

## Summary WhatsApp Case

Legal Counsel instructed by the Scottish Police Federation sought a petition for a Judicial Review in a case of alleged misconduct on the part of ten police officers. The officers were in a private chat group on the WhatsApp messaging platform.

The phone of one of the members was seized in an unrelated criminal inquiry. Examination of the phone found no evidence in support of the criminal matter but did find the wholly unrelated private message group. The Police Service of Scotland thereafter sought to rely on the messages to bring gross misconduct proceedings against the officers.

Grounds for Petition were to seek orders that the:

- Decision to bring Misconduct proceedings based on messages exchanged on WhatsApp was unlawful and a breach of Article 8 of the ECHR; and
- Preventing Police Scotland from maintaining Misconduct Proceedings based on the messages exchanged on WhatsApp.

### Relevant Issues

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?

Lord Ballantyne's Opinion provides for a comprehensive summary of the arguments submitted by Craig Sandison QC and Maria McGuire QC on behalf of Police Scotland.

### Decision of Lord Bannatyne

Lord Bannatyne first considered whether the messages exchanged via WhatsApp engaged a common law right of privacy or Article 8 of the ECHR

In doing so, a preliminary consideration was whether a common law right to privacy exists in Scotland. Describing the right to privacy as being a core value, Lord Bannatyne considered whether the common law in England provided for a right to privacy. Lord Bannatyne concluded there was.

Following a brief review of English case law with particular reference to the 'Naomi Campbell' privacy case, Lord Bannatyne concluded that a common law right of privacy does exist in Scotland. A summary of Scottish case law was outlined in support of this conclusion.

Both sides acknowledged that Police Scotland are a public authority therefore they are subject to Section 6 of the Human Rights Act 1998. Applicability of the ECHR flows from the Human Rights Act 1998.

## What constitutes private life?

Lord Bannatyne moved on to consider what is within the scope of private life. In other words, did the officers / Petitioners have a legitimate expectation of privacy when sending the WhatsApp messages?

In considering this point, Lord Bannatyne considered an objective test was the determinant as opposed to the officer's expectations. This decision was made following a review of applicable case law.

A review of the characteristics of the 'WhatsApp' messaging service followed. Lord Bannatyne contrasted WhatsApp with other social media platforms given the number of participants within a particular group is controlled and limited by a group administrator. Police Scotland forwarded an argument that the use of an administrator relinquished control of the group, thereby resulting in no reasonable expectation of privacy. Lord Bannatyne disagreed. The conclusion reached in this regard was that the characteristics of WhatsApp dictate that participants within a group would have a reasonable expectation of privacy.

Craig Sandison QC submitted an additional argument which was considered by Lord Bannatyne. The rationale for creating the WhatsApp was that all participants were training to become police officers, they knew each other and had a trust and confidence in each other. This was a factor deemed to be supportive of a reasonable expectation of privacy on behalf of the officers.

Lord Bannatyne noted that when considering whether a reasonable expectation of privacy exists, the nature of the content of the messages is a relevant factor. Officers were subject to standards with said standard applying both on and off duty. Police Scotland sought to rely on the "abhorrent nature" of the messages as disapplying the applicability of Article 8 of the ECHR. Lord Bannatyne did not agree with this.

Lord Bannatyne considered whether police officers, as a consequence of their position, have no reasonable expectation of privacy when sending messages of this type on "WhatsApp"?

The question was rephrased in the following terms:

*"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."*

Lord Bannatyne considered there was some merit in this argument. When becoming a constable, it is accepted that the right to privacy is limited to the extent as set out within the 2013 Regulations. Following consideration of two hypothetical examples, it was concluded that because of the attributes of a constable the content of the messages can inform the question of whether there was a reasonable expectation of privacy. In formulating the extent of a constable's reasonable expectation of privacy, Lord Bannatyne summarised as below:

*"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."*

It is deemed that 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 an officer has sworn to uphold. Lord Bannatyne noted officers are under a positive obligation under the Standards to:

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

In conclusion, Lord Bannatyne concluded that the officers had no reasonable expectation of privacy in respect of the messages therefore no right exists under both Article 8 of the ECHR and at common law.

### **Whether disclosure of messages could have occurred lawfully?**

It was not disputed that Police Scotland had a right under criminal law to review the messages within the WhatsApp Group. Whether it was lawful for the content of the messages being passed to the Professional Standards Department was disputed. Following a review of authorities, Lord Bannatyne considered 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. Reference was made to there being a public interest in having a properly regulated police force in order to protect the public.

### **Whether Article 8(2) of the ECHR was engaged?**

Article 8(2) of the ECHR requires that any interference into an individual's private life 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."*

Lord Bannatyne considered that "*public safety*" was applicable in this instance. Officers have acted in a manner which may be held to have contravened the 2013 Standards thereby engaging Article 8(2) of the ECHR. In assessing proportionality, the importance of public confidence was an important factor. Given that the content of messages were disclosed for limited purpose, to allow the Professional Standards Department to review whether Misconduct proceedings should be instigated, disclosure was considered proportionate.

### **Conclusion**

Lord Bannatyne found in favour of Police Scotland with the Petition being refused.

### **Next Steps**

The Scottish Police Federation has authorised Counsel to pursue an appeal to the Inner House of the Court of Session and a decision is awaited.

