OUTER HOUSE, COURT OF SESSION

[2019] CSOH 48

P105/18

OPINION OF LORD BANNATYNE

In the petition

B C AND OTHERS

Petitioners

against

CHIEF CONSTABLE POLICE SERVICE OF SCOTLAND AND OTHERS

Respondents

Petitioner: Sandison, QC, Young; Kennedys Scotland LLP
Respondents: Maguire, QC, Lawrie; Clyde & Co (Scotland) LLP

28 June 2019

Introduction

[1] The petitioners are ten individual police officers against whom misconduct proceedings have been brought under the Police Service of Scotland (Conduct) Regulations 2014 ("the 2014 Regulations"). The compearing respondents are the Chief Constable and Deputy Chief Constable of the Police Service of Scotland and a Chief Superintendent of Police appointed under the 2014 Regulations to conduct misconduct proceedings brought against the petitioners.

[2] The petitioners seek orders: finding and declaring that the use by constables in the Police Service of Scotland of messages sent to, from, and amongst the petitioners via the

electronic WhatsApp messaging system ("the messages") for the purpose of bringing misconduct proceedings in respect of allegations of non-criminal behaviour on the part of the petitioners is unlawful *et separatim* is incompatible with the petitioners' right to respect for their private and family life in terms of Article 8 of the ECHR ("the Convention"). Second, interdicting the second and third respondents from conducting or maintaining any misconduct proceedings against the petitioners in respect of allegations of non-criminal behaviour on their part on the basis of, or involving the use of, the messages; and interdicting the same *ad interim*.

[3] Following sundry procedure, the matter came before me for a substantive hearing.

Background

[4] The factual background was not contentious and is adequately set forth in the petition and answers.

[5] In short the core of the factual background is this:

- In July 2016 a detective constable was engaged in an investigation into sexual offences. There is no suggestion any of the petitioners were of any interest to that investigation.
- In the course of this investigation, she reviewed the messages. The messages had been sent via the "WhatsApp" messaging system and were present on a mobile phone belonging to a suspect and recovered during the course of the investigations. The suspect was a constable within the Police Service of Scotland. The messages form the basis of the misconduct allegations against the petitioners. They were contained in "group chats", being messages shared amongst members of the two WhatsApp groups. The first of these

groups had 15 members including the 5th, 7th and 10th petitioners. The second group had 17 members including all of the petitioners. Having considered the content of the messages the investigating officer (a detective constable) decided to pass them to other constables in the Professional Standards Department within the Police Service of Scotland. Those other constables thereafter used and relied upon the messages in order to bring misconduct charges against each of the petitioners under the 2014 Regulations.

[6] The petitioners' position in respect to the use of the messages is that it amounts to an infringement of their common law right of privacy *et separatim* their rights in terms of Article 8 of the Convention. The respondents deny this.

The issues

[7] Against the above background the following issues arose at the hearing:

1. Does the respondents' disclosure and use of the messages interfere with the petitioners' common law right to privacy *et separatim* Article 8 Convention rights?
2. If so, does that disclosure and use have any clear and accessible legal basis so as to be "in accordance with law"?
3. If so, is that interference necessary and/or proportionate.
4. What would constitute an effective remedy for the petitioners?

Submissions for the petitioners

[8] The first issue contained a preliminary question: does the common law of Scotland recognise a right of privacy?

[9] Mr Sandison's submissions on this preliminary point in summary were these. He took as his starting point a general submission that in recent years, the Supreme Court has repeatedly emphasised the importance of relying on fundamental common law rights, as opposed to immediate resort to Convention rights. The submission was made under reference to *R (Osborn)* v *Parole Board* [2014] AC 1115 at paragraphs 57 to 63 and *A* v *British Broadcasting Corporation (Scotland)* 2014 SC (UKSC) 151 at paragraph 56.

[10] Mr Sandison then turned to look at the position in England where he submitted the courts have recognised and developed the concept of a common law right to privacy, most notably in developing the scope of delictual duties of confidence in relation to private information. The development of this right was perhaps most clearly seen in *Campbell* v *MGN Ltd* [2004] 2 AC 457. Mr Sandison accepted that this case was often referred to, however, it had not been expressly approved by the Scottish Courts. Nevertheless, it was an important case when considering the position in Scotland because the law of confidence is generally considered to be the same in Scotland and England: see, *Lord Advocate* v *Scotsman Publications Ltd* 1989 SC (HL) 122 at pages 162 and 163.

[11] Moreover, there are Scottish authorities which implicitly recognise this right. He directed my attention to *Henderson* v *Chief Constable of Fife Police* 1988 SLT 361 at page 367 and the discussion in Reid, *Personality, Confidentiality and Privacy in Scots Law* at paragraphs 17.03 to 17.05.

[12] For the foregoing reasons he submitted that there is a right of privacy in terms of the common law of Scotland.

[13] Turning to Article 8 of the Convention Mr Sandison began by saying this: private diaries, communications, or correspondence, whether electronic or otherwise, are possibly the paradigm example of something giving rise to an expectation of privacy.

Correspondence is expressly referred to in Article 8(1) and it plainly extends to electronic communications.

[14] In advancing his argument under this head, Mr Sandison placed particular reliance on the observations of Lord Toulson JSC at paragraphs 88 to 98 of *In re JR38* 2016 AC 1131.

[15] In particular he directed my attention to the observations of Lord Toulson at paragraph 85 where having considered the leading European case of *Von Hannover* v *Germany* [2005] 40 EHRR 1 sets out the test to be applied when considering whether there exists a right of privacy which then requires the party interfering with it to justify the interference:

> "This passage highlights three matters: the width of the concept of private life; the purpose of Article 8, ie what it seeks to protect; and the need to examine the particular circumstances of the case in order to decide whether, consonant with that purpose, the applicant had a legitimate expectation of protection in relation to the subject matter of his complaint."

[16] Thus the test is one of whether "the applicant had a legitimate expectation of protection" or to use an expression which Lord Toulson says is synonymous "a reasonable expectation of privacy".

[17] So far as the issue of the scope of the Article 8 right, Mr Sandison again directed my attention to the judgment of Lord Toulson in *JR38* and in particular paragraph 86 thereof where Lord Toulson adopts the analysis of Laws LJ in *R (Wood)* v *Commissioners of Police of the Metropolis* [2010] 1 WLR 123 regarding the issue of the scope of the right:

> "20. The phrase 'physical and psychological integrity' of a person (the *Von Hannover* case 40 EHRR I, para 50; *S v United Kingdom* 48 EHRR 50, para 66) is with respect helpful. So is the person's 'physical and social identity'; (see *S v United Kingdom*, para 66 and other references there given). These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual.
>
> 21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the

> principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him-should make him-master of all those facts about his own identity, such as is name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the 'zone of interaction' (the *Von Hannover* case 40 EHRR I, para 50) between himself and others...
>
> 22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if Article 8 is to be engaged) attain 'a certain level of seriousness'. Secondly, the touchstone for Article 8(1)'s engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy' (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to Article 8(2). I shall say a little in turn about these three antidotes to the overblown use of Article 8."

[18] It was Mr Sandison' position that the messages fell within the scope of Article 8. The exchanging of messages he submitted clearly forms part of the zone of interaction of the petitioners.

[19] Mr Sandison went on to submit that the messages were sent in a confidential context and that plainly would have given rise to an expectation of privacy on the part of the petitioners.

[20] In development of this argument he relied first on the nature and characteristics of the WhatsApp messaging service.

[21] The important point he submitted regarding the messages is that they were exchanged within a closed group.

[22] The group is closed in that:

- There is an identified known group of members.

- A person can only join the group on the basis of the administrator introducing that person and all members of the group are told at that time of the introduction and have the option to leave the group at the point of that person joining.
- Group members know when any member of the group leaves.
- Someone joining the group cannot see messages which have been exchanged before that person has joined.

[23] Beyond the issue of the nature and characteristics of WhatsApp, Mr Sandison submitted that the following factors set out in the petitioners' affidavits could be considered in deciding whether there was a reasonable expectation of privacy. These matters could be considered because a reasonable person in the position of the petitioners would have regard to these matters:

- The genesis of the groups (namely, when the petitioners had been undergoing training).
- The petitioners knew the other members of the groups.
- The petitioners had a trust and confidence in other members of the groups.

[24] Taking all of the above factors together a reasonable expectation of privacy arose in respect to the messages.

[25] Mr Sandison used this analogy to support his contention that a reasonable expectation of privacy arose, namely: if a person invites a number of people to his house, these people are friends, and thereafter this group of people has a discussion, he submitted that it was plain that the terms of such a discussion were in a confidential context and there would be a reasonable expectation of privacy on the part of those who took part in the

discussion. There was no material difference between this example and the circumstances of the present case.

[26] Mr Sandison emphasised that the content of the messages was not a relevant consideration in respect to the question of whether there was a reasonable expectation of privacy. He contended that a right of privacy that covers only good behaviour is not a right at all. He relied in making this submission on the judgment of Lord Nicholls of Birkenhead in *Campbell* v *MGN Ltd*. At paragraph 20 Lord Nicholls considers the issue of proportionality which arises on a consideration of Article 8(2) of the Convention. Article 8(2) recognises that there are occasions when intrusion into private and family life may be justified. Lord Nicholls gives at paragraph 20 an example of such an occasion:

> "One of these is where the intrusion is necessary for the protection of the rights and freedom of others. Article 10(1) recognises the importance of freedom of expression. But Article 10(2), like Article 8(2), recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. When both these Articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged Article 8 at all by being within the sphere of the complainant's private or family life."

[27] At paragraph 21 having identified the issue or proportionality which arises on consideration of Article 8(2) he observes that:

> "Accordingly, 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."

[28] Mr Sandison took from the foregoing passages that the question of the nature and content of the messages, is irrelevant at stage one ie in considering whether there is a reasonable expectation of privacy. It only becomes relevant at stage two namely when a consideration of Article 8(2) is being carried out and the issues of justification and

proportionality arise. It was his submission that the foregoing could not be read in any other way, although Ms Maguire sought in her written and oral submissions to suggest to the contrary.

[29] Mr Sandison went on to submit that the right of privacy was a particularly important one. The importance arose at least in part from the increasing capabilities of technology such as mobile phones to store vast amounts of information in a permanent and reproducible form. In such circumstances issues such as access to and disclosure of such information are acutely important. He submitted that they demanded a significant degree of vigilance by the court as to the extent of the intrusions which the court will permit. This submission was made under reference in particular to a decision of the Canadian Supreme Court in *R* v *Vu* [2013] 3 SCR 657 at paragraphs 1 to 3 and 40 to 45 per Cromwell J.

[30] Mr Sandison then turned to look at the position advanced by the respondents in respect to the issue of reasonable expectation of privacy both in their answers to the petition and in their written submissions and began by saying this: it appeared that the respondents sought to advance a proposition that the existence of the Standards of Professional Behaviour contained in Schedule 1 to the 2014 Regulations ("the Standards") to which the petitioners as police officers were subject means the petitioners suddenly lose all expectations of privacy, (see: Answer 14). He described this proposition as misconceived. Mr Sandison accepted that there are standards of behaviour set out in the 2014 Regulations; that the petitioners were informed of these Standards; swore on oath to behave in accordance with these; and that they applied to the petitioners both when on and off duty. However, that fell a considerable distance short of the petitioners having no reasonable expectation of privacy in the circumstances of the present case. The Police Service of

Scotland Regulations 2013/35 ("the 2013 Regulations") set out the restrictions on the private life of a constable at paragraph 4 which provides:

> "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."

[31] Schedule 1, paragraph 1 provides:

> "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; ..."

[32] It was his submission that the circumstances of the present case did not engage paragraph 1 of schedule 1. This paragraph had no relevance to the circumstances of the present case as nothing there prevents messages being exchanged in the context of a private group.

[33] Paragraphs 2 and 3 are not germane to the matters before the court. This was not a contentious issue.

[34] There are no other relevant statutory provisions in respect to restrictions on the private life of a constable. The Standards accordingly have to be read in terms of the above provisions of the 2013 Regulations.

[35] Accordingly it was his position that there were no statutory restrictions on the private life of a constable which were of relevance to the circumstances of the present case.

[36] In conclusion it was his position, that merely because the Standards can apply to conduct in a constable's private life it follows that the petitioners have no reasonable expectation of privacy for any and all actions in their private life is clearly wrong. Rather, it is plain that the petitioners do not lose all such expectations simply by virtue of being

subject to the Standards or being police constables. This final submission was made under reference to *R (Chief Constable of Cleveland Constabulary)* v *Police Appeals Tribunal* 2017 ICR 1212 (no 1).

[37] In further response to the respondents' position, Mr Sandison noted that they appeared to place some weight on analogy to Employment Tribunal cases involving first work email (*Garamukanwa* v Solent NHS Trust [2016] IRLR 476 and Facebook posts, *Teggart* v *TeleTech UK Ltd* [2012] NIIT 00704/11. He described such analogies as missing the petitioners' point. In both cases, the emails and Facebook posts were essentially public and open communications. The petitioners' point is that the messages at issue in the present case were private messages shared confidentially amongst members of a closed group of individuals.

[38] Turning to the second issue he described the interference into the petitioners' privacy as both illegal and not in accordance with law.

[39] He began by generally submitting that an intrusion into the petitioners' privacy must have a proper, clear and accessible legal basis. In support of this submission he directed the courts attention to the following: *R (on the application of P)* v *Secretary of State for the Home Department* [2019] UKSC 3 at paragraphs 12, 16, 17, and 24; *Khan* v *United Kingdom* 2001 31 EHRR 45; *Sciacca* v *Italy* 2006 43 EHRR 20 and *Halford* v *The United Kingdom* 1997 24 EHRR 523. He contended that importantly, for the purposes of the present case, because an initial intrusion into private data is justified on a particular legal basis, that does not provide a legal basis for all subsequent and further disclosure of that data. This submission was vouched by *Sciacca* v *Italy*. In that case there was no suggestion that the initial compiling of information on Ms Sciacca, including her photograph, the subject of the intrusion into her privacy following her arrest was not in accordance with law, however,

that provided no clear or accessible legal basis for a different and collateral disclosure of her photo to members of the press. Equally in the present case the initial legal intrusion for the purposes of the criminal investigation gave no clear and accessible legal basis for the use of the messages for a collateral purpose, namely: the disciplinary proceedings against the petitioners.

[40] In expansion of the above submission he said that the relevant legal basis is not some Rubicon that once passed becomes irrelevant and authorises all and any collateral uses of the information or data recovered. The need for a clear link between the legal basis and the particular use or disclosure is implicit in the whole structure of privacy rights and Article 8. This finds its clearest expression in the structure of the Data Protection Act 2018 and most notably for the purposes of the present case finds its clearest expression in the terms of section 36(4) of the 2018 Act which provides:

> "Personal data collected for any of the law enforcement purposes may not be processed for a purpose that is not a law enforcement purpose unless the processing is authorised by law."

[41] Thus in *R (Catt)* v *Association of Chief Police Officers of England, Wales and Northern Ireland and another* 2015 AC 1065, the Supreme Court made the following observation about the potential disclosure of information gathered by police at common law to third parties:

> "There has been no disclosure to third parties, and the prospect of future disclosure is limited by comprehensive restrictions. It is limited to policing purposes, and is subject to an internal proportionality review and the review by the Information Commissioner and the Courts." (See: paragraph 15 in the judgment of Lord Sumption).

This he said was consistent with the approach taken in other jurisdictions and he cited an example from the Australian courts, namely *Flori* v *Commissioners of Police and Another* 2014 QSC 284.

[42] Returning to the facts of the present case the petitioners' position is that they do not dispute that the investigating detective constable had a clear and accessible legal basis for the initial intrusion into their privacy whether in the form of the consent of a suspect to a search, exercise of common law powers of search, or exercise of a common law search warrant. However, that only authorised intrusion for the purposes of the detection and prevention of crime. What it did not do was to provide any clear or accessible legal basis for the subsequent disclosure of that information to other constables within the Police Service of Scotland for the quite different purpose of investigating non-criminal misconduct on the part of the petitioners.

[43] Looking at the respondents' answer to this particular issue of clear and accessible legal basis for the subsequent disclosure, he described it as wholly misconceived. The argument was to this effect that the 2014 Regulations themselves provided such a legal basis. He made a number of responses in relation to that contention: first, the 2014 Regulations have nothing to do with the purposes for which the messages were recovered. Specifically they say nothing expressly about disclosure of information. Secondly, the logical extent of the argument advanced by the respondents is that police constables can never have any real right to privacy. The police may be called upon to investigate any member of the public with whom, at some point in time, another constable has communicated in private. The argument advanced by the respondents would always apply. Thirdly, the disclosure is utterly arbitrary and dependent upon the discretion of an investigating officer as to whether he or she thinks the conduct inadvertently stumbled upon falls below the Standards within the 2014 Regulations. That does not meet the test for being sufficiently accessible and predictable as to amount to law for the purposes of Article 8. In making this submission he

referred back to *R* (*on the application of P)* v *Secretary of State for the Home Department* and in particular to paragraphs 16 to 17 and also paragraphs 28 to 37 per Lord Sumption.

[44] In conclusion Mr Sandison submitted that the court could satisfy itself that there was no clear or accessible legal basis for the disclosure of the messages for the purpose of disciplinary proceedings by asking itself this question: if a constable were to seek advice from a legal advisor as to what is the legal basis for a disclosure for disciplinary proceedings following an initial legal intrusion into his privacy for other purposes, the legal advisor would not be able to provide an answer. Thus there is no clear or accessible legal basis.

[45] Turning to the third issue namely whether the intrusion into the petitioners' privacy was justified or proportionate, it was his submission that it was neither.

[46] His general argument was that even if there were a legal basis for disclosure, the disclosure would require to be justified as both necessary and proportionate and it was neither.

[47] He submitted that the correct approach to this issue was to consider the following:

1. Whether the objective of the relevant legal basis is sufficiently important to justify the limitation of the appellants' right at common law or under Article 8(1)?;
2. Whether there is a rational connection between the relevant legal basis and that legitimate aim or objective?;
3. Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective?; and
4. Whether the impact of the right's infringement is proportionate having regard to the likely benefit of the relevant legal basis. These submissions were made under reference to *AB* v *HMA* 2017 SC (UKSC) 101 at

paragraph 24 and *R* (*on the application of P*) v *The Secretary of State for the Home Department* paragraphs 16 to 17, 24 and 73.

[48] In developing the above Mr Sandison's first argument was that the relevant legal power relied upon by the respondents is the consent of the accused, common law search, or search warrant. There is no rational connection between the objective of such powers, namely: the prevention and detection of crime and the disclosure of information for a completely separate purpose (see: *AB*, paragraphs 31 to 35).

[49] Moreover, Mr Sandison argued that the interference was not necessary in terms of any of the factors set out in Article 8(2). Looking at each of these factors he submitted that they were not engaged in the circumstances of the present case. In particular he argued that the circumstances of this case had nothing to do with public safety. No identifiable issue of public safety had been advanced. Equally no issue of crime or disorder was identifiable. He argued that the test was one of necessity, which was a high one and clearly had not been met.

[50] He went on to argue that in any event the interference in the petitioners' rights was disproportionate. He referred to his earlier submissions where he had said that the courts had recognised the very real problems and challenges to privacy that are presented by mobile phone data. They can provide a complete permanent record of a person's activities, which can easily become destructive of any privacy. This he submitted requires the police to handle collateral disclosure of such material exceptionally carefully. Even if there was a proper legal basis, they cannot sensibly justify trawling through every line of correspondence a constable has exchanged with an individual in private in order to see whether it might be considered to demonstrate a lack of "courtesy" or "integrity".

[51] Turning to the fourth issue of what would constitute an effective remedy for the petitioners, he first turned to consider the declarator sought and argued that if the petitioners are correct in their characterisation of what has already happened to them and what the first and second Respondents propose to do to them, the decree of declarator first prayed for should be granted as a matter of course. So far as the issue of interdict was concerned Mr Sandison at the outset accepted the petitioners are not automatically entitled to the further remedy of interdict. He conceded in his written argument that:

> "40. … The mere fact that information and evidence has been gathered in breach of Article 8 is not, of itself, sufficient to exclude its subsequent use in legal proceedings: see, *inter alia*, Kinloch v *HM Advocate* 2013 SC (UKSC) 257 at paras. 17 – 19 and *HM Advocate* v *P* 2012 S.C. (U.K.S.C.) 108 at para. 27. The question remains one of fairness in all of the circumstances: *Lawrie* v *Muir* 1950 JC 19 at p.26, *HM Advocate* v *P*, and *Kinloch* above. However, it has been recognised that the key to the resolution of what fairness requires will often be determined by whether there has been an Article 8 breach: cf. *Kinloch*, above, para. [17]. Further, a claim for an exclusionary remedy such as interdict will often be strongest where the impugned evidence is the direct fruits of infringement and of central importance to the case: see *HM Advocate* v *P*, above, at paras. [26]-- [27].
>
> 41. It is submitted that, if the Court is persuaded that the use of the Messages for the purposes of disciplinary proceedings is a breach of the Petitioners' common law and Convention rights, fairness demands an exclusionary remedy. The Messages are the entire sum and substance of the misconduct charges against the Petitioners. Evidence of misconduct on the part of the Petitioners does not exist independently of the Messages. They are not a mere adminicle of evidence. In such circumstances, it is plainly unfair to permit their use notwithstanding the infringement of the Petitioners' rights."

For these reasons the court should grant the declarator and interdict sought.

The respondents' reply

[52] In respect to the preliminary question of whether a right of privacy existed in terms of the common law of Scotland Ms Maguire's position was a short one: there is no

recognised standalone common law right to privacy in Scots law. None of the authorities relied upon by the petitioners in this regard establish otherwise.

[53] In development of this position she argued first that *Campbell* v *MGN Ltd* is a case in which the right to privacy was developed as part of the way in which the law protects confidential information. In *Campbell*, Lord Nicholls of Birkenhead observed at paragraph 17:

> "The time has come to recognise that the values enshrined in Articles 8 and 10 are now part of the cause of action for breach of confidence."

[54] It was her position that applying *Campbell* to the present case, the content of the messages could not be said to constitute private information which gave rise to a duty of confidentiality.

[55] Turning to the *Henderson* case she submitted that the petitioners' reliance on this was similarly misplaced. Contrary to the petitioners' assertion it is not an authority which implicitly recognises a fundamental common law right of privacy. Rather, it is a case which is generally cited in connection with the right to liberty and security. In *Henderson*, Lord Jauncey held that the removal of the pursuer's bra by the police while she was detained constituted "an interference with her liberty which was not justified in law" (at page 367H to I). While the case heading refers to an "infringement of liberty and privacy", the reference to "privacy" was not reflective of the terms used in the judgment.

[56] Turning to Article 8, her position on the substantive issue of whether the petitioners had a reasonable expectation of privacy, her answer to this question was a clear no.

[57] She took as her starting point that the nature of the material in the messages informed the issue of the reasonable expectation of privacy. This argument was founded

upon the regulatory background to which each of the petitioners as police constables was subject.

[58] In development of this core point in her argument she submitted this: it is a very long established and incontrovertible principle that the public must have confidence in the police service. This is the fundamental requirement of policing by consent. The policing principles as set out in the Police and Fire Reform (Scotland) Act 2012 ('2012 Act') section 32 make this clear.

[59] The foregoing forms the background to the provisions contained in the 2014 Regulations. These regulations applied to the petitioners and in particular they must adhere to the Standards which provide as follows:

> "***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.*** *[emphasis added]*
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."

[60] Moreover, the 2013 Regulations placed restrictions on the private lives of constables such as the petitioners and she referred in particular to paragraph 4(1) and Schedule 1.

[61] Against that background she asserted that the nature of the material in the messages establishes that no privacy or confidentiality rights arise on any basis. As is apparent from the material produced, both the titles of the WhatsApp group and the content of some of the messages relate to matters which arose during the professional lives of the petitioners as police officers. An objective view of the material is such that the court would have no difficulty in concluding that it is capable of bringing the police into disrepute with the public.

[62] Returning to the Standards she submitted, that they make it clear, that they apply to the behaviour of officers such as the petitioners in their private lives as well as in their roles

as police officers. The 2013 Regulations also make that connection clear. In order for the appointment as police officer to take effect it is essential that a declaration is made before a sheriff or a justice of the peace. All of the petitioners have made this declaration "the oath of office" in terms of section 10 of the 2012 Act,. namely that they –

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

The reference to "according to law" includes adherence to the Standards as set out in Schedule 1 to the 2013 and the 2014 Regulations.

[63] Any expectation of privacy under Article 8 or at common law must be reasonable for it to be protected and for any right to privacy to be engaged. This submission was made under reference to *Campbell* v *MGN Ltd*, para 21 as applied in a police misconduct context in *R (Chief Constable of Cleveland Constabulary)* v *Police Appeals Tribunal* at para 70:

> "70 In Campbell v MGN Ltd [2004] 2 AC 457, para 21 Lord Nicholls of Birkenhead said:
>
> > 'Accordingly 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.'"

[64] Turning to the use by the respondents of the messages she submitted this: use of the messages has only ever been for proper policing purposes, namely: the detection and investigation of crime and the obligation to fulfil the statutory duties to maintain Standards and discipline. In this regard it does not conflict with Lord Sumption in *R (Catt)* v *Association of Chief Police Officers of England, Wales and Northern Ireland and another* as suggested by Mr Sandison.

[65] She submitted that the fact that the messages were found on a mobile phone and that such devices are nowadays capable of storing large amounts of data does not impact on the conclusion that the messages do not engage any privacy right, whether at common law or Article 8. Concerns similar to those raised by Mr Sandison were raised by two accused before the Criminal Appeal Court in *JL* v *HM Advocate* 2014 JC 199 and dismissed.

[66] *JL* concerned the seizure of a "smartphone" during the detention of the accused. It was argued that such seizure not only provided the police with access to the contents of the phone but, by accessing the internet, it also provided access to email, internet and social media sites and could be regarded as a "living filing cabinet" and an interrogation of the accused's "private cyberspace" for which the police had no authority.

[67] Notwithstanding the absence of any findings in fact by the Sheriff or ground of appeal to support the submission for the accused, the court took a pragmatic approach finding in para 13 that:

> "...For all that we were told, in the present case, examining the iPhone 5 involved little more than connecting the device to a power supply, switching it on and touching the appropriate portions of the screen. In our opinion, so doing was clearly within the powers conferred by sec 14(7) (of the 1995 Act). We are not satisfied that there was any illegality or irregularity in recovering the evidence objected to. In our opinion the evidence is admissible. We agree with the conclusion of the sheriff and accordingly refuse the appeal."

[68] The petitioners rely on the Canadian case of *R* v *Vu* to argue that the search of modern technologies cannot be treated in the same way as ordinary filings cabinets and cupboards. However, *JL* is the binding Scottish authority which states that you can, at least in respect of smartphones.

[69] Ms Maguire then turned to consider *JR38* and submitted that the following points could be taken from that authority and in particular from the judgment of Lord Toulson: he emphasised the need to examine the particular circumstances of the case in order to decide

whether, consistent with the purpose he had identified, the applicant had a legitimate expectation of protection in relation to the subject matter of his complaint. If so, it is then up to the defendant to justify the interference with the defendant's privacy.

[70] Ms Maguire placed particular reliance on the analysis of Lord Toulson between paragraphs 97 and 100 where he said this:

> "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.
>
> 98 I therefore do not agree with Lord Kerr JSC's suggestion (para 56) that the test of reasonable expectation of privacy (or legitimate expectation of protection), excludes from consideration such factors as the age of the person involved, the presence or absence of consent to publication, the context of the activity or the use to which the published material is to be put. The reasonable or legitimate expectation test is an objective test. It is to be applied broadly, taking account of all the circumstances of the case (as Sir Anthony Clarke MR said in *Murray's* case) and having regard to underlying value or values to be protected. Thus, for example, the publication of a photograph of a young person acting in a criminal manner for the purpose of enabling the police to discover his identity may not fall within the scope of the protection of personal autonomy which is the purpose of Article 8, but the publication of the same photograph for another purpose might. Nor am I persuaded by Lord Kerr JSC's reading of *Von Hannover* (in para 57 of his judgment) that the commission and the court treated dissemination to the general public as a self-standing test.
>
> 99 The facts set out by Sir Declan Morgan LCJ at para 37 included the following:
>
> > '(i) The violence at this [the Fountain Street/Bishop Street] interface was persistent, extending over a period of months, and was exposing vulnerable people to fear and the risk of injury. (ii) There was, therefore, a pressing need to take steps to bring it to an end by identifying and dealing with those responsible. (iii) Detection by arresting those at the scene was not feasible so use of photographic images was necessary. (iv) All reasonably practicable methods of identifying those involved short of publication of the photographs had been tried.'
>
> 100 These facts have obvious relevance to the issue of justification, but it is also relevant to understand the nature of the activity in which the appellant was involved in considering whether the scope of Article 8 extends to his claim (or, to use language familiar to lawyers, whether Article 8 'is engaged'). When the authorities speak of a protected zone of interaction between a

> person and others, they are not referring to interaction in the form of public riot. That is not the kind of activity which Article 8 exists to protect. In this respect the case is on all fours with *Kinloch* v *HM Advocate* [2013] S AC 93. Lord Hope DPSC's words, at para 21, are equally applicable to the appellant: 'The criminal nature of what he was doing, if that was what it was found to be, was not an aspect of his private life that he was entitled to keep private.' If, for example, members of the public gave descriptions of a rioter from which an artist prepared an indentikit, would its use by the police for the purpose of his identification be an infringement of his rights to privacy? I consider not."

[71] She submitted that there was a clear parallel between the circumstances as described in *JR38* and the present case. It was her position that the abhorrent nature of what the police officers were doing and the breach of the Standards by which they are required to operate was clearly not an aspect of their lives which they were entitled to keep private.

[72] She went on to take this further point from the *JR38* case: whether there is a reasonable expectation of privacy is fact sensitive. She then contended that in the present case the facts and circumstances established that there was no such expectation. In fact to expect privacy would be wholly unreasonable and untenable standing the role of a police officer in society.

[73] In support of the foregoing submission she made a series of points.

[74] *First*, as she had submitted, both the titles of the groups, and the content of some of the messages relate to matters arising during the petitioners' professional lives as police officers. Further, in respect of these direct links between the messages and the public office of police officer, the content of the messages clearly engages the following Standards:

a. The 'Confidentiality' Standard – reference is made, for example to:

   i. the fifth petitioner's posting of a police shift pattern; and

   ii. the ninth petitioner's posting of a police bulletin and also of photographs connected to police incidents;

b. the 'Authority, respect and courtesy' Standard – reference is made, for example to the third petitioner's discussions about Constables AB and CD in relation to their dyslexia and personal appearance; and

c. the 'Discreditable conduct' Standard – reference is made, for example to the images posted by the fifth, seventh and ninth petitioners.

[75] *Second*, the Standards indicate that there is no privacy right or interest engaged in this case. The public policy underlying them (*viz.* the preservation of public confidence in the Police Service) militates against any claim to privacy in the circumstances of this case. The fitness and judgement of the persons responsible for sending the messages was properly brought into question and, once any question of criminality was ruled out, made subject to the regime set out in the 2014 Regulations. In these circumstances, no right of confidentiality attached to the messages and none attached to a third party such as the investigating detective constable who reported the material, given the clear countervailing need for her to do so. Even if the material were to be regarded as "confidential" it is not accepted that she would not have a duty to disclose it. Reference is made to *Attorney General* v *Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 pp. 154-155. Following an analysis of the duty owed by a third party who comes into possession of confidential information and may be under a duty not to use it Scott J said the following:

> "But, on the other hand, there are cases where third parties coming into possession of confidential information are not only entitled to use that information but may even be under a duty to do so. A striking example of this is Reg. v. Tompkins (1977) 67 Cr.App.R. 181. A confidential note passed by the defendant to his counsel fortuitously found its way into the hands of prosecuting counsel. It was held that prosecuting counsel was entitled to use the note. The public interest in the administration of justice outweighed the private interest of the defendant that the confidentiality of his note should be preserved. By contrast in I.T.C. Film Distributors Ltd. V. Video Exchange Ltd. [1982] Ch. 431, 440, a defendant who had by improper means obtained confidential documents belonging to the plaintiff, was held by Warner J. not to be entitled to use them in the action. He accepted the submissions of counsel for the plaintiff that he should:

> 'balance the public interest that the truth should be ascertained, which is the reason for the rule in Calcraft v. Guest [1898] QB 759 against the public interest that litigants should be able to bring their documents into court without fear that they may be filched by their opponents, whether by stealth or by a trick, and then used by them in evidence.'

These cases show, in my opinion, that the duty of confidence owed by the original confidant will not necessarily lie on every third party who comes into possession of the confidential information. For it to do so, the circumstances must be such as to raise 'an obligation of conscience' affecting the third party. Public interest factors may apply to the information in the hands of the third party that did not apply to the information in the hands of the original confidant."

[76] Third, the fact that no confidentiality or expectation of privacy can be said to reasonably arise is evidenced by the way in which WhatsApp operates. The relevant matters regarding the operation of "WhatsApp" (as set out in her written note of argument) are:

> "WhatsApp is a free to download mobile phone application that is available for use on most smartphones.
>
> 3. WhatsApp allows users to communicate with other users via VOIPH (voice over internet protocol) including to make voice and video calls and send and receive texts and multimedia messages, through data or internet connections rather than via the phone network.
>
> [...]
>
> 6. Communication through WhatsApp can take place between two individual users in a private session or, as part of a group. A group can contain multiple individuals where any messages sent and received to that group can be read by each of the users of it.
>
> 7. In order to join a WhatsApp group an administrator of that group sends an 'invite' to the other user to join it, this 'invite' is then 'clicked' by the user who, then joins that group.
>
> 8. The administrator of a group is someone within that group who, has higher rights that *(sic)* other normal users as can promote others as admin as well as invite and remove other users from the group.
>
> 9. There must always be an administrator for the group. Only the administrator can invite and allow others to join.

> 10. If an administrator sends an invitation to an individual outside the group and it is accepted, that existing members of the group have no control over that person joining and cannot prevent it."

[77] In addition another important factor relative to the operation of the application is: the "administrator" of the group controls its membership. New persons who are brought into the group by the administrator may be people unknown to some or all of the other members and are brought into the group without reference to those other members. Members cannot prevent the addition of such new members or have control over the membership. Assessed objectively, there can be no reasonable expectation of privacy in a group where members have no such control. Not one petitioner has identified themselves as the controller or has been able to name the extent of the membership of the group.

[78] Ms Maguire referred to a number of examples where group chats on WhatsApp or similar applications resulted in a member of a group reporting the content of such group discussions to disciplinary authorities. As I understand it these examples were referred to in order to show the lack of privacy in such groups and thus the lack of expectation of privacy in respect to messages exchanged on such apps. The examples referred to related to students attending Warwick University, Exeter University, Glasgow University and Dundee University and the reporting of the content of the chats to the relevant University authorities.

[79] She then referred to a case involving the discovery of discriminatory WhatsApp messages exchanged among police officers following the seizure of a mobile phone belonging to another police officer as part of a separate criminal investigation. This matter was dealt with by Leicestershire Police and triggered misconduct proceedings as a result of which four officers were dismissed without notice for gross misconduct and four other officers were issued with a final written warning for misconduct. The report of the

Disciplinary Hearing was before the court and was titled Leicestershire Police, Police Misconduct Hearing, Presiding Officers Account.

[80] She submitted in light of the foregoing characteristics of "WhatsApp" the petitioners had no reasonable expectation of privacy.

[81] She went on to submit the lack of control that members have over the group is exemplified in this case by the information provided in the petitioners' affidavits. They all profess in various ways that the group was set up with the purposes of keeping in touch and providing professional and exam support. However, it is clear from the content of the messages that that was not the intended purpose or, even if it was initially, it was subsequently hijacked by other members for other purposes. The surprise at the way in which the group was used is expressed by the second petitioner who states in paragraph 5 of his affidavit that:

> "At no time when I joined the group did I believe or expect that it would have been a platform for my colleagues to share their inappropriate thoughts or comments relating to our fellow colleagues."

The first petitioner in his response in the misconduct pack stated:

> "That group quickly became a group for 'banter' which was never the reason I joined. ... ... there were numerous times when I would open the application on my phone and find in excess of 100 messages."

The sixth petitioner stated: "the tone and content of the chat no longer reflected my personality or beliefs."

[82] The lack of control is further evidenced by the fact that the name of one of the groups was changed at one point without reference to any of the members. The fourth petitioner mentions the name change at paragraph 4 of her affidavit and the sixth petitioner states at paragraph 4 of her affidavit that:

> "... I do recall that at some point whoever was administering for the group changed the name to... I had no input into this at all and I considered that the name change was no more than a pretty poor attempt at humour."

[83] The fourth and fifth petitioners are unable to remember the identity of the administrator of the group, which belies the assertions made that there was any mutual understanding implied or express about who could become members of the groups and how the messages exchanged in the groups would be treated.

[84] Indeed, the absence of any agreement or understanding about the way in which the groups would operate is further evidenced by the fact that the fourth and sixth petitioners appear to have been added after the groups were first established. The fourth petitioner states at paragraph 4 of her affidavit: "... I was made aware of a private WhatsApp group chat that had been created by colleagues from police college." The sixth petitioner states at paragraph 4 of her affidavit: "I was added once the group was already fully established and could see it had already been in use before I was 'added'". None of the petitioners speak to any agreement being reached at any point about the addition of new members to the groups. There is no suggestion that the members of the groups were even friends with each other. The sixth petitioner positively disavows that they were friends. "I do not class any of these persons a *(sic)* friends."

[85] Further, whether or not the messages were sent when the petitioners were "on" or "off duty" or in the context of their private lives is irrelevant. Police officers can bring the police service into disrepute by virtue of what they do in their private lives. This is clear from the Standards and see, also, eg, the Cleveland Constabulary case and the Leicestershire Police decision. However here, there is the fact that, in any event, that conduct consists of messages which bear to relate – in some cases very closely and intimately – to aspects of the performance of the role of a police officer and training as such.

[86] In relation to the Cleveland Constabulary case as set out in the rubric that case concerned:

> "a police officer ...[who had] lied to fellow officers and members of the Crown Prosecution Service about the cause of injuries which he had sustained when he was assaulted by the husband of a female police sergeant with whom he was having an affair. At a misconduct hearing, a disciplinary panel rejected the police officer's contention that he had been entitled to lie in order to protect his right to respect for his private life under Article 8...finding that the lies had been promulgated, while he was on duty, in a professional rather than a private capacity and that his Article 8 rights were, therefore, not engaged. The panel found the police officer guilty of gross misconduct and concluded that the appropriate sanction was dismissal without notice. Allowing an appeal by the police officer, the Police Appeals Tribunal found that the panels decision was unfair and unreasonable...in so far as the panel had held that there was no such thing as 'private on-duty conduct' and that exceptional mitigation was required in the circumstances of the case. The tribunal held that the police officer had been entitled to lie to protect his privacy and that, while his conduct had amounted to misconduct, it was not gross misconduct and the appropriate sanction was a final written warning."

[87] The Chief Constable's claim for judicial review of the tribunal's decision was dismissed. As can be seen from paragraph 112 of the decision, the court found the argument made by Mr Yeo, for the police officer as an interested party, set out at paragraph 73 of the decision to be well made. The relevant paragraphs are as follows:

> **"73** Mr Yeo's position is that, based upon the jurisprudence in relation to privacy issues and undertaking the balancing act, para 1.28 of the HOG should relate not to questions as to whether the officer was off duty. The decision-maker should also consider the relevant conduct on the basis of whether it related to the police officer's private life, i.e. whether it related to something in respect of which the officer had a reasonable expectation of privacy.
>
> [...]
>
> **112** In terms of the issues surrounding para 3.8 of the panel's decision, it has to be said that it does seem to me to be clear that there is such a thing as 'private on-duty conduct' ..."

[88] Moreover, in any event, on an objective analysis, disclosure of the messages out with "the group" was easily foreseeable. This is inherent in the fact that they were exchanged as part of groups which included police officers (and others, some of whom remain unknown).

The Standards impose a legal duty on police officers to "report, challenge or take action against the conduct of other constables which has fallen below the Standards". That duty clearly required each petitioner to report, challenge or take action against their colleagues within the said WhatsApp groups given the content of the messages. Similarly, given that the group names, in themselves, link the participant to an association with or involvement in the police, it was wholly foreseeable that the messages might be seen by police colleagues who would likely consider the content to breach the Standards. It was entirely foreseeable that such a colleague would, as they should, standing the terms of the 2014 Regulations consider it necessary to report the matter for investigation given that their failure to do so could place them in breach of the Standards. In any event the following demonstrates knowledge on the part of some of the participants.

> (1) In the group chat a member stated specifically in relation to the female officers "right I say we don't pound them anymore" and "Here we would (*sic)* sacked it's victimisation". Notwithstanding that, the chat continued.
>
> (2) The first petitioner states "I do admit that there are times when I was aware of inappropriate comments in respect of Constables [the 3 named female officers], and I understand with hindsight that I should have challenged these".
>
> (3) The statement of the second petitioner in the misconduct pack includes the following "I understand that as a Police Constable I have to hold higher Standards of professionalism, integrity and honesty compared to the general public ... . I accept I have fallen below those Standards... .... I completely accept I could have voiced my concerns to the group."
>
> (4) The statement of the sixth petitioner accepts the obligation "I understand that the onus is on me to challenge those comments and behaviour and if necessary report this."

[89] Ultimately, it was a fellow officer (namely: the investigating officer) acting in the course of her duties, who took the necessary action. She was obliged to report the messages given their content and the Standards. The officer to whom she reported the messages in turn was required to act in accordance with the Standards. In these circumstances and in

light of the Standards, neither the respondents nor their officers, including the investigating officer, owed any duty to maintain any confidence (if it did arise, which is denied) which may have arisen as between the petitioners as members of these groups. Improvement notices were served on and accepted by three members of the group. The first, second and sixth petitioners have substantially accepted their behaviour as part of the group(s) and submitted reflective statement in their defence. This includes an acceptance on the part of the sixth petitioner that she has a duty to report such messages.

[90] Lastly, separate from the fact that group membership included police officers subject to the Standards, it was entirely foreseeable that messages on an "app" or on such groups might be disclosed to persons not part of the relevant group by a group member by a range of means and for any reason. As already stated, the identities of some of the members of the group remain unknown. Such disclosure is separate and in addition to the fact that control over membership of the group has been relinquished to the administrator. The foreseeability of this was exemplified in a message by the fourth petitioner "see if this chat ever gets leaked I'm changing my name". The court may consider this as rather contradictory to the approach as set out in this petitioners' affidavit.

[91] Ms Maguire submitted that any person using a group messaging app would be aware that there can be no expectation of privacy. It is a matter of simple common sense in this day and age. If the objective analysis is carried out as *per JR38* then there is no basis for the expectation of it. The subjective views of the petitioners are not relevant/carry very little weight. A useful question for the court might be to ask whether or not, if members of the judiciary/ the bar/ a group of doctors were to set up such a group and exchange such messages, there could be any expectation of privacy?

[92] In support of the foregoing submission she referred again to the finding in the

Leicestershire Police decision at paras 30-39:

> "30. Balancing these factors, the Panel concluded that Article 8 was not engaged in the circumstances of this case. If, as is stated, the messages were sent from personal mobile phones and also the messages were sent to a closed group of recipients, those two factors taken individually or together are not determinative.
>
> 31. The alleged messages consisted of comments about third parties. As serving police officers, the Officers are obliged to conduct themselves in accordance with the Standards of Professional Behaviour. This obligation applies regardless of whether they are on or off duty (see Paragraph 30 of the Guidance). Furthermore, officers have a duty to challenge or take action against the conduct of colleagues which might fall below the Standards of Professional Behaviour (see Paragraph 127 of the Guidance). As was pointed out during submissions, Article 8 is not a 'shield against conduct which may result in adverse consequences. In **Razgar**, Lord Bingham considered the scope and extent of the private life dimension to Article 8 and held:
>
> 'Elusive though the concept is, I think one must understand 'private life' in Article 8 as extending to those feature which are integral to a person's identity or ability to function socially as a person.'
>
> 32. In the view of the Panel, the above dicta is equally applicable to private correspondence which is an integral factor of private life.
>
> 33. The Panel concluded that the messages that were allegedly sent by the Officers are not features which are integral to their identity or role as a police officer or their ability to function as such. It also concluded that in light of Regulation 6(1) and Schedule 1(1) of the Police Regulations 2003, the context in which the messages were sent and the fact that they were about third parties, including colleagues, the Officers could not have had a reasonable expectation of privacy.
>
> 34. If the Panel is wrong in that conclusion and Article 8(1) is engaged, it considers that the derogations in Article 8(2) apply in this case, in arriving at that conclusion, the Panel took the step by step approach in **Razgar**.
>
> 35. Did the actions of Leicestershire Police and/or IPCC interfere with the Officers right to respect of their private lives? Leicestershire Police and or the IPCC did interfere with the Officers private lives by obtaining their private messages.
>
> 36. Does that interference have consequences of such gravity as to potentially engage the operation of Article 8? Yes, the Officers have been referred to a misconduct hearing, it is alleged that they are guilty of gross misconduct. As such, their livelihood as police officers and their reputations are at risk.

37. Was the interference in accordance with the law? The Panel has already taken the view that the seizure and investigation into PC F's mobile phone was not unlawful and that any subsequent investigations arising from information gleaned from the mobile phone were legitimate. In any event, in **Nakash** supports the proposition that in the Article 8 context at least, the interference does not have to be in accordance with the law. The Court held that despite the fact that in that case, the relevant material had been obtained as a result of an unlawful search, that did not outweigh the legitimate aim served by its disclosure which was a proportionate response to the legitimate aim. Similar consideration would apply to any breach of the Data Protection Act.

38. Is such interference 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? In the view of the Panel, the interference identified is necessary. One of the roles of police officers is to ensure public safety: compliance with Standards of Professional Behaviour is an aspect of preventing disorder as is treating others with respect and tolerance. The protections of the rights and freedoms of others is an integral feature of these proceedings and the public interest.

39. Is the interference proportionate to the legitimate public end sought to be achieved? In the view of the Panel, the interference is entirely proportionate to the legitimate aims. The public interest is a weighty factor in these proceedings and the panel has accorded it significant weight. The Panel reminded itself that the purpose of these proceedings is to serve the public interest. The public interest in this context means protecting the public, maintaining proper professional Standards and maintaining public confidence of the policing profession."

[93] In conclusion on this point Ms Maguire referred to two authorities: First *R (Nakash)* v *Metropolitan Police Service* [2014] EWHC 3810 Admin) which was referred to at para 18 of the *Leicestershire Police* decision. As can be seen from that paragraph, *Nakash* concerned:

"a criminal investigation into the conduct of a doctor, the police had obtained material following an unlawful arrest and search. The General Medical Council requested disclosure of some of the evidence arising from the police investigation. The doctor disputed whether the Defendant police force concerned could legitimately disclose the material. The Court held that the Defendant could disclose the material from the unlawful search to the General Medical Council and this did not breach Article 8."

[94] Secondly she directed my attention to *Garamukanwa* v *Solent NHS Trust* at para 27.

"Accordingly, the case that the Tribunal was addressing and in which any Article 8 rights had to be addressed was a disciplinary investigation into matters that, whilst

> they related to a personal relationship with a workplace colleague, were brought into the workplace by the Claimant himself and were introduced into the workplace as giving rise to work related issues. The emails of particular concern were published to colleagues at work email addresses. The publication of those emails had an adverse consequence on other employees for whom the Respondent had a duty of care, and raised issues of concern so far as the Respondent's own working relationship with the Claimant or individual responsible was concerned. These are all features that entitled the Tribunal to conclude that Article 8 was simply not engaged and was therefore not relevant because the Claimant had no reasonable expectation of privacy in respect of the private material."

The above passages she submitted supported the position she was advancing.

[95] For all of the above reasons Ms Maguire maintained her position that the petitioners had no reasonable expectation of privacy in respect of the messages.

[96] In respect to the second issue of whether the disclosure and use of the messages had any clear and accessible legal basis and was thus in accordance with law, Ms Maguire's argument was this: any interference (if there was any) was plainly lawful. The messages were discovered during the forensic analysis of a mobile telephone lawfully seized and examined as part of a criminal investigation (see the Criminal Procedure (Scotland) Act 1995, section 14(7)). Access to the telephone was facilitated by the provision of the PIN by the person from whom the phone had been seized. Having discovered the messages, the investigating officer and her senior officers were obliged by the Standards to report them to Police Scotland's Professional Standards Department ("PSD"). She referred to the Standards and submitted that they are "law" for the purposes of Article 8. Thereafter, the conduct issues arising from the messages were addressed in accordance with the 2014 Regulations. This is set out in the detailed and referenced chronology which forms part of the respondents written submissions. It can be seen that they were properly recovered for the misconduct process in line with Misconduct Procedures and the SOP.

[97] She then turned to the third issue. Is such interference necessary for a legitimate aim in a democratic society? One of the primary purposes of the Standards as she had earlier submitted is the preservation of public confidence in the police. Any interference (if there was any) with the petitioners' Article 8 rights was undertaken to ensure that all officers uphold such Standards and, thus, was done in the public interest for a legitimate aim (see the *Leicestershire Police* decision (above), para 38; *Garamukanwa*, para 31. She then asked this question: If so, is such interference proportionate to the legitimate public end to be achieved? Again, she submitted this question must be answered in the affirmative. Any interference was plainly proportionate in light of the issue at stake - the public interest in the conduct of police officers (see *Leicestershire Police* decision, para 39). Further, the handling of the messages for the reasons she had advanced had been carried out at all times on a proper, clear and accessible legal basis.

[98] On the final issue Ms Maguire's position was this in terms of her written note of argument:

> "78. *Esto* there was a breach of any common law right of Article 8, it does not follow that exclusion of the evidence is automatically required (see *R* v *Khan* [1997] AC 558, p.581; *Khan* v *United Kingdom* (2001) 31 EHRR 45, paras. 35-39).
>
> 79. In *Khan*, the appellant appealed against the dismissal of his appeal against conviction of being knowingly concerned in the importation of heroin. The appeal turned on whether criminal evidence amounting to an admission obtained by means of an electronic listening device installed by the police was admissible, and if so whether it should have been excluded under the Police and Criminal Evidence Act 1984 s.78. Mr Khan, who had visited a private house which was under surveillance, argued that, as there was no statutory regulation of the use of covert listening devices, statements made during the course of a private conversation should not have been admitted, especially in a case where the attachment of the device to a private house without the knowledge of its owners or occupiers had given rise to damage to property and trespass. It was further argued that the evidence was obtained in breach of the European Convention on Human Rights 1950 Art.8.

80. In *R* v *Khan* [1997] AC 558, at p. 581 Lord Nolan considered the approach which had been taken in the ECHR case of *Schenk* v *Switzerland*. In *Schenk* the applicant had complained that the making and use as evidence against him of an unlawfully obtained recording of a telephone conversation violated his right to a fair trial under Article 6 and his right to confidentiality of telephone communications under Article 8. The ECrtHR rejected his claim. Lord Nolan observes:

> *'The submission put forward on behalf of Liberty suggests that the European Court of Human Rights would not necessarily have reached the same conclusion under Article 6 in the circumstances of the present case, first because in the present case (unlike Schenk's case) there was no evidence, gainst the accused other than the tape-recorded conversation and secondly because whilst the interception in Schenk was conceded by the Swiss government to have been in breach of domestic law safeguards, in the present case there are no domestic law safeguards and for that reason the breach is arguably of a more fundamental character. I would, for my part, find it difficult to attach very great significance to either of these distinguishing features, but in any event we are not concerned with the view which the European Court of Human Rights might have taken of the facts of the present case. Its decision is no more a part of our law than the Convention itself. What is significant to my mind is the court's acceptance of the proposition that the admissibility of evidence is primarily a matter for regulation under national law, and its rejection of the proposition that unlawfully obtained evidence is necessary inadmissible.*
>
> *Further, it is to be noted in this connection that although the recording of the relevant conversation in the present case was achieved by means of a civil trespass and, on the face of it, criminal damage to property. Mr. Muller accepted at the outset that these matters were not fundamental to his argument. His submission would have been essentially the same if the surveillance device had been lawfully positioned outside the premises, or, for that matter, if the conversation had been overheard by a police officer with exceptionally acute hearing listening from outside the window.*
>
> *This brings one back to the fact that, under English law, there is in general nothing unlawful about a breach of privacy, The appellant's case rests wholly upon the lack of statutory authorisation for the particular breach of privacy which occurred in the present case, and the consequent infringement, as the appellant submits, of Article 8.'*

81. At the European level, in *Khan* v *United Kingdom* (2001) 31 EHRR 45, paras. 36-40 the ECrtHR also concluded that exclusion of the evidence was not necessarily automatically required:

> '36. *The Court notes at the outset that, in contrast to the position examined in the Schenk case, the fixing of the listening device and the recording of the applicant's conversation were not unlawful in the sense of being contrary to domestic criminal law. In particular, as Lord Nolan observed, under English*

law there is in general nothing unlawful about a breach of privacy. Moreover, as was further noted, there was no suggestion that, in fixing the device, the police had operated otherwise than in accordance with the Home Office Guidelines. In addition, as the House of Lords found, the admissions made by the applicant during the conversation with B were made voluntarily, there being no entrapment and the applicant being under no inducement to make such admissions. The 'unlawfulness' of which complaint is made in the present case relates exclusively to the fact that there was no statutory authority for the interference with the applicant's right to respect for private life and that, accordingly, such interference was not 'in accordance with the law', as that phrase has been interpreted in Article 8(2) of the Convention.

37. The Court next notes that the contested material in the present case was in effect the only evidence against the applicant and that the applicant's plea of guilty was tendered only on the basis of the judge's ruling that the evidence should be admitted. However, the relevance of the existence of evidence other than the contested matter depends on the circumstances of the case. In the present circumstances, where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker. It is true, in the case of Schenk, weight was attached by the Court to the fact that the tape recording at issue in that case was not the only evidence against the applicant. However, the Court notes in this regard that the recording in the Schenk case, although not the only evidence, was described by the Criminal Cassation Division of the Vaud Cantonal Court as having 'a perhaps decisive influence, or at the least a not inconsiderable one, on the outcome of the criminal proceedings'. Moreover, this element was not the determinative factor in the Court's conclusion.

38. The central question in the present case is whether the proceedings as a whole were fair. With specific reference to the admission of the contested tape recording, the Court notes that, as in the Schenk case, the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did not challenge its authenticity, but challenged its use at the 'voire dire' and again before the Court of Appeal and the House of Lords. The Court notes that at each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to section 78 of PACE, and the courts discussed, amongst other matters, the non-statutory basis for the surveillance. The fact that the applicant was at each step unsuccessful makes no difference.

39. The Court would add that it is clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it under section 78 of PACE.

40. In these circumstances, the Court finds that the use at the applicant's trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6(1) of the Convention.'

82. Even if obtained in an irregular way the Messages were plainly relevant from the standpoint of the Standards. The Respondents content that there was no right of privacy or confidentiality in the Messages but, even if that contention is incorrect, their use in disciplinary proceedings is not unfair to the Petitioners. The Petitioners are serving, albeit probationary police officers. The content of the Messages is inflammatory and shocking. It us a matter of the utmost public interest and concern that serving police officers would express such views. The Messages are, thus, on any view, relevant material in the pending disciplinary proceedings having regard to the Petitioners' said status as serving officers.

83. In this regard, reference is made to the advice of the Judicial Committee of the Privy Council delivered by Lord Hodge in the case of *Baronetcy of Pringle of Stichill* [2016] SC (PC) 1, para 77 where it was observed:

> *'In Scots law historically, the prevailing view was that in civil cases evidence that was relevant to the issue before the court was admissible even if it had been irregularly obtained (Rattray v Rattray). But that can hardly have been an unqualified rule so as, for example, to permit the admission of evidence obtained by torture. More recently, judges have asserted a discretion to admit or exclude evidence having regard to whether it is fair in the circumstances to admit it (Duke of Argyll v Duchess of Argyll; Martin v McGuiness). In Duke of Argyll v Duchess of Argyll Lord Wheatley assessed the fairness of admitting evidence from the Duchess's diaries which the Duke had stolen from her by breaking into her house. In assessing fairness in all the circumstances Lord Wheatley looked at the nature of the evidence, the purpose for which it would be used in evidence, and the manner in which it had been obtained. He took into account whether the introduction of the evidence was fair to the party from whom it had been illegally obtained and also whether the admission of the evidence would throw light on disputed facts and enable justice to be done.'*

84. Further, the context in which the analysis of admissibility is taking place is that the first, second and sixth petitioners have accepted their behaviour as part of the group(s).

[99] For the foregoing reasons she submitted that I should refuse the petition.

Discussion

Issue 1

[100] The first issue is this: do the messages engage either or both a common law right of privacy and Article 8 of the Convention?

[101] A preliminary question in respect of the first issue is this: does a right to privacy exist in the common law of Scotland?

[102] It is necessary to consider this question in that as argued by Mr Sandison the Supreme Court has in recent cases to which he referred emphasised the importance of relying on common law rights rather than turning immediately to the Convention.

[103] The starting point in consideration of this question is to understand the relationship between the Human Rights Act 1988 and the Convention rights which flow from it and the common law. Lord Reid in *R (Osborn)* v *The Parole Board* in considering this question gave the following guidance at paragraph 57:

> "The importance of the Act (the Human Rights Act) is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based on the judgments of the European Court. Human rights continue to be protected by domestic law, interpreted and developed in accordance with the Act when appropriate."

[104] Accordingly in the present case (a) Article 8 does not supersede a right of privacy in common law, if that right exists and (b) Article 8 and the European *jurisprudence* flowing therefrom can be used to inform and develop the common law in the area of the right to privacy.

[105] Secondly, I believe it is important to ask the question: is there a justification for protection of a right of privacy at common law? Lord Nicholls of Birkenhead in *Campbell* when considering the aspect of invasion of privacy, namely: wrongful disclosure of private information said this:

> "But it (respect for an individual's privacy), too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see La Forest J in *R* v *Dymont* [1988] 2 SCR 417, 426." (para 12).

[106] I would adopt Lord Nicholls' characterisation of the importance of a right of privacy. It is a right which can I think be described as a core value and one which is inherent in a democratic and civilised state.

[107] It seems to flow from the centrality of the role of privacy in a democratic society and particularly in a society where electronic storage of information and electronic means of intrusion into the private lives of a citizen by government, private organisations and individuals are growing exponentially the common law should recognise the right to privacy.

[108] Having made the above observations it has to be recognised as Lord Nicholls does at paragraph 11 in *Campbell*:

> "In this country, unlike the United States of America, there is no over-arching, all-embracing cause of action for 'invasion of privacy': see *Wainwright* v *Home Office* [2004] AC 406."

[109] Thus the question arises: has the common law developed to protect a right of privacy first in England: the answer to that question is clearly yes. Lord Nicholl's in *Campbell* begins his analysis of this by observing that:

> "The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence." (See: paragraph 13).

[110] He then explains how the cause of action, known as breach of confidence has been developed by the English courts in order to protect a right of privacy. He observes at paragraph 14:

> "14. This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No 2*) [1990] 1 AC 109, 281. Now the law imposes a 'duty of confidence' whenever a person received information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of

> confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information."

[111] In the context of whether there is a right to privacy in Scots common law the above analysis of the English position is of assistance. The English courts have developed the cause of action of breach of confidence. In Scotland an action based on breach of confidence is a well understood remedy and the law in that field in Scotland has been explicitly accepted as being the same as in England (see: *Lord Advocate* v *Scotsman Publications* per the speech of Lord Keith of Kinkell at page 164).

[112] The English courts' approach to the development of the common law of privacy in *Campbell* has been to use the values which form the basis of Article 8 rights and to accept that these should be reflected in the common law (see: Lord Nicholls in *Campbell* at paragraph 17).

[113] This approach of developing the common law in light of Convention rights and in particular the development of the common law by seeking to reflect in it the values which underlie the Convention rights would in my view find favour in the Scottish courts.

[114] Accordingly taking as a starting point the cause of action: breach of confidence and applying the above approach to Convention rights to that cause of action I am persuaded that the Scottish courts would reach the same conclusion as the English courts in respect to the issue of existence of a common law right of privacy.

[115] The above analysis tends to support the view that there is a common law right of privacy in Scotland.

[116] In addition I observe that given privacy is a fundamental right I think it highly likely that it exists in the common law of Scotland. Beyond that if it does not exist in Scots

common law a very odd conclusion is reached that Scottish and English law in relation to this fundamental matter are entirely different. I think that is an inherently unlikely result.

[117] Again the above tends to support the view that there is a right of privacy known to the common law of Scotland.

[118] Lastly, and most importantly, I am persuaded that the case law in so far as there is any in Scotland tends to support the existence of such a right.

[119] First, there is the decision of Lord Jauncey in *Henderson*. In this matter Lord Jauncey considered whether the removal of an undergarment against the will of a person lawfully taken into custody was justified. He found it was not justified. For the purposes of the present case it is his observations as to the basis on which he held it to be unjustified that are of importance. He said at page 367H to I as follows:

> "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*."

[120] Lord Jauncey goes on to expand on this analysis at page 368A to B where he observes:

> "I shall therefore sustain Mrs Henderson's first plea-in-law in so far as it relates to wrongful search. As I have concluded that her arrest and detention was neither wrongful nor illegal it will be inappropriate to sustain the whole of the plea and the word 'search' appears to be the most apposite to the interference with her <u>privacy</u> and liberty which I have found to be justified." (Emphasis added).

[121] In the above passage Lord Jauncey explicitly uses the word "privacy" to describe the right of the pursuer which was invaded. Accordingly I think Ms Maguire is wrong in asserting that in this case he does not recognise a right of privacy and that it is only in the headnote of the case (prepared by the editor) that there is reference to the issue of privacy.

In any event it is clear that what Lord Jauncey is considering is privacy in that he held that her being deprived of her liberty, namely: her arrest was lawful.

[122] It is interesting to note that one of the examples of an invasion of privacy given by Lord Nicholls in the *Campbell* case at paragraph 15 is "strip searches" a very similar situation to that considered by Lord Jauncey in the *Henderson* case.

[123] In addition there are the obiter and tentative views expressed by Lord Bonomy in *Martin* v *McGuinness* 2003 SLT 1424 (referred to in Reid) where at para 28 he says this:

> "it does not follow that, because a specific right to privacy has not so far been recognised, such a right does not fall within existing principles of the law. Significantly my attention was not drawn to any case in which it was said in terms that there is no right to privacy."

These observations again tend to support the view that there is a right of privacy in the common law of Scotland. 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.

[124] I therefore consider there is a nascent recognition of a common law right of privacy in the case law.

[125] I also find it noteworthy that there is no case in Scots law to which I was referred or to which Lord Bonomy was referred in *Martin* which either explicitly or implicitly is to the effect that no such right exists in Scots law.

[126] For all of the foregoing reasons I am satisfied that a right of privacy exists in terms of the common law of Scotland.

[127] Turning next to a consideration of Article 8(1) of the Convention it was not a contentious issue that the respondents are a public authority and subject therefore to the provisions of section 6 of the 1998 Act.

[128] The first question in considering this issue is this: what constitutes private life and therefore engages the provisions of Article 8(1)? It is not a matter of dispute that the test is as explained by Lord Toulson in *JR38* at paragraph 88. Thus the question the court must ask is this: in the circumstances was there a legitimate expectation of privacy in relation to the subject matter of the complaint? Or put another way, was there a reasonable expectation of privacy? Thus in the present case the question becomes, was there a legitimate expectation of privacy in respect to the messages?

[129] So far as the scope of the Article 8 protection Lord Toulson at paragraph 86 in *JR38* refers to and adopts the analysis of Laws LJ in *R (Wood)* v *Commissioners of Police of the Metropolis* [2010] 1 WLR 123:

> "20. The phrase 'physical and psychological integrity' of a person (the *Von Hannover* case 40 EHRR 1, para 50; *S* v *United Kingdom* 48 EHRR 50, para 66) is with respect helpful. So is the person's 'physical and social identity': see *S* v *United Kingdom*, para 66 and other references there given. These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual...
> 21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him—should make him—master of all those facts about his own identity, such as is name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the 'zone of interaction' (the *Von Hannover* case 40 EHRR 1, para 50) between himself and others ...
> 22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think that there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's autonomy must (if Article 8 is to be engaged) attain 'a certain level of seriousness'. Secondly, the touchstone for Article 8.1's engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy' (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference

> with personal autonomy. Thirdly, the breadth of Article 8.1 may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to Article 8.2. I shall say a little in turn about these three antidotes to the overblown use of Article 8."

It is noteworthy for the purposes of this case that the scope of Article 8 covers the "zone of interaction" between the individual and others. I consider that it is clear that correspondence between individuals whether by means of paper or electronic communication can form part of the zone of interaction and therefore part of the core right protected by Article 8. As pointed out by Mr Sandison "correspondence" is expressly referred to in Article 8. In respect to the three qualifications to the right listed above by Laws LJ, I observe as follows.

[130] First, there was no dispute in the present case that the alleged interference attained "a certain level of seriousness" and thus to that extent Article 8 would be engaged.

[131] Rather the parties in the present case in the first place join issue in respect to the second of Lord Justice Law's questions, namely: having regard to the whole circumstances was there "a reasonable expectation of privacy"?

[132] There is a helpful analysis as to how that question should be approached at paragraph 88 in *JR38* where Lord Toulson cites with approval the comments of Sir Anthony Clarke MR in *Murray* at paragraphs 35 and 36 who on looking at the question of reasonable expectation of privacy said this:

> "…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."

[133] Sir Anthony Clarke then turns to consider the reason for what he describes as the "touchstone" (the reasonable expectation of privacy test) and he explains:

> "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."

[134] It is clear from the above remarks that the test to be applied by the court is an objective one.

[135] I turn to consider whether in the circumstances of the petitioners they could have had such a reasonable expectation of privacy in respect to the messages.

[136] The messages at the heart of this case were all made by way of a mobile phone app known as "WhatsApp". The first question which arises is this: given the characteristics of "WhatsApp" does a reasonable expectation of privacy arise?

[137] The characteristics of "WhatsApp" insofar as relevant to the issue of legitimate expectation of privacy can I believe be described as follows:

- Communication through WhatsApp can take place between two individual users in a private session or, as part of a group. A group can contain multiple individuals where any messages sent or received to that group can be read by each of the users of it.
- There is an identified known group of members.
- A WhatsApp group will have an administrator of the group.
- The administrator of the group is the only person who can admit others to the group.
- There must always be an administrator for the group.
- If a new member is introduced to a group any existing member is advised of this.

- If a new person is admitted to a group and any existing member does not wish to continue to be a member then he can withdraw from the group.
- A new member of a group cannot see the content of messages exchanged prior to his becoming a member.

I consider it can be taken from the foregoing characteristics that "WhatsApp" can be contrasted with other social media platforms where any member of the public can gain access to the content of the platform and thus messaging is entirely open and public. Rather use of WhatsApp involves messaging within a group where the membership is controlled. I think this can properly be described, as Mr Sandison did, as involving messaging among a closed group of individuals. In addition I am persuaded that Mr Sandison's description that the messages were exchanged within a confidential context is also accurate.

[138] Ms Maguire argued that the characteristics of "WhatsApp" were such that there could be no reasonable expectation of privacy.

[139] She first submitted that as a result of the use of the administrator the membership relinquished control of the group. I do not agree with this. The use of such does not undermine the essential controlled nature of group membership. Importantly if a new member is appointed the existing membership is informed and can decide whether they wish to continue membership.

[140] Ms Maguire next argued that the ability to have "group chats" on WhatsApp undermines the reasonable expectation of privacy. I think this is shown to be wrong by consideration of the following situation: because one has a chat with eight friends in one's house rather than one friend I do not think that it follows that one no longer has a reasonable expectation of privacy. Having a "group chat" within a defined group of persons is I consider no different.

[141] Ms Maguire referred to a number of newspaper Articles involving "WhatsApp" groups or similar groups where a member of the group had reported to university authorities the content of the messaging. The newspaper reports involved four such groups at four different universities. Following on from this whistleblowing there had been disciplinary proceedings against members of the group. As I understood it the reference to these newspaper Articles was to show nobody joining a "WhatsApp" group could have any reasonable expectation of privacy.

[142] I accept that it may happen that a person who joins a WhatsApp group makes public the content of what has been exchanged within the group. However, equally in the example I gave where confidences were exchanged in a house between friends one of those friends may breach the confidence. That does not undermine the individual's reasonable expectation of privacy. The exchanging of any information in a private context always carries with it the risk of breach of the confidence. Thus an individual's reasonable expectation may turn out to have been misplaced. However, it does not follow that the individual did not have a reasonable expectation of privacy.

[143] For the foregoing reason I do not find the reference to these four newspaper stories where there has been the making public of the content of the WhatsApp messaging to be of any assistance in deciding whether in this case the petitioners given the characteristics of "WhatsApp" had a reasonable expectation of privacy. I also observe that there must be many thousands if not millions of "WhatsApp" groups and therefore in my view four cases where someone has decided to report what has been said does not of itself support the view that there could be no reasonable expectation of privacy in such a group.

[144] In addition, Ms Maguire founded upon the decision in the *Leicester Police* case. In this case it was argued that the messages were sent from "personal mobile phones" to "a

closed group of recipients" and thus there was a reasonable expectation of privacy. The panel held that these factors were not determinative and thus made no decision in respect to the question of whether the characteristics of a "WhatsApp" group when taken on their own gave rise to a reasonable expectation of privacy.

[145] In respect to the issue of whether, given the characteristics of "WhatsApp", there was a reasonable expectation of privacy, Ms Maguire also relied on the case of *Garamukanwa*. I am of the view that this case does not support the respondents' position. In proceedings for unfair dismissal brought against the claimant's employer the claimant argued that his human rights in terms of Article 8 had been breached by examination of matters which related to his private life. The circumstances were that:

> "A fake social media account was set up in [the name of a person with whom the claimant had had a relationship], to which the names of approximately 150 colleagues were added, and anonymous emails were sent from various email addresses to members of the employers' management."

[146] It was held that some of these emails were sent by the claimant. It was found that Article 8 was not engaged as he could not have had any reasonable expectation of privacy.

[147] The circumstances in the above case are entirely different from the present case. The claimant intended that the emails he published would find a wide audience. In such circumstances it can clearly be seen why there could be no legitimate expectation of privacy in relation to these communications. Such circumstances are entirely different to the situation of a "WhatsApp" group. This decision in no way advances the respondents' argument.

[148] The respondents' equally relied on the *Teggart* case. This once more does not advance the respondents' position. Again the context of the case was an employment tribunal where various comments were placed by the claimant on a Facebook page. It was

the claimant's position that he had a reasonable expectation of privacy relative to these and these rights had been breached by the use of this information in disciplinary proceedings. The tribunal held at para 17 as follows in relation to this argument:

> "(a) when the claimant produced comments on his Facebook pages, to which members of the public could have access, he abandoned any right to consider his comments as being private and therefore he cannot seek to rely on Article 8 to protect his right to make those comments."

[149] Accordingly it was the fact that "members of the public could have access" which was the critical finding. In the present case the public could not have such access.

[150] In conclusion it appeared to me that having regard only to the characteristics of "WhatsApp" an ordinary member of the public using such could have a reasonable expectation of privacy.

[151] Looking beyond the mere characteristics of "WhatsApp" Mr Sandison sought to persuade me that in considering the issue of the petitioners' reasonable expectation of privacy there was an additional factor to which regard should be had: it could be taken from a reading of the petitioners' affidavits when looked at as a whole that the genesis of the group was during their training as police officers, the members of the group knew each other and had a trust and confidence in each other. Although the test is an objective one these are factors which I believe can be properly considered. The court in considering the issue of reasonable expectation of privacy can have regard to the individuals with whom messages are shared. This I think can be seen from the following scenario: there is a substantial difference in respect to the objective reasonable expectation of privacy where information is being shared with a group of friends and with a group of strangers. It seems to me appropriate to consider that the petitioners did have trust and confidence in other members of the group in respect to the petitioners' reasonable expectation of privacy. It

seems to me that this factor would support a reasonable expectation of privacy on the part of the petitioners.

[152] Moving on from the foregoing factors it is important to observe that it is the whole circumstances of the case that the court must have regard to when considering reasonable expectation of privacy and Ms Maguire's argument went on to contend that in considering this question regard must be had to the nature of the content of the messages; that the petitioners were subject to the Standards; and that the Standards applied both when the petitioners were on and off duty.

[153] A number of arguments in respect to reasonable expectation of privacy were advanced by the respondents arising from the foregoing factors.

[154] First, Ms Maguire placed reliance on part of Lord Justice Toulson's analysis of the approach to be taken when considering the issue of reasonable expectation of privacy in *JR38*, namely: that section between paragraphs 97 and 100, which I have set out in full earlier.

[155] Her argument was this: in the present case there was a clear parallel to the circumstances in *JR38* as explained by Lord Justice Toulson. In development of that she made a short sharp submission that the abhorrent nature of what the police officers were doing and the breach of the Standards by which they require to operate is clearly not an aspect of their lives which they were entitled to keep private.

[156] Accepting for the purposes of the present argument that the nature of what was being said and exchanged among the petitioners could be characterised in this way and breached the Standards, I observe first that there is a substantial difference between the circumstances of the present case and those being considered by Lord Justice Toulson and I am not persuaded that there is a clear parallel between it and the present case. The activity

being considered by Lord Justice Toulson was described in this way: the child was taking part in a "public riot". It was the public nature of the behaviour which was photographed which appears to me to have been the principal factor which was decisive in it being held by Lord Justice Toulson that there was no reasonable expectation of privacy. It was not the nature of the behaviour, namely "a riot" which was the relevant factor but the "public" nature of that riot which was the telling factor. The context of the behaviour upon which he was commenting is thus entirely different from that which is the subject of the present case. What is being dealt with in the present case is messaging in what is, as I have held, essentially a private context. That type of activity it is clear can form part of the zone of interaction which engages Article 8. Whereas a public riot does not form part of the "protected zone of interaction between a person and others" and therefore cannot engage the protection of Article 8.

[157] As I have said Ms Maguire described the content of the messages as being of "an abhorrent nature", accepting that that is the case for the purposes of this argument, it does not, I think, take the communings out of the zone of interaction which is clear from the *Von Hannover* case is a matter which falls within the scope of Article 8. The zone of interaction, I am persuaded, covers messages made in a private context even if they are of an abhorrent nature.

[158] It appears to me as a matter of principle, that as argued by Mr Sandison, if behaviour in a private context which may be regarded by the general public as abhorrent does not engage Article 8 then there is perhaps little point in there being such a right. It is in such a context that the right to privacy may arise most acutely.

[159] I am persuaded that normally the content of behaviour does not sound when consideration is being given to the question of reasonable expectation of privacy. It is not

generally a relevant consideration when deciding whether the reasonable expectation of privacy arises. Lord Nicholls of Birkenhead in *Campbell* considers the proper approach to this question and says this at paragraph 21:

> "Accordingly, 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."

[160] I believe what Lord Nicholls is saying in this passage is reasonably clear: that considerations of the type on which the respondents' seek to found, namely: the nature of the messages do not normally form a part of the consideration at this first stage of deciding whether there is a reasonable expectation of privacy. Such matters normally only arise as a relevant consideration at the second stage where one is considering the issue of justification for the interference and proportionality.

[161] Accordingly, for the above reasons I am not persuaded by this particular argument advanced by Ms Maguire.

[162] The second argument advanced by Ms Maguire in summary was this: that the Standards indicate that there is no privacy right engaged in the circumstances of this case.

[163] This argument, I think, seeks to put forward that as a consequence of their position as police officers who are subject to the Standards the petitioners had no reasonable expectation of privacy when exchanging messages of this type on "WhatsApp".

[164] I consider that the argument comes to this: given the Standards and the regulatory framework to which a police officer is subject then he or she is in a different category from an ordinary member of the public and that because of their position as police officers their reasonable expectation of privacy is different from an ordinary member of the general

public. As I understand it the argument is developed in this way: where the officer's private behaviour can be said to be disconform to the Standards then (because of his position as a police officer) the officer does not have a reasonable expectation of privacy. I consider there is some force in this argument. The starting place in considering this point is what was submitted by Ms Maguire in her note of argument.

> "18. It is a very long established and incontrovertible principle that the public must have confidence in the police service. This is the fundamental requirement of policing by consent. The policing principles as set out in the Police and Fire Reform (Scotland) Act 2012 ('2012 Act') section 32 makes this clear."

The 2014 Regulations and thus the Standards flow from the 2012 Act. In addition explicit regulations have been promulgated restricting the right to privacy of a constable namely Regulation 4 and Schedule 1 of the 2013 Regulations. Thus if in his private life a constable was to act in such a way that it "is likely to interfere with the impartial discharge of his duties or is likely to give rise to the impression amongst members of the public" he has no reasonable expectation of privacy. The officer has accepted by becoming a constable that his right to privacy is limited to the extent as set out in the 2013 Regulations. It is an attribute of constables that they are subject to this limitation in their right to privacy. In addition it is an attribute of a constable that he is subject to the Standards. I think that when analysed 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. To take two examples, a constable who in messages evidenced attitudes showing an inappropriate attitude towards various groups in society that would be likely to give rise in the mind of the public that he could not impartially discharge his duties or where messages showed disclosure of confidential material relative to his policing duties that could equally be held to evidence an inability to impartially discharge his duties.

[165] Accordingly I am persuaded that because of these attributes of a constable the content of the messages can inform the question of whether there was a reasonable expectation of privacy. In the circumstances of this case where the members of the group were not just members of the public but police officers the content is a relevant consideration.

[166] Ms Maguire in her written submissions characterised the content of the messages in this way:

> "It will be seen that it is, on any view, 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."

I believe that is a characterisation which a reasonable person having regard to the content of the messages would be entitled to reach. I conclude that the content of the messages can be regarded as potentially informing the issue of breach of Standards in circumstances calling into question the impartial discharge of the petitioners' duties. The petitioners in these circumstances had no reasonable expectation of privacy. This flows from the attributes which arise as a result of their position as constables.

[167] That the attributes of the petitioners is one of the circumstances the court can have regard in considering the reasonable expectation of privacy is made clear in *JR38* where Lord Toulson at paragraph 88 says this quoting the words of Sir Anthony Clarke MR in the *Murray* case:

> "'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, <u>including the attributes of the claimant</u>, 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." (Emphasis added).

[168] The approach of having regard to the attributes of a constable in considering the question of reasonable expectation of privacy does not mean that a police officer has no

reasonable expectation of privacy at all as argued by Mr Sandison. However, that expectation is limited. The limitation can, I think, be described thus: if their behaviour in private can 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 then they have no reasonable expectation of privacy. The police officer in such a situation is in a different position from an ordinary member of the public because of the attributes I have identified.

[169] In *R (Chief Constable of Cleveland)* v *Police Appeals Tribunal* counsel (Mr Yeo) in addressing the issue of a police officer's reasonable expectation of privacy in terms of Article 8 in his skeleton argument said this:

> "Police officers have some restrictions on their private life. These restrictions are laid down in the Police Regulations 2003. These restrictions have to be balanced against the right to a private life. Therefore, in considering whether a police officer has acted in a way which falls below the Standards while off-duty or otherwise relating to his private life, due regard should be given to that balance and any action should be proportionate taking into account all of the circumstances." (see: para 74).

[170] I would respectfully adopt the succinct statement there put forward. There is a restriction on police officers' private life and therefore their expectation of privacy. That restriction is in respect to the matters identified in the 2013 Regulations and the Standards which the officer has sworn to uphold. It is only in relation to these matters that there is a limitation on the officer's privacy it is not a whole scale intrusion into his private life. Accordingly to achieve the underlying purpose of the Standards, namely: the maintenance of public confidence in the police, police officers have a limitation on their expectation of privacy as above described.

[171] A further argument based on the Standards was advanced by Ms Maguire which reading short is this: 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".

[172] Looked at objectively in considering whether a reasonable person in the position of the petitioners would have had a reasonable expectation of privacy in respect to the exchanging of messages of this type, the duty incumbent on the members of the group which consisted of not just the petitioners but others who were serving officers and thus each subject to the above duty must materially undermine the contention of reasonable expectation of privacy. 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. It is not an answer to this point to say: no member of the group disclosed. The fact is there was a duty to disclose incumbent on many of the members and in looking at the issue of reasonable expectation this is the relevant point.

[173] In conclusion, drawing together all of the various strands of the argument and having regard to all of the circumstances, I conclude that the petitioners had no reasonable expectation of privacy in respect of the messages. In summary that they had no such reasonable expectation of privacy arises from their holding the position of police officers and what flows therefrom as I have explained above. Accordingly no right exists in terms of Article 8 or at common law.

Issue 2

[174] The next issue relates to whether there was a clear and accessible basis regarding the circumstances in which disclosure could take place so as to be in accordance with law.

[175] The argument here in essence turned on this: there was no dispute that the respondents had a right in terms of criminal law to look at the messages. However, it was argued by the petitioners that there was no clear and accessible legal basis for it being passed to the disciplinary branch of Police Scotland.

[176] The test of "in accordance with law" is most clearly set out in *Halford* v *United Kingdom* where the court of Human Rights says this:

> "The expression 'in accordance with the law' not only necessitates compliance with domestic law, but also refers to the quality of that law, requiring it to be compatible with the rule of law. In the context of secret measures of surveillance or interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures."

[177] Putting the foregoing test into language appropriate to the circumstances of the present case: 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.

[178] Thus what the court is looking for is a clear and accessible legal basis for the use of the messages initially legally recovered in terms of the criminal proceedings for a collateral purpose, namely: in respect of disciplinary proceedings.

[179] Ms Maguire's primary response to this matter was to rely on the 2014 Regulations governing the procedure to be followed in the course of the disciplinary proceedings. However, I agree with Mr Sandison that merely looking to the 2014 Regulations does not

give a clear and accessible basis for the disclosure of information obtained in the course of criminal investigations involving one officer for use in disciplinary proceedings involving other officers.

[180] However, in the course of her submissions Ms Maguire referred to *Nakash* v *Metropolitan Police Service and the General Medical Council* which case in turn made reference to and followed *Woolgar* v *Chief Constable of Sussex Police* UKCC 1999 WL 477340, which was described as the leading authority in this area. I believe that a consideration of these two cases gives the clear and accessible basis for the use of material recovered in the above way in the course of disciplinary proceedings.

[181] The background to *Woolgar* was this: The appellant was a state registered nurse. After the death of a patient in her care allegations were made to the police and she was arrested. The evidence found did not meet the level for criminal charges. However, the police reported the matter to the Registration and Inspection Unit of the relevant Health Authority who reported the matter to the UKCC the regulatory body for nurses. The issue which arose was this:

> "… whether, if the regulatory body of the profession to which the suspect belongs is investigating serious allegations and makes a formal request to the police for disclosure of what was said in interview, the public interest in the proper working of the regulatory body is or may be such as to justify disclosure of the material sought." (See: paragraph 6).

[182] Lord Justice Kennedy giving the judgment of the Court of Appeal considered from paragraph 7 a number of authorities concerning the use by the police of information coming into their hands from the public. In the course of considering these various authorities one of the cases which he looked at was *Marcel* v *Commissioner of Police* 1992 2 AER 72. The issue in that case was whether the police were entitled to disclose seized documents to a third

party for use in civil litigation. Dillon LJ at 81 cited with approval what had been said by Sir Nicolas Browne-Wilkinson V-C at first instance, namely:

> "In my judgment, subject to any express statutory provisions and other acts the 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 …. 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 regulatory authorities or to the security services."

[183] The above tentative remarks I believe indicate that there is a legal basis for communication of information recovered by the police in criminal proceedings to bodies such as the one in the present case for the purpose of disciplinary proceedings.

[184] Lord Justice Kennedy also refers to *R* v *Chief Constable of North Wales ex parte AB* 1999 QB 396. The background to this case in short was this: the police informed the owner of a caravan site of the convictions of certain paedophiles. In the Divisional Court Lord Bingham CJ said this at 409H:

> "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 the 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."

Again these remarks suggest that information recovered by the police can be used for a collateral purpose of the type in the present case. Reference is also made by Lord Justice Kennedy to the remarks in the same case of Buxton J at 415B where he says this:

> "… 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."

[185] The Divisional Court's decision was upheld by the Court of Appeal and in giving the judgment of the Court of Appeal Lord Woolf MR commented at 429B as follows:

> "The issue here is not the same as it would be in private law. The fact that convictions of the applicants had been in the public domain did not mean that the police as a public authority were free to publish information about their previous offending absent any public interest in this being done. As Lord Bingham CJ stated, before this happens it must at least be a situation where in all the circumstances it is desirable to make disclosure. Both under the convention and as a matter of English administrative law, the police are entitled to use information when they reasonably conclude that this is what is required (after taking into account the interest of the applicants) in order to protect the public and in particular children."

The above remarks clearly identify the basis upon which such collateral disclosure by the police can be made, namely: where it is in the public interest and in order to protect the public. This I think gives the clear and accessible basis on which such disclosure can take place.

[186] Having considered the various authorities Lord Justice Kennedy at paragraph 9 concluded:

> "… in my judgment, where a regulatory body such as the UKCC, operating in the field of public health and safety, seeks access to confidential information 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. As Mr Horan said in paragraph 14 of his skeleton argument:
> 'A properly and efficiently regulated nursing profession is necessary in the interest of the medical welfare of the country, to keep the public safe, and to protect the rights and freedoms of those vulnerable individuals in need of nursing care. A necessary part of such regulation is the ensuring of the free flow of the best available information to those charged by statute with the responsibility to regulate.'"

[187] Lord Justice Kennedy then sought to put the matter in Convention terms and in doing so adopted a submission made by Lord Lester:

> "… disclosure is 'necessary in a democratic society in the interests of … public safety … or … for the protection of health or morals, or for the protection of the rights and freedoms of others.' 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."

[188] Applying the foregoing analysis to the circumstances of the present case this I consider gives a clear and accessible basis upon which the police could disclose to regulatory bodies information which they recovered in the course of criminal investigations. 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).

[189] Lord Justice Kennedy in addition indicates the safeguards which should be applied by the police in relation to such disclosure:

> "It is, in my judgment desirable that where the police are minded to disclose, they should, as in this case, inform the person affected of what they propose to do in such time as to enable that person, if so advised, to seek assistance from the court."

[190] Accordingly, to return to the question posed by Mr Sandison in the course of his submissions: if a constable had asked a lawyer to advise in respect to the issues raised in this case, then I believe the lawyer could have given advice as to the circumstances in which information recovered in the course of a criminal inquiry, could in accordance with law be disclosed for the purpose of disciplinary proceedings. He could do so by referring to the law as analysed in *Woolgar*.

[191] The decision in *Nakash* followed that in *Woolgar*.

[192] For the above reasons I am satisfied that there is a clear and accessible basis for the disclosure in the circumstances of this case. The present case can clearly be distinguished from the case of *Sciacca* relied on by Mr Sandison. In *Sciacca* it is apparent that there was no such clear and accessible legal basis for the disclosure of the photograph. In *Sciacca* there was no public duty incumbent on the police to disclose the photograph to the press. In the present case there is a public duty which demands the disclosure for the collateral purpose as identified above.

[193] Nor is the disclosure arbitrary in that it is based on a consideration of whether the Disciplinary Body requires to consider such information in order to have a properly and efficiently regulated police force and accordingly to protect the public.

Issue 3

[194] Having looked in terms of Article 8(2) as to whether the exercise of the right was in accordance with the law, in the sense of there being a clear and accessible basis. The next point argued was also in terms of Article 8(2). Mr Sandison contended that the second part of Article 8(2) required that any interference must be:

> "... necessary in a democratic society in the interest of national security, public safety or the economic wellbeing 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."

[195] In short his position was that the interference had not been shown to be necessary in respect of any of these matters.

[196] Ms Maguire made a submission in reply that all of the matters set out in Article 8(2) were engaged, however, she appeared particularly to rely on issues of "public safety" and "prevention of disorder or crime".

[197] I think it is plainly wrong that all of the matters listed in Article 8(2) are engaged. No issue of "national security", or "economic wellbeing of the country", or "the protection of health or morals" are engaged.

[198] The following, however, I think are engaged: first, "public safety". The principle purpose of the police is the protection of the public. Officers behaving in the way set out in these messages may be held to have contravened the Standards. An officer who fails to meet the Standards, for the reasons put forward in the present case on the basis of the messages, can 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 is essential for the purpose of successful policing that the police maintain the confidence of the public. If the public loses confidence in the police in this way then public safety would be put at risk as the police cannot operate efficiently without such public confidence. This fits in with an intervention being necessary for "the prevention of disorder or crime". The police, if the public loses confidence in them, are likely to be less able to prevent disorder or crime.

[199] I observe that certain aspects of the behaviour displayed in the messages shows a mind-set where the public's right to be treated fairly is called into question for example depending on their race, religion or sexuality. Once more an officer who holds these types of views is less likely to have the confidence of the public and the public safety would be put at risk by having an officer of that type for the reasons I have set out.

[200] Thus for the foregoing reasons I believe Article 8(2) is engaged. The next question is the balancing exercise and the issue of proportionality.

[201] The importance of public confidence in the police is clearly considerable. Equally the protection of the public by the police is extremely important. In order to maintain public

confidence and to protect the public it is necessary for the police to be regulated by a proper and efficient disciplinary procedure. I believe that a necessary part of this regulation is the ability for the police where it lawfully obtains information which can inform the proceedings before such a body that the police should be able to disclose it to such a regulatory body as that set up under the 2014 Regulations. The information is being disclosed only to that body and only for a limited purpose. In these circumstances had the petitioners had a legitimate expectation of privacy the foregoing factors would have caused me to consider that the messages could nevertheless be disclosed to the disciplinary body. I believe the disclosure would have been proportionate. The balance I consider is heavily weighted on the side of disclosure. I am unable to identify a less intrusive measure which could have been used without unacceptably comprising the objectives I have identified.

Issue 4

[202] Finally there is the fourth question. I do not require to answer this given my answer to the earlier questions. Had I been with the petitioners in respect to the earlier issues and had to consider this issue: I would have found that nevertheless they were not entitled to interdict. Having regard to all of the circumstances to which I have already referred I would have considered it fair in all the circumstances for the material to be admitted for use in the disciplinary proceedings.

Conclusion

[203] For the foregoing reasons I find in favour of the respondents and refuse the petition.