Neutral Citation Number: [2008] EWHC 1105 (Admin)

Case No: CO/8624/2005

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2008

Before :

THE HONOURABLE MR. JUSTICE McCOMBE

- -

Between :

ANDREW WOOD	**Claimant**
- and -	
THE COMMISSIONER OF POLICE FOR THE METROPOLIS	**Defendant**

- -
- -

Mr Martin WESTGATE (instructed by **Liberty**) for the **Claimant**
Mr Sam GRODZINSKI (instructed by **Metropolitan Police Legal Services**) for the **Defendant**

Hearing dates: 1-2 May 2008
(Final written submissions received 15 May 2008)

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Judgment

The Honourable Mr. Justice McCombe:

(A) The Claim

1. This is an application for judicial review (brought with the permission of Lord Justice Sedley sitting in the Court of Appeal) of a decision by the Defendant's officers "to photograph the Claimant and to try to obtain details of his identity at the Reed Elsevier PLC Annual General Meeting on 27 April 2005". The Claimant applies first, for a declaration that the Defendant acted in breach of the Claimant's rights under the European Convention on Human Rights by taking the photographs and seeking to establish his identity, secondly, an order requiring destruction of any photographs or photographic records that it holds of the Claimant as taken on the date in question and, thirdly, a declaration that the current practice of the Metropolitan Police in pursuing overt photographic surveillance of those engaged in political protests or demonstrations is unlawful as tending to infringe the rights of subjects under Articles 8, 10, 11 and 14 of the European Convention on Human Rights. The Claimant also claims damages.

(B) The Facts

2. There are some disputed issues of fact in the case but those are not of such significance as to impair the Court's task in deciding the important points. It is agreed by the parties that authority dictates that, in judicial review cases, where differences of fact arise the Defendant's account should be used by the court. I set out here those facts material to the matter.

3. At the relevant time the Claimant was a media co-ordinator employed by an unincorporated association known as Campaign against Arms Trade ("CAAT"). CAAT's name clearly indicates its objects. The Claimant had and has no criminal convictions and has never been arrested as a result of any campaigning activities or otherwise.

4. Reed Elsevier PLC ("Reed") was the parent company of Spearhead Exhibitions Limited ("Spearhead") which is concerned in the organisation of trade fairs for various industries, including the arms industry. One of the events with which it has been concerned is an exhibition held every other year in London called Defence Systems and Equipment International ("DSEi"). Because of the association with Spearhead, Reed's offices in this country had been subjected to demonstrations, some involving criminal damage. Other damage had been caused to Reed's premises in the Netherlands.

5. Prior to Reed's Annual General Meeting on 27 April 2005 (due to take place at an hotel in Grosvenor Square in London) the police were contacted by a member of Spearhead staff explaining that the company had recently noted the purchase of single shares entitling the new holders to attend the forthcoming AGM. Some five or six share transactions were said to have involved members of CAAT. One individual known to hold a proxy for a shareholder was a woman, called in this case "EA", a member of CAAT until 2003, who had a history of unlawful activity against organisations involved in the defence industry and had been convicted of a number of offences in that context.

6. The Defendant took the view that there was a real possibility of demonstration at the AGM and that unlawful activity might occur. He (or his senior officers) therefore decided to deploy a number of officers around the hotel where the meeting was to be held. One inspector, three sergeants and 21 constables were so allocated. In addition, two "Forward Intelligence Teams" ("FITs") of three and two officers respectively and an "Evidence Gathering ("EG") Team" of three officers and a civilian photographer were engaged. These officers were in uniform and the photographer, although a civilian, wore a uniform identifying him as engaged with the police.

7. The EG team gathers intelligence by taking photographs and making notes of significant events which may be thought to be of potential evidential value; the FIT teams are used to monitor people's movements at events of the kind in question to assist in the efficient deployment of resources.

8. Before the meeting a CAAT member ("KB") approached the officer in charge and asked to hand out leaflets at the hotel entrance to those attending the AGM. The officer agreed to this on the understanding that no obstruction would be caused and KB would be acting alone. KB did carry on her leafleting activity without problems arising.

9. The Claimant attended the AGM having previously bought a share in Reed. He attended with about six other CAAT members, but entered the meeting with only one other. He states that his purpose was to learn more about Reed's involvement with Spearhead and to ask appropriate questions.

10. At the meeting two people, EA (already mentioned) and one RH, were ejected by private security staff, apparently after chanting slogans. There is no suggestion that the Claimant was in any way involved in this activity. His participation appears to have been confined to asking one unobjectionable question. There appears to have been no other disturbance at the meeting.

11. The Claimant left the meeting as soon as formal business was over, without staying for the social reception held thereafter for which other shareholders did stay. He left the hotel in the company of another CAAT employee, a Mr. Ian Prichard. They spoke to KB and, while they were doing so, a man (whom the Claimant believed to be a police officer, but who was in fact the civilian photographer already mentioned) got out of a police vehicle and began to take photographs. There is a dispute as to how many photographs were taken but the Claimant's evidence is that the photographer was working continuously for some time and approached to within two metres of the Claimant and Mr. Prichard. The photographer says that he customarily tries to keep a safe distance from subjects in order not to invade their "personal space" and for his own safety and the safety of his equipment. In evidence, seven images have been produced of which only two show the Claimant clearly.

12. The Claimant complains that he was not told the reason why the photographs were being taken. On the other hand, it appears that he did not ask the officers for the reason either.

13. The Defendant's evidence is that, after eviction from the meeting, EA joined KB outside the hotel. It is stated that the Claimant and Mr. Prichard stopped to speak to KB (as they accept) and that they were joined by EA. The Claimant says that he

cannot recall EA joining the group. In his evidence, a sergeant from the EG team states that he decided that it was appropriate to photograph the Claimant and to try to establish his identity. His reasons for doing so were the sighting of the Claimant in a group with EA and the possibility that unlawful activity in the meeting, from which EA had been ejected, might later come to light. Other officers also give evidence of having seen the Claimant with EA at this time.

14. The Claimant and Mr. Prichard walked away from the hotel towards an Underground railway station. They were followed by officers from the EG team. The Claimant says that a police vehicle pulled up near to him and Mr. Prichard and about four officers came and stood near to them. The Claimant was asked for his identity, as was Mr. Prichard. Mr. Prichard identified himself, but the Claimant asked whether he was obliged to do so and, on being told he was not, declined to answer. They both refused to answer questions about the AGM. They were told that they were free to leave the scene and that they were not being detained, although two officers then followed them to the station, trying at one stage to get the assistance of railway staff to obtain the Claimant's identity from the Claimant's travel document. The Defendant's evidence is that the two men were followed in order to see whether they were truly leaving the area or whether they might return to the venue of the AGM or become involved with a different demonstration which was thought by the police to be occurring in St. James's Square. There is no evidence to suggest that the exchanges between the police on the one hand and the Claimant and Mr. Prichard on the other hand were other than polite on each side.

15. The Defendant has adduced detailed evidence as to retention of photographs taken in such circumstances as these. It appears that they are retained subject to strict controls. Usually they are kept only for use by officers of the Public Order branch of the force. Copies are not permitted to be taken outside the offices of that branch. The one exception to this is that at future public events where there is a potential need to identify persons involved in unlawful activity, who may have participated in similar events previously, a sheet of relevant images may be given to a limited number of EG and/or FIT team members. However, the images do not identify the names of those depicted, each image merely being allocated a code. The sheets are returned after the event and are then destroyed.

16. It seems that, in this case, the police did subsequently find out the Claimant's identity. They apparently found from company records the names of the new shareholders in Reed. They were able to ascertain the identities of all others, apart from the Claimant, and by process of elimination worked out that the person photographed in the company of Mr. Prichard and others was the Claimant.

17. The perceived need for photographs generally in the present case appears to have been because of police fears of unlawful activity at the DSEi event to be held in September 2005, after the disturbances at Reed's premises in this country and in the Netherlands, and the association on this occasion of the Claimant and others with EA who had previous convictions for unlawful activities in related manifestations. The Defendant says that, but for the proceedings in this court, the retained photographs of the Claimant would have been destroyed shortly after the September 2005 event. It is said that such photographs are not accessible for general intelligence purposes but are used only if a civil claim is made against the police in relation to the recorded events

or if a specific offence has come to light and it is believed that the images may provide material evidence in relation to that offence.

18. The Claimant says that he felt scared and intimidated by the events in issue. He also says that the incident was "extremely upsetting" and that he "felt shaken and frightened as a result". He says that he feels very uncomfortable that information may be kept about him indefinitely and may be used without his consent or knowledge. The Defendant, through Counsel, accepts that the Claimant may have felt "unsettled" by what occurred. However, the Claimant relies on his unchallenged evidence to the effect that I have just outlined, asserting that the incident was more than just "unsettling" so far as he was concerned.

(C) The Issues

19. On those facts the following issues now arise:

    i) Whether the *taking* of the photographs of the Claimant constituted an interference with his rights under Article 8(1) of the ECHR;

    ii) Whether the *retention* and potential use of the photographs constituted such an interference;

    iii) If there was such an interference in either case, whether it was justified and, in particular, whether it was (a) in accordance with the law and (b) proportionate;

    iv) Whether there was interference with the Claimant's rights under Articles 10 and/or 11 of the ECHR and, if so, whether it was justified; and

    v) Whether there was a breach of Article 14 of the ECHR and, if so, whether that was justified.

20. I shall take each of these issues in turn.

(D) Taking of the photographs and Article 8

21. Article 8 of the ECHR provides as follows:

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

22. Mr. Grodzinski, appearing for the Defendant submits that there has been no relevant interference with the Claimant's rights under Article 8 (or any other Convention right), but that any interference that there might have been was at a very low level,

was in pursuit of the legitimate aim of preventing crime, was in accordance with the law and proportionate.

23. In support of those submissions he wished to emphasise certain features of the facts of the case as the Defendant saw them:

    a) The claimant was photographed on leaving the AGM, which he had attended not simply in a private capacity but as a media officer of CAAT. CAAT was conducting a legitimate but public campaign against Reed. In such circumstances, he submits, the Claimant could have no reasonable expectation of privacy;

    b) The Claimant was not, it is argued, photographed randomly or arbitrarily but in the light of past offences against Reed and the association on this occasion with EA;

    c) This was not an exercise in compiling any national database;

    d) The photography was overt;

    e) While it is accepted that the Claimant may have felt "unsettled", the protections afforded by Article 8 are not concerned to protect the over-sensitive: see *Campbell v MGN Ltd.* [2004] AC 457, 483, per Lord Hope of Craighead;

    f) The Claimant never bothered to try to find out why the photographs were being taken;

    g) There was never any question of publication of the photographs and the retention of them was subject to rigorous internal controls;

    h) There was no compilation of a "file" or permanent record of the Claimant or his activities.

24. Mr. Westgate for the Claimant submits that the "touchstone" of the Article 8 right is the reasonable expectation of the individual concerned. At the present time, he submits, it is not expected that police officers will take "targeted" photographs of individuals at close range when going about their lawful activities and then retain them. It is impossible, he submits, to "compartmentalise" the taking of the photographs without regard to the circumstances in which they were taken, the purposes of their retention, whether, for example, it is intended thereby to identify the individual and whether there is proper and certain legal control over the photography as a whole. He submits that here the Claimant's identity *was* discovered and there was a degree of systematic gathering of information about CAAT activity and its members. He pointed also to evidence from the Claimant's solicitor of other occasions when members of CAAT have been similarly photographed.

25. In granting permission to apply for review in this case Lord Justice Sedley wrote:

> "1. The ECtHR decision in *Von Hannover* reinforces the submission that deliberately photographing an individual, albeit

in a public place, is a prima facie invasion of their right of privacy, especially where it is the state that does it…"

26. It strikes me that herein lies some of the difficulty in the present case. The majority of the recent high authorities, here and in Strasbourg, are concerned with Article 8 in the context of media intrusion and publication of material relating to celebrity figures with high public profiles. The principal authority in England and Wales is *Campbell*, a breach of confidence case between private persons with the added complication of balancing the media's right to freedom of expression under Article 10. There are few recent cases addressing intrusions on privacy by the state, but there are some and they are important. I shall return to them. It appears that the question of "intrusion or not", engaging Article 8, is, in modern jargon, "fact sensitive": see per Sir Anthony Clarke MR in *Murray v Big Pictures (UK) Limited* [2008] EWCA Civ 446 paragraph 41.

27. As I said in argument, it is perhaps intrusion by the state with which the draftsmen of the Convention would have been particularly concerned in 1949 and I felt throughout the case the importance that the courts should attach to vigilance in this area, while recognising the difficulties of police forces in democratic societies in protecting us all from criminal behaviour.

28. In argument, we touched upon the activities of the Staatssicherheitsdienst ("the Stasi") in the former, so-called German Democratic Republic in seeking to collect in jars vast quantities of "smells" of suspected persons (probably scientifically useless) and storing them indefinitely. One would hope, for example, that such extreme intrusions would be protected under the ECHR. (Cf the retention of DNA samples, upon which there is authority, to which I shall return.)[1] The allegedly intrusive activity here is, of course, at a far lower level than that, but, in my judgment, it is the development of such state activity against which one has to vigilant. The recent cases on breach of confidence have not focussed directly on these things, but from them (and others) it is necessary to extract the relevant principles. It is also important to bear in mind that, as a matter of our law, I am obliged to follow the decisions of the higher courts in this country, even if there is conflict between those decisions and decisions of the European Courts: see *Kay v Lambeth BC* [2006] 2 AC 465 and *Murray v Big Pictures (UK) Limited* [2007] EWHC 1908 Ch.; [2008] EWCA Civ 446 paragraph 20, per Sir Anthony Clarke MR.

29. It is important to remember that the Convention is concerned with the protection of fundamental rights and freedoms and that the courts have on many occasions stressed that, before an interference with such rights is established, a certain level of significance or seriousness: see *Gillan v Commr of Police for the Metropolis* [2006] 2 AC 307, 344F per Lord Bingham of Cornhill.

30. The taking of photographs in public places by the media has received substantial attention in the recent decisions of the courts. The starting point must be the decision of the House of Lords in *Campbell.* It will be recalled that this was the case where a

[1] Mr Grodzinski accepted that a campaign by a political party in government to obtain systematic photographic records of opposition party members (even if merely walking down a public street) could well be an intrusion. On the other hand, he was inclined to argue that similar photography by the police of persons known to be regular attenders at football matches where disturbances tended to take place might well fall on the other side of the line. I give these examples to illustrate the difficulty of assessing the intrusive quality of mere street photography.

well-known fashion model was photographed in a public street, leaving a narcotic addiction therapy session. The House held that the test as to whether information was private was to ask whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of disclosure, would find the disclosure offensive. Since the details of the claimant's therapy for drug addiction were akin to private and confidential information contained in medical records and required specific justification, it was held that the publication of that information went beyond disclosure necessary to add credibility to a legitimate story. Further, although the photographs were taken in a public place, the context in which they were used and linked to articles about her addiction added to the intrusion. The publication was in such circumstances an interference with Miss Campbell's rights under Article 8.

31. I think that Mr. Grodzinski was correct in his submission that, although the ultimate decision was by a majority, their Lordships and Baroness Hale of Richmond were essentially agreed on whether or not the mere taking of the photographs amounted to an interference with the claimant's rights under Article 8 and found that they did not. For example, Lord Hoffmann (who dissented in the result) said at paragraphs 73 and 74 of the speeches the following:

> "In the present case the pictures were taken without Miss Campbell's consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and even the not so famous who go out in public must accept that they may be photographed without their consent…But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large…"

32. Lord Hope of Craighead said (at paragraph 122),

> "The photographs were taken of Miss Campbell while she was in a public place, as she was in the street outside the premises where she had been receiving therapy. The taking of photographs in a public street must…be taken to be one of the incidents of living in a free community. The real issue is whether publicising the contents of the photographs would be offensive"

A little later he said,

> "…the European Court has recognised that a person who walks down a street will inevitably be visible to any member of the public who is also present and, in the same way, to a security guard viewing the scene through closed circuit television: *PG and JH v UK* Reports of judgments and Decsions 2000-ix, p. 195, para. 57. But, as the court pointed out in the same paragraph, private life considerations may arise once any systematic or permanent record comes in to existence of such material from the public domain…"

33. Finally, Baroness Hale said (at paragraph 154),

> "Publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, they are not objectionable. Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591. We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it."

34. It is, I think, clear that the House of Lords did not find that the mere taking of the photographs was objectionable but only the publication of them in all the circumstances of that case.

35. In the European Court matters have moved on in the Court's decision in *Von Hannover v Germany* (2005) 40 EHRR 1. It is a case requiring particular attention here, particularly because of Lord Justice Sedley's comment in granting permission to apply for judicial review in this case.

36. This case concerned the publication of photographs of Princess Caroline of Monaco engaged in various everyday activities such as horse riding, shopping, dining in a restaurant with a companion, on a skiing holiday, leaving her Paris home with her husband and tripping over an obstacle at a private beach club in Monaco. The court held that there had been an infringement of Article 8, even though the only photographs *not* taken when the Princess was in a public place were those, taken of her at long range, while she was at the private beach club.

37. The judgment in *Von Hannover* began with certain statements of principle. It is sufficient to quote paragraphs 50-53, 57 and 59.

> "50. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name, or a person's picture.
>
> Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Art.8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life".

51. The Court has also indicated that, in certain circumstances, a person has a "legitimate expectation" of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant "would have had a reasonable expectation of privacy for such calls".

52. As regards photos, with a view to defining the scope of the protection afforded by Art.8 against arbitrary interference by public authorities, the Commission had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public.

53. In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life. …"

"57. The Court reiterates that although the object of Art.8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. That also applies to the protection of a person's picture against abuse by others.

The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation. …"

"59. Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment that induces in the persons concerned a very strong sense of intrusion into their private life or even of persecution."

The court's conclusion in the case appears at paragraph 76 and 77 in the following terms:

> "76. As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.
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> 77. Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public"

38. Since the decision in *Von Hannover* there have been two cases in this country in which that case has been considered: *McKennitt v Ash* [2007] 3 WLR 194 in the Court of Appeal and *Murray v Big Pictures (UK) Limited* (supra). In *McKennitt* Lord Justice Buxton said that there was little doubt that *Von Hannover* extends the reach of article 8 beyond what had previously been understood and that the English courts should now give "respectful attention" to that case: see paragraphs 37 and 40 of the judgments, at pp. 208-9. That case did not concern photographs but a book which was held in some parts to infringe the claimant's rights of confidence and her rights under Article 8. It seems, however, that certain parts of the book were regarded both by Mr Justice Eady at first instance and by the Court of Appeal as so trivial as not to warrant protection under either head, for example trivial information about a mundane shopping trip in Italy.

39. The *Murray* case involved the covert photographing of a well known author, her husband and young child while out in a public street in Edinburgh. The action was brought by the child, acting by his litigation friends. The Court of Appeal reversed a decision of the judge who had struck out the claim. The Court considered that the judge had placed insufficient emphasis on the "reasonable expectation" of privacy of the *child*, as expressed through the parents, as opposed to the position of the child's mother in her own right. This was, of course, another "publication" case and the particular interest of the court in the rights of a child, as opposed to the rights of a celebrity parent, meant that little emerges about the current problem involving street photography by the agencies of the state. The court re-stated the "reasonable expectation of privacy" principle and went on to say (at paragraph 36),

> "As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes into account 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 of the purpose of the intrusion, the absence of consent and

> whether it was known or could be inferred, the effect on the claimant and the purposes for which the information came into the hands of the publisher".

All these features, apart from the last, require to be examined in the present case.

40. Amongst the English cases on Article 8(1), I would wish to refer finally to *Gillan* (supra). That case centred upon the DSEi event in September 2003. An authorisation had been made by the Assistant Commissioner of Police for the Metropolis under sections 44 and 45 of the Terrorism Act 2000 allowing police officers to stop and search members of the public at random for articles that could be used in connection with terrorism. The claimants, a student who was on his way to join a demonstration and a journalist, were stopped and searched by police officers pursuant to the authorisation. The claimants sought judicial review and challenged the police actions, among other reasons, as constituting a breach of article 8. Their claim was dismissed as were their appeals to the Court of Appeal and the House of Lords.

41. The defendants accepted that a search might amount in some circumstances to an interference with a person's rights under Article 8 but not that it would necessarily do so. The House held further that the search in that case was amply justified under Article 8(2).

42. Lord Bingham's speech recognised the long guarded constitutional principle that persons are entitled to go about their business without being the subject of search by the police in the absence of their being suspected of a crime, but he recognised that there are statutory exceptions: see paragraph 1 of the speeches, [2006] 2 AC 307 at 344.

43. It seems clear from these cases that the mere taking of a person's photograph in a public street may not generally interfere with that person's right of privacy under Article 8. More is usually required before that threshold is crossed, for example if there is the type of encyclopaedic press recording and subsequent publication of photographs of the comings and goings of a person, as there was of Princess Caroline in the *Von Hannover* case, or the taking and publication of photographs tending to expose medical confidences to the public gaze, as in the *Campbell* case. Further, the *Gillan* case indicates that not every intrusion even by police, if otherwise lawful, into the ordinary comings and goings of persons passing on the street will involve an interference with those persons' rights under Aticle 8. Many such cases will simply not involve intrusions sufficiently serious to bring them within the ambit of a convention designed to protect fundamental rights and freedoms.[2] Mr. Westgate for the claimant has stressed the importance of looking at the nature and purpose of the photography as a whole, including the retention of the material and the uses to which the images are intended to be put or are in fact put. I agree that, following the passage from the judgment of the Court of Appeal in Murray's case (paragraph 36) already cited, those factors are indeed relevant. I shall return to these additional questions below in dealing with the second issue in the present case, but before doing so, I

[2] Viewed in the absence of these authorities it might have been expected that photography and searches of this nature by police *would* prima facie engage Article 8, but that in many cases the intrusion would be easily justifiable under Article 8(2), but that is not how the law has developed in cases that are clearly binding on me.

should review shortly certain other cases in the European jurisprudence that were cited to me.

44. I think I can confine myself to certain cases involving, or commenting on police photography or other surveillance. The relevant cases are *X v UK* (1973) Decision 5877/72, *Friedl v Austria* (1995) 21 EHRR 83, *PG & JH v UK* (2001) Appl. 44787/98 and *Perry v UK* (2004) 39 EHRR 3.

45. *X v UK* was a case before the Commission. It concerned a protest in England against the apartheid laws in South Africa. The Applicant was arrested during a rugby match in England involving the South African national team and was photographed upon arrest and thereafter at the police station. She said that she was told that the photographs would be kept in case she made trouble at future matches. The Commission's decision, declaring the claim inadmissible, stated as follows:

> "The Commission has noted here the following elements in the case as it has been presented: first, that there was no invasion of the applicant's privacy in the sense that the authorities entered her home and took photographs of her there; secondly, that the photographs related to a public incident in which she was voluntarily taking part; and thirdly, that they were taken solely for the purpose of her future identification on similar public occasions and there is no suggestion that they have been made available to the general public or used for any other purpose. Bearing these factors in mind, the Commission finds that the taking and retention of the photographs of the applicant could not be considered to amount to an interference with her private life within the meaning of Article 8 (Art.8).
>
> An examination by the Commission of the applicant's complaint as has been submitted shows that the taking of her photographs was part of and solely related to her voluntary public activities and does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention and in particular in the two articles just considered."

46. That case was cited in *Friedl*. This was a case where there had been a demonstration involving a round-the-clock "sit in" of about 50 persons in an underground pedestrian passage in Vienna. The police took photographs, including a video cassette for use in the event of a prosecution. The applicant also claimed that he was photographed individually, his identity was checked and his particulars noted down. In declaring this claim inadmissible, the Commission stated:

> "49. In the present case, the Commission has noted the following elements: first, there was no intrusion into the "inner circle" of the applicant's private life in the sense that the authorities entered his home and took the photographs there; secondly, the photographs related to a public incident, namely a

> manifestation of several persons in a public place, in which the applicant was voluntarily taking part; and thirdly, they were solely taken for the purposes, on 17 February 1988, of recording the character of the manifestation and the actual situation at the place in question, *e.g.* the sanitary conditions, and, on 19 February 1988, of recording the conduct of the participants in the manifestation in view of ensuing investigation proceedings for offences against the Road Traffic Regulations.
>
> 50. In this context, the Commission attaches weight to the assurances given by the respondent Government according to which the individual persons on the photographs taken remained anonymous in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system, and no action was taken to identify the persons photographed on that occasion by means of data processing.
>
> 51. Bearing these factors in mind, the Commission finds that the taking of photographs of the applicant and their retention do not 89 amount to an interference with his right to respect for his private life within the meaning of Article 8(1) of the Convention."

47. In *PG & JH*, a case from the United Kingdom, a covert listening device was installed in police cells in which the applicants were being detained. Written authorisation was given by the Chief Constable in accordance with Home Office guidelines. The object was to obtain speech samples for comparison with earlier recordings relating the applicants to possible offences. The court held that there had been an interference with the applicants' rights under Article 8. The case is useful in the present context for the European Court's summary of earlier cases involving the taking of photographs. The judgment includes the following passages:

> "57. There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Article 8, even where the information has

not been gathered by any intrusive or covert method (see *Rotaru v. Romania* [GC], no.28341/95, paragraphs 43-44, ECHR 2000-V). …

58. In the case of photographs, the Commission previously had regard, for the purpose of delimiting the scope of protection afforded by Article 8 against arbitrary interference by public authorities, to whether the taking of the photographs amounted to an intrusion into the individual's privacy, whether the photographs related to private matters or public incidents and whether the material obtained was envisaged for a limited use or was likely to be made available to the general public (see *Friedl*, cited above, opinion of the Commission, p. 21, paragraphs 49-52). Where photographs were taken of an applicant at a public demonstration in a public place and retained by the police in a file, the Commission found no interference with private life, giving weight to the fact that the photograph was taken and retained as a record of the demonstration and no action had been taken to identify the persons photographed on that occasion by means of data processing (ibid., para 51-52). "

48. Finally, *Perry* involved the covert photography by video film of the applicant in the custody "suite" of a police station. He had been brought to the police station for the purpose of attending an identity parade. He had refused to participate. The court found that there was an interference with the applicant's Article 8 rights and stated as follows:

"39. In the present case, the applicant was filmed on video in the custody suite of a police station. The Government argued that this could not be argued as a private place, and that as the cameras which were running for security purposes were visible to the applicant he must have realised that he was being filmed, with no reasonable expectation of privacy in the circumstances.

40. As stated above, the normal use of security cameras *per se* whether in the public street or on premises, such as shopping centres or police stations where they serve a legitimate and foreseeable purpose, do not raise issues under Art.8(1) of the Convention. Here, however, the police regulated the security camera so that it could take clear footage of the applicant in the custody suite and inserted it in a montage of film of other persons to show to witnesses for the purposes of seeing whether they identified the applicant as the perpetrator of the robberies under investigation. The video was also shown during the applicant's trial in a public courtroom. The question is whether this use of the camera and footage constituted a processing or use of personal data of a nature to constitute an interference with respect for private life.

> 41. The Court recalls that the applicant had been brought to the police station to attend an identity parade and that he had refused to participate. Whether or not he was aware of the security cameras running in the custody suite, there is no indication that the applicant had any expectation that the footage was being taken of him within the police station for use in a video identification procedure and, potentially, as evidence prejudicial to his defence at trial. This ploy adopted by the police went beyond the normal or expected use of this type of camera, as indeed is demonstrated by the fact that the police were required to obtain permission and an engineer had to adjust the camera. The permanent recording of the footage and its inclusion in a montage for further use may therefore be regarded as the processing or collecting of personal data about the applicant.
>
> 42. The Government argued that the use of the footage was analogous to the use of photos in identification albums,[3] in which circumstance the Commission had stated that no issue arose where they were used solely for the purpose of identifying offenders in criminal proceedings. However, the Commission emphasised in that case the photographs had not come into the possession of the police through any invasion of privacy, the photographs having been submitted voluntarily to the authorities in passport applications or having been taken by the police on the occasion of a previous arrest. The footage in question in the present case had not been obtained voluntarily or in circumstances where it could be reasonably anticipated that it would be recorded and used for identification purposes.
>
> 43. The Court considers therefore that the recording and use of the video footage of the applicant in this case discloses an interference with his right to respect for private life."

49. It is to be noted that, in these cases, the only one in which photography was held to constitute an infringement was *Perry*. In that case there had been a ploy used to circumvent the applicant's refusal to participate in an identification parade; the filming was covert and was later used publicly at the applicant's trial. It does not seem to me that any of the cases runs counter to the tenor of the English authorities, which in any event are binding on me, to the effect that I have already stated in paragraph 28 above.

50. In my judgment, therefore, the mere *taking* of the photographs in the present case did not engage the claimant's rights under Article 8. The next question, however, is whether they were engaged by the *retention* of the images in the circumstances of the present case. That is the second issue. I accept Mr. Westgate's submission that all the circumstances of the *taking* and *retention* of the images have to be considered in answering the Article 8(1) point.

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[3] Clearly a reference to Lupker v The Netherlands Comm. Appl. 18395/91 (infra)

(E) Retention/Use of the Photographs

51. There appear to be no English cases dealing with retention of photographic material by police and the question of the engagement of Article 8.

52. In *X v UK* it was found that there was no interference with Article 8 by the retention of the photographs in issue. The same is true of the retention of the materials in issue in *Friedl*.

53. The case of *Lupker v The Netherlands,* Commission Application 18395/91 was cited to me. There the police had compiled a book of photographs of persons who, it was thought, might have been involved in criminal offences during a protest against town planning policies at Nijmegen. They were used by the police to show to members of the public who might assist the investigation. The photographs came from various official sources including applications for passports and driving licences and in relation to earlier arrests. The Commission found that the use of the photographs in this manner did not infringe Article 8 as they had been lawfully obtained and were not used other than for the purpose of the criminal investigation and had not been made available to the general public or used in any other way.

54. It seems to me that *Lupker* supports a view that the use of lawfully obtained photographs by police for the purpose of investigations will not normally entail interference with Article 8, in the absence of publication elsewhere.[4]

55. On the other hand the systematic collection and retention of secret police files recording information about subjects, even from public sources, over a period of years can infringe Article 8: see *Rotaru v Romania* Application No. 28341/95 and *Segersted-Wiberg v Sweden* (2007) 44 EHRR 2.

56. The closest related case in England is *R (S & Marper) v South Yorkshire Police* [2004] 1 WLR 2196. This case concerned the retention of DNA samples of persons arrested who were either subsequently acquitted or never charged at all.[5] Lord Steyn, with whom all but Baroness Hale agreed on this point, quoted with approval the following passage from the judgment of Mr Justice Leveson (as he then was) in the Divisional Court in that case to the following effect:

> "19….A person can only be identified by fingerprint or DNA sample either by an expert or with the use of sophisticated equipment or both; in both cases, it is essential to have some sample with which to compare the retained data. Further, in the context of the storage of this type of information within records retained by the police, the material stored says nothing about the physical make-up, characteristics or life of the person to whom they belong. "

[4] In my judgment, the case of *Doorson v the Netherlands* Application 202524/92 is to the same effect. Equally, photographs taken upon arrest of a subject and their retention do not infringe Article 8: see *Kinnunen v Finland,* Application 24950/94.

[5] I was told that a decision of this case before the Grand Chamber of the European Court of Human Rights is awaited.

Lord Steyn's conclusion (at paragraph 31 of the speeches) was as follows:

> "31. Looking at the matter in the round I incline to the view that in respect of retained fingerprints and sample article 8(1) is not engaged. If I am wrong in this view, I would say any interference is very modest indeed."

57. As Baroness Hale said in her speech (at paragraph 71, p. 2218A) there can be little, if anything, more private to the individual than the knowledge of his genetic make-up. If, however, as the majority thought, the retention of such samples in that case could be no more than a "very modest" interference with Article 8(1), it is hard to see how the retention of these photographs, in the circumstances of this case, could be any interference at all.

(F) Conclusions on Article 8(1)

58. It seems to me that the English courts at the highest level have adopted a very robust approach to questions of interference with rights under Article 8(1) in relation to the taking of photographs in public places[6], and their subsequent retention, and in relation to the retention of intimate samples for proper police purposes in assisting in the detection of crime. Adopting the "reasonable expectation" of privacy test adopted with regard to *disclosure* of photographic material in *Campbell* and the views of the House of Lords concerning first, the stop and search powers in the *Gillan* case and, secondly, the retention of DNA samples in *S & Marper*, it is difficult to see how the taking and retention of the photographs in this case can be an interference with the claimant's rights under Article 8.

59. I think that, in this state of the authorities, there is force in Mr. Grodzinski's submission that, on the facts of this case, the Claimant could have little expectation of privacy generally in relation to his attendance at the AGM of Reed. He was attending as a media co-ordinator of a high-profile national pressure group. One of CAAT's members was actively and publicly canvassing those attending the meeting. Reed was a company which had been the victim of criminal activity in the conduct of its lawful business in the past. It would not have been surprising if press interest had led to photography of those attending, irrespective of police interest. The Claimant was photographed in a public street, in circumstances in which police presence could not have been unexpected by the Claimant or by anyone else. The images were to be retained, without general disclosure, for very limited purposes. The retention of the images was not part of the compilation of a general dossier of information concerning the Claimant of the type that has been held in the past to constitute an interference with Article 8 rights.

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[6] I note, of course, the comment in the Court of Appeal's judgment in *Murray v Big Pictures (UK) Ltd.* that, "We do not share the predisposition identified by the judge that routine acts such as a visit to a shop or a ride on a bus should not attract any reasonable expectation of privacy. All depends on the circumstances". (see paragraph 56)

60. In all these circumstances, it seems to me that, on the present authorities, there was no interference with the Claimant's rights under Article 8(1) by the taking and retention of these photographs.

61. If I am wrong about this, was any interference justified in terms of Article 8(2) of the Convention? I now turn to that issue which has been fully argued before me.

(G) If there was an interference with rights under Article 8, was it "justified"

62. I have set out Article 8(2) above. On this hypothesis, it is necessary to ask first whether the interference was "in accordance with the law".

(a) "in accordance with the law"

63. The Defendant relies upon the lawfulness of his officers' conduct under the common law, controlled by the public law principles against arbitrary exercise of any police powers. The Claimant submits that the mere lawfulness of the conduct does not define with sufficient precision, clarity and accessibility (for the purposes of Article 8(2)) the circumstances in which any common law right can be exercised by police officers.

64. In his written argument, Mr. Grodzinski invoked the power of the police to take and retain photographs pursuant to the Defendant's powers to detect and prevent crime. To this end, he cited the judgment of Lord Parker CJ in *Rice v Connolly* [1966] 2 QB 414 at p. 418:

> "It is also in my judgment that it is part of the obligations and duties of a police constable to take all steps which appear to him to necessary for keeping the peace, for preventing crime or protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice."

65. In oral argument, however, in reliance on the decision of the European Court in *Murray v UK* (1994) 19 EHRR 193, Mr. Grodzinski went further and submitted that that case recognised that the fact that the act complained of was not tortious or otherwise contrary to law was a sufficient basis for saying that it was "in accordance with the law". In my judgment, that submission is indeed borne out by that case on its own facts.[7]

66. In *Murray's* case the first applicant was arrested and detained under the Northern Ireland (Emergency Provisions) Act 1978. She was suspected of collecting money for the purchase of arms for the Irish Republican Army. At an Army screening centre she refused to answer questions, was photographed without her knowledge and consent and the photographs were kept on record along with personal details about her, her family and her home. She was later released without charge. In a short passage the

[7] It is perhaps strange that a finding that the conduct in issue was not unlawful of itself provided a sufficient basis on its own for holding that that conduct was "in accordance with the law" for the purposes of Article 8, but that does seem to be the effect of the decision in *Murray*.

European Court endorsed the findings of the trial judge and of the Court of Appeal in Northern Ireland as follows:

> "The taking and, by implication, also the retention of a photograph of the first applicant without her consent had no statutory basis but, as explained by the trial court judge and the Court of Appeal, were lawful under common law.
>
> The impugned measures thus had a basis in domestic law. The Court discerns no reason, on the material before it, for not concluding that each of the various measures was "in accordance with the law", within the meaning of Article 8(2)."

The Court referred to the Northern Irish courts' findings on this question as set out in paragraphs 26, 30 and 39-40 of its judgment.

67. First, the Court referred to the statement of Murray J's view that "…merely taking the photograph of a person against their will, without physically interfering with or defaming the person was not tortious". In its judgment, quoted by the European Court, the Court of Appeal said,

> "The taking of the photograph involved nothing in the nature of a physical assault. Whether such an act would constitute an invasion of privacy so as to be actionable in the United States is irrelevant, because the [first applicant] can only recover damages if it amounts to a tort falling within one of the recognised branches of the law on the topic. According to the common law there is no remedy if someone takes a photograph of another against his will."

68. At paragraph 40 of its judgment recorded in its statement of the relevant domestic law the following:

> "In the general law of Northern Ireland, as in English law, it is lawful to take a photograph of a person without his or her consent, provided no force is used and the photograph is not exploited in such a way as to defame the person concerned.
>
> *The common law rule entitling the Army to take a photograph equally provides the legal basis for its retention."* (Emphasis added)

69. Mr Westgate submitted that the decision in *Murray* was "wrong"[8]. He was prepared to accept that *Rice v Connolly* might provide the outline of a legal basis for what was done here and prevents the conduct in issue from being actionable in tort, but it does not address the recognised requirements of accessibility, certainty and precision now recognised in European jurisprudence. In answer, Mr. Grodzinski submitted that the

[8] Mr. Westgate has observed sine a draft of this judgment was supplied that he did not simply submit that the decision in Murray was wrong and that the Court should decline to follow it. However, my note of submissions indicates that the argument was as summarised in this paragraph and that Mr. Westgate did submit that "Murray is wrong".

decision in *Murray* was that of the Full Court and post-dated *Malone*, (1985) 7 EHRR 14 *Silver v UK* (1983) 5 EHRR 347 and *Sunday Times v UK* (1980) 2 EHRR 245 in which the principles of precision, certainty and accessibility were fully considered; it was inconceivable, it was submitted, that the Court would not have had those principles well in mind.

70. I recognise that the European Court in *Malone* stated (at paragraph 68 of its judgment, 7 EHRR at p. 41) that the degree of precision required of the law will depend on the subject matter and, on any footing, any interference with the Claimant's rights under Article 8 must, in any view, be no more than modest. In the circumstances, it appears that the common law power relied upon by the defendant must, in the circumstances of this case, be sufficiently in accordance with the law to satisfy Article 8(2). Further, as the Defendant rightly submits, the exercise of that power is subject to public law control reaching over and above the inherent "lawfulness" of the actions. In addition, I cannot accept that it is my place simply to dismiss the decision of the Full Court in *Murray* as "wrong", as Mr. Westgate would have me do. That would do quite inadequate respect for the decisions of that court, the ultimate arbiter of these matters, in a case in close proximity of subject matter to the present one.

71. The Defendant further argues that the taking and retention of the photographs are subject to the controls imposed by the Data Protection Act 1998. The Claimant contends that the Act does not cover the taking of the photographs; it is not sufficiently precise for the purposes of Article 8; its safeguards are subject to certain exceptions, in particular in relation to the prevention or detection of crime (see e.g. s.29 of the Act); and, in any event, in this case the Defendant has committed breaches of the Act's requirements.

72. In my view, the 1998 does provide control over the collection and retention of the images in the present case. By section 1 of the Act the "processing" of data includes obtaining it. Thereafter, the Act does contain controls in respect of retained data. Even with the exceptions provided for in Section 29 of the Act, the statute does provide significant protection for an individual whose data are held by police forces. Further, it is to be noted that the Act is this country's implementation of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data. The Directive recognises the rights of individuals under Article 8 of the Convention (see recital 10) and article 1 of the Directive itself directs Member States to protect rights to privacy. It is not suggested that the 1998 Act is incompatible with the Directive or fails properly to implement it. In my judgment, moreover, it is nothing to the present point that, in any given case, there have been breaches of the Act. That does not negate the existence of the controls and, of course, the Act provides remedies for breaches of its provisions. I consider that the 1998 Act does provide very significant controls on the taking and retention of data by the police so as to reinforce the necessary legal basis required by Article 8 of the Convention.

73. The next question, on the hypothesis that Article 8 has been engaged in this case, is whether the police actions in this case were "necessary in a democratic society…for the prevention of disorder or crime…". In short were the actions of the police "proportionate". I turn now to that question.

(b) "…necessary in a democratic society…" etc.

74. I can take this matter shortly. It seems quite clear to me that, if there was an interference with the Claimant's rights under Article 8, it was entirely proportionate. The police have common law powers and duties to prevent and to investigate crime. Here was a meeting at which genuine fears had arisen as to potential criminal activity. Two of those attending had been ejected; the precise circumstances were not known. The Claimant was seen associating with one of those who had been removed from the meeting. There were also fears of criminal disruption at DSEi in September 2005. To my mind, it was entirely reasonable and proportionate for the police to photograph persons who, as it might turn out, had been engaged or might be likely to engage in criminal disorder. I note in this context, the speech of Lord Steyn in *S & Marper* at paragraph 1:

> "My Lords, it is of paramount importance that law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science. Such real evidence has the inestimable value of cogency and objectivity. It is in large measure not affected by the subjective defects of other testimony. It enables the guilty to be detected and the innocent to be rapidly eliminated from inquiries. Thus in the 1990s closed circuit television ("CCTV") became a crime-prevention strategy extensively adopted in British cities and towns. The images recorded facilitate the detection of crime and prosecution of offenders. Making due allowance for the possibility of threats to civil liberties, this phenomenon has had beneficial effects."

75. In such circumstances, it is not, in my judgment, for the courts to second-guess the operational decisions of the police in the exercise of their accepted powers and duties.

(H) Conclusions on Article 8(2)

76. In this case, if there was an interference with the Claimant's rights under Article 8(1) it was in accordance with the law and proportionate for the purposes of Article 8(2) of the Convention.

(I) Articles 10 and 11

77. Under this head the Claimant complains of interference with his rights to freedom of expression and of assembly.

78. It is clear that there was no interference with either of these rights so far as they were to be exercised at the AGM itself. It is not suggested that the Claimant was in any way restricted in his attendance at the meeting or in his participation at it. The activities complained of relate solely to events after the meeting. The Claimant alleges that the police conduct had an intimidating effect on him which tended to inhibit his willingness to exercise such rights in the future. I note the citation in Mr. Westgate's skeleton argument of a passage from the speech of Lord Nicholls of Birkenhead in *R (Prolife Alliance) v BBC* [2004] 1 AC 185, at paragraph 6 of the speeches:

> "Freedom of political speech is a freedom of the very highest importance in any country which lays a claim to being a

> democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts."

79. Even in the face of such rigorous scrutiny, however, I cannot accept that the actions of the police here amounted to an interference with either of these Convention rights. As already mentioned in another context, the provisions of the Convention are not designed for the protection of the unduly sensitive. Lord Bingham did not consider that the powers of search in issue in *Gillan*, if properly exercised, would infringe rights of freedom of expression and assembly: see paragraph 30 of the speeches. The exercise of the proper common law power to take and retain photographs in this case could not in my judgment sensibly be said to restrict the Claimant's rights under either of these Articles. The same is true of the police officers' limited attempts to find out the Claimant's identity. They correctly told the Claimant that he did not have to supply those details and that he was free to leave at any time. The officers were clearly indicating their recognition of the limits upon their powers. The lawful and limited exercise of such powers should not amount to an interference with the Convention rights here in issue.

80. In any event, for much the same reasons and for those already set out above in relation to article 8, I am quite satisfied that, in the present circumstances, the actions of the police were sufficiently justified under Articles 10(2) and 11(2).

(J) Article 14 (Prohibition of Discrimination)

81. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

82. For the reasons already given, I have held that the facts of the present case do not fall within the ambit of any relevant substantive convention right. Therefore, as appears from the opening words of Article 14, and as is well known, that article cannot be engaged either.

83. The Claimant alleges that he was discriminated against in comparison with other persons who were present on this occasion and others attending the AGM. However, the reasons why the police took the photographs and acted as they did were not relevant to those others. The police actions were not taken because of the Claimant's political beliefs or because of his attendance at the meeting to exercise freedom of speech or his rights of assembly; they were taken for the reasons already identified which did not apply to those attending the meeting generally.

(K) Conclusion

84. For the reasons that I have endeavoured to express above this claim for judicial review is dismissed.