SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 61
P105/18

Lord Justice Clerk
Lord Menzies
Lord Malcolm

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in the Petition

by

BC and OTHERS

Petitioners and Reclaimers

against

IAIN LIVINGSTONE QPM, CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND and OTHERS

Respondents

Petitioners and Reclaimers: Sandison QC and T Young; MacRoberts LLP
Respondents: Maguire QC and Lawrie; Clyde and Co (Scotland) LLP

16 September 2020

Introduction

[1] The ten reclaiming police officers challenge the Lord Ordinary's decision of 28 June 2019 to refuse their petition for judicial review. The respondents are the Chief Constable and Deputy Chief Constable of the Police Service of Scotland and a Chief Superintendent of Police appointed under the Police Service of Scotland (Misconduct) Regulations 2014 ("the 2014 Regulations") to conduct misconduct proceedings brought against the reclaimers. The

petition sought (1) declarator that the respondents' use of messages sent to, from and amongst the reclaimers in private "WhatsApp" electronic message groups ("the Messages") to bring misconduct proceedings against them in respect of allegations of non-criminal behaviour was unlawful *et separatim* incompatible with their ECHR article 8 rights; and (2) interdict to prevent use of the messages in misconduct proceedings against them.

Background

[2] The messages were discovered in July 2016 by a detective constable during an investigation in to a serious sexual offence, in which the reclaimers were not persons of interest. They were found on a mobile phone belonging to a suspect and recovered during the course of the investigation. The suspect was a constable within the Police Service of Scotland. The messages were contained in "group chats", shared amongst members of two "WhatsApp" groups of which the suspect was a member. One was entitled "Quality Polis" and the other "PC Piggies". One of the groups had 15 members including the 5th, 7th and 10th reclaimers. The second group had 17 members including all of the reclaimers. Not all of the members of the groups have been identified.

[3] The Lord Ordinary considered that a reasonable person having regard to the content of the messages would be entitled to reach the conclusion that they were sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability and included a flagrant disregard for police procedures by posting crime scene photos of current investigations. The messages also included pictures of a police shift pattern, and a police bulletin.

[4] Having considered their content the investigating officer, suspecting the users of the group to be police officers, reported the matter to her supervisors, who in turn forwarded the matter to the Professional Standards Department for investigation. Professional

Standards thereafter used and relied upon the messages to bring misconduct charges against each of the reclaimers under the 2014 Regulations. Between 25 and 30 November 2017 the reclaimers received notification from the second respondent that they required to appear before misconduct hearings. The misconduct charges relate to alleged breaches of the standards of professional behaviour as set-out in Schedule 1 to the 2014 Regulations ("the Standards").

The 2014 Regulations, Standards and associated legislative regime

[5] The Standards provide as follows:

"**Standards of Professional Behaviour**

Honesty and integrity

Constables are honest, act with integrity and do not compromise or abuse their position.

Authority, respect and courtesy

Constables act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy.

Constables do not abuse their powers or authority and respect the rights of all individuals.

Equality and diversity

Constables act with fairness and impartiality. They do not discriminate unlawfully or unfairly.

Use of force

Constables use force only to the extent that it is necessary, proportionate and reasonable in all the circumstances.

Orders and instructions

Constables give and carry out only lawful orders and instructions.

Duties and responsibilities

Constables are diligent in the exercise of their duties and responsibilities.

Confidentiality

Constables treat information with respect and access or disclose it only in the proper course of their duties.

Fitness for duty

Constables when on duty or presenting themselves for duty are fit to carry out their responsibilities.

Discreditable conduct
Constables behave in a manner which does not discredit the Police Service or undermine public confidence in it, whether on or off duty.

Constables report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice.

Challenging and reporting improper conduct

Constables report, challenge or take action against the conduct of other constables which has fallen below the Standards of Professional Behaviour."

It was accepted that the reclaimers were informed of these Standards, which applied whether they were on or off duty, and that they had each sworn on oath to behave in accordance with them.

[6] The relevant oath was in the following terms:

"*I, do solemnly, sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable with fairness, integrity, diligence and impartiality, and that I will uphold fundamental rights and accord equal respect to all people, according to law.* "

[7] The Police Service for Scotland Regulations 2013 (the "2013 Regulations") set out, *inter alia*, restrictions on the private life of a constable. Paragraph 4 provides:

"4. *Restrictions on the private life of constables*

(1) Schedule 1 has effect.

(2) No other restrictions except those designed to secure the proper exercise of the functions of a constable may be imposed by the Authority or the chief constable on the private life of constables."

[8] Schedule 1, paragraph 1 provides:

> "RESTRICTIONS ON THE PRIVATE LIFE OF CONSTABLES
>
> 1. *A constable must at all times abstain from any activity which is likely to interfere with the impartial discharge of that constable's duties or which is likely to give rise to the impression amongst members of the public that it may so interfere; and, in particular a constable must not take any active part in politics.*"

The Lord Ordinary's decision and reasoning

[9] The Lord Ordinary considered that the following questions arose for consideration:

1. Whether the respondents' disclosure and use of the messages interfered with a common law right to privacy vested in the reclaimers *et separatim* their Article 8 rights under the European Convention on Human Rights?

2. Whether that disclosure and use has a clear and accessible legal basis so as to be "in accordance with law"?

3. If so, whether the interference was necessary and/or proportionate?

4. What would provide an effective remedy?

The Lord Ordinary answered the first 3 questions in the affirmative, his key findings being:

Issue 1

[10] The Lord Ordinary was persuaded of the existence of a common law right of privacy, the nature and scope of which he concluded was essentially a reflection of the rights protected under Article 8 ECHR, save that it would apply to bodies other than public authorities. "Correspondence" was expressly referred to in Article 8. Electronic communication could form part of "the zone of interaction" between the individual and others and was therefore part of the core right protected by Article 8. The remaining arguments on this issue centred on the question whether the reclaimers had in the circumstances a reasonable expectation of privacy such as would bring their rights of

privacy, at common law or under Article 8, into play, "a reasonable expectation of privacy", being the "touchstone" for Article 8.1 engagement. Applying an objective test the Lord Ordinary concluded that the reclaimers had no reasonable expectation of privacy in respect of the messages. An ordinary member of the public could have a reasonable expectation of privacy in respect of "WhatsApp" messages, having regard only to the characteristics of the platform. The Lord Ordinary rejected the respondents' argument that the very fact of chats taking place amongst groups rather than between individuals, and the existence of an administrator to control the group, and admit members, suggested that members of the group relinquished control of the group. It was appropriate to consider that the reclaimers did have trust and confidence in other members of the group, a factor supporting a reasonable expectation of privacy. Whilst there was a possibility of a person joining a WhatsApp group making public the content of group exchanges, this could happen following any private occasion and did not undermine the individual's reasonable expectation of privacy.

[11] The content of the messages would not normally sound when consideration was being given to whether there existed a reasonable expectation of privacy, and the protected "zone of interaction" would extend even to messages "of an abhorrent nature". Content was generally relevant to proportionality, not to the initial question whether a reasonable expectation of privacy arose (*Campbell* v *MGN Ltd* [2004] 2 AC 457, para 21). However the standards and regulatory framework to which a police officer was subject put him in a different category from ordinary members of the public. These attributes were relevant to the issue of reasonable expectation of privacy (*In re JR38 [2016] AC 1131* para 88). A failure to comply with many of the standards would be likely to interfere with the impartial discharge of a constable's duties or give that impression to the public. The content of the

messages was thus relevant to the question whether there was a reasonable expectation of privacy. Because of the attributes attaching to a constable and the need, in a system of policing by consent to maintain public confidence, the reclaimers could have no reasonable expectation of privacy when exchanging messages of the character involved here.

Issue 2

[12] For the disclosure and use in disciplinary proceedings of messages recovered in criminal proceedings to be "in accordance with law" there had to be a clear and accessible legal basis for that collateral use (*Halford* v *United Kingdom* 1997 24 EHRR 523 at 524). The analysis adopted in *Woolgar* v *Chief Constable of Sussex Police* [2000] 1 WLR 25 at para 9 gave a clear and accessible basis upon which the police could disclose to regulatory bodies information which they recovered in the course of criminal investigations:

> "Even if there is no request from the regulatory body, it seems to me that if the police come into possession of confidential information which, in their reasonable view, in the interests of public health or safety, should be considered by a professional or regulatory body, then the police are free to pass that information to the relevant regulatory body for its consideration".

[13] Under reference also to *Nakash* v *Metropolitan Police Service and the General Medical Council* [2014] EWHC 3810 Admin), the Lord Ordinary concluded that in a case where the police sought to refer the information recovered to their own internal disciplinary body for the strictly limited purpose of disciplinary proceedings, the position must be the same. There was a public interest in having a properly regulated police force in order to protect the public. Directed to such an end, the disclosure could not be described as arbitrary. *Sciacca* v *Italy* 2006 43 EHRR 20 was clearly distinguishable, there having been no public duty requiring or justifying the disclosure in that case.

Issue 3

[14] The Lord Ordinary was of the view that "public safety" and, separately, "the prevention of disorder or crime" listed in Article 8(2), were both engaged in the present circumstances. In relation to the former, the principle purpose of the police was the protection of the public. An officer behaving in the way reflected in the messages could reasonably be inferred to be likely to be someone who would lose the confidence of the public and cause a decline in confidence in the police. As the police could not operate efficiently without such public confidence, public safety would be put at risk, and the police would be less able to prevent disorder or crime. Furthermore certain aspects of the messages showed a mind-set where the public's right to be treated fairly and equally was called into question. An officer who held these types of views was less likely to have the confidence of the public and in turn public safety would be put at risk.

[15] Turning to the issue of proportionality, the importance of public confidence in the police was clearly considerable. Equally, the protection of the public by the police was extremely important. To maintain public confidence and to protect the public it was necessary for the police to be regulated by a proper and efficient disciplinary procedure. Disclosure and use of information of the kind and in the circumstances recovered in this case were a necessary part of that. Even if he had considered the reclaimers to have a legitimate expectation of privacy, the foregoing factors would have caused him to conclude that disclosure of messages would have been proportionate.

Grounds of Appeal

[16] The grounds of appeal are that the Lord Ordinary erred:

1. In holding that the reclaimers had no reasonable expectation of privacy in the communications.

2. In holding that there was a clear and accessible legal basis for the disclosure and use of the content of the communications for the collateral disciplinary purpose.

3. In holding that any interference with the reclaimers' right to privacy was necessary, in a democratic society, in the interest of public safety or for the prevention of disorder or crime, and that the proposed use was proportionate to a legitimate end.

4. In observing that in any event it would have been "fair" to allow the content of the messages used in the disciplinary proceedings.

Submissions

[17] Detailed notes of argument supplemented by further written submissions were lodged by both parties. What follows is a summary of the main points.

Submissions for the reclaimers

[18] This case concerned the implications of the increasingly vast capabilities of IT devices to store and record private information in a permanent and reproducible form, even if such storage and recording was not intended or even known by the individuals involved. International juridical treatment of this issue recognised that, for the core value of privacy to have practical content in this context, courts had to be vigilant to protect private information stored on or generated by such devices, and to ensure that dealings with such information were adequately controlled and regulated: Murdoch (ed) Reed and Murdoch (4 ed) at para 6.107, *R (Catt)* v *Association of Chief Police Officers of England and Wales and Northern Ireland & Anor* [2015] AC 1065 (Lord Sumption at para 2), the Canadian Supreme Court decision of *R* v *Vu* [2013] 3 SCR 657, particularly at paras [1] - [3] and [40] -[45] (Cromwell J),

Riley v *California* 573 US (2014) at p17-22 (Roberts CJ), and *Carpenter* v *Unites States No. 16-402,* 585 US (2018).

Ground 1- reasonable expectation of privacy

[19] The Lord Ordinary correctly concluded that Scots law recognised a common law right of privacy. He correctly identified that an ordinary member of the public using "WhatsApp" would have a reasonable expectation of privacy. The reclaimers' engagement in correspondence with others with whom they shared a bond of friendship and confidence was an obvious example of a situation in which a reasonable expectation of privacy would normally arise. The Lord Ordinary erred in determining that the reclaimers had no such expectation because of their particular "attributes" as constables. These attributes amounted to no more than being in public service and subject to certain professional standards. The Lord Ordinary confused the proportionality of a particular interference with private life with the logically prior question of whether there was a reasonable expectation of privacy in connection with any communication. This was evident from his reliance at [169] on *R (Chief Constable of Cleveland Constabulary)* v *Police Appeals Tribunal* [2017] 1 ICR 1212, in connection with reasonable expectation when in fact the passage cited was addressing the subsequent issue of proportionality. The respondents seek to gloss over this reliance by suggesting that the Lord Ordinary was using the case to assess proportionality in relation to the application of professional standards to private conduct rather than whether disclosure for the collateral purpose was proportionate, but that is not what the Lord Ordinary said.

[20] Despite referring to *Campbell* v *MGN Ltd* [2004] AC 457 (para 21), where the importance of that distinction was emphasised, the Lord Ordinary failed to reflect that distinction or apply the guidance that proportionality considerations should not be brought

into the assessment of reasonable expectation. Issues such as the extent to which publication was a matter of proper public concern were only relevant to proportionality. The fact that the Standards apply in private life, or the importance of maintaining public confidence are not issues for consideration at the threshold stage, only when considering proportionality.

[21] The Lord Ordinary's reliance on general comments in *In re JR38* [2016] AC 1131 and *Campbell* that a person's attributes were relevant to assessment of reasonable expectation was misconceived. At issue in *In re JR38* was whether a child had a greater expectation of privacy than an adult. A person's attributes in this context are things about that person which affect his understanding of where the private/public divide may lie in relation to any activity undertaken, for example capacity for understanding, or insight. They are not something as ephemeral as a job or occupation. The Lord Ordinary's reasoning that behaviour "said to be potentially in breach of the Standards" allowed the conclusion that there was no reasonable expectation of privacy meant that no constable had any reasonable expectation of privacy at all having regard to the general and aspirational nature of the Standards, which exhorted officers to act with "fairness and impartiality", "self-control and tolerance", "integrity", and "respect and courtesy". Something normally considered private does not cease to be so because of the office or role of the individual. The respondents relied on the requirement on police officers to challenge and report conduct which falls below the Standards, but that is no more than a restatement of the "attributes" argument.

[22] It was a *non sequitur* for the Lord Ordinary to say that, because the Standards applied to conduct in private life, there was no reasonable expectation of privacy for any and all actions that could potentially breach them. Such an approach would render assessment of proportionality redundant. It would result in many employees and professionals in other

fields who were also subject to aspirational policies or rules about their conduct to lose any reasonable expectation of privacy.

[23] Even in cases where employees had been expressly made aware of potential monitoring of their communications, the European Court of Human Rights has held that employees still had a reasonable expectation of privacy and that such monitoring interfered with or engaged Article 8 rights: *Bărbulescu* v *Romania* [2017] IRLR 1032 at paras 69- 81, and *Garamukanwa* v *United Kingdom* [2019] IRLR 853 at paras 22-27. The concept of private life includes interacting and corresponding with others. The argument that police officers cannot be equated with ordinary employees is false: see *Halford.*

[24] It was submitted that the Lord Ordinary ought properly to have determined that the respondents' disclosure and use of the messages did interfere with the reclaimers' common law rights to privacy *et separatim* Article 8 Convention rights.

Ground 2 – no clear and accessible legal basis for the disclosure and use of the messages

[25] For an interference in the reclaimers' private life and correspondence to be "in accordance with law" it must have a proper, clear, and accessible legal basis: *R (on the application of P)* v *Secretary of State for the Home Department* [2019] UKSC 3, Lord Sumption at paras 12, 16 -17, and 24; *Sciacca* v *Italy* (2006) 43 EHRR 20, *Khan* v *United Kingdom* (2001) 31 EHRR 45 and *Halford* v *United Kingdom* (1997) 24 EHRR 523. It involved a dual test of accessibility and foreseeability- Lord Sumption at para 17 in *R (on the application of P)*. It is not enough that the domestic law provides some basis for the impugned measure, the law must provide protection against arbitrariness: *R(T)* v *Chief Constable of Manchester Police* [2015] AC 49, Lord Reed, para 108 and 113-116.

[26] The purpose limits the extent of legitimate use: a legal basis for interference for purpose A did not justify interference for purpose B. In the context of the police, the relevant purposes that justified interference into a person's private life were the prevention and detection of crime, the investigation of alleged offences, and the apprehension of suspects or persons unlawfully at large. It is for those purposes alone that the police were trusted with such intrusive common law and statutory powers. The Courts had repeatedly recognised that collateral use of information by the police for different purposes was unacceptable: *Hellewell* v *Chief Constable of Derbyshire* [1995] 1 WLR 804 at 810 (Laws J); *Bunn* v *British Broadcasting Corporation* [1998] EMLR 846 at 852-853 (Lightman J); *Taylor* v *Director of the Serious Fraud Office* [1999] 2 AC 177 at 198 (Millett LJ), 211B-D (Lord Hoffman) and 218H- 219D (Lord Hope); and also *R (Catt)* v *Association of Chief Police Officers of England, Wales and Northern Ireland and another* [2015] AC 1065 at para 15 (Lord Sumption).

[27] These purposes can, in some cases, justify disclosure to third parties, but only where such disclosure is in pursuit of those purposes: *R* v *Chief Constable of North Wales ex parte Thorpe* [1999] QB 396 at 410F - G and 411B- D (Lord Bingham). A similar approach had been taken in other jurisdictions: eg see *Attorney General* v *Yaya* [2009] FJCA 60, and *Flori* v Commissioner of *Police & Anor* [2014] QSC 284.

[28] While it was accepted that the respondents had initially and justifiably infringed the reclaimers' privacy in the messages for a legitimate purpose, that initial purpose was not relevant to the subsequent disclosure and use for the purpose of investigating and pursuing non-criminal misconduct proceedings. The reclaimers accept that the police have a legal power to disclose information gathered for policing purposes, so, for example, they are justified in publishing photographs or disclosing information where necessary for the apprehension of a suspect, or they may warn of the presence of known criminals for the

purpose of preventing crime. Disclosure for other purposes is not however permitted *Sciacca* v *Italy* (2006) EHRR 20. To allow disclosure for collateral purposes would undermine the likelihood of public co-operation in the detection of crime.

[29] Contrary to the Lord Ordinary's reasoning *Woolgar* and *Nakash* did not provide a proper, clear, and accessible legal basis for disclosure of the messages for collateral purposes. *Woolgar* predated many of the leading authorities on privacy and Article 8, in particular *Campbell,* and was decided when the need to separate legality from proportionality was poorly apprehended. There had been no argument about whether there was a proper, clear, and accessible legal basis for disclosure: only proportionality was considered: see p36E-H. In any event, there was a pre-existing disciplinary investigation in the course of which a formal request for disclosure of information had been made. The case of *Nakash* was even starker, there being in the relevant statutory scheme a specific power to require information for disciplinary purposes. The respondents' reliance on these cases rests on an underlying proposition that the police have a common law power to disclose any information where they consider that to be "in the public interest and in order to protect the public", without limitation by reference to traditional policing purposes such as prevention, detection and investigation of crime, maintenance of public order, or the apprehension of suspects or persons unlawfully at large. Such a test confers so wide a discretion on the police as to be effectively unconstrained by law. In practice, it would be dependent on an arbitrary exercise of will in virtually all instances. A measure was not legitimate if it conferred a discretion so broad as to be dependent on the will of those applying it rather than on the law itself: *R(P),* para 17.

[30] The point had much wider significance than the particular facts of the present case. It could easily arise in the case of any professional or other person holding a role which

engaged the public interest e.g. healthcare professionals, lawyers, accountants and teachers. The Lord Ordinary's reasoning resulted in the proposition that a private communication involving someone in the aforementioned categories could accidentally come to the attention of a constable during the course of a criminal investigation (even where that individual is not the subject of the investigation), and that the police may, or even must, disclose it to an employer or regulatory body even if it had nothing to do with the prevention or detection of crime. Such a generic and wide-ranging power was neither accessible nor foreseeable in its application.

[31] The Lord Ordinary's conclusion did not accord with recent decisions involving statutory schemes for disclosure of information by and between public authorities (including the police): *R (T)* v *Chief Constable of Greater Manchester Police* [2015] AC 49 at paras 110- 121 (Lord Reed) and *Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29 at paras 79- 85. If the police had an open-ended and vaguely defined power to disclose information *"in the public interest"* such statutory schemes would not be necessary in the first place.

[32] A power to disclose for non-policing purposes material which had come to them for such purposes might well be counter-productive – see Lightman J in *Bunn* at 853.

[33] The Lord Ordinary ought to have concluded that there was no proper, clear, or accessible legal basis for the collateral use of the messages, which amounted to an illegal interference with the reclaimers' common law rights to privacy *et separatim* Article 8.

Ground 3- proportionality

[34] The Lord Ordinary rejected the legal basis the respondents relied on to justify disclosure and use but found an alternative legal basis. Since the respondents had not

identified the correct legal basis in the first place, they could not have even begun to undertake a proper proportionality exercise. The Court was now being asked to approach the whole issue in the abstract, without the benefit of any actual decision by the respondents based on a correct legal understanding of their powers.

[35] The Lord Ordinary identified that the correct approach to assessing proportionality was to consider: (i) whether the objective of the relevant legal basis or measure was sufficiently important to justify limitation of the appellant's right to private life; (ii) whether there was a rational connection between that relevant legal basis and the legitimate aim or objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether the impact of the right's infringement was proportionate, having regard to the likely benefit of the relevant legal basis: cf. *AB* v *HM Advocate* 2017 SC (UKSC) 101 at [24] (Lord Hodge) and *R (on the application of P)* v *Secretary of State for the Home Department* [2019] UKSC 3, at paras 16-17, 24, and 73 (Lord Sumption).

[36] There was at best only a tenuous connection between the legal basis held by the Lord Ordinary as justifying disclosure and use and any of the permissible objectives enumerated in Article 8(2). The respondents themselves had still failed to identify any relevant legal measure or the proper objective of that measure.

[37] The public interests involved are not all on one side, or even weighted to one side. The interest in the existence and efficient conduct of police disciplinary procedures is to be balanced against the equally important public interest in maintaining privacy and confidentiality in general and in respect of material gathered during a criminal investigation in particular. Private communications which have never been published or shared

publically do not constitute a threat to public confidence in the police. There is nothing in the messages which amounts to speech which the law has seen fit to criminalise.

[38] There must be circumstances where conduct in private, or in relation to private life, might amount to a breach of the Standards but where disclosure for disciplinary purposes would be disproportionate : *R (Chief Constable of Cleveland Constabulary)* was an example. No matter how important the maintenance of public confidence in the police it could not always justify the destruction of private life.

[39] It was submitted that the case concerned entirely private correspondence not involving breach of the criminal law. The petitioners have never suggested that the content of the messages is creditable or that they would have been acceptable if made in the course of their duties to a member of the public or anyone with whom they did not share a bond of confidence. However, privacy applied whether statements were banal or outrageous. The respondents were trying to censor private conversations between officers.

[40] The whole point of the law of privacy and of the rights in Article 8 was to ensure personal autonomy; a space within which a person was free to develop and fulfil their own personality: *R (Catt)*, at paras 2 and 4 (Lord Sumption) and *In re JR38*, at para 86-88 (Lord Toulson). A presumption against interference with an individual's liberty, was a defining characteristic of a free society. It needed to be preserved, even in the little cases: see *In re JR38*. To seek to censor and punish wholly private and non-criminal conversations in the name of public safety or maintenance of public confidence in the police, which the respondent was doing, was entirely destructive of that principle.

[41] It was submitted that the Lord Ordinary ought to have held that the use and disclosure of the messages was plainly disproportionate in the circumstances of the present case.

Ground 4- remedy

[42] It was submitted that the Lord Ordinary's reasoning on this point was cursory, no doubt because the issue was irrelevant to his ultimate determination. It was accepted that the reclaimers were not automatically entitled to interdict. The fact that information and evidence has been gathered in breach of Article 8 was not completely determinative, but will usually be key: *Kinloch* v *HM Advocate* 2013 SC (UKSC) 257 at paras 17-19 (Lord Hope) and *HM Advocate* v *P* 2012 SC (UKSC) 108 at para 27 (Lord Hope). The question remained one of fairness in all of the circumstances: *Lawrie* v *Muir* 1950 JC 19 at 26, *HM Advocate* v *P*, and *Kinloch*. A claim for a remedy such as interdict will be particularly strong where the impugned evidence is the direct fruit of infringement and is of central importance to the case: *HM Advocate* v *P*, at [26] - [27] (Lord Hope).

[43] If the Court were persuaded that collateral use of the messages was a breach of the reclaimers' common law and Convention rights, fairness demanded an exclusionary remedy. Evidence of alleged misconduct did not exist independently of the messages.

Submissions for the respondents

Ground 1

[44] The reclaimers had no reasonable expectation of privacy in the circumstances; context was everything. To assess whether they had such an expectation, the Lord Ordinary correctly applied the broad, objective test, which required him to take account of all the circumstances of the case, including the attributes of the reclaimers, the nature of the activity, the place where it occurred and the nature and purpose of the intrusion and the underlying values to be protected, as explained by Lord Toulson in *In re JR38* at [86]-[100].

The assessment was to be done from the point of view of the sender, applying the sensibilities of a reasonable person in that position.

[45] The Lord Ordinary was thus correct to consider the content of the messages in the context of the attributes of the reclaimers and all the circumstances. Having identified the appropriate test, he gave due regard to the relevant factors. A key factor was the attributes of a constable which, in combination with the content of the messages, "inform[ed] the question of whether there was a reasonable expectation of privacy" (para [165]).

[46] The Lord Ordinary's reasoning was based soundly on the long established and incontrovertible principle that a fundamental requirement of policing by consent is that the public must have confidence in the police service. This was secured by the fact that police officers: (a) must adhere to the Standards of professional behaviour; (b) are subject to restrictions on their private lives; and (c) must make the constable's declaration as set out in section 10 of the Police and Fire Reform (Scotland) Act 2012. Applying the approach in *In re JR38*, the Lord Ordinary had correctly held that these attributes were relevant because "a failure to comply with many of the Standards would evidence that it would be likely to interfere with the impartial discharge of that constable's duties or give that impression to the public"(at [167]). The Standards specifically required constables to behave in a manner which did not discredit the Police Service or undermine public confidence in it, whether on or off duty. Additionally, they must at all times abstain from any activity which is likely to interfere with the impartial discharge of their duties or which was likely to give the impression that it may do so. The Lord Ordinary was also right to also find that the content of the messages was relevant in a context where those communicating were not members of the public but police officers.

[47] The Lord Ordinary's approach was firmly based in authority and the statutory provisions to which the reclaimers were subject and which were properly identified as "attributes" which differentiated them from the ordinary member of the public. The Lord Ordinary did not seek to rely on *In re JR38* and *Campbell* for anything other than general statements regarding the correct legal test to apply. The reclaimers' argument was based on their own misreading of these cases.

[48] The reclaimers were not employees but holders of a public office which involved a significant degree of curtailment of private life. Records required to be kept of their marriages or civil partnerships, children and dependants; their DNA and fingerprints were kept on file; their ability to engage in businesses, directly or indirectly was restricted; their finances were subject to scrutiny; they could not engage in politics; vetting was required; and relationships with third parties had to be notified if such persons had questionable histories.

[49] However, it was not the case that any breach of the Standards meant that there was no reasonable expectation of privacy; the test takes into account all the circumstances, the context of the activity and whether an expectation of privacy would be reasonable. The Lord Ordinary held that only where the conduct was likely to interfere with the impartial discharge of the officer's duties or was likely to give rise to that impression amongst members of the public would there be no expectation of privacy.

[50] The Lord Ordinary did not confuse questions of proportionality and reasonable expectation of privacy. His positive reference to arguments made in *R (Chief Constable of Cleveland Constabulary)* was to controvert the reclaimers' unfounded assertion that having regard to the aforementioned attributes would mean "that a police officer has no reasonable expectation of privacy at all". Rather, the correct position, was that the "expectation is

limited". Constables had no reasonable expectation of privacy if their behaviour in private could be said to be potentially in breach of the Standards in such a way as to raise doubts regarding the impartial performance of their duties ([168]-[170]). This limitation was ignored by the reclaimers in their arguments.

[51] Issues of the proportionality of the application of professional standards to private conduct were discussed by the Lord Ordinary at this stage, not in respect of whether the disclosure of the messages to the disciplinary body was proportionate. Proportionality in respect of that issue was properly addressed at the third stage of the Lord Ordinary's analysis and once the question of whether there was any reasonable expectation of privacy had been determined.

[52] The conclusion that the reclaimers could have no reasonable expectation of privacy in respect to the messages was not inconsistent with recent decisions of the European Court of Human Rights: the reasonable expectations of ordinary employees could not be equated to the reasonable expectations of police officers.

[53] The Lord Ordinary was right to agree with the respondents' submission on the characterisation of the messages. What any reasonable person would be entitled to regard the messages as demonstrating was directly relevant to the question of the underlying value or values to be protected. These factors had relevance as to whether or not Article 8 was engaged and not simply to justification (see Lord Toulson in *In re JR38* at para 100). It was inevitable that involvement in such messages engages and informs the issue of whether the Standards may have been breached by the reclaimers, all serving officers, and calls into question the impartial discharge of their duties.

[54] It was important to recognise the additional basis on which the Lord Ordinary held that the reclaimers had no reasonable expectation of privacy, namely that, on an objective

analysis, "there could be no reasonable expectation of privacy given that the group contained police officers whose duty in terms of the Standards was to 'report, challenge or take action against the conduct of other constables which has fallen below the Standards'" ([171]-[172]) and the "Challenging and reporting improper conduct" standard in Schedule 1 of the 2014 Regulations. The reclaimers did not advance any argument as to why the Lord Ordinary was wrong to found on this clear, unambiguous legal duty imposed on all officers by the Standards.

[55] The reclaimers' submission that the messages were correspondence amongst individuals with whom there was a shared bond of friendship and confidence was not borne out by the facts. The membership of the groups extended beyond the reclaimers, who were unaware of the whole membership. There was no evidence that members shared a bond of friendship and confidence or even all knew each other.

Ground 2

[56] It was submitted that *esto* it was determined that the Lord Ordinary erred and the reclaimers had a reasonable expectation of privacy, the use of the messages was justified under Article 8(2).

[57] There was a clear and accessible legal basis for the messages to be passed to the disciplinary branch of Police Scotland and, thus, such disclosure and use was "in accordance with the law". The reclaimers, as police officers, were being made the subject of disciplinary procedures partly because of their alleged use of confidential information from crime scenes and a picture of a female in a police cell. If this conduct were established, the reclaimers were using this material, to which they had access professionally for their own purposes of "amusement and support", which were patently nothing to do with policing purposes. The

respondents required to take action to deal with such apparent disregard for the confidentiality of information in the possession of the police.

[58] The reclaimers' argument (at paragraphs [33] to [35] of their Note) that information can only be disclosed to third parties where such disclosure is for the limited purposes of the prevention and detection of crime, the investigation of alleged offences and the apprehension of suspects or persons unlawfully at large ignored the authorities supporting a broader duty of disclosure where that is in the public interest. It also ignored the mandatory obligations on police officers to report and act on alleged improper conduct. As Scott J said in *Attorney General* v *Guardian Newspapers Ltd (No .2)* [1990] 1 AC 109 at page 154-155, third parties may not only be entitled to use information but may, in the public interest, "even be under a duty to do so". The reclaimers took an unduly narrow approach to "policing principles" which are stated in the 2012 Act section 32.

[59] The maintenance of a police service involves maintenance of standards and discipline. A policing purpose could be administrative or the fulfilment of a public law duty. In *Taylor* v *Director of the Serious Fraud Office* [1999] 2 AC 177 the court noted an exception to a bar on disclosure where the overall interests of justice required the documentation to be made available in other proceedings.

[60] The authorities cited by the reclaimers to support their assertion that "[t]he Courts have repeatedly recognised that collateral use of information by the police for different purposes is unacceptable"- *inter alia Hellewell*; *Bunn*; *Taylor* and *R (Catt)* - had to be considered against the facts of those cases and the specific questions they were determining.

[61] Contrary to the reclaimers' argument, the nub of the issue in *Woolgar* was whether, and in what circumstances, the police could disclose otherwise confidential material to a regulatory body (see para 6 of the decision), something which the Lord Ordinary expressly

recognised (at [181]). In *Woolgar*, the court was determining the legal basis on which disclosure could be made in circumstances where there was no express statutory power permitting the United Kingdom Central Council for Nursing, Midwifery and Health Visiting to obtain transcripts of police interviews. In *Woolgar*, the court did not proceed straight to a proportionality assessment. In *Nakash* it was recognised that no specific request from "the relevant regulatory body" was required to trigger disclosure by the police. The evidence deemed admissible in *Nakash* had in fact been obtained in an unlawful search.

[62] The reclaimers' argument that the Lord Ordinary's decision "confers such a wide discretion on the police as to be effectively unconstrained by law" and, thus, would "be dependent on an arbitrary exercise of will in virtually all instances" was unfounded. The Lord Ordinary held that, in accordance with authority rooted in *Woolgar* and followed more recently in *Nakash*, collateral disclosure by the police can be made to a regulatory body, such as its own disciplinary body, where it was in the public interest and in order to protect the public. It was submitted that that conclusion was "reasonably predictable" and fell within Lord Sumption's dicta in *R (Catt)* at para 11. Whilst the Lord Ordinary did not find that the disciplinary framework under the 2014 Regulations of themselves was sufficient, the rules did provide a clear pathway for the use of the information and the purposes for that use and should be part of the analysis.

[63] Safeguards existed when the information was given to the relevant regulatory body for a strictly limited purpose and the person affected was notified about the proposed disclosure. The same decision was made in respect of communications between police officers in *Leicestershire Police (unreported).*

Ground 3

[64] It was submitted that *esto*, the reclaimers' had a reasonable expectation of privacy, any interference with that right was necessary, proportionate and aimed at ensuring the legitimate interests of public safety and the prevention of disorder and crime. As the Lord Ordinary observed, these matters were a particular focus of the respondents' submissions (at [196]), a fact which was ignored by the reclaimers. The Lord Ordinary's reasoning was adopted. No error of law or fact was made by him. In relation to the engagement of the legitimate interests of "public safety" and "the prevention of disorder or crime", the Lord Ordinary's conclusion was fairly and properly built on a number of propositions:

(a) the purpose of the police was the protection of the public;

(b) those acting as set out in the messages may be held to have contravened the Standards;

(c) such officers can reasonably be inferred to be individuals who would lose public confidence and cause a decline in the general public's confidence in the police;

(d) maintaining public confidence was essential for policing by consent; and

(e) if the public lost confidence in the police, public safety would be put at risk as the police could not operate efficiently without such confidence and the prevention of disorder or crime would be compromised.

[65] Having identified the relevant interests at issue, the Lord Ordinary correctly turned to consider the necessity and proportionality, including the considerable importance of: (i) maintaining public confidence in the police; and (ii) the protection of the public by the police. It was reasonable for him to conclude that to maintain both, it was necessary for the police to be regulated by a proper and efficient disciplinary procedure with the ability for

the police, where it lawfully obtains information which can inform disciplinary proceedings, to disclose it to the relevant regulatory body. The respondents submitted that "… one of the primary purposes of professional misconduct proceedings is to ensure the preservation of public confidence in the profession in question"- under reference to *R (Chief Constable of Wiltshire Police)* v *Police Appeals Tribunal and Woollard* [2012] EWHC Admin 3288, para 53. It was necessary to recognise the link between public confidence and public safety in the policing context.

[66] The Lord Ordinary correctly found that Article 8(2) was engaged in respect of the issues of public safety and the prevention of disorder or crime. Having made that finding, it was a short step to find that a constable, if involved in the drafting and/or sending and/or approving of the messages, could reasonably be inferred as someone who would lose the confidence of the public and cause a decline in public confidence in the police. This followed upon a careful analysis of how such an officer could be considered incapable of carrying out his/ her duties impartially. It was an inevitable conclusion that public safety was then at risk and the prevention of disorder or crime compromised.

[67] Even if the reclaimers did have a reasonable expectation of privacy the Lord Ordinary's conclusion on proportionality would still be correct, because: (1) the objective of the relevant legal basis was sufficiently important to justify the limitation because public confidence in the police was of great importance- a point emphasised in *Woollard*; (2) there was a clear rational connection between the aim and the objective since the 2014 Regulations were an essential part of maintaining an effective police force and public confidence in that force; (3) there was no less intrusive measure and the reclaimers did not point to one; and (4) the intrusion was proportionate because it was limited and for a purpose which clearly favoured disclosure in the public interest having regard to the

ensuing damage if the public felt that improper behaviour went unchecked and officers could behave without accountability.

[68] The reclaimers' reliance on *R (Chief Constable of Cleveland Constabulary)* failed to address the fact that misconduct was established, notwithstanding that the issue concerned an aspect of the officer's private life. In *Leicestershire Police (unreported)*, it was also determined in identical circumstances that the public interest required the disclosure of the material.

[69] It was disputed that the messages were understood as darkly humorous or a way of forming meaningful relationships with friends. In fact the first, second and sixth reclaimers had submitted reflective statements and accepted their behaviour was unacceptable; and the sixth reclaimer had said she would not class any of the group as friends.

[70] The reclaimers' arguments were, in effect, asking the court to sanction conduct which might, objectively construed, breach the Standards simply because the conduct was undertaken in, what the reclaimers stated was a closed WhatsApp group. There was no evidence before the Lord Ordinary that all the group members were known to one another. The respondents were not seeking to censor behaviour but rather uphold the Standards and the limitation set out in schedule 1 of the 2013 Regulations.

[71] The messages spoke for themselves and raised the legitimate question of whether the conduct could be such as to lead to a finding of misconduct or gross misconduct. It would be a matter for the decision maker in the disciplinary proceedings to determine the appropriate findings. The reclaimers would have the opportunity to explain the messages, their meaning and their context in respect of the issues of whether there has a) been misconduct; b) the level of that conduct; and c) the appropriate disposal.

[72] It was not necessary for the development of the reclaimers' police careers for them to be allowed to disclose highly confidential and sensitive material to which they only had access by virtue of their position as police officers or for them to be allowed to fail to treat others with respect and tolerance. The titles of the two WhatsApp groups made it clear that these communications were being entered into by virtue of their position as police officers.

Ground 4

[73] It was fair for the messages to be used in the disciplinary proceedings and an exclusionary remedy was neither appropriate nor necessary. The reclaimers failed to articulate on what basis the Lord Ordinary erred. There was no justification for interfering with his decision. The significance of the interests of public confidence, public safety, public protection and the prevention of disorder and crime was such that, had there been any breach of the reclaimers' rights, it did not follow that exclusion of the evidence was automatically required (*Khan* v *United Kingdom* (2001) 31 EHRR 45, paras 36-40).

[74] The messages were, on any view, relevant material in the pending disciplinary proceedings having regard to the reclaimers' status as serving officers (see *In the matter of the Baronetcy of Pringle of Stichill* [2016] SC (PC) 1, para 77). In the words of Lord Hodge, the admission of the evidence would "enable justice to be done". In the context in which the analysis of admissibility was taking place it was important to note that the first, second and sixth reclaimers had accepted their behaviour as part of the group(s) and submitted reflective statements. In all the circumstances, the use of the messages in disciplinary proceedings was not unfair to the reclaimers.

Analysis and Decision

A general right of privacy?

[75] Having concluded that there was a common law right of privacy in Scotland the Lord Ordinary proceeded to address the issues only in terms of Article 8. That there were stateable arguments for bringing the case within the terms of Article 8, and that the issues between the parties fell to be determined according to principles applicable to Article 8 rights, was not disputed. No doubt for that reason there was no cross appeal questioning the Lord Ordinary's conclusion as to the existence and scope of a common law right of privacy. I regard that as somewhat unfortunate, because it means that the issue was not a live one for determination in this case. In the absence of a cross reclaiming motion we were not addressed on the point at all. However, whilst I would be unwilling to decide the matter without having the benefit of detailed submissions, I do not feel that the Lord Ordinary's conclusions on the matter can pass without comment.

[76] The Lord Ordinary stated (para 124) that he considered there to be "a nascent recognition of a common law right of privacy in the case law", going on to confirm that in his view it is a right which exists in the common law of Scotland. The process by which the nascent right became fully established is not developed, at least in terms which specify the nature, degree and scope of the right, or how it has progressed over time. The reasoning which led to the Lord Ordinary' conclusion was: (i) his assessment that the English courts have developed a law of privacy by extension from the law providing a cause of action for breach of confidence; (ii) the law on breach of confidence in Scotland is the same as that in England; and (iii) the idea of a right of privacy was supported by observations in *Henderson* v *Chief Constable of Fife Police* 1988 SLT 361 and *Martin* v *McGuinness* 2003 SLT 1424. The Lord Ordinary does not examine in any detail what the precise nature and scope of such a

right might be, and has not recorded submissions as to these matters. His conclusion that "the nature and scope of that right would I believe be the same as that protected in terms of article 8 except that it would apply to bodies other than public authorities" is unexplained, although one might deduce that it is a conclusion drawn from the influence of Article 8 on the development of the law in respect of breach of confidence.

[77] It seems to me that the reasoning which led the Lord Ordinary to conclude that there is a fully developed right of privacy in Scots law concomitant in range and scope with Article 8 may be questioned.

[78] The foundation of his reasoning is the decision in *Campbell* v *MGN Ltd* [2004] 2 AC 457, but whether that case justifies the Lord Ordinary 's conclusion is another matter. As I read it the case was one which essentially rested on the use of confidential information, namely details of therapy and treatment which were akin to the confidential material which might be contained in medical records, and which gave rise to a duty of confidentiality. There is an overlap between confidential information and privacy, since the former is clearly an aspect of the latter, but the case was very focused on the former issue rather than on developing some generally applicable right of privacy. As Lord Nicholls pointed out, (para 12) *Campbell* concerned "one aspect of invasion of privacy: wrongful disclosure of private information", a wrong which he felt was better encapsulated (para 14) in the modern phrase "misuse of private information". The case had initially featured a claim asserting a general invasion of privacy claim, but that had been abandoned at an early stage and the case proceeded only on the confidential information point (see para 130, Lady Hale). Other remarks making it clear that this was the basis of the case can be found in the speeches of Lord Nicholls (para 11), Lord Hoffman (para 43), Lord Hope (para 82-83) and Lord Carswell (para 162).

[79] The extent to which the effect of the ECHR, specifically articles 8 and 10, had significantly influenced the courts' approach to the issue of misuse of confidential information was an issue, and the court took the opportunity to confirm that the values enshrined in articles 8 and 10 were now part of the cause of action for breach of confidence, and were applicable between private individuals as much as against public authorities (Lord Nicholls, paras 16-18), (Lord Hoffman, para 50), (Lord Hope para 86), (Lady Hale, 132). The practical effect of this was that in common law actions relating to misuse of private information the balancing exercise which a court may require to carry out in weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure was essentially aligned with the familiar proportionality test which would arise between the competing interests under articles 8 and 10.

[80] *Campbell* thus elaborated on, or explained, the extent to which private information may be protected at common law, but did not go as far as to say that a fully protected right of privacy had been established. Lord Nicholls said this at para 11:

> "In this country, unlike the United States of America, there is no overarching, all-embracing cause of action for "invasion of privacy": see *Wainwright* v *Home Office* [2004] AC 406. But protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions. The recent decision of the Court of Appeal of New Zealand in *Hosking* v *Runting* [2004] NZCA 34 is an example of this. In this country development of the law has been spurred by enactment of the Human Rights Act 1998."

[81] Observations to similar effect were made by Lord Hoffman (para 52), who noted that the changes resulting from (a) modern recognition that a requirement for a confidential relationship before private information could be protected was illogical; and (b) the influence of the ECHR in this area,

> "must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified."

[82] In *Campbell*, however, it was "unnecessary to consider these implications" (para 53). Lady Hale echoed the words of Lord Nicholls (para 133) under reference to *Wainwright* v *Home Office:*

> "That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy. But where existing remedies are available, the court not only can but must balance the competing Convention rights of the parties."

It seems to me therefore that the *Campbell* does not reach the conclusions which the Lord Ordinary attributed to it.

[83] The existence in Scotland of an obligation of confidence has long been recognised, and here too the need for a confidential relationship has given way to a focus on the knowledge of those possessing the information that it had been imparted in confidence (*Lord Advocate* v *Scotsman Publications* 1988 SLT 490). I see no reason to think that the effect of articles 8 and 10 in respect of this area of the law in Scotland is any different to that in England, but it does not mean that there has thereby been created a widely applicable general right of privacy.

[84] The Lord Ordinary sought to strengthen his conclusions by reference to *Henderson* v *Chief Constable of Fife Police* and *Martin* v *McGuinness* but again, I beg leave to doubt whether these cases have that effect. *Henderson* was essentially about the liberty of the subject and the extent to which it had been justifiable for a police officer to remove an intimate item of clothing from a person in police custody. The whole analysis was related (as were the submissions) to the issue of liberty and the limits of police authority. Lord Jauncey's conclusion on this aspect of the case was that the pursuer had:

> "established that the request to remove her brassiere was an interference with her liberty which was not justified in law, from which it follows that she has a remedy in damages. I should perhaps add that the researches of counsel had disclosed no Scottish case in which it had been held that removal of clothing forcibly or by

> requirement could constitute a wrong but since such removal must amount to an infringement of liberty I see no reason why the law should not protect the individual from this infringement just as it does from other infringements and indeed as the law of England did in very similar circumstances in *Lindley* v *Rutter*. "

[85] The only appearance of the word "privacy" occurs in the concluding paragraphs dealing with damages where reference is made to the interference with, or invasion of "privacy and liberty". I do not see this case as advancing matters. The case of *Lindley* v *Rutter* [1981] 1QB 128, a similar case on its facts, contains general references to the desirability of protecting the personal freedom, privacy and dignity of citizens but was in reality determined on the basis of action taken in excess of authority.

[86] In *Martin* v *McGuinness* Lord Bonomy, in an entirely *obiter* section, summarised submissions made to him about the possibility that there existed a general right of privacy. The submissions were largely based on the extended approach being developed in respect of misuse of information cases such as *Campbell,* with a side excursion into the *actio iniuriarum.* His Lordship reached no decision on the issue, concluding [para 30]:

> "I have done no more than reflect the submissions made. Whether an infringement of art 8 by one private individual causing loss to another, which has not in the past given rise to a successful claim, should now have that result, and the basis on which such a claim may be made remain to be determined in a case where these questions arise as live issues."

I have difficulty in seeing that either of these cases supports the Lord Ordinary's reasoning. There is no doubt that the law in this area continues to evolve, and that the scope of protection given to private information has expanded considerably, but I beg leave to doubt that it has reached the absolute stage suggested by the Lord Ordinary.

WhatsApp

[87] It is uncontentious to observe that correspondence, including electronic correspondence, is within the area of private life which is protected by Article 8, or that such

protection may be afforded even within the context of an individual's professional life. The Lord Ordinary considered that the general characteristics of WhatsApp were such that, compared with other social media platforms, an ordinary member of the public using it could have a reasonable expectation of privacy. Again, this determination was not the subject of challenge, or detailed submissions, and I propose therefore to restrict my comments to two specific areas of the Lord Ordinary's reasoning.

[88] The first relates to the Lord Ordinary's conclusion that "the messages were exchanged within a confidential context". Although referring to "the messages" this comment (para 137) appears to relate to the generality of messaging in WhatsApp; it is not apparent to me that this can be said of WhatsApp messaging as a generality. The factors referred to by the Lord Ordinary for his decision that there would be a reasonable expectation of privacy do not seem to justify this further conclusion as to the confidentiality of information thus exchanged. The extent to which the test for a reasonable expectation of privacy applied for the purposes of Article 8 is the same as that applied to misuse of confidential information at common law does not appear to have featured in the submissions. The Lord Ordinary's comments about confidentiality appear to be more relevant to the latter, which requires at the least the identification of some private matter which the claimant wishes to protect (*Campbell*, Lord Hope, para 92). The approach of the Lord Ordinary may give rise to the risk of confusion between two separate issues.

[89] The second point is a related one, because the Lord Ordinary also concluded that the reclaimers all "had trust and confidence in other members of the group" which seemingly enhanced the likelihood of their having a reasonable expectation of privacy. I find it difficult to understand how such a conclusion could be reached having regard to the affidavits and written statements which were contained in the material before the court. Moreover, it is

difficult to see how such trust and confidence could exist when the members of the group knew that each one of them was bound to report, challenge or take action against any of the others who exhibited behaviour which was below that expected in the standards applicable to police officers. However, since neither of these matters was the subject of attack in the hearing before this court, (although touched on in submissions for the respondents) I shall say no more and simply proceed to address the remaining issues as arising in the grounds of appeal.

Ground 1 - Reasonable expectation of privacy

[90] The basic point advanced here is that the Lord Ordinary erred (a) in deciding that the reclaimers' attributes as constables were relevant to whether they had a reasonable expectation of privacy and (b) in considering that these attributes allowed the contents of the messages to be taken into account. It was submitted that neither the content of the messages nor the attributes of an individual would normally fall to be taken account of at the stage of the threshold question.

[91] The Lord Ordinary considered that the zone of interaction covered messages in a private context even if their content is of an abhorrent nature. Whilst that appears to be an absolute proposition, it seems that the Lord Ordinary may not have intended it to be taken as such, since his eventual conclusion was that "normally the content of behaviour does not sound when consideration is being given to the question of reasonable expectation of privacy" (para 159), drawing that conclusion from the judgment of Lord Nicholls in *Campbell* (para 21)*:*

> "in deciding what was the ambit of an individual's "private life" in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in

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

[92] The examples he went on to give in para 22 were the degree of intrusion into private life and the extent to which publication was a matter of proper public concern. I have little difficulty in agreeing with the Lord Ordinary that the content of correspondence is of much greater relevance in addressing the question whether its use is justified, and that unpleasant or unworthy content does not necessarily, or even usually, mean that the protection of Article 8 cannot be invoked. I accept also that the balancing exercise necessary under a proportionality assessment is not part of the threshold question. I am less able to see that content is of no relevance at all to the question of whether there is a reasonable expectation of privacy. For example, the fact that material relates to medical treatment of an individual may be sufficient to make it obviously private; and even where the assessment of reasonable expectation arises the content may be relevant to that question. In *Campbell* Lord Nicholls appears to have addressed the nature of the material himself when asking the threshold question: see paras 24-27. See also Lord Carswell at para 165.

[93] In *In Re JR38* 2016 AC 1131 the UKSC indicated that the touchstone test was an objective one, to be applied broadly having regard to all the circumstances of the case. One of those circumstances would surely be the content of the material in question, as would the means by which the material came into the hands of those seeking to use it. Counsel for the respondents was correct in my view to highlight the fact that there was no question in this case of covert or underhand behaviour in the recovery of the material, or any issue of surveillance. In any event, the Lord Ordinary did take into account the content, since he considered it open to him to do so having regard to what he described as the attributes of the reclaimers as police officers. In my opinion he was entitled to do so. I do not accept the

reclaimers' submission that "attributes" is limited to matters specifically personal to an individual and cannot reflect their status. This does not seem to me to accord with either *In Re JR38* or *Murray* v *Express Newspapers* [2009] Ch 481. It is true that in both cases amongst the attributes under discussion was the fact that the claimant was a child but I do not think the observations can thereby be deprived of general application when one considers the context in which they were made. The passage in *Murray,* quoted in *In Re JR38,* at para 36 is as follows:

> "As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

[94] This seems to me to be of general application, setting out a broad test. It is not limited to the fact of the claimant being a child, since that difference was addressed in what followed:

> "37. In the case of a child the position is somewhat different from that of an adult."

[95] In *In Re JR38* images of a child involved in rioting had been captured on CCTV. At the request of police images were published in local newspapers to assist in identification of those involved. The central issue in the case was whether there had been a reasonable expectation of privacy. At para 88, Lord Toulson said:

> "Applying *Campbell's* case, Sir Anthony Clarke MR said in *Murray's* case at para 35 that 'The first question is whether there is a reasonable expectation of privacy'. He said at para 36 that the question is a broad one which takes account of all the circumstances of the case, including the attributes of the claimant, the nature of the activity in which the claimant was involved, the place at which it was happening, and the nature and purpose of the intrusion. The principled reason for the "touchstone" is that it focuses on the sensibilities of a reasonable person in the position of the person who is the subject of the conduct complained about in considering whether the conduct falls within the sphere of article 8."

He added:

> "97 In considering whether, in a particular set of circumstances, a person had a reasonable expectation of privacy (or legitimate expectation of protection), it is necessary to focus both on the circumstances and on the underlying value or collection of values which article 8 is designed to protect."

[96] Lord Clarke was to similar effect:

> "The law is to be applied broadly, taking account of all the circumstances of the case. In Lord Steyn's famous phrase, in law context is everything."

[97] The circumstances of the case would include the nature of the activity, or in this case, the content of the correspondence. I recognise that *In Re JR38* was concerned with behaviour which had taken place in public, and criminal behaviour at that, but I do not think that the relevance of the factual matrix to the question of reasonable expectation of privacy is limited to circumstances where the activity takes place in a public context.

[98] The suggestion that a person's status as a public official, or as here the holder of a public office, is a relevant factor in assessing the threshold test is in my view consistent with *Sciacca* v *Italy* (2006) 43 EHRR 20 where the fact that the claimant was an "ordinary person", and not a public figure or politician, was said to enlarge the zone of interaction which could fall within the scope of private life. The fact that the reclaimers are holders of a public office by virtue of which they have accepted certain restrictions on their private life is relevant to the question of whether they may in the circumstances be said to have had a reasonable expectation of privacy. As counsel for the respondents submitted, the reclaimers are not in the position of mere employees: they are the holders of a public office who are subject to a strict regulatory framework which is essential for the preservation of public confidence and the proper discharge of their duties as police officers.

[99] Moreover, the nature of the material in question is relevant to that question. The Lord Ordinary accepted that a reasonable person would be entitled to agree with the respondents' description of the content of the messages as being

> "blatantly sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability and includes a flagrant disregard for police procedures by posting crime scene photos of current investigations".

[100] That is in my view a categorisation that the messages are capable of bearing. Furthermore, the Lord Ordinary considered that, when examined against the standards to which the reclaimers were subject they were capable of calling into question the reclaimers' ability impartially to discharge their duties. The messages do not contain material which is personal to the reclaimers, although it does touch on material which may be personal to other individuals. Apart from the many messages which call into question the extent to which the reclaimers recognised their duty, reflected in their oath, to uphold fundamental rights and accord equal respect to all people according to the law, there were other messages which were a clear breach of the duty to keep confidential information obtained in the course of their duties, such as the sharing of photographs of weapons recovered, or of an individual in police custody. As the Lord Ordinary noted (para 172):

> "The petitioners were exchanging messages within a group of people whom they knew were under a positive obligation to report messages of the type above described where originating from other constables. This must, when viewed objectively, have greatly increased the risk of disclosure of the messages by a member of the group."

The Lord Ordinary did not conclude that there could be no private life for a serving police officer, no private zone of interaction with others; what he concluded was that the restriction was limited to those matters which were capable of suggesting that the officer was not capable of discharging his duties in an impartial manner. In addressing the issues he applied the appropriate broad, objective test. In all the circumstances I consider that the

Lord Ordinary was entitled to reach the conclusion that in the circumstances the reclaimers could have had no reasonable expectation of privacy in respect of the messages in question. There was thus no interference with the reclaimers' rights under Article 8(1) ECHR.

Ground 2 – was there a clear and accessible legal basis for disclosure and use of the messages

[101] The Lord Ordinary proceeded on the basis that the requirement for a clear and accessible basis for disclosure and use of the material meant, under reference to *Halford* v *United Kingdom* (1997) 24 EHRR 523, that:

> "the domestic law must be sufficiently clear in its terms, to give police officers an adequate indication, as to the circumstances and the conditions on which a public authority "the police", who recover information in the course of lawful criminal investigations in respect of one member of the police force, can disclose to the police for the purposes of considering the bringing and thereafter the use in disciplinary proceedings in respect of other officers."

[102] In concluding that there was an accessible and foreseeable legal basis for the intended use the Lord Ordinary relied heavily upon *Woolgar* v *Chief Constable of Sussex Police UKCC* [2000] 1 WLR 25 which concerned a registered nurse, interviewed under caution by police following the death of a patient. The matter having otherwise been referred to the relevant regulatory body, that body sought release from the police of the information in question. Rejecting the argument that the material, which had been gathered for the purpose of the criminal investigation, could not be used for a collateral disciplinary purpose, the court decided that:

> "where a regulatory body such as UKCC, operating in the field of public health and safety, seeks access to confidential material in the possession of the police, being material which the police are reasonably persuaded is of some relevance to the subject matter of an inquiry being conducted by the regulatory body, then a countervailing public interest is shown to exist which, as in this case, entitles the police to release the material to the regulatory body on the basis that, save in so far as it may be used by the regulatory body for the purposes of its own inquiry, the confidentiality which already attaches to the material will be maintained."

[103] I think there is some merit in Mr Sandison's submission that in *Woolgar* the court went straight to the issue of proportionality, and did not really address the question with which this ground of appeal is concerned. However, the Lord Ordinary did not rely solely on *Woolgar*. He referred to *Marcel* v *Commissioner of Police for the Metropolis* [1992] Ch 225 where a question arose whether documents seized under statutory police powers for investigating crime could be used for an ancillary purpose. Sir Nicholas Brown-Wilkinson V-C observed (p234):

> "there manifestly must be some limitation on the purposes for which seized documents can be used. Search and seizure under statutory powers constitute fundamental infringements of the individual's immunity from interference by the state with his property and privacy - fundamental human rights ... the Act has to be interpreted having regard to its subject matter, i.e., provisions conferring police powers for police purposes. Powers conferred for one purpose cannot lawfully be used for other purposes without giving rise to an abuse of power. Hence, in the absence of express provision, the Act cannot be taken to have authorised the use and disclosure of seized documents for purposes other than police purposes."

[104] At p 235 the passage which found particular resonance with the Lord Ordinary states:

> "police are authorised to seize, retain and use documents only for public purposes related to the investigation and prosecution of crime and the return of stolen property to the true owner. Those investigations and prosecutions will normally be by the police themselves and involve no communication of documents or information to others. However, if communication to others is necessary for the purpose of the police investigation and prosecution, it is authorised. It may also be, though I do not decide, that there are other public authorities to which the documents can properly be disclosed, for example to City and other regulatory authorities or to the security services. But in my judgment the powers to seize and retain are conferred for the better performance of public functions by public bodies and cannot be used to make information available to private individuals for their private purposes."

[105] The Lord Ordinary also relied upon *R* v *Chief Constable of North Wales ex parte AB* 1999 QB 396 and the following observations:

> "When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty" (Lord Bingham of Cornhill CJ at 409H)
>
> "… information acquired by the police in their capacity as such, and when performing the public law duties that Lord Bingham CJ has set out, cannot be protected against disclosure in the proper performance of those public duties by any private law obligation of confidence. That is not because the use and publication of confidential information will not be enjoined when such use is necessary in the public interest, though that is undoubtedly the case. Rather, because of their overriding obligation to enforce the law and prevent crime the police in my view do not have the power or vires to acquire information on terms that preclude their using that information in a case where their public duty demands such use." (Buxton J, p415B

[106] These comments were approved on appeal:

> "information having come into the police's possession to enable them to perform their functions, as a public body they were only entitled to use that information when this was reasonably required to enable them to properly carry out their functions." (Lord Woolf, MR, p429)

[107] The Lord Ordinary drew from these observations the conclusion that there was a clear and accessible basis upon which the police could disclose to regulatory bodies information which they recovered in the course of criminal investigations. He added:

> "It seems to me that this must be the position in a case such as the present one where the police are referring the information recovered to their own internal disciplinary body. There is a public interest in having a properly regulated police force in order to protect the public and thus it is lawful that information recovered in criminal proceedings by the police can be passed to its own disciplinary body for that strictly limited purpose (and there is no suggestion in the present case that it will be used for any other purpose)."

[108] In my view the Lord Ordinary was correct in reaching this conclusion. The discretion to use the material is limited by nature of the public interest which the disclosure is to meet. I should not be taken as suggesting that any amorphous or vague public interest may be sufficient to provide the clear and accessible basis necessary. On the contrary, in the

present case it seems to me that there is a very clear, specific public interest in the maintenance of a properly regulated police force and its importance to the retention of public confidence and the proper discharge of police duties.

[109] In addition, it is in my view an interest which falls within general policing purposes, such that the fact that the police would be entitled to forward the information would be accessible to the reclaimers and the consequences of doing so foreseeable. Mr Sandison submitted that the encapsulation of policing purposes could be found in para 9 of *R (Catt)* v *ACPO per* Lord Sumption:

> "'police purposes' … are defined … as protecting life and property, preserving order, preventing crime, bringing offenders to justice and performing any legal duty or responsibility of the police".

He accepted that if disclosure were for such a purpose then such a measure would be capable of being in accordance with law. In my view Mr Sandison, in suggesting that the use for which the material was intended in this case fell outwith the definition of "police purposes" viewed the matter through too narrow a prism. The definition which he himself submitted includes references to any legal duty or responsibility of the police. That in my view is wide enough to include the responsibility of maintaining police discipline in order that all wider policing purposes may properly be carried out.

[110] In *R* v *Chief Constable of North Wales ex parte AB* at p410, Lord Bingham quoted Lord Parker CJ in *Rice* v *Connolly* [1966] 2 QB 414 that whilst the obligations and duties of a police officer would include the obvious ones of keeping the peace, preventing or detecting crime and bringing an offender to justice, "There is no exhaustive definition of the powers and obligations of the police".

[111] In this respect section 32 of the Police and Fire Reform (Scotland) Act 2012 Act is relevant:

"**32 Policing principles**

The policing principles are—

(a) that the main purpose of policing is to improve the safety and well-being of persons, localities and communities in Scotland, and

(b) that the Police Service, working in collaboration with others where appropriate, should seek to achieve that main purpose by policing in a way which—

(i) is accessible to, and engaged with, local communities, and

(ii) promotes measures to prevent crime, harm and disorder."

[112] The maintenance of a properly regulated police force is in my view something which squarely falls within an identifiable policing purpose. The disclosure of the information at issue would not be arbitrary but would be dictated by consideration of the relevant policing standards and breaches thereof. Disclosure is for that limited purpose and no other. I am satisfied that the Lord Ordinary reached the correct conclusion on this matter and that this ground of appeal must be rejected.

Ground 3 – whether the Lord Ordinary erred in finding that the intended disclosure and use was necessary and proportionate

[113] *Esto* the circumstances had amounted to an interference with the reclaimers' Article 8(1) rights, the Lord Ordinary concluded that the disclosure was necessary in the interest of public safety and prevention of disorder or crime, and would thus be justified according to Article 8(2). He considered that an officer who behaved in the way revealed in the messages could reasonably be inferred to be likely to be someone who would lose the confidence of the public and cause a decline in the general public confidence in the police. It was essential for the purpose of successful policing that the police maintain the confidence of the public, without which public safety would be at risk - the police could not operate efficiently without such public confidence, and would be less able to prevent disorder or crime.

Certain of the messages showed a mindset where the public's right to be treated fairly is called into question for example depending on their race, religion or sexuality. That officers hold these views is likely to weaken the confidence of the public and put public safety at risk.

[114] On the issue of proportionality, the importance of public confidence in the police was considerable. To maintain public confidence and to protect the public it was necessary for the police to be regulated by a proper and efficient disciplinary procedure. The Lord Ordinary considered the matter to be heavily weighted on the side of disclosure. It was submitted that in reaching that conclusion he had given insufficient weight to the counterbalancing interest which would lie in protecting the Article 8 rights of the reclaimers. It is true that the Lord Ordinary did not repeat the issues which bear on this matter but he clearly understood that what was involved was not a one sided assessment but a balancing exercise, having regard to the detailed submissions on the matter which were made to him. In any event, in my view the Lord Ordinary reached the correct conclusion on this matter. Had the reclaimers had a reasonable expectation of privacy their Article 8 rights would be an important factor in the balancing exercise, worthy of preserving "even in the small cases". Their protection would be an important competing public interest. The fact of the messages having been exchanged amongst a select group of participants would be relevant. Equally relevant however, would be the content of the messages in the context of the responsibilities of individual police officers. There is a strong public interest in knowing that officers who behave in this way will be subject to disciplinary proceedings. Other factors which would be relevant would be that the messages came to the attention of the police in a legitimate way in the course of a criminal investigation, and not by any covert means. An important aspect of the duties of a police officer is "to maintain order" (section

20(1)(b) of the 2012 Act). Their ability to do so depends largely on being able to maintain public confidence in the holders of their office. Public confidence that police officers will approach their duties fairly and impartially across all communities is critical to the notion of policing by consent. We can see from recent examples in this country and elsewhere what can happen when that public confidence is placed at risk. The objective of maintaining it is sufficiently important to justify the restriction on the reclaimers' Article 8 rights. The information would be disclosed only to the regulatory body and only for a limited purpose. The information, as noted above, does not contain material of a personal nature in respect of any of the reclaimers. There is a clear rational connection between the aim and the objective. The level of intrusion is limited to the extent necessary for the maintenance of public confidence.

Ground 4 – whether it would in any event be fair for the messages to be used in disciplinary proceedings

[115] It was recognised by the reclaimers that the issue here was a matter for the Lord Ordinary to determine as a matter of fairness having regard to all the circumstances. As the Lord Ordinary noted, he did not require to deal with this matter, and he did so by reference back to the whole circumstances as he had determined them to be. It is not suggested that the Lord Ordinary left out of account any element which bore on the question of fairness, or included any irrelevant consideration. I can detect no error in his approach and I would refuse also this ground of appeal.

Addendum

[116] Shortly after the court made avizandum in this case, and the preparation in draft of this opinion, the UKSC issued its decision in *Sutherland* v *HM Advocate* [2020] UKSC 32 (now

reported 2020 SLT 745). We accordingly invited parties to make short submissions in writing on the potential impact of that decision.

Additional submissions for the reclaimers

[117] The reclaimers' submissions were to the effect that the differing circumstances of *Sutherland* meant that it had no impact on the submissions already made or the correct outcome of the case. There were five points of material distinction.

i. This case, unlike *Sutherland,* involved state interference. It involved police constables interfering with the petitioners' communications in exercise of their statutory powers. The collateral use of information gathered for an initially legitimate purpose of investigating crime is fundamentally different from the context of Sutherland where the disclosure was voluntary and from an entirely private individual. The case of *Sutherland* confirms that Article 8 may be engaged even where the conduct in question is not in itself worthy of respect in accordance with the scheme of the ECHR, supporting the contention that Article 8 is engaged in the present circumstances, and that the content of the messages is not usually a relevant consideration.

ii. The case did not involve communication with a child, or someone who was believed to be a child.

iii. The conduct in *Sutherland* was criminal, which was not the case here.

iv. Unlike *Sutherland* this is not a case of messages being sent 'out of the blue'; rather it is a case of messages being sent in a closed group of individuals who shared a pre-existing bond of trust and confidence, and none of whom voluntarily disclosed the content.

v. *Sutherland* did not involve any new statements of principle or any other analogous factual context. The discussion of the authorities on reasonable expectation of privacy is

orthodox and refers to many of the same authorities as were mentioned in the petitioners' primary submissions.

Additional submissions for the respondents

[118] The Lord Ordinary's decision that the petitioners had no reasonable expectation of privacy in the circumstances is consistent with the decision in *Sutherland* which applied the same broad, objective test as the Lord Ordinary had, following *In re JR38*. *Sutherland* concerned two compatibility issues, the first of which was: "whether, in respect of the type of communications used by the appellant and the PH ["paedophile hunter"] group, article 8 rights may be interfered with by their use as evidence in a public prosecution of the appellant for a relevant offence". The court held that there was no interference with the appellant's Article 8 right for two reasons, first that the nature of the communications from the appellant to the person whom he believed to be a child, was not worthy of respect, and second that the appellant had no reasonable expectation of privacy in relation to the communications. The UKSC noted that Article 8(1) may be engaged when the conduct itself is not worthy of respect under reference to *Benedik* v *Slovenia* E:ECHR:2018:0424JUD006235714. *Benedik* did not establish that the nature of the conduct is irrelevant as this was a matter which depended on context. At para 60 the UKSC noted that there was "an area of overlap between the issue of reasonable expectation of privacy and the issue of the nature of the communications by the appellant…". What was at issue in *Benedik* was not the abhorrent conduct but the systematic storage of subscriber information associated with specific dynamic IP addresses assigned at certain times and from which the applicant's identity could be determined. It was the interest in having his identity protected, in respect of online activity, which merited protection.

[119] The factual circumstances in *Sutherland* were markedly similar to the present case: the messages were on WhatsApp which is protected by end-to-end encryption and were not shared with others; there was no surveillance or interception by the state; the appellant participated fully in the communications and was aware that they were reaching the intended recipient; by the time the police were informed, the activity had already been carried out.

[120] There were three points of particular relevance. First, in applying the broad objective test under *In re JR38*, the court held that in addition to factors such as the nature of the relationship between sender and recipient, and absence of state surveillance, regard could also be had to the content of the communications. Second, at para 58 the court stated that:

> "In the present context, the appellant may have enjoyed a reasonable expectation of privacy in relation to his communications for the purposes of article 8(1) so far as concerned the possibility of police surveillance or intrusion by the wider public, but he had no reasonable expectation of privacy in relation to the recipient of his messages. He could not reasonably expect that, where his messages constituted evidence of criminal conduct on his part, the recipient would not pass them on to the police"

This was a relevant finding in the present case which involved police officers whose recognised and accepted statutory duty was to report, challenge or take action against the conduct of other constables which had fallen below the relevant standards, a duty which took precedence over any relationship of "trust and confidence". Given that the content of the messages was open to interpretation as conduct in breach of the relevant standards the senders could have no reasonable expectation that they would be kept private. Finally, in para 60 the UKSC noted *In Re JR38* as authority for the proposition that "the nature of the information in question is relevant as part of the context in which an assessment whether a reasonable expectation of privacy exists is to be made". The value(s) which the petitioners seek to uphold are essentially their right as police officers to exchange messages between

them which are not only offensive to communities they should serve and their fellow officers but also infringe the rights of others by breach of their own duty of confidentiality in respect of information they hold only by virtue of their privileged status as police officers. They could not in these circumstances have any reasonable expectation of privacy. *Sutherland* confirms that the Lord Ordinary's interpretation of the case of *In re JR38,* was correct.

Conclusions

[121] The extent to which the present case involved interference by the state relates to the use by the state of material which came into its hands for another, legitimate purpose. There is no question of surveillance, covert operations, bugging or the like. To that extent the circumstances are more similar to those of *Sutherland* than to such cases, even though the information was discovered by police in the course of an inquiry, rather than handed over to them for the purpose to which it is now intended to be put. The real question is the extent to which collateral use of information properly obtained for a legitimate investigative purpose may be permitted.

[122] The present case turns to a significant extent on the question whether the reclaimers had a reasonable expectation of privacy. *Sutherland* has not in my view innovated on the test to be applied in such circumstances or altered the factors which are relevant to that issue. On the contrary, it is a decision in line with the well-established authorities referred to above, in particular *Campbell* and *In Re JR38* already referred to. In particular, *Sutherland* emphasises that whether there is a reasonable expectation of privacy is a question requiring an objective assessment on all the facts. In addition, the content of the messages in question was seen as a relevant factor in that assessment (para 56, and in particular paras 60-61).

Para 58 also suggests that the attributes of those involved in the communication may be a relevant factor. Accordingly, I see nothing in *Sutherland* which is inconsistent with the views which I have expressed above. In conclusion therefore I consider that the reclaiming motion must be refused.

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 61
P105/18

Lord Justice Clerk
Lord Menzies
Lord Malcolm

OPINION OF LORD MENZIES

in the Petition

by

BC and OTHERS

Petitioners and Reclaimers

against

IAIN LIVINGSTONE QPM, CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND and OTHERS

Respondents

_____

Petitioners and Reclaimers: Sandison QC and T Young; MacRoberts LLP
Respondents: Maguire QC and Lawrie; Clyde and Co (Scotland) LLP

16 September 2020

[123] I am grateful to your Ladyship in the chair for setting out so clearly the background, issues & submissions in this matter. I am in such complete agreement with the conclusions which you have reached, and the reasoning behind these, that there is little need for me to say anything further. However, in view of the importance of the subject, I should like to add a few observations of my own, largely by way of emphasis.

[124] Your Ladyship expresses concerns (at paragraphs [75]-[86] above) about the foundation for the Lord Ordinary's conclusion that there exists a common law right of privacy in Scotland. I share these concerns. However, in the absence of any cross-appeal on this point, and so without our having had the benefit of hearing any submissions on it, I express no views on the subject.

[125] The first Ground of Appeal, relating to whether the reclaimers had a reasonable expectation of privacy, is of central importance in the case. As senior counsel for the reclaimers put it in his submissions to this court, this is the threshold question – if he doesn't get over it, that is the end of the reclaimers' case. He argued that there had to be a "private zone" for police officers – a room for private discourse off the record, for informal discussion between friends. In this regard he referred us to *Bărbulescu* v *Romania*, [2017] IRLR 1032, particularly at para 71. While he accepted that the regulations required to be given due weight, they were not determinative of the question of whether the reclaimers had a reasonable expectation of privacy.

[126] For my part I do not suggest that the regulations are inevitably determinative of the question, but they are a factor of very considerable weight in deciding whether the reclaimers had a reasonable expectation of privacy. When deciding this issue the court should have regard to all the circumstances of the case, including the attributes of the maker of a statement (*In re JR38,* particularly at para 88; *Murray* v *Express Newspapers*). In this regard, I do not accept the submission by senior counsel for the reclaimers that an "attribute" in this context is nothing so ephemeral as a mere job or occupation – I consider that the fact that a person holds a particular office, with recognised responsibilities, duties and restrictions, may well form part of an "attribute". However, it is well settled and established by these authorities that the court, when deciding whether or not there is a

reasonable expectation of privacy, should not limit its consideration only to the attributes of the person making the statement, but should consider all the circumstances of the case. These may include the attributes of the person to whom the statement or communication has been made.

[127] In the present case the reclaimers were aware that not only they themselves but also some, if not all, of the recipients of the messages were serving police officers who were subject to the Police Service of Scotland Regulations 2013 (SSI 2013/35), and the Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68), the relevant passages of which are set out above at paragraphs [5]-[8]. They were therefore aware that some or all of the recipients of the messages were under a sworn duty to report, challenge or take action against the conduct of other constables which had fallen below the Standards of Professional Behaviour.

[128] If a person makes a statement to a journalist who explains that he is recording their conversation and will publish it verbatim, any reasonable expectation will, in general, fly off. The attributes of the recipient of a message or statement are one of the relevant circumstances for the consideration of the court. Similarly, if a person sends messages to others whom he knows to be under a sworn duty to report them, this will be a relevant circumstance of some weight in the court's consideration.

[129] The phrase "all the circumstances of the case" includes the attributes of the reclaimers (including their status as the holders of a public office), the attributes of the recipients, and the content of the messages, and may well include other relevant circumstances. I can find no error of law by the Lord Ordinary in his consideration of the issue of whether there was a reasonable expectation of privacy. I agree that there was no interference with the reclaimers' rights under Article 8(1) ECHR.

[130] That is sufficient to dispose of the reclaiming motion – senior counsel for the reclaimers accepted that issues as to whether the use of the messages was not in accordance with law, proportionality, and the appropriateness of an exclusionary remedy, would only arise if the reclaimers succeeded on the threshold issue. However, as we were favoured with careful submissions on these other points, I shall comment briefly on some of them.

[131] With regard to the second Ground of Appeal, it is clear from the authorities to which the Lord Ordinary and your Ladyship in the chair have referred that it may be in accordance with law, in certain circumstances, for the police to pass information which they have obtained in the course of a criminal investigation to a regulatory body. It is worthy of note (as the Lord Ordinary noted at para [188] of his opinion, quoted above at para [107]) that in this case there is no question of disclosure to an external body – the information was referred to Police Scotland's own internal disciplinary body.

[132] The maintenance of a properly regulated police force is important in retaining public confidence in the police, which is itself of great importance in the proper discharge of police duties.

[133] Senior counsel for the reclaimers accepted the summary given by Lord Sumption at paragraph 9 of his opinion in *R (Catt)* v *ACPO* [2015] AC 1065 of "policing purposes", as these are defined in paragraph 2.2 of the Code of Practice on the Management of Police Information, issued by the Secretary of State in July 2005 under section 39A of the Police Act 1996 in relation to England, namely "protecting life and property, preserving order, preventing crime, bringing offenders to justice and performing any legal duty or responsibility of the police". It seems to me that the duties imposed by the 2013 & 2014 Regulations are of importance when considering the last element of this summary.

[134] Mr Sandison submitted that as a matter of practicality it was necessary for police officers to be able to determine the sphere of application of rules relating to disclosure of information, and that the result of the Lord Ordinary's decision was to confer a discretion on the police authorities so vague as to depend on the will or whim of the respondents. I do not agree. I consider that the accessibility test, as discussed in *R(P)* v *Justice Secretary* [2019] 2 WLR 510, particularly by Lord Sumption at paras 16 & 17, has been met here. If the reclaimers had sought professional legal advice, they would have been able to discover that it would be open to the respondents to make use of these messages in disciplinary proceedings against them. I can find no error of law in the Lord Ordinary's consideration of this issue.

[135] In terms of his third Ground of Appeal, Mr Sandison accepted that the court had some margin of appreciation as to whether any interference with the reclaimers' Article 8(1) rights was proportionate or not. He submitted that in this case disclosure of the messages was disproportionate, for 4 broad reasons – (1) the public interests are not all on one side – although a general public interest in the efficient conduct of police disciplinary proceedings was accepted, there was also a substantial public interest in maintaining privacy & confidentiality generally; (2) private communications that have never been published cannot rationally be a substantial threat to public confidence in the police; (3) although it was accepted that the messages were unguarded and not carefully expressed, there was nothing in them which amounted to criminal conduct; and (4) in a properly balanced and nuanced balancing exercise the decision to disclose was disproportionate.

[136] I am not persuaded by these submissions for the reclaimers. The Lord Ordinary carried out a careful balancing exercise, and concluded that the public interest in effective disciplinary proceedings outweighed other interests. I am unable to say that he was wrong

in reaching this conclusion. Public confidence in the police is central to effective policing. Such restriction on the reclaimers' Article 8 rights as there might have been (but which, for the reasons given above, I have concluded did not occur in this case) was in my view proportionate.

[137] I have no additional comments to make regarding the fourth Ground of Appeal.

[138] With regard to the recent decision of the UKSC in *Sutherland* v *HM Advocate* 2020 SLT 745, I agree with the views expressed by your Ladyship in the chair in the addendum to your opinion. The decision in *Sutherland* supports my view that the reclaimers did not have a reasonable expectation of privacy in all the circumstances of the present case. It is consistent with the approach taken in *In re JR38*, and with my view that "all the circumstances of the case" includes the attributes of both sender and recipient, the nature of the relationship between them, and the content of the messages. I consider that this decision supports the position of the respondents, and is consistent with the reasoning of this court. I do not think it provides any support for the reclaimers' position, so I need say no more about it.

[139] I agree that the reclaiming motion should be refused.

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 61
P105/18

Lord Justice Clerk
Lord Menzies
Lord Malcolm

OPINION OF LORD MALCOLM

in the Petition

by

BC and OTHERS

Petitioners and Reclaimers

against

IAIN LIVINGSTONE QPM, CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND and OTHERS

Respondents

Petitioners and Reclaimers: Sandison QC and T Young; MacRoberts LLP
Respondents: Maguire QC and Lawrie; Clyde and Co (Scotland) LLP

16 September 2020

[140] While I am in full agreement with the opinions of your Ladyship and your Lordship, I wish to add a few observations on whether article 8 is engaged. Before doing so I would comment that even if our law mirrored developments south of the border, I would not have been persuaded that the recipients of the various communications at the heart of this case were under a duty of privacy, the breach of which would constitute a civil wrong on their

part. That said, I agree that as matters have developed it is not necessary to dwell on either this or the current state of our common law on privacy.

[141] As to article 8 engagement, it is important to note that this is not a case concerning questionable police surveillance or data storage, nor the abuse of search or other police powers. If it was, and given that article 8 controls the arbitrary use of state power, different considerations might arise.

[142] The question is whether disclosure of the material described by your Ladyship, for the sole purpose of possible disciplinary proceedings, would disrespect either the officers' private lives or their correspondence, both of which raise essentially the same factors. The relevant authorities establish that a case such as the present can be approached by asking whether the petitioners could have a reasonable expectation of privacy, sometimes described as a legitimate expectation of protection, in respect of the messages and photographs forwarded to their colleagues. If the answer is no, disclosure does not offend against the values of autonomy, dignity, and personal integrity which article 8 was designed to protect and promote. The matter is not within the sphere of the individual's private life.

> "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy." (Lord Nicholls in *Campbell* v *MGN Ltd* [2004] 2 AC 457 at paragraph 21)

[143] All of those involved were police officers. Each had solemnly sworn to uphold certain professional responsibilities and standards in both their public and private lives, and had promised, in effect, to take action if informed of the misconduct of others. This was known to each participating officer. To take perhaps an extreme example, if a constable (or indeed any public official) writes to a colleague stating that he accepts bribes, he might hope that it will be treated in confidence; he might even have such an expectation, but if so, it is neither reasonable nor legitimate.

[144] The above illustration demonstrates that the nature of the information communicated is of importance. For example, if it were sensitive personal information, a claim under article 8 may well succeed. In *Campbell* v *MGN* it was the nature and consequences of the proposed disclosure which created the quality of privacy. The present case does not involve the use of personal information. Notwithstanding the refusal of the petition, there will remain an extensive zone of interaction in which police officers can communicate in reasonable expectation of privacy.

[145] Mr Sandison submitted that police officers should enjoy the opportunity to have "off the record" communications between each other in whatever terms they consider to be appropriate. As he put it, the petitioners should be "free to be persons", presumably as opposed to being members of the police force. The difficulty is that they are both. Whatever else, the proposition requires that their status, privileges, and responsibilities as police officers be laid aside when it comes to the test of "reasonable expectation of privacy"; whereas the case law states that all relevant surrounding circumstances should be taken into account. If and in so far as the underlying suggestion is that the petitioners' status is not a relevant factor, I am unable to agree.

[146] Mr Sandison was driven to submit that if one of the recipients forwarded the messages to the police disciplinary authorities, they would have to be ignored, however unpalatable that might seem. This brings to mind the observations of Laws LJ in *R (Wood)* v *The Commissioner of Police of the Metropolis* [2010] 1 WLR 123 at paragraph 22 to the effect that the legitimate expectation test is one of the safeguards against the "unreal and unreasonable" use of article 8. (See also *In re JR38* [2016] AC 1131, Lord Toulson at paragraph 87.)

[147] Where, as here, there is a clear justification for the proposed disclosure, it might reasonably be thought that it matters little whether one analyses the case in terms of no interference under article 8(1), or vindication by virtue of article 8(2). However the approach of non-engagement is appropriate and can be supported; and particularly so when the reason for the justification has throughout been known to those claiming the benefit of article 8. That is one of the special features of this case. In any event, there is no affront to human autonomy, identity, or dignity, and thus no disrespect for private life or correspondence when the circumstances disclose no good reason for an expectation that a statement or other communication will be kept private, either by its immediate recipient or anyone else. Whatever mutual understandings and assurances might have been in play, and the evidence for such was less than compelling, none of the group could reasonably expect blanket secrecy in respect of all messages, whatever their nature, not least given the disclosure obligations each was under. The scope of article 8 and the quality of privacy for these purposes is not the product of subjective desire or intent. After quoting the broad test set out by Lord Toulson in *Re JR38* at paragraph 88, the Lord Ordinary noted that he required to apply an objective test focussing on the sensibilities of a reasonable person in the position of the officer concerned (paragraphs 133/4 of his opinion). In common with many other professional people and public servants, no police officer can reasonably or legitimately expect article 8 to provide a shield against the consequences of any and all communications to fellow officers, however inimical they might be to the standards he or she is expected to uphold.

[148] In *Re JR38*, Lord Kerr of Tonaghmore said (in a dissenting opinion) that:

> "The test for whether article 8 is engaged is, essentially, a contextual one, involving not merely an examination of what it was reasonable for the person who asserts the right to expect, but also a myriad of other factors… and any other circumstance

> peculiar to the particular conditions in which publication is proposed." (paragraph 56)

I can identify no factors or circumstances which on any objective evaluation support the view that the state is interfering with an article 8 right. Whatever the position might be in relation to private claims of breach of confidence had the disclosure come from a fellow member of the group, in my view no real issue of lack of respect for the private life or correspondence of the petitioners as covered by article 8 arises from the respondents' proposal to refer the material concerned for internal disciplinary purposes. (For the avoidance of doubt, the final categorisation of the messages and the outcome of any disciplinary proceedings will be for the appropriate body in due course; the refusal of this petition does not prejudge that determination.)

[149] In the recent decision of the UK Supreme Court in *Sutherland* v *HMA* [2020] UKSC 32, the "reasonable expectation of privacy" yardstick was reaffirmed. The discussion also acknowledged the potential importance of the nature and content of the communications, and in particular whether they "involve the expression of an aspect of private life or an aspect of correspondence which is capable of respect within the scheme of values inherent in the ECHR." – Lord Sales at paragraph 40. That was a case of clearly criminal conduct; nonetheless his Lordship's comments as to an area of overlap between the issues of reasonable expectation of privacy and the nature of the communications (paragraphs 60/61) are apposite in the circumstances of this petition.

[150] I am of the view that the respondents' proposed use of the messages does not breach the petitioners' article 8 rights. It follows that I agree that the reclaiming motion should be refused.