If, as DCI McGarvie thought, the date was the date the entry was made, it may have been an entry made on 13 May 2015 in relation to activity that had taken place earlier.

#### **Issues of law**

46. Mr Wilson's complaint is predicated upon Police Scotland's having obtained his number unlawfully. In the light of our findings on the evidence, we dismiss his complaint. Mr Wilson also claims, however, that the conduct of Police Scotland, on the agreed facts, was incompatible with his Convention rights under Articles 8 and 10.

### *Jurisdiction*

47. This tribunal is the only appropriate tribunal in relation to proceedings for actions incompatible with Convention rights which fall within section 65(3) RIPA: section 65(2)(a) RIPA. For the purposes of this case, the relevant provision of section 65(3) is paragraph (d). The proceedings must relate to the taking place in challengeable circumstances of any conduct falling within section 65(5).

48. Section 65(5) provides that conduct falls within it if, whenever it occurred, it was conduct of certain specified types. The types of conduct specified have been altered by amendment during the lifetime of RIPA. Some of the types of conduct are now described by reference to particular provisions of the Investigatory Powers Act 2016.

49. Section 65(7) provides:

For the purposes of this section conduct takes place in challengeable circumstances if it is conduct of a public authority and

(a) it takes place with the authority, or purported authority, of anything falling within subsection (8); or

(b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought; but, ... conduct does not take place in challengeable circumstances to the extent that it is authorised by, or takes place with the permission of, a judicial authority.

50. Subsection (8) lists various types of warrants and authorisations. Subject to three exceptions which are not relevant in this case, they are all currently defined by reference to provisions of the Investigatory Powers Act 2016.



51. The conduct in this case took place in 2015. Under RIPA as it stood at the time of the conduct, the conduct fell within section 65(5)(c), namely conduct to which Chapter II of Part I of RIPA applied. The question as to whether it had taken place in challengeable circumstances was answered by reference to subsection (8)(b), which referred to an authorisation or notice under Chapter II of Part I of RIPA. Regulation 7 of The Investigatory Powers Act 2016 (Commencement No 4 and Transitional and Saving Provisions) Regulations 2018 (SI 2018/341) expressly preserved the jurisdiction of the tribunal under those provisions in relation to conduct which occurred when they were in force, until the repeal of Chapter II of Part I of RIPA. Chapter II of Part I was repealed by paragraph 54 of Schedule 10 to the 2016 Act, which was brought into force on 22 July 2020 by regulation 2(e)(ii) of the Investigatory Powers Act 2016 (Commencement No 12) Regulations 2020 (SI 2020/766). The jurisdiction of the tribunal was not expressly preserved by a saving provision extending beyond 22 July 2020. At the point of repeal, however, the terms of section 16 of the Interpretation Act 1978 came into play. Unless the contrary intention appears, the repeal of an enactment does not affect the previous operation of the enactment repealed, or anything duly done under it. It does not affect any right or privilege acquired under it, and it does not affect any legal proceeding in respect any such right or privilege. These proceedings may continue as if the repealing Act had not been passed. Our jurisdiction is therefore that provided by RIPA as enacted at the time of the conduct complained of.

### *Article 8*

52. The conduct which is said to be incompatible with the rights protected by Article 8 is the use of his number in the first version of application 122054, which was rejected by the officer supervising Mr Pike, and did not progress further as originally drafted. Mr Wilson's Article 8 claim was not articulated in his claim form. Police Scotland raised no objection to our exercising our discretion to allow the claim to proceed out of time, and we have done so.

53. Mr Wilson's Article 8 claim does not turn on whether his telephone number was confidential information. Parties agreed that the mobile telephone number was personal information which could be within the area of private life that engaged and attracted the protection of Article 8. They agreed that even where personal data was in the public domain, it might attract the protection of Article 8 where it was collected and processed in such a form or manner beyond that which was normally foreseeable. That joint position is consistent with the distinction between rights of confidence and privacy rights recognised by the Supreme Court in *PJS v News Group Newspapers Ltd* [2016] AC 1081 at paragraph 25 and following.
54. In this case the manner in which the telephone number came into the hands of the police is unobjectionable. What is significant is the use to which they put it. The act of placing it in the draft application is an act which engages Article 8. It was an act directed at obtaining call data associated with the number. It was directed at obtaining information about a journalist's sources, although it disavowed that intention. It was intended to be placed before a designated person, rather than a judicial authority, as the Code of Practice required. The act, or conduct, of placing the number in an application was itself, therefore, not in accordance with the law. Even if it had been, it could not have been justified in the interests of preventing disorder or crime. Police Scotland have conceded that when they purported to conduct an investigation into the disclosure of information they had no coherent view as to what crime, if any, had been committed by any individual. They had no intelligence case suggesting that police officers had disclosed information to journalists.
55. In determining whether the conduct took place in challengeable circumstances, the question is whether the circumstances were such that it would not have been appropriate for the conduct to take place without the authority of an authorisation or notice under Chapter II of Part I of RIPA. The conduct of drafting the application using Mr Wilson's number is not conduct that required an authorisation of that sort. The conduct relied on here, is not, therefore, conduct that took place in challengeable

circumstances. For that reason, it is not conduct in respect of which we have jurisdiction, and we dismiss Mr Wilson's claim under Article 8.

### *Article 10*

56. The Article 10 claim proceeds on two bases:

(i) that the act of using Mr Wilson's number in the first version of application 122054 was incompatible with his Article 10 rights; and

(ii) that Mr Wilson's Article 10 rights were contravened in relation to the applications that did proceed to authorisation and which resulted in the recovery of information, although no data relating to him were recovered, and the applications did not result in the discovery of his sources.

57. The first of these raises the same issue about challengeable circumstances as does the Article 8 claim. For the reasons already given, the conduct of placing Mr Wilson's number in the application was not conduct that took place in challengeable circumstances, and we do not have jurisdiction.

58. The second of these bases does not raise that issue, as it arises from the recovery of information on the basis of a purported authorisation. Police Scotland argued that that did not infringe Mr Wilson's Article 10 rights. He was not required to reveal journalistic sources. Police Scotland did not discover his sources.

59. The Article 10 rights of a journalist include his rights to receive and impart news. He must be able to gather news. From that flows the protection afforded to journalistic sources, which is recognised in the various international instruments cited in *Telegraaf Media Nederland Landelijke Media BV and others v The Netherlands*, Application no 3915/06, 22 November 2012, at paragraph 60. One of those international instruments is Recommendation No R(2000) 7 on the right of journalists not to disclose their sources of information, adopted by the Committee of Ministers of the Council of Europe on 8 March 2000. One aspect of the Article 10 rights of a journalist is his right not to disclose information identifying a source.

60. In *Telegraaf Media Nederland*, the applicants contended that orders to disclose sources might have a detrimental impact not only on sources, but also on a newspaper, because it would no longer be trusted by potential sources. As the court observed at paragraph 127, without the protection of journalistic sources, sources may be deterred from assisting the press in informing the public on matters of public interest. If they are so deterred, the public watchdog role of the press will be undermined. While every individual has a right of free expression, the free expression rights of journalists are rights which relate to a broader public interest. They are rights which serve the public at large in a modern participatory democracy. As Laws LJ put it in *R(Miranda) v Secretary of State for the Home Department and another* [2014] 1 WLR 2140 at paragraph 46 (and cited in *Moran and others v Police Scotland* at paragraph 32),

“The contrast is not between private right and public interest. The journalist enjoys no heightened protection for his own sake, but only for the sake of his readers or his audience. If there is a balance to be struck, it is between two aspects of the public interest.”

61. The overarching policy which underlies the protection of a journalist from being required to reveal his sources is the need to preserve his access to sources in the public interest. It recognises the need to prevent sources from being deterred from cooperation. That information about individuals was recovered with a view, it is now admitted, to discovering Mr Wilson’s sources, therefore it represents an interference with his Article 10 rights as a journalist. His name and status as a journalist were expressly invoked in both the authorised applications. There is a real risk that conduct of that sort will have a chilling effect on his ability to obtain and disseminate information in the public interest. It is a matter of concession that Police Scotland acted otherwise than in accordance with the law when they sought to discover Mr Wilson’s sources. We therefore find that Police Scotland acted in a manner incompatible with Mr Wilson’s rights under Article 10.

### *Remedy*

62. We are making a declaration that Police Scotland acted in a manner incompatible with Mr Wilson's Article 10 rights.
  
63. In submissions Police Scotland apologised for, as Mr Duguid put it, Mr Wilson's having been "caught up" in an investigation which they conceded was unfounded and unlawful. No order requiring them to apologise is, therefore, necessary.
  
64. Police Scotland conceded that they had no justification for continuing to hold Mr Wilson's data, and in particular his mobile phone number, other than in connection with these proceedings. They undertook to remove and delete the data when these proceedings come finally to be resolved. In the light of that undertaking, we make no order requiring them to do so.