Case No: CO/2491/2017

Neutral Citation Number: [2018] EWHC 471 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2018

Before :

MR JUSTICE DOVE

- -

Between :

	BARBARA HEWSON	**Claimant**
	- and -	
	COMMISSIONER OF POLICE OF THE METROPOLIS	**Defendant**

- -
- -

Una Morris (instructed on **Direct Access**) for the **Claimant**
Nick Yeo (instructed by **Directorate of Legal Services**) for the **Defendant**

Hearing dates: 16th & 25th January 2018

- -

Judgment**Mr Justice Dove :**

Introduction

1. This is a claim for judicial review brought by the claimant against the issuing to her of a Prevention of Harassment Letter ("a PHL"), which has in other connections been referred to as a Police Information Notice or PIN. The PHL is dated 1st March 2017, but a decision to issue it was made prior to this around 24th February 2017. The basis of the claimant's case is that the issuing of the PHL to her constituted a breach of articles 8 and

10 of the ECHR. It was issued without any specific consideration of the impact of the PHL on the claimant's article 8 and 10 rights, pursuant to a process without effective procedural safeguards, in particular in the form of an interview with the claimant, and was a disproportionate interference with those rights. Furthermore, on the facts of the case the claimant contends that she had a legitimate expectation that she would be interviewed prior to the PHL being issued. On this basis the claimant contends that the issuing of the PHL was unlawful.

2. Various forms of relief are sought by the claimant in the claim form. Following a discussion at the hearing it was concluded that, if necessary, there would be a need for further discussion in relation to the appropriate form of any relief consequent upon any decision in the claimant's favour. It also has to be noted that on the second day of the hearing the recording facilities in court failed. All parties were content that the hearing should continue without the proceedings being recorded, on the basis that the court was hearing argument, and it had been made clear that judgment was to be reserved.

The Facts

3. The claimant and Ms Sarah Phillimore ("the complainant") are both practising barristers. In addition, the claimant is also a writer and contributor of articles to the legal and non-legal media. For some months prior to the facts with which this case is concerned the claimant and the complainant had been involved in a dispute which, at least at the outset, was concerned with their differing opinions in relation to legal issues.

4. It appears that around 5th February 2017 the complainant contacted Wiltshire Police complaining that she was being subjected to harassment by the claimant. The report was also referred to the defendant at around this time, although the Wiltshire Police continued to be involved in the investigation of the matter, and in particular gathering evidence from the complainant. The complainant submitted a timeline to the Wiltshire Police setting out a chronology of the events from her perspective. From that timeline it appears that the complainant was concerned that during the autumn of 2016 she was the subject matter of regular posts on Twitter by the claimant accusing the complainant of being a "malicious crackpot" and "unhinged". The complainant instructed solicitors who sent a letter before action requesting that the claimant refrain from further mention of the complainant on social media, failing which an injunction would be sought. That letter did not cause the claimant to cease posting what the complainant regarded as "a significant number of abusive tweets" and a second letter before action was sent. By this time the complainant had already made a complaint to the Bar Standards Board in relation to what she contended were possible breaches by the claimant of Core Duties 3 and 5 of the Code of Conduct.

5. At the end of October the complainant complained to Wiltshire Police about what she contended was an abusive email sent to her chambers, and abusive comments left on her blog. She blamed the claimant for these communications acting either directly or

indirectly. At the end of November 2016 the claimant's solicitors were in contact with the complainant seeking her withdrawal of the complaints to the Bar Standards Board. Around this time the complainant contended there were further episodes of harassment of her on social media. The complainant stated in the chronology that what she regarded as harassment of her by the claimant ceased just prior to Christmas 2016, but then resumed in the middle of January. At that time the complainant contacted the claimant's solicitors requesting confirmation that she could serve any injunction application at their offices. In the chronology the complainant expresses her fear as to people she is concerned are associated with what she regards as the claimant's campaign of harassment, one of whom she was informed has a criminal past. At the end of January she was contacted by a journalist from a national newspaper in relation to the dispute following which the issue was covered in the press.

6. These matters canvassed in the timeline were also set out in a witness statement compiled by the complainant dated 12th February 2017. In the witness statement, in addition to these matters, the complainant complained of further abusive tweets which had been posted by the claimant including tweets to her chambers, the Bar Standards Board and one of her colleagues in chambers. She expressed her concern in relation to the claimant's activities on social media and the anxiety which this was causing her in her private and professional life.

7. On 16th February 2017 the complainant again contacted the police enquiring as to progress with their investigations and expressing her concerns about further activity on social media by the claimant, in particular on Twitter. She produced screenshots of the tweets posted by the claimant from late on 15th February 2017 through to the early hours of the 16th February 2017. The tweets, amongst other things, called the complainant "evil" and "dodgy", and suggested that the complainant had made a "malevolent intrusion into my private life acting in concert with #Trolls #Evil". This contact from the complainant to the police was followed up on 18th February 2017 when she referred to having received her fourth email from the claimant since 17th January 2017 and she provided the defendant with an email into which she had been copied. Further emails were forwarded on 20th February 2017 by the complainant. These were not emails from the claimant to the complainant, but from the claimant to other individuals expressing the claimant's concern that they had acted in collusion with the complainant and been engaged in harassing the claimant as a consequence of their involvement with the complainant.

8. On 20th February 2017 the investigation was allocated to PC Downs of the defendant. On that date he logged onto the defendant's computer records both his intended course of enquiry and also his attempts to contact the complainant. He noted that he had received the timeline referred to above and the statement provided by the complainant. On 22nd February 2017 the complainant again contacted the police complaining that she

was being harassed online. On 23rd February PC Downs made an unsuccessful attempt to contact the complainant by telephone and sent her an email seeking confirmation of her contact details. On 24th February PC Downs contacted the claimant by telephone. He logged that the purpose of the contact was for her to come in for an interview under caution. In his witness statement in these proceedings PC Downs states as follows:

> "10. At some point on 23 February 2017, I also called the Claimant to invite her to attend the police station for interview. I do not now recall the exact time I called the Claimant however it would have been before the end of my shift at 17:00. Although I do not recall the exact words spoken during our conversation, I would have introduced myself by name and informed the Claimant that I was a police officer investigating an allegation of harassment which I wanted to speak to her about. My intention in speaking with the Claimant in interview was to gain further information on alleged communications as due to the number of instances of complaint, I suspected that there may have been an offence of harassment committed. However, rather than arrest the Claimant I felt it more appropriate to proceed by way of voluntary attendance.
>
> 11. The claimant agreed to attend and confirmed she would contact her solicitor and arrange a convenient time the following week. Unfortunately before completing the conversation the call was abruptly cut-off. I tried to re-dial the Claimant but was unable to get through to her. Given that the Claimant was aware of my request to attend the police station and that she had indicated she would make enquiries with her solicitor as to their availability, I was of the opinion that sufficient information had been provided and that she would contact me again to discuss an appointment time. She did not do this."

9. In fact the time of the call from PC Downs can be further identified from an email which the claimant wrote to the defendant on 27th February 2017 in which she made a complaint in respect of the telephone call. In the email she noted that the telephone call had occurred at 16:22. Her complaint was expressed as follows:

> "I was working at home (I am a writer and a barrister) when my ex-directory home landline rang. The caller claimed to be an Adam Dowson from the Met and said I was required to attend for an interview at the request of Wiltshire Police. I asked how he had got hold of my ex-directory number and he said 'the police computer'. I could not understand this.
>
> What happened?: I asked why and was told a statement had been given regarding me on Feb 2nd. I asked by whom but he would

> not say. He pressed me to give a date and explained I was in Court on Friday and all the following week. He suggested this weekend. I said that I would require my solicitor to be present and I did not think he worked weekends. I said I would need to contact him to find out his availability. I said that I have much experience of reporting complaints of my own to the Met and that the officer I dealt with is PC Alexander Michael who is based at Holloway. I said I was aware of a person who had been writing to my solicitors since last September – at this point the phone went dead. I contacted my solicitor immediately and we arranged some dates. No call has been returned to me by the person calling himself Dowson and I now think this was a hoax. I am afraid my private home phone number has been leaked to a third party by someone in the Met accessing my personal data for improper purposes."

10. In her evidence in these proceedings the claimant explains what happened in relation to the telephone call in the following terms:

> "5. When T/DC Downs rang me, he said nothing about a PIN. I thought he wanted to interview me about an alleged offence. This has never happened to me before. He put me under some pressure to agree a date. I said I wanted my solicitor with me. I was in court the next day and all the following week. He suggested I attend at the weekend and I explained that I did not think my solicitors (Simons Muirhead & Burton) worked weekends. I also explained that the complainant had been writing to my solicitors for some months now. I got onto my solicitors as soon as our call was cut off."

11. When PC Downs commenced work on 24th February 2017 he noted that he had received emails from the complainant just prior to midnight on 23rd February and then in the early morning of 24th February 2017. These emails were accompanied by screenshots of tweets which had been posted by the claimant directed at the complainant inviting people to email the complainant, and included the following tweets sent at 17:15 and 17:41 respectively (i.e. after PC Downs had spoken to the claimant on the telephone):

> "I object to a barrister @svphillimore of @StJohnsChambers making false, malicious claims about me. She is mischievous, manipulative & wrong." (5:15pm – 23 Feb 2017)
>
> "Goodness. @svphillimore of @StJohnsChambers is now running around asking the police to oppose anyone who disagrees with her." (5:41pm – 23 Feb 2017)

12. In the light of this further material PC Downs decided to send the claimant a PHL. He explained the basis for this decision in his witness statement as follows:

> "12. On 24 February 2017 I started work at 08:00 and saw I had 3 further emails from Ms Phillimore, with attachments of screenshots of further online tweets posted overnight. The emails were dated 23 February 2017 at 23:44 and 23:48; and 24 February 2017 at 06:03 and I exhibit copies of the same to this statement as AD/04. As a result of the ongoing tweets which had been posted by the Claimant I formed the view the Claimant needed to be informed before the chance to arrange an interview, that her behaviour was causing harassment to Ms Phillimore and ask that she stop. I therefore decided to send the Claimant a Prevention of Harassment letter ("the letter") and consulted with my supervisor, DS Barbe, in accordance with the Harassment and Stalking policy – *Deal with witnesses and suspects* who authorised this decision.
>
> 13. In particular, I had regard to the paragraph in the policy which reads:
>
> "The police should warn a suspect whenever a first allegation of any harassment is received and if, following a thorough investigation, there is insufficient evidence available to establish a course of conduct or prove another substantive offence. A warning may also be used when the conduct could appear normal to others but causes the victim harassment, alarm or distress (for example, sending the victim flowers every week." (emphasis added)
>
> 14. My understanding of this paragraph is that there are two circumstances in which the service of a letter is appropriate. Firstly, when the investigation does not lead to charge because there is insufficient evidence to establish a course of conduct. Secondly, where the suspect may not recognise that the conduct might be causing harassment, alarm or distress.
>
> 15. It was clear in this case that there had been a number of instances of the Claimant behaving in the manner complained of and therefore it could not be said there was "insufficient evidence of a course of conduct". I therefore considered that the second circumstance for sending a person the letter applied."

13. In his evidence PC Downs explains that he experienced difficulties in being able to deliver the PHL to the claimant on 24th February and 28th February 2017. In all there were three attempts to deliver the letter, and ultimately in the light of these difficulties he decided to send the letter via Royal Mail registered delivery. In the event the Royal Mail

delivery was unsuccessful, and so on 4th March 2017 PC Downs decided to send the claimant a copy of the PHL by email. The PHL provided as follows:

> "An allegation of harassment has been made against you:
>
> Details of alleged conduct (specific actions that are cause for complaint):
>
> It is alleged from 14th January 2017 – Present you have sent several unwanted tweets to Sarah Phillimore directly and indirectly. You have directly mentioned @SVPHILLIMORE even when the account holder blocked you for unwanted correspondance [sic]. You have mentioned @STJOHNSCHAMBERS in an indirect attempt to haras [sic] Sarah Phillimore. This unwanted correspondance [sic] to Sarah has been maliciously worded at times using abusive language.
>
> HARASSMENT IS A CRIMINAL OFFENCE under the Protection from Harassment Act 1997.
>
> "A person must not pursue a course of conduct which amounts to harassment of another and which he/she knows, or ought to know, amounts to harassment of the other."
>
> Harassment can take many forms and examples can include: wilful damage to property, assault, unwanted verbal or physical threats, abusive communication or repeated attempts to talk to or approach a person who is opposed to this.
>
> 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 but will not be disclosed now to the alleged victim. However a copy could be disclosed in any subsequent criminal proceedings against you as proof that police have spoken to you about this allegation. This does not in any way constitute a criminal record and will only be referred to should further allegations of harassment be received."

14. In addition, in the accompanying email PC Downs provides as follows:

> "I have reviewed the evidence in the form of screenshots from the complainant. At this present time there is no need to attend Islington police station as you have been issued a Prevention Harassment warning letter. Please find this attached in this email. I have been to your home address three times in an attempt to serve you this warning, you have not been home… Upon opening

of this email you are in receipt of the warning."

15. In the meantime, on 28th February 2017, in response to the claimant's complaint email set out above, she was contacted by another of the defendant's officers explaining that she had not been in receipt of a hoax call, but that PC Downs was the officer who had contacted her. On 2nd March 2017 the claimant wrote back to the officer who had been in touch, expressing her concern that PC Downs had not taken the trouble to contact her again and confirming that she was happy to attend for an interview on a voluntary basis, and that as a consequence of her solicitor's commitments any interview would need to be scheduled for a future date. The claimant received a response from the officer on 3rd March 2017 copying in PC Downs.

16. On 5th March 2017 the claimant wrote to PC Downs in response to the PHL setting out her contention that the issuing of it to her had been unlawful and explaining that she was a writer and member of the NUJ and regarded the letter as having a "seriously chilling effect" on her freedom of speech. She set out the background from her perspective to the complainant's allegations in the following terms:

> "BACKGROUND
>
> Sarah Victoria Phillimore has been publicly cyber-stalking me since May 2016. She has been openly discussing her desire to sue me, she has publicised that she has reported me to the police, and so on. She appears to be an attention-junkie. She has repeatedly called for others to report me; she has tried to derail a talk that I was due to give by joining a public troll attack on the organiser and owner of the venue; and she has issued dozen and dozens of complaints about me to third parties including the chambers where I work and the legal regulator. She has also posted a series of menacing tweets, implying that she seeks my downfall and wants me dead. It can't get much nastier than this.
>
> It is striking that she has not approached my union, the NUJ.
>
> She has also deliberately allied herself with a group of Twitter trolls who use false identities online and who have been cyber-stalking me for upwards of 18 months.
>
> The Met granted a RIPA authorisation to investigate the trolls last year. She is thus trying to undermine an ongoing investigation, on their behalf, seemingly. Her correspondence with others in particular the Bar Standards Board makes plain that she is acting in concert with these trolls.
>
> This is shocking, and calls for public comment and criticism – from which it seems she is attempting to shield herself, by

> making bogus complaints of harassment to the police.
>
> Our dispute has been reported in the "The Times", so it is public knowledge.
>
> She has also publicised that she is seeking an injunction against me, that she has reported me to the police, etc etc.
>
> She cannot attempt to shut down public debate and criticism about her dubious tactics.
>
> This is highly manipulative behaviour on her part."

17. On 6th March 2017 PC Downs returned her email and explained that the warning would not be withdrawn and furthermore than the PHL was "nothing more than a warning and is not a judicial disposal". He invited the claimant to contact his supervisor DS Barbe. In his witness statement DS Barbe explains that he was content to authorise PC Downs' issuing of the PHL at the time when he did so. During a conversation with the claimant on 10th March 2017 he explained, and subsequently confirmed in an email, that having reviewed PC Downs' investigation he was content with the actions taken, and that the PHL was not to be withdrawn.

18. As set out above part of the claimant's case is concerned with the failure of the defendant to interview her under caution prior to issuing the PHL. What is set out above, in particular in relation to the complainant's timeline and witness statement, it is submitted, is only one side of the case. The claimant contends that had she been interviewed under caution she would have been able to put her side of the question. Whilst the claimant does not dispute that she sent the tweets underlying the complainant's allegation, her contention is that those tweets needed to be seen in context. The context of the tweets is itself complex. As explained in the emails set out above she points out that she had herself been in contact with the defendant in relation to her concerns about the attacks upon her in social media.

19. On 3rd February 2017 she spoke to the officer with whom she had been liaising at the defendant, explaining her concern that the complainant was associated with internet trolls, and that through her solicitor's letters and other action the complainant was attempting to control the claimant's twitter account. She noted that it had been indicated that the complainant would be making a witness statement to the police. She further points out that on 16th February 2017 she contacted the police officer at Wiltshire Police who was dealing with the investigation of the complainant's allegation pointing out that the claimant was concerned that she had been "cyber stalked" by the complainant as a result of the complainant's participation in a campaign of harassment against the claimant, involving serious and misconceived allegations against her family. In this correspondence she pointed out to Wiltshire Police that the Metropolitan Police were involved as a consequence of her complaint about these matters which she later clarified

had been made in January 2016. That investigation had been interrupted after the claimant started to receive death threats which then became the focus of the investigation. The claimant explained that the complainant joined the group cyber-stalking the claimant in May 2016, and that the claimant had made the defendant aware that the complainant was alleging harassment against her and that this was "a classic troll tactic". She asked to see the complainant's statement or alternatively for it to be forwarded to the officer who was dealing with her complaints.

20. On 17th February 2017 the claimant emailed Wiltshire Police explaining that she had taken leading counsel's advice who had advised her that her conduct did not meet either the criminal or civil threshold for complaints under the Protection from Harassment Act 1997. The claimant sought to insist that the complainant withdraw her "unfounded claims" forthwith, and if not that her statement should be forwarded to the officer of the defendant who was identified as the one dealing with the claimant's complaints about cyber-stalking.

21. On 23rd February 2017 the claimant contacted the officer investigating her complaints at the defendant reminding him of the allegations being made against her by the complainant and advising that she had been contacted by PC Downs although they had been cut off. She indicated that she had told PC Downs of the assistance which she had been provided by the defendant. Thus, it was submitted on behalf of the claimant that although it was accepted that she had sent the tweets which the complainant relied upon, they were in the context of a more complex issue related to cyber-stalking of the claimant, and her concern that the complainant was involved in a campaign against her. Furthermore, whilst it was accepted that some of the tweets contained very strong language and were extremely pejorative about the complainant, nonetheless it was contended that the complainant herself was not averse to the use of strong language and, that what had taken place was, in effect, tit for tat.

22. In her evidence the claimant also draws attention to the fact that even before she had received the PHL on 2nd March 2017, the fact that she had received the PHL was being blogged about in the wider media. She contends that the complainant deployed the PHL in a media strategy designed to cause her serious reputational harm by informing the national media about the existence of the PHL, leading to it being reported in what the claimant contends is a false and defamatory story in The Times on 12th April 2017, as well as in a story published by the Mail Online in a press statement from the defendant repeatedly describing the complainant as "the victim". She points out in her evidence that after this publication in the national press the complainant had also blogged about the PHL in the public domain. She also explains in her evidence her belief that the allegation of harassment against her was used by the complainant to bring pressure to bear upon her at a time when she was proposing to give evidence in a criminal trial on behalf of a defendant who was accused of cyber-stalking.

The Law

23. The issuing of a PHL is not authorised or governed by any statutory provisions, and if anything stems from the wide discretion afforded to the police in carrying out their duty of enforcing the law recognised in R v Commissioner of Police of the Metropolis ex part Blackburn (No 3) at p254 B-C. As Lord Denning MR observed, it would only be in extreme cases that the court would be willing to interfere with the police's exercise of that discretion. The practice of issuing PHLs is however a consequence of the way in which the offence of harassment is framed in the Protection from Harassment Act 1997. Section 1 of the 1997 Act, so far as relevant to these proceedings, provides as follows:

> "1.— Prohibition of harassment.
>
> (1) A person must not pursue a course of conduct—
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other."

24. The issuing of a PHL is particularly directed to the questions, firstly, of whether or not a person is engaged in a "course of conduct" and, secondly, whether or not they "ought to know that it amounts to harassment". The theory of a PHL is that once a person has received a letter advising them that the police have received an allegation of harassment, it is no longer possible for them to claim that they were unaware that their conduct might amount to harassment of the complainant. That need can arise, in particular, in cases where the conduct complained of may be thought by the person performing it to be reasonable, and it may be properly intentioned, but in the eyes of the recipient it is frightening or intimidating. A classic example of such conduct would be where a person, pursing amorous intentions towards another individual, sends them bunches of flowers daily to their home or work. Their feelings are not in any way reciprocated by the person receiving the flowers, following which this campaign of kindness comes to be perceived as threatening, frightening or intimidating by the person being pestered by repeated bouquets. In these circumstances police practice, and the policy of the defendant set out above, recognise that it is necessary before the 1997 Act could be invoked, for the person sending the flowers to have pointed out to them that in fact their conduct is capable of amounting to harassment. This category of case, the "bunch of flowers" case, is the category into which the defendant considers the present case fell.

25. The courts have had to consider the legal consequences of the issuing of a PHL so far as the recipient is concerned in R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland and Another [2015] AC 1065. In that case the Supreme Court upheld the view of the Court of Appeal in its earlier ruling that the collection and storage in retrievable form of information about an individual which is involved in the issuing of a PHL amounts to an interference with private life and that therefore Article 8.1 of the ECHR is engaged. The question which arose was whether or not the retention

of that data was, under Article 8.2, "in accordance with the law" and, secondly, if it was, also proportionate to the objective of securing public safety or preventing disorder or crime. The court held, again consistently with the Court of Appeal, that the collection and retention of data in police information systems was in accordance with the law. The real issue was proportionality.

26. The case of Catt involved two claims, only one of which was related to a PHL. The claim related to a PHL was brought by Ms T. She received a PHL following an allegation that she had been responsible for a single episode of homophobic abuse towards a visitor to one of her neighbours. She adamantly refuted the allegation and sought judicial review proceedings both in relation to the issuing of the PHL without her having any opportunity to put her side of the case and, also, in relation to the retention of record of the issuing of the PHL by the police. By the time the matter came before the Court of Appeal (and prior to the consideration of the case by the Supreme Court) the police authority had decided to destroy their record of the PHL. Further, Ms T was not granted permission to appeal the decision of the Court of Appeal that the PHL had been lawfully issued. Thus, the question of whether or not the PHL was lawfully issued and, more particularly, whether it had been proportionate to issue it, was determined by the Court of Appeal. In giving the judgment of the court, Moore-Bick LJ observed the following, firstly in relation to the question of justification under Article 8.2:

> "(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."

27. Having concluded that the question of legality was tied up with proportionality and further that the collecting and processing and retaining of the information contained in the PHL was in pursuit of a legitimate aim Moore-Bick LJ went on to observe the following in respect of proportionality, and in particular the process whereby the PHL had been issued:

> "(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."

28. Having concluded (albeit this aspect of the judgment was overturned in the Supreme Court) that the retention of the information for the periods concerned was disproportionate and a breach of Article 8, Moore-Bick LJ went on to conclude in relation to common law fairness as follows:

> "…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."

29. As set out above, by the case came to the Supreme Court Ms T was no longer able to argue as to whether to letter had been lawfully issued but observations were provided by Lord Sumption in respect of the proportionality of the retention of the PHL and its corresponding CRIS in the following terms:

> “42 The purpose of the Prevention of Harassment letter is plain enough from its terms. Under the Act, harassment requires a “course of conduct”, not just a single incident. The Prevention of Harassment Letter is intended to warn the recipient that some conduct on his or her part may, if repeated, constitute an offence. It also seeks to prevent the recipient from denying that he or she knew that it might amount to harassment. It therefore serves a legitimate policing function of preventing crime and, if a repetition occurs, it may also assist in bringing the accused to justice. It is, however, impossible to conceive how, in the circumstances of this case, that purpose could justify the retention of the letter in police records for as long as seven years or of the corresponding CRIS for 12. It seems obvious that within a few months the incident on 20 July 2010 would have become too remote to form part of the same “course of conduct” as any further acts of harassment directed against Mr S It is not suggested that the material has any relevance to the investigation or prevention of possible offences by others.”

30. In the course of her submissions Ms Morris, who appeared on behalf of the claimant, drew attention to some particular dimensions of the case to be considered under Article 8. She drew attention to the case of Pfeifer v Austria [2009] 48 EHRR 8 in which the European Court of Human Rights observed at paragraph 35 of their judgment that “a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life”.” Thus the interests protected by Article 8 include a person’s reputation within the public domain.

31. Further, she drew attention to the European Court of Human Right’s decision in Keegan v United Kingdom [2007] 44 EHRR 33. That case concerned the forced entry by the police into the applicant’s home in pursuit of an investigation which had mistakenly identified the applicant’s home address as being involved. In reality there was no connection between the investigation and the applicants or their address. The court observed in reaching the conclusion that there had been a violation of Article 8 that in order to satisfy the needs of proportionality a fair balance had to be struck between the right of the applicants to respect for their home on the one hand, and the prevention of crime and disorder on the other. On the basis that basic steps to verify any connection between the address and the offence under investigation had not been effectively carried out, the resulting police action could not be regarded as proportionate.

32. A further example for the need for there to be a careful and proper balance between the interference with a person’s Article 8 rights and the public interest in the prevention of crime and disorder is provided by the decision of HHJ Taylor sitting as a Judge of the High Court in Crook v Chief Constable of Essex Police [2015] EWHC 988. In that case the Judge concluded that the inclusion of the claimant’s photograph in a “most wanted” press release was disproportionate in the particular circumstances of the case. Her

conclusions were as follows:

> "61 I find in any event that had a proper balancing exercise been carried out on all the information that could reasonably practicably have been taken into account, the decision to use the Claimant's photograph and provide the details that were provided, and in the manner they were provided, was not reasonable and proportionate in the circumstances of this case. Firstly, in relation to the claim for breach of confidence, the photograph was over ten years old and showed the Claimant with a very different appearance to the description given by X, and different to a photograph contemporary with the alleged offence produced for this trial by the Defendant. No consideration appears to have been given to the discrepancy. Indeed, a paradoxical situation emerged, whereby Mr Stagg adduced the new contemporaneous photograph, and put to the Claimant in cross-examination that the released photograph did not look like him and, therefore, there was no reason to believe people would recognise him from it. On the other hand, the Claimant claimed that due to his ethnicity, uncommon in Clacton, and distinctive name, the photograph looked sufficiently like him that anyone in the area would have put two and two together and recognised him, even though he had not lived in Essex for some time. If Mr Stagg is right, the release of the photograph in breach of confidence was not necessary and proportionate in the public interest in the service of the legitimate aim of locating the Claimant, as people would not have recognised him. If they are both right, the same purpose could have been achieved without the photograph by giving the Claimant's details and description. On the basis that proportionate disclosure is minimum necessary disclosure, the use of the photograph taken in custody was a breach of confidence.
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> 62 Further, unlike cases such as Hellewell and Stanley , Marshall and Kelly , the Claimant's details were published to the world at large. Whilst the press release in this case was to local media, no consideration was given to the realities of modern technology. Firstly, of the potential for the information to spread across the internet and, secondly, as to the difficulty, once spread, of retrieving and eradicating it, should that be necessary. As Mr Partridge acknowledged, once imparted, the police lost control of the data. It was not on posters that they could take down or photographs they could retrieve from shopkeepers. They were reliant on others to remove it, when notified. Detective Inspector Watson's report and evidence were instructive in this respect. Whilst he would have been prepared to go to the press, he would not have included the Claimant in this type of release or included the word "rape." …

> 64 However, accurate or not, the issue is whether it was proportionate to include all the details, including the allegation of rape. The nature of this allegation against the Claimant, in contrast to others included in the release, is highly relevant for two reasons, in my judgment. Firstly, sexual offences carry a stigma which does not attach to, for example, acquisitive offences such as theft or burglary. And, secondly, by section 1 of the Sexual Offences Amendment Act 1992 , complainants in rape cases are granted automatic anonymity. Section 1(2) prohibits the publication of any matter likely to lead to the identification of a claimant. Consequently, particular care has to be taken in assessing the release of information in such cases, not least where the suspect and complainant are known to each other. In this case, these factors were not considered either in relation to the Claimant or, indeed, in relation to X. Whilst in appropriate cases, the release of a suspect's photograph and the details of alleged crime including rape could undoubtedly be justified as being in the public interest, for example, where the suspect was evading arrest or the safety of the public was at risk or there was a pressing need to locate and detain him, this was not such a case. A less intrusive approach could have been taken which did not require the inclusion of rape in the details at the stage of the release, and the minimum approach would have been to identify him by name and that he was required to contact Essex Police. This was the conclusion drawn by DI Watson."

33. Drawing the threads from these authorities together the following is the framework for the consideration of the issues in this case. Firstly, the issuing of a PHL, whilst not a creature of statute, is justified by reference to the particular ingredients of the offence of harassment from the 1997 Act. Bearing in mind the collection and retention of information by the police that the issuing of a PHL involves, Article 8 will be engaged, and the issuing of the letter and the retention of information pertaining to it constitute an interference with Article 8 rights under Article 8.1. The issue then arises as to whether or not the interference is justified in the light of Article 8.2. There is no doubt that the issuing of it is in pursuit of a legitimate aim namely the prevention of disorder or crime. The question which then arises is as to whether or not the interference is proportionate. The assessment of proportionality will depend upon the particular circumstances of the case and will involve an examination, for example, of the process leading to the issuing of the PHL, the nature of the PHL itself and the circumstances of the allegation.

34. In relation to Article 10, the right to freedom of expression, it is important to recognise that this is a qualified right. It is again a right which is capable of being restricted in the interests, for example, of the prevention of disorder or crime. As was pointed out in the case of Ware v McAllister [2015] EWHC 3086 at paragraph 30, the exercise of the rights protected by Article 10 must be subject to restrictions such as the right of a person not to

be harassed. In that sense, therefore, the 1997 Act is consistent with Article 10.

35. In addition to Articles 8 and 10 the claimant relies upon the common law principles of fairness and legitimate expectation. In respect of fairness it is contended that the requirements of fairness included the provision of the opportunity to the claimant to put her side of the question, either by way of being interviewed or otherwise, before the PHL was issued. In respect of legitimate expectation, it was contended that there was a promise provided to the claimant by the defendant that she would be interviewed prior to any further action being taken. That was a promise as to a particular procedure being followed. The failure to provide the claimant with the opportunity to answer the claimant's allegation was a failure of the requirements of fairness as well as a breach of her legitimate expectation that she would be interviewed before any further action was undertaken.

Conclusions

36. It is sensible to start with the claimant's case under Article 8 since that was at the forefront of Ms Morris' submissions, and the points which arise in connection with Article 8 read across into the case put under Article 10 and at common law. The starting point in the light of the authorities set out above must be that the issuing of the PHL in this case did engage Article 8.1 and was an interference with the claimant's Article 8 rights. The nature and extent of that interference needs to be carefully gauged for the purposes of the necessary proportionality exercise. In gauging the extent of the interference, it is important in the circumstances of this case to bear in mind that the claimant's Article 8 rights included rights in relation to her reputation. There was clearly evident in the present case a public dimension, to the extent that publication of views on social media are in the public domain. In addition in this connection there had been coverage in the national media of the claimant's dispute with the complainant prior to the issuing of the PHL. Part of the interference with the claimant's Article 8 rights included, therefore, the implications for her reputation of the PHL being issued.

37. This point has to be balanced with a proper understanding of the nature of a PHL. As Moore-Bick LJ pointed out in Catt, the PHL is no more or less than a warning. As the letter made clear it did not involve any formal determination of any kind, nor did it carry with it the imputation that the conduct which had been alleged against the claimant had actually taken place (albeit that in this case as set out above it is accepted by the claimant that she sent the messages complained of). The PHL is not therefore a finding or determination that the allegation the offence of harassment has been or may have been committed. Furthermore, it was a warning provided in the context of a "bunch of flowers" type of case, in which it was accepted on behalf of the defendant that it might well be that the claimant had no idea that the conduct complained of was said to be giving rise to harassment of the complainant. Overall, therefore, the nature of the PHL and its terms must considerably temper the extent of the interference with the claimant's Article 8 rights.

38. As Ms Morris pointed out the consideration of Article 8 incorporates a requirement for any interference to be procedurally fair, in order for it to be proportionate. In this connection she placed particular emphasis on the failure to interview the claimant prior to issuing the PHL as evidence of unfairness and a lack of proportionality in the issuing of the letter. Associated with this submission was her reliance on the undisputed fact that PC Downs made no assessment of Article 8 compliance prior to reaching his decision that the PHL should be sent to the claimant. Having considered her submissions I am not satisfied that fairness, or a fair procedure related to an interference in Article 8, required that the claimant should be interviewed prior to the PHL being issued. As set out above the PHL does not involve any finding that the allegation made is true. It is simply a record that the allegation has been made, and a warning in respect of future conduct. In the particular circumstances of this case, as opposed to the case against Ms T in Catt, the basis of the allegation was documented in the material before the defendant. It was not simply an allegation of something said, as in the case of Ms T. Nonetheless as Moore-Bick LJ observed in the case of Catt the issuing of the PHL in that case was not rendered unfair or disproportionate by failure of the police to speak to Ms T prior to issuing it. As he observed, and as is set out above, the PHL does not involve a formal determination nor is it akin to a caution or charge initiating proceedings. Whilst it might be good practice to speak to the potential recipient of a PHL prior to issuing it, fairness does not require that such should happen in every case in order for the issuing of the PHL to be lawful. I am not therefore satisfied, in principle, that there was a need for the claimant to be interviewed for the procedure to be fair and proportionate prior to the issuing of the PHL.

39. Notwithstanding this conclusion, it is still necessary to examine whether in the particular circumstances of this case fairness and a proportionate and appropriate procedure required there to be an interview. Furthermore, and allied to this question, is the consideration of whether it was proportionate and fair for the PHL to be issued at the time that it was. In my view in considering these issues it is relevant that the evidence shows that certainly by mid February the claimant was aware that Wiltshire Police were investigating an allegation made against her by the complainant. It is clear from the evidence that when she was contacted by PC Downs on 23rd February, whilst it may not have been made explicit in the conversation why PC Downs wished to interview her, nevertheless she clearly drew the inference that police enquiry of her was a consequence of the complaint which the complainant had made to Wiltshire Police. That inference is evident from the tweet which the claimant broadcast at 17:41 on 23rd February 2017. Against this background, and following on from contact by the police, as PC Downs noted from the material provided to him by the complainant early on 24th February 2017 the communication through the use of social media by the claimant nonetheless continued, and continued in the vein which she had previously pursued. In the light of these factual circumstances in my view the action taken of issuing the PHL without awaiting the undertaking of further investigations was understandable. There were obviously good grounds in these circumstances for the defendant to seek to nip in the bud, to use the language of Moore-Bick LJ, the behaviour which was the subject of the complaint and which was continuing notwithstanding the investigation of the matter by

the police.

40. Taking into account all of the factors which have been set out in the preceding paragraphs both as to the nature and extent of the interference with the claimant's Article 8 rights through the issuing of the PHL and also the circumstances which pertained at the time when PC Downs decided to issue the PHL on the basis of the need to seek to extinguish the claimant's persistent use of social media involving communication about the complainant was in my view proportionate. It pursued the legitimate aim of drawing to the claimant's attention that whilst she may not have realised it, and may have believed that the complainant was a robust individual capable of shrugging off the nature of the observations which the claimant was making about her over social media, they were said to be giving rise to distress and alarm to the complainant. Thus, the issuing of the PHL provided the claimant with the opportunity to reflect on the allegation, and if (as was the case) she had been communicating over social media as alleged, to take stock of whether she wished to continue bearing in mind the probability of investigation for a criminal offence under the 1997 Act which would follow. Having considered the points raised on both sides of the case I am satisfied that the interference with the claimant's Article 8 rights in this instance was proportionate at the time when the PHL was issued.

41. Whilst I have not taken the point into account in reaching my judgment as to proportionality, it must nonetheless be observed that in the particular circumstances of this case even had the claimant been interviewed it is difficult to accept that what she may have said to PC Downs would have affected his judgment. She would have been able to explain that in fact she believed that she was the wronged party in this particular dispute. She would have provided PC Downs with the information which has been set out above in that connection, and contended that in fact the complainant was part of an orchestrated attack on her through social media and other channels. She would have explained that she believed that her observations on social media were, as described by Ms Morris in her submissions, in effect tit for tat, exchanged with another legal professional who in the light of that person's previous contributions to the debate she believed to be robust and more than capable of keeping up her end of the argument. However, even after all that has been said, it needs to be borne in mind that PC Downs was not reaching a conclusion on the truth of either the allegation or the impact of the impact of the allegation on the complainant in issuing the PHL. He was not being called upon to adjudicate in relation to who might be the wronged party in the lengthy dispute between the claimant and the complainant. As set out above the purpose of the PHL was to provide the claimant with notice of the allegation which had been made against her, and the opportunity to consider her position and, if so advised, avoid any further investigation. Providing her side of the story would not necessarily have obviated the justification for the issuing of a PHL. All this said, as set out above, the conclusions which I have reached have been arrived at without any reference to these points.

42. Turning to Article 10, as set out above the points that are germane to Article 8 read across into the substance of the argument in respect of Article 10. Whilst the PHL interfered with the claimant's Article 10 rights, it did so in a manner which in my judgment was proportionate for essentially the same reasons which have been set out in

respect of Article 8. I also do not consider that the principles of common law fairness lead to any different conclusion in respect of the procedural requirements pertaining to whether or not an interview was required than arise under Article 8. For the same reasons that it was not procedurally unfair and disproportionate for the claimant not to have been interviewed prior to the issuing of the PHL it was also not unfair for her not to be interviewed at common law.

43. So far as legitimate expectation is concerned I accept that submission made on behalf of the defendant by Mr Yeo that there was no promise in this case that the claimant would be interviewed prior to any PHL being issued. The reality is that an interview was contemplated by PC Downs as part of the investigation, but once he had spoken to the claimant and the conduct in relation to the use of social media had persisted shortly thereafter, he formed the view that the PHL should be issued directly without an interview. There is nothing in the evidence or indeed in any policy or other statement by the defendant to suggest that the claimant had received a procedural promise that she would be interviewed prior to a PHL being issued. Lastly, Ms Morris submitted that the issuing of the PHL was irrational. That is a contention which in the light of the findings which I have set out above I am unable to accept.

44. It follows for all of the reasons which I have given the claimant's application for judicial review must be dismissed.