Neutral Citation Number: [2020] EWHC 2528 (Admin)

Case No: CO/2962/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/09/2020

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

The Queen on the application of II (by his mother and Litigation Friend, NK)	**Claimant**
- and -	
Commissioner of Police of the Metropolis	**Defendant**

- -
- -

Jude Bunting (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Robert Talalay (instructed by **Metropolitan Police Service**) for the **Defendant**

Hearing date: 16 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 24 September 2020 at 10:30

Mrs Justice Steyn :

A. Introduction

1. The Claimant is a 16-year-old boy. In December 2015, when he was 11 years old, an online tutor raised certain concerns about his alleged behaviour with the Department for Education. In accordance with the Prevent Strategy, the matter was referred to the Metropolitan Police. On 20 June 2016, the case was closed by the Defendant's local Prevent panel. The Claimant challenges a decision made by the Defendant on 26 April 2019 to retain the Claimant's personal data, refusing his mother's requests for such material to be deleted.

2. Permission to apply for judicial review was granted by Thornton J on 8 October 2019, and an anonymity order was made, pursuant to which the identity of the Claimant ("II") and his mother ("NK") shall not be disclosed.

3. The challenge pursued by the Claimant is limited to a challenge to the legality of the retention of the Claimant's personal data. The Claimant's original grounds included a wider challenge to the Defendant's policy on the retention of data arising as a result of the Prevent duty, insofar as it relates to children. However, on 9 June 2020, the Claimant withdrew the wider policy challenge. As a result, the College of Policing, which had been joined as an interested party, with a view to addressing the policy challenge, took no further part in the case.

4. The Claimant contends that the retention of his personal data is in breach of Article 8 of the European Convention on Human Rights, the first, third and fifth data protection principles in the Data Protection Act 2018, and the public sector equality duty.

B. Approach to the evidence and ex-post facto reasoning

5. The Claimant submits I should be cautious before accepting witness evidence written 3½ years after the events described which goes beyond - and the Claimant submits cuts against the grain of - what is recorded in contemporaneous documents. There was no disagreement as to the approach, but the Defendant submits the witness evidence goes with the grain of the contemporaneous evidence.

6. The reference to evidence which goes with or against the grain is derived from *Herefordshire Waste Watchers Ltd v Herefordshire Council* [2005] EWHC 1919 (Admin), in which Elias J (as he then was) considered at [45] to [49] whether he could have regard to observations in a witness statement to make good a lack of clarity in the contemporaneous decision-making log. He observed:

> "47. … as the principles enunciated in *Nash* and indeed the decision in *Ermakov* make plain, any supplementary reasons must elucidate or explain and not contradict the written reasons. It will be rare indeed for an inconsistent explanation, given in the course of the judicial review proceedings, to be accepted as the true reason for the decision.
>
> 48 This is in accordance with basic principles of fairness. Plainly the courts must be alive to ensure that there is no

> rewriting of history, even subconsciously. Self deception runs deep in the human psyche; the truth can become refracted, even in the case of honest witnesses, through the prism of self justification. There will be a particular reluctance to permit a defendant to rely on subsequent reasons where they appear to cut against the grain of the original reasons."

7. I have also borne in mind the observations regarding evidence based on recollection made by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15] to [22]. In particular, as Leggatt J observed at [18]:

> "Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time."

8. The parties drew my attention to *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302, *R (Nash) v Chelsea College of Art and Design* [2001] EWHC Admin 538, *Caroopen v Secretary of State for the Home Department* [2017] 1 WLR 2339 and *R (Uber London Ltd) v Transport for London* [2018] EWCA Civ 1213.

9. I note, in particular, that in *Caroopen* at [30] Underhill LJ endorsed Stanley Burnton J's recognition, in *Nash*, that

> "even in a case where there was no explicit statutory duty to give reasons the courts should approach attempts to rely on subsequently-provided reasons with caution; and he said that that was particularly so in the case of reasons put forward after the commencement of proceedings and where important human rights are concerned."

10. Most recently the Court of Appeal addressed the approach to retrospective judgments when assessing proportionality in the *Uber* case at [40] to [42]:

> "*Ex-post facto reasoning*
>
> 40. In determining whether a measure is proportionate, the court may consider information, evidence or other material available at the time it gives its ruling and is not confined to considering the material available when the decision to implement the national measure was taken: *Scotch Whisky Association v Lord Advocate* 2017 SLT 1261 at [65].
>
> 41. However, a public authority should not be afforded the same margin of appreciation in relation to justifications and material supporting them which it did not take into account

when imposing the relevant restriction, and which it only developed in response to litigation. This point was made by the Supreme Court in *Re Brewster* [2017] 1 WLR 519 at [50]:

> "But the margin of discretion may, of course, take on a rather different hue when, as here, it becomes clear that a particular measure is sought to be defended (at least in part) on grounds that were not present to the mind of the decision-maker at the time the decision was taken. In such circumstances, the court's role in conducting a scrupulous examination of the objective justification of the impugned measure becomes more pronounced."

42. The Supreme Court went on to state that, if the justifications were real and within the decision maker's competence, a reviewing court must afford him deference. It continued at [52]:

> "[o]bviously, if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide."

It was then held at [55], for the purpose of that appeal:

> "the test to be applied is that of 'manifestly without reasonable foundation'. Whether the test requires adjustment to cater for the situation where the proffered reasons are the result of deliberation after the decision under challenge has been made may call for future debate. Where the state authorities are seen to be applying 'their direct knowledge of their society and its needs' on an ex post facto basis, a rather more inquiring eye may need to be cast on the soundness of the decision.""

C. <u>The facts</u>

11. On 22 February 2016, the Department for Education's Due Diligence and Counter Extremism Group ("DDCEG") raised a concern with Counter Terrorism Command of the Metropolitan Police (SO15) regarding a "*radicalisation risk to a pupil*" at a school in East London ("the Claimant's former school"). This was a referral pursuant to the Government's "*Prevent Strategy*", the aim of which is to stop people becoming terrorists or supporting terrorism.

12. DDCEG's briefing note stated that a concern had been raised in December 2015 by a tutor ("the source") "*who provides online tutoring to a Year 7 boy called [REDACTED]*[1]". The briefing note continued:

> "She has tutored him for a year and over that time has seen his behaviour change and has highlighted these as a concern:
>
> - Talks about America being evil
> - Obsessed with killing the PM
> - Like [sic] Game of Thrones because of the beheadings
> - Changed his email address to @ISbeards.
>
> He has lost interest in his school work.
>
> The tutor has tried to engage with the boy but he is no [sic] open to alternative views. She has not spoken to the mother (no further details regarding the mother) as she fears that the views come from her (no further context provided to substantiate this claim)."

13. The feedback regarding the Claimant provided to DDCEG by the Claimant's former school (which it was noted had been rated as Outstanding following an Ofsted inspection in June 2015) indicated "*some issues with timekeeping and his behaviour and attention in class, but he is noted as bright. There are no concerns mentioned in relation to extremism*".

14. The Prevent referral was initially allocated to PC Gareth Nash who was located in the London Borough of Newham. On 24 February 2016, he created an "*Intelligence Development Plan*" (known as the "Dev Plan"). The Dev Plan consists of contemporaneous entries by the officers who were involved in this case and it is the primary source of evidence regarding the steps taken in response to the referral and the decision to close the case. From the outset, the risk was assessed as "*low*".

15. PC Nash contacted the Safeguarding Lead at the Claimant's former school. In an email dated 29 February 2016, the Safeguarding Lead informed PC Nash that II had left the school the previous month and transferred to another school ("the Claimant's current school"). The Safeguarding Lead was happy to speak to PC Nash about II, "*although there we[re] no concerns regarding his behaviour from a staff point of view in terms of extremism*". PC Nash noted the response from the Claimant's former school in an entry dated 1 March 2016 on the Dev Plan, recording that "*the school had no behaviour/vulnerability to extremism concerns in relation to the subject*".

16. PC Nash contacted the Claimant's current school on 9 March 2016 and his note records:

> "School have no concerns about student but identified they monitor groups of students on a six weekly basis who may need

[1] The name given by the source did not fully match the Claimant's name. However, she gave NK's (rather than the Claimant's) surname and the Claimant's former school was able to identify II as the pupil in respect of whom the source had raised concerns.

> help/support. Subject is to be added to this and Prevent Officer will be contacted if any Prevent type concerns should arise."

17. On 9 March 2016[2], PC Nash spoke with the source. His note records:

> "The source states that she tutored the subject via skype. The views came from these sessions.
>
> She stated she was ok with the family knowing the referral came from her and the agency she works on behalf of have been made aware of her referral.
>
> The source has not been in contact with the subject but was aware he was about to start at a new school."

18. PC Nash made a witness statement on 11 November 2019. In his statement he refers to the conversation with the online tutor and states:

> "The source appeared genuinely concerned for the welfare of the Claimant and they confirmed that the views they believed the Claimant held came from their conversations with him. There appeared no reason for the information being shared to be in any way other than in the best interest of safeguarding the Claimant."

19. The Claimant submits I should not accept this evidence because (i) it was written 3½ years after the events described, (ii) it goes beyond and against the grain of the contemporaneous evidence, (iii) and it is in remarkably similar terms to the statement of Temporary Detective Superintendent Vicky Washington dated 8 November 2019 and the statement of PC Sangita Patel dated 13 November 2019. Although I accept the need to be cautious about such evidence, in my judgment it does not go against the grain of the contemporaneous evidence. PC Nash did not record whether the source came across as having genuine concerns. However, it is clear from the contemporaneous evidence that the source was a professional who had informed her agency of the concerns she had raised with the Department for Education and she told PC Nash she was content to be identified to the family as the person who had raised a concern. It is likely that if PC Nash had formed the view that she was acting in bad faith, rather than raising genuine concerns, he would have made a note to that effect.

20. As a result of PC Nash's enquiries, he discovered that the Claimant's address was within Waltham Forest, and so ordinarily the case would have been dealt with by Prevent Officers from that area. On 11 March 2016, PC Nash spoke with PC Sangita Patel, a Prevent Engagement Officer based in Waltham Forest. He noted on the Dev Plan:

> "As I have progressed this matter to the point of visiting parents I have agreed that I would be prepared to progress this matter further. I will notify Sgt Pullen and ensure this has his

[2] PC Nash refers in his witness statement to this conversation as having been on 10 March 2016. However, while the relevant entry in the Dev Plan was made on 10 March 2016 (at 08.24.11), it states, "I have spoken with the source of this information on 09/03/2016".

> agreement. Sangita Patel has spoke with the L/A lead at Waltham Forest who is happy for us to progress this matter."

21. PC Nash and PC Patel planned to undertake a joint visit, on 21 March 2016, to the Claimant's home. However, they had to postpone the visit due, PC Patel has explained, to other commitments relating to a heavy workload. The plan to visit the Claimant's home on 21 March 2016 was recorded on the Dev Plan by PC Nash on 18 March 2016. The plan for PC Patel and PC Nash to undertake a joint visit, and the reason for the postponement, is not recorded in the Dev Plan but it is consistent with the contemporaneous evidence.

22. On 24 March 2016, the visit to the Claimant's home, to speak to his mother, was undertaken by PC Trevor Jeffries and PC Baiju Soni, two Newham officers. The reason why they undertook the visit is not explained in the Dev Plan or in PC Nash's statement. PC Jeffries' statement dated 11 November 2019 records that he undertook the home visit at the request of PC Nash. While I do not doubt that is his recollection, or that PC Jeffries was asked by someone to undertake the home visit (and he in turn asked PC Soni to accompany him), his recollection that he was asked by PC Nash is inconsistent with the contemporaneous evidence.

23. In the Dev Plan, PC Nash recorded on 29 March 2016 that the matter had been "*incorrectly managed*" as a Newham case. That is plainly a reference to the visit that had just taken been undertaken by Newham officers. The Dev Plan makes clear that <u>following</u> the visit by PC Jeffries and PC Soni, PC Nash notified PC Patel that it had occurred "*so that consideration for next steps can be taken*". Thereafter, PC Patel sought (unsuccessfully) to arrange to make a home visit herself (as she had originally planned to do with PC Nash).

24. On 24 March 2016, PC Jeffries made the following note of the home visit which he made that day with PC Soni:

> "When we arrived at the home address, we were met by the mother of the subject who was wearing jeans, a top and a coat. The subject's mother appeared shocked to see us however invited us into the address and was polite throughout the meeting. The issues of what [II] had allegedly said were mentioned and it was explained what he was supposed to have said. The mother appeared shocked by this and initially said, when hearing that … 'he thinks America is evil' that it would have been something he has heard from other peers and would not have meant it, however when the further comments were explained, she became upset and stated that they were not correct and that her son would not have said those things, she stated that her son did not dislike the Prime minister, and had recently written (a very well written) letter that he wanted sent to the Prime minister, which spoke of Peace and unity throughout the world, and that this letter was addressed to David Cameron. When it was mentioned that he liked watching 'game of thrones' for the beheading scenes, she immediately pointed out that she did not let him watch a game of Thrones so he wouldn't know anything about the violence in the show. It

> was mentioned that he had apparently changed his Email address to '@isbeards' which she also pointed out is not the case, as she has access to his online accounts and knows that he has not done that. She was then asked about how his school work is going, at which point she pointed out that she had recently been to school where she believes that he has been doing well in education, this would also be evident in the letter that he wrote earlier, whilst still in primary school, it was explained that he is an extremely intelligent young man.
>
> When asked which mosque the subject attends, or any other places where he might have other influences, she stated that the subject does not go to the Mosque, she then went on to explain that they do not go, as she would be separated from him whilst there and he would on his own in the male prayer area's and anybody could speak to him (leading us to believe, she meant that people could approach him with a view to exploiting his vulnerability due to his age). When asked about how they would describe themselves relating to their religion, she described herself as a moderate muslim, stating that she prays and adheres to fasts, but does not go to the mosque and does not think that it over rules everything else, she stated that she does not agree with what is going on in the world at the moment and spoke about human beings and life and how important these are (leading us to believe that she values these). She became quite emotional when speaking to us and does not believe that her son would make any of these comments.
>
> The mother stated that the only male role model that [II] has is his grandfather who they live with. The whole family are very intelligent and university educated … The family appear to be quite genuine and upstanding, the mother herself appears to have a liberal view of her religion."

25. In his witness statement, PC Jeffries stated, and I accept this accurately reflects his view at the time:

> "After the visit and speaking with the mother I did not feel that there were any concerns with the subject or the mother. There was no apparent counter terrorism or violent extremist concerns identified. That said, I did not speak to the Claimant or see his computer or check what the mother had told me."

26. Following the email from PC Nash to PC Patel to which I have referred in paragraph 23 above, on 25 April 2016 PC Patel recorded that the case would be discussed the following day at the Prevent Case Management ("PCM")/Channel meeting. The plan agreed at the PCM meeting was that PC Patel would speak to the source to establish more details about the online tutoring sessions with the subject and then would speak to NK and seek her consent to speak with her son.

27. On 23 May 2016, PC Patel sent the source an email requesting she make contact (having not been able to reach her by telephone). The source telephoned PC Patel and said that the last online tutoring session took place in November 2015 and since then she had had no contact with II. She had taught him for two hours per week. The source said she referred II because she "*was concerned about the comments he made in particular about David Cameron and how angry he became when talking about him*". She again said she was happy for the police to divulge where the information came from.

28. PC Patel did not make a contemporaneous note of her impression of the source. In her witness statement she said:

> "The source came across as professional and there was nothing that concerned me about their motivations for making the referral. The referral appeared to be the source's genuine concerns about the Claimant."

29. The Claimant raised the same objections to this evidence as I have referred to in paragraph 19 above. In my judgment, PC Patel's evidence is consistent with the contemporaneous evidence. The motivation for the referral that the source expressed was not one which would have given rise to any cause for concern and if PC Patel had had any concerns about the source's motivation it is likely she would have noted them. The fact that she wished to pursue the matter further indicates that the source had raised what appeared to PC Patel to be a genuine concern.

30. PC Patel spoke to NK on 28 May 2016 and arranged an appointment to speak with II on 3 June 2016, with a view to undertaking a "vulnerability assessment". However, on 3 June NK cancelled the meeting. NK sent an email to PC Patel the same day, attaching a letter, and asking for a response to all the points raised in the letter. In her letter, NK described the meeting with officers on 24 March 2016, and the answers that she gave to the concerns they raised. She wrote:

> "I was given the indication from the officers that the matter would be closed. However, I was requested by an officer named Sangeeta Patel via a voice mail left on 29 March 2016 to attend another meeting on 3 June 2016 for "a chat". I am not entirely sure why another meeting is necessary.
>
> I would like to engage with this process in an informed manner. However, I have not been provided with any official paperwork or minutes from the meeting we have had pertaining to this. In order to resolve the situation in an amicable manner, I would like you to answer the following questions:
>
> 1. Had the meeting and discussions that have taken place concerning [II] fall within the remit of the Counter-Terrorism and Security Act [2015], in particular the PREVENT duty?
>
> 2. If this is happening under the PREVENT duty, why was this not clarified to me at any stage in the process?

> 3. Which risk factors from the Channel duty guidance have been used to determine the need to apply this process to [II]?
>
> 4. [II] is from a Muslim background. As you are aware, religion is a protected characteristic under the Equality Act. How have you ensured that these characteristics have not been infringed upon in this instance?
>
> 5. Is there a reason why I have not been provided any documentation concerning [II] or minutes from the meeting which we have had?
>
> 6. Can you please provide any documentation pertaining to [II] concerning these matters to me? It would help me understand what has happened throughout this process.
>
> I found the whole proceeding disturbing. ... It is frightening and saddening to me that you are potentially viewing [II] as a possible terrorist in the future.
>
> …
>
> I would hope that you do not speak to my son without my permission pertaining to this matter. Please can all correspondence take place via written means. Please provide a written response within ten days of receipt of this letter. I hope that this matter can be resolved amicably."

31. PC Patel responded by email on 3 June 2016:

> "Thanks very much for your email and letter outlining your concerns. I'd very much like to meet with you (alone) to discuss your concerns, grateful if you can give me a call."

32. The Claimant's mother initially replied on 3 June that she would be in touch in due course. Later the same day she sent a further email to PC Patel in which she said:

> "… I would be most grateful if you could kindly respond to my queries via written means as outlined in my previous email and attached letter. I have done my utmost to engage in this matter and wish to continue to do so with greater clarity and transparency. I do find it a little disconcerting that you wish to meet me alone, rather than follow the norms of due process and transparency. …"

33. On 6 June 2016, PC Patel responded to NK:

> "At your request I will respond to you via email only.
>
> My intentions of meeting you alone were to solely explain my role and clear up any misunderstandings you have about PREVENT/Safeguarding, I preferred to me[et] you in person so

> that you can see how sincere and genuine my intentions are, I do however respect your decision if you preferred not to meet with me. Secondly, I wanted to speak to you about the concerns which have been raised about your son, rest assured I have no other intentions. I do understand it's not a pleasant situation for both you and your son however please understand my priority is solely about safeguarding.
>
> My next step is to speak with the officers who visited you initially and if they're happy with your explanation I will not take any further action and I will close the case."

34. The Claimant's mother also directed the questions in her letter of 3 June 2016 to the Claimant's current school. On 8 June 2016, the Deputy Head sent an email to PC Patel requesting a police response to those questions. PC Patel responded by email on 8 June 2016:

> "I would suggest as you've had no concerns about [II] and had no input into this case prior to speaking with me, you respond to that effect, rather than speaking from a police perspective. It has been clarified I'm not in a position to speak with [II] without his mother's permission. Prevent is voluntary and therefore police do not have the power to speak with him or his mother.
>
> During our telephone conversation earlier you confirmed since 18/01/2016 when [II] started at your school you've had no concerns, my intention therefore is to close this case, I'll confirm this in the next couple of days."

35. It is apparent from the Dev Plan that following her email to NK on 6 June 2016, and as indicated in that email, PC Patel contacted both PC Jeffries and PC Soni. PC Patel noted on the Dev Plan on 10 June 2016:

> "On Wed 08/06/16 at 1335 hours I spoke with Baju SONI at CTIO at KF. Baju was the 2nd officer who attended [II's] H/A with Trevor Jeffries to speak to the subject's mother. To summarise he had no concerns about [II], both officers formed the opinion that the allegations made about her son were malicious and did not actually concern her son."

36. PC Soni did not himself record that he considered the allegations to have been made "*maliciously*". The evidence that he expressed such a view is PC Patel's note of what PC Soni said to her during their telephone conversation on 8 June and PC Patel's witness statement in which she says that during the telephone conversation on 8 June 2016:

> "I recall PC Soni telling me that the time of the visit he had no concerns about NK and both he and PC Jeffries were in agreement, there were no radicalisation/CT concerns evident.

> He stated they believed the allegations made about her son were malicious and did not actually concern her son."

37. In his witness statement dated 11 November 2019, PC Soni has acknowledged that, although he cannot recall the conversation with PC Patel, it is likely that PC Patel's note of it, made two days later, is accurate. While he accepts that in all likelihood he used the word "*malicious*" to describe the allegations, he states:

> "…upon reflection I would not have been in a position to say whether or not there was any basis for this point of view as I did not actually speak to the source or have [/] obtain independent verification."

38. Although it is likely that PC Patel's note of her conversation with PC Soni is accurate, in my judgment it cannot be taken to reflect a considered judgement of the two officers who met the Claimant's mother – but never spoke to the source – that the allegations were made maliciously, given that neither PC Soni nor PC Jeffries ever recorded such a view.

39. It appears from the Dev Plan that following her conversation with PC Soni, PC Patel asked PC Jeffries to "*update*" the Dev Plan "*to explain/clarify*" his "*earlier report and findings*". PC Jeffries' entry on 9 June 2016 states:

> "PC Soni and Myself met with the mother of the subject on the 24th of March, to discuss the allegations made about the subject, and to make an assessment of the mother and home life.
>
> After this meeting we could not see any reason to belief that there was any CT/VE concerns with the subject's mother or home life, the mother was able to produce information that contradicted the allegations. Due to the age of the subject and the close relationship that the mother/family had with the subject it would appear unlikely that the family would not be aware of any CT/VE vulnerabilities displayed by the subject.
>
> I believe that the source should have been recontacted to confirm the allegation and bottom out the concerns, and the school to be contacted to check their concerns for the subject. This already appears to have been done by the Waltham Forest PEO, and the school does not appear to have any concerns for the subject what so ever, due to the fact that no concerns were highlighted during the meeting with the mother, no concerns with the school, and the source has been re-contacted. The findings have been entered by the PEO, Once these have been done and provided there is no other concerns raised I would recommend that this PCM can be closed, pending the Waltham Forest PEO's decision."

40. On 10 June 2016, PC Patel recorded her intention to close the case and the rationale for doing so in the following terms:

> "Given my conversation with the officers at Newham and the Deputy Headteacher at the school my intention is to close this case at the next PCM/Channel meeting on the 20/06/2016, the rationale outlined [is] as follows:
>
> 1. These allegations date back to Nov 2015, there have been no concerns raised by the online tutor or the subjects former and current school since. There is no evidence to support these allegations, they appear to be misinformed.
>
> 2. At the time of conducting the visit to the mothers address in March the KF officers did not have any concerns about [what] the mother told them;
>
> - Her son wrote a letter addressed to David Cameron which he wanted to send, he spoke about Peace and Unity, there was no reference made to killing him.
>
> - There is no evidence that [II] has changed his email address to @ISBeards, his mother has access to his online accounts and would know if he had.
>
> - His mother does not allow him to watch 'Game of Throne', she doesn't know where this information has come from.
>
> - There is no evidence he's lost interest in his school work, his mother visited her son's school recently and this was confirmed to her."

41. In a further entry on 10 June 2016, PC Patel stated that it was clear that NK did not wish to engage with Prevent/Channel. I note that what NK had in fact said was not that she was unwilling to engage in the process but that she wished to engage with the process "in an informed manner". PC Patel noted that once she had confirmation from the panel that the case was closed, she intended to notify NK of the outcome by email.

42. On 20 June 2016, the case was discussed at the PCM meeting and the local Prevent panel agreed the case could now be closed. PC Patel's note of the discussion and the panel's reasons (contained in a 4 July entry on the Dev Plan) states:

> "This case was discussed at the Channel/PCM meeting held on the 20/06/16, the following was put to the panel and agreed this case can now be closed.
>
> These allegations date back to Nov 2015, there have been no concerns raised by the online tutor or the subjects former and current school since. There is no evidence to support these allegations.
>
> On the 24/03/16 Newham Prevent Officers spoke to the subjects mother (the subject was not present) they did not have

> any concerns about her and did not disbelieve what she'd told them.
>
> She told them her son wrote a letter addressed to David Cameron which he wanted to send, he spoke about Peace and Unity, there was no reference made to killing him.
>
> There is no evidence that [II] has changed his email address to @ISBeards, his mother has access to his online accounts and told the officers she will continue to monitor his usage.
>
> [II's] mother does not allow him to watch 'Game of Thrones' she does not know where this information has come from.
>
> There is no evidence [II] has lost interest in his school work, his mother visited her son's school recently and was told he's performing very well.
>
> At the end of May [PC Patel] had a telephone conversation with the subjects mother, she initially agreed to meet with [PC Patel] however changed her mind addressing her concerns in an email. She has also approached [the Claimant's current school] asking why her son had been referred to Prevent, the school were not aware as [the Claimant's former school] did not pass this information on. [PC Patel] has had several emails from [II's] mum, she declined Channel and has requested that officers do not approach/speak with her son.
>
> [REDACTED] - Deputy headteacher confirms since [II] started at the school in Jan 2016 he has no concerns about mum or her son. He has agreed to monitor his behaviour and report any concerns.
>
> The panel agreed as there are no CT concerns and no evidence of radicalisation this case can now be closed and stepped down to Universal Help – RW to liaise with the school and continue to monitor his behaviour.
>
> The panel agreed this case is now closed."

43. On 9 June 2016, PC Patel created an entry for this case on the Channel Management Intelligence System ("CMIS"). Although the case never progressed to being a "Channel" case, PC Patel and Det. Sgt. Deeney have explained that entering it on the CMIS was an administrative requirement. PC Patel recorded the case as closed on CMIS on 20 June 2016. The notes on CMIS stated that "*[n]o concerns or potential concerns were identified (No CT/DE/Safeguarding/Criminal element present)*". PC Patel recorded on CMIS (and also on the PCM tracker) that "*the concerns expressed by the source appear to be a misunderstanding*".

44. On 21 June 2016, NK – who was not aware of PC Patel's decision on 10 June to ask the local Prevent panel to close the case or of the panel's decision the previous day to

do so – sent a response to PC Patel's email of 6 June 2016, expressing concern that she had still received no documentation and no response to the questions raised in her letter of 3 June. NK stated that she was considering seeking legal advice. PC Patel responded in a letter sent by recorded delivery on 27 June 2016, inviting NK to meet to discuss the case. It appears that NK was still not informed that the case had been closed.

45. On 4 July 2016, Det. Sgt. Deeney updated to the Dev Plan to record the case was closed, noting:

> "Closure outcome – No prevent issue to be addressed
> Onward Referral – No onward referral required."

D. Evidence of the impact of retention

46. Det. Sgt. Deeney's evidence is that the Claimant's personal data is held on ten databases:

i) One of these databases, namely the London PCM Excel spreadsheet, is accessible only to Metropolitan Police Service (MPS) Counter Terrorism (CT) officers;

ii) Four databases are accessible (only) to MPS officers, but not limited to CT officers, namely Merlin Report, CRIMINT, DevPlan and the MPS's Computer Aided Despatch System;

iii) One database, the Multi-Agency Safeguarding Hub, is accessible (only) to MPS officers and local authorities;

iv) Three databases are accessible (only) to CT officers (nationally i.e. not limited to MPS officers), namely the Prevent Case Management Tracker application, the National Master PCM Excel spreadsheet and the National Counter Terrorism Policing Headquarters system (NCIA/NSBIS); and

v) The Channel Management Intelligence System, a Home Office database, is accessible to CT officers (nationally), "some Home Office colleagues and 10 local authorities".

47. NK's evidence is that:

> "Whilst I have attempted to shield him from these proceedings, the allegations continue to cast a shadow. [II] is a bright young man, with plans to apply to a top university in the UK and to train to become a medical doctor. But he is afraid that at some point in the future the untrue data may affect any potential police record searches and could give rise to further monitoring of him, and jeopardise his future prospects."

48. In a letter of 19 July 2018, the Defendant stated that there was "no way" that the Claimant's personal data would be shared with "any educational institution or any

prospective employer": see paragraph 54 below. However, the position taken in the Defendant's pleadings and submissions regarding the possibility of disclosure was considerably more nuanced. The Defendant's detailed grounds state that as this is not "conviction data or similar it is not subject to any mandatory disclosure requirements … The police retain their discretion to make onward disclosure of information in their possession, but always within the confines of what is permitted by the 2018 Act and the GDPR". Mr Talalay submitted that there is little prospect of the Claimant's personal data being disclosed to third parties.

49. The Claimant correctly observed in his grounds of claim that "[t]here has been no guarantee that the data will not be disclosed to third parties, and the policy guidance expressly permits such disclosures".

50. Following the hearing, the Claimant drew attention to an article published on *The Guardian* website on 19 July 2020, bearing the headline "Manchester colleges agreed to share data of students referred to counter-terror scheme". The article suggests that Prevent officers from the Greater Manchester Police have entered into a data-sharing agreement with a number of further and higher education colleges in the Greater Manchester area and the Department of Education, with the purpose of informing universities and further education colleges where a new student has been referred to Prevent. The Claimant contends that the existence of such data-sharing arrangements demonstrate that if, for example, he were to apply to and obtain a place at Manchester University to study medicine, the fact of his Prevent referral would be shared with the university. The Defendant has stated that the article did not suggest that the Greater Manchester Police were a party to any such information sharing agreement and that the Defendant does not have a data sharing agreement of that nature in place.

51. If the Court were to uphold the Defendant's decision to retain his personal data following the review triggered by his mother's request, the Defendant would retain his personal data until at least 2022. That is because the six-year retention period begins when the documents in question were made.

E. The decision

52. The decision to retain the Claimant's data which is the subject of this challenge was made by a very senior officer, T/Det. Supt. Washington. In her first statement, dated 8th November 2019, T/Det. Supt. Washington describes her experience in these terms:

> "I have 28 years' of experience in policing, mainly in London across a variety of departments including frontline, neighbourhood, public order policing, serious crime, including child abuse investigations, and running CID and Safeguarding teams. I currently hold the role of Deputy National Co-ordinator for Prevent. My job involves managing Prevent teams to deliver national policy, guidance, strategy, and projects to direct and support the work of a network of 430 Prevent officers nationally. I have held this role since November last year. Previously I was a Detective Chief Inspector in SO15, Metropolitan Police Service Counter Terrorism Command, leading Prevent teams across London."

53. In her first statement, T/Det. Supt. Washington states that "[t]he Commissioner's position in relation to the Claimant's case is set out in letters to the Claimant's solicitors of 19 July 2018, 18 July 2019 and 26 April 2019".

54. In the letter of 19 July 2018, the Defendant stated:

> "5. … we appreciate that your client is concerned that the allegation made by his tutor might have some bearing on his future education and career prospects. We would like to reassure your client that there is no way in which, and no reason for which our client would share any information about this matter with any educational institution or any prospective employer now that it has been closed.
>
> 6. Indeed, we hope that your client can appreciate that our client has taken reasonable and proportionate steps in line with its statutory duties to satisfy itself that no further action has been necessary, and that all such steps have been taken with the primary intention of safeguarding your client from possible harm. Our client's officers are duty bound to take such allegations seriously, and they are always relieved when it is possible to close enquiries at such very early stages. …
>
> 28. We of course appreciate that your client considers the allegation against him to be factually inaccurate, but we doubt that you are seriously making the suggestion that police cannot record the fact of an allegation, and must not process any information about an allegation until the unequivocal truth of it is established. For the avoidance of doubt, the allegation about your client has only ever been treated as an allegation, not proven fact, and it has been processed accordingly. …
>
> Conclusion
>
> 34. To conclude, our client is satisfied that the manner in which it has processed your client's personal data is entirely consistent with its legal obligations. Our client is sympathetic that your client has been the subject of unpleasant allegations by his former tutor, and it recognises that must have been an experience which he would rather had never taken place. However, our client's officers' actions have only ever been carried out with the welfare and safeguarding of your client as the primary motivating factor. Our client is relieved that the allegations proved to be untrue and that it was possible to close the matter so quickly with no further action required. …" (emphasis added)

55. T/Det. Supt. Washington's decision to retain the Claimant's personal data is documented in a letter dated 26 April 2019 from the Defendant's solicitor to the Claimant's solicitor ("the decision letter").

56. The decision letter stated:

> "The data is retained in accordance with Part 3 of the Data Protection [Act] 2018. The comprehensive statutory guidance (pursuant to s.39A of the Police Act 1996) on retention of data in this context is the College of Policing's Authorised Professional Practice on "Management of Police Information: Retention, review and disposal" (the "APP"). The APP provides that, being "Group 4" data, subject to earlier deletion following a "triggered" review, the information should be retained for a minimum of 6 years. Such a period, in the context of matters pertaining to your client as a potential child victim of crime, is plainly not disproportionate.
>
> My client has a duty under the Prevent Strategy arising out of s.26 Counter-Terrorism and Security Act 2005, requiring her to "have due regard to the need to prevent people from being drawn into terrorism". Given that the underlying Prevent Strategy is to stop individuals from becoming radicalised, data obtained from referrals has to be retained for a reasonable period of time so that the relevant authorities are able to spot patterns of behaviour which may give rise to concern. Pursuant to §3.29 and §9.1 of the Prevent Strategy 2011 and §§137-8 of the Prevent Strategy Guidance 2015, the police are considered primary data holders and radicalisation is considered to be a process that occurs over time. Accordingly, and where there is plainly a legitimate aim in retaining data for the purpose of preventing terrorist activity, we consider that retention for the time periods countenanced by the APP is proportionate.
>
> The retention of your client's data is in accordance with the above legal framework. The purpose for retaining the data is to enable my client to discharge her duties arising out of the Prevent Strategy. It is manifestly necessary for the police to retain, under conditions of confidence, records of this type. The retention does not have a practical impact on your client, but it does enable my client to carry out important counter-terrorism functions and to safeguard children.
>
> Your client was 11 at the time of the referral in 2015, and it has been just over 3 years since the referral was made. It is therefore necessary to retain the data given that your client is still in his formative years, and therefore more vulnerable than (for example) an adult. In this regard, your client should have solace in the fact that he is not considered to be an offender, and in fact the referral is treated as a safeguarding issue by my client. Accordingly, it is necessary to retain the data to enable my client to discharge her duty to safeguard your client.
>
> The retention has no practical impact on your client and the concerns you raise simply do not apply. In the event that the

> data is still retained at the relevant time, this would have no effect on his ability to apply to university.
>
> …
>
> **Triggered Review**
>
> Notwithstanding the retention framework sets out a retention period of 6 years, I have taken instructions from my client as to whether she would be minded to delete the data presently. For the reasons set out above, she concluded that it was still necessary and proportionate to retain the data." (emphasis added)

57. In her second statement, T/Det. Supt. Washington has confirmed that she provided the instructions referred to in the decision letter.

58. In her first statement, T/Det. Supt. Washington reiterates, as explained in the decision letter, that the applicable retention period is set by the College of Policing's Authorised Professional Practice, *Information Management: Management of Police Information* ("MOPI"). Data falls within one of four data "Groups". The retention review and disposal ("RRD") schedules specify the retention periods applicable to each Group. The longest retention period applies to Group 1 data and the shortest to Group 4 data. Group 4 captures miscellaneous data, on "undetected crime, intelligence products, missing persons, victims and witnesses". T/Det. Supt. Washington states:

> "In the case of the Claimant, the data is treated as Group 4 "intelligence product" information, with a minimum retention period of 6 years."

59. T/Det. Supt. Washington further explains:

> "Key purposes of Prevent are to identify and address a subject's vulnerability to being drawn into terrorism or extremism. As set out in the Prevent Guidance, radicalisation is a *process, not an event*, and it follows that it is incumbent on all public authorities with responsibilities under Prevent to consider radicalisation *over time*. This will not be possible if police prematurely delete records referrals on the basis that there does not appear to be a concern at that time. The MOPI RRD Schedules provide reasonable initial retention periods so that police and partners can spot patterns of concerning behaviour and carry out meaningful risk assessments on a subject's vulnerability.
> …
>
> There are many things that people do or say that are not, in isolation, clear indicators of vulnerability to terrorism or extremism. It is the combination of relevant incidents or events, when taken together in context, which create concern. The

> retention of historic records of referrals and the police's actions in relation to them in conjunction with information from partners is what enables us to build up an accurate picture over time. This is even in the case where a subject may not initially meet a threshold for formal intervention (for example through multi-agency work). If this data were deleted too soon following closure of the case, then opportunities for intervention would be missed, and the police would be incapable of properly assessing the subject's vulnerability."

60. T/Det. Supt. Washington has given three anonymised examples, referred to as Case Studies 1-3, which she says "illustrate how a single referral which seems innocuous can actually be very significant" and which she contends demonstrate that the retention periods specified in MOPI are "carefully thought out and strike the correct balance between the rights of a subject and the need to retain the data for a reasonable period of time to safeguard the subject and/or protect the public".

61. In her first witness statement, T/Det. Supt. Washington explains that in her professional opinion it is necessary and proportionate to retain the Claimant's data and gives the following reasons:

> "I considered what conclusions may be drawn on the basis of the information that was available at the time of the closure of the case, and now. On the one hand, the referral appears to result from the source's genuine concern for the Claimant. On the other hand, the Claimant's mother does not believe that her son could be vulnerable. This is not uncommon…
>
> In the Claimant's matter, the case holder conducted her enquiries to the point where she could not take them further and then closed the case. The Claimant was (and is still) young, and it is precisely during a subject's developmental years that they are most vulnerable to radicalisation. … Even if the information (in isolation) appeared to be entirely unfounded at the time, it is with a reasonable retention period that the concerns can prove to be important parts of the puzzle.
>
> The retention of the data itself will have minimal impact on the Claimant, and certainly not to the extent alleged in the claim form. Notwithstanding the use of the 3Ms ["Malicious, Misguided or Misinformed"] in the closing rationale, it appears that the source raised genuine concerns for the Claimant, which relate to ideology. I also considered the use of the word "malicious" in the Dev plan's case log. Neither of the visiting officers spoke with the original source or conducted further enquiries and so it would be impossible (on the information available) to conclude that malice was a motive for the referral. Moreover, the two officers who did speak with the source considered their concerns to be genuine. The fact that the source did not appear to have a motive for maliciously making the report was a relevant consideration in the decision to retain

> the Claimant's data. The source went to the trouble of referring their concerns, which from my experience of Prevent, sources of this type do not undertake lightly. The Claimant's Prevent case relied on willing participation. … The case officer therefore got to a point where she could no longer gather information and had to assess the risks posed to the Claimant on the basis of the information that had been gathered up to that point. There was no evidence that the referral had been malicious, and the Claimant's mother had denied that the concerns raised had occurred. The Prevent matter therefore had to be closed. As to the retention of the data, the impact on the Claimant's privacy rights is proportionate given the need to ensure that he is safeguarded.
>
> As I have explained above, it is often a patchwork of information gathered over time which allows for a complete assessment of risks and safeguarding needs. The content of the information held in relation to the Claimant gives rise to safeguarding concerns, which necessitates the retention of the data. As applied in this case, the purpose of retaining this information is to protect the Claimant from the harm of radicalisation. …
>
> … It is the combination of relevant incidents or events, when taken together, that create concern. The retention of historic records of referrals and our actions, even where an individual concern does not meet a threshold for formal intervention initially (e.g. through multi-agency work), is what enables us to build up a picture over time. This is a key element in our ability to properly assess vulnerability and identify risk. Given the Claimant's young age and the fact that only three and a half yours have elapsed since his case was closed, it is necessary and proportionate to retain the data in line with MOPI." (emphasis added)

F. Article 8 ECHR: proportionality

62. Both parties focused their submissions on the question whether the decision to retain the Claimant's personal data is a proportionate interference with his rights under Article 8 of the ECHR.

63. It was common ground that:

    i) The retention by the Defendant of the Claimant's personal data constitutes an interference with his private life which engages his right under Article 8(1).

    ii) The retention of the Claimant's personal data has a legitimate aim, namely the prevention of radicalisation and terrorism, and it is "in accordance with the law" for the purposes of Article 8(2).

iii) The assessment of proportionality is a matter for the Court, giving appropriate weight to the views of those with particular expertise in the relevant field.

iv) The Court must assess the proportionality of continuing, presently, to retain the Claimant's personal data, rather than the proportionality of doing so when the decision was taken more than 16 months ago.

64. Both parties drew attention to, and I have applied, the approach taken by the Supreme Court in assessing the proportionality of decisions by the police to retain personal data in *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* and *R (T) v Commissioner of Police of the Metropolis* [2015] AC 1065.

65. The Claimant submits that the case was closed because it was concluded there were no grounds for concern. As the Defendant stated in the letter of 19 July 2018 (see paragraph 54 above), the allegations "proved to be untrue". The Claimant contends that description is consistent with the contemporaneous evidence; and notes the Defendant did not seek to depart from it in pre-action correspondence or the summary grounds of defence. It was only when the Defendant's detailed grounds and evidence were served that the Defendant sought to suggest that there were – and remain – valid concerns, albeit the allegations were not substantiated.

66. The Defendant contends that the statement that the allegations proved to be untrue was a "throwaway line", written in an attempt to mollify the Claimant's mother, and that the Court should focus on the picture that emerges from the evidence rather than a single line in a lawyer's letter. The Defendant also contends that PC Patel's conclusion, when closing the case, that the source's concerns were "misinformed" meant that they were unsubstantiated rather than untrue. The Defendant's evidence explains that, at the time, officers were required to use one of the "3Ms" (malicious, misguided, or misinformed) to close cases even if none of those terms was particularly fitting to describe the reasons.

67. In my judgment, it is clear from the contemporaneous evidence that the case was closed because the officers involved concluded that there was no cause for concern that II was at risk of being radicalised. PC Patel described the source's concerns as "misinformed" (paragraph 40 above) and based on a "misunderstanding" (paragraph 43 above). These descriptions were given in the context of narrative explanations of the reasons for closing the case, not in response to a drop-down menu requiring one of the 3Ms to be ticked as that stage of the process had not been reached. The term "misunderstanding" was not one of the 3Ms. I accept that PC Patel may have more readily reached for the term "misinformed" than she might otherwise have done if it had not been one of the 3Ms, but on the face of the contemporaneous evidence it was a substantially accurate description of the conclusions she reached.

68. First, the source expressed a fear, in effect, that II was being radicalised by his mother. No basis for that fear was provided. This is an allegation that the officers dealing with the matter in 2016 clearly found proved to be untrue and misinformed, not merely unsubstantiated: see paragraphs 24-25, 36, 39-40, 43 and 45 above.

69. Secondly, the source expressed concern that II had lost interest in his schoolwork. This, too, proved to be untrue, not merely unsubstantiated. Principally, it proved to be untrue because II's former school and his current school had no such concerns. In

addition, it was clear that his family valued education highly and his mother would have been concerned if her 11-year-old son had lost interest in his schoolwork. Consistently with the reports from school, NK said he was doing well at school and showed the officers an example of his work (namely a letter he had written to the Prime Minister) which they described as "very well written" (see paragraph 24 above). This does not mean the source had no genuine concern. She may have had reason to believe that II had, by November 2015 when the tutorials ceased, been showing less interest in her online tutorials. But the source had no broader information and the information from both schools and NK proved that he had not lost interest in his schoolwork.

70. Thirdly, the source stated that II had changed his email address to "@ISbeards". Mr Bunting pointed out that "@ISbeards" would not be a valid email address. That is, of course, correct but the source may have meant that II had changed his email address to include "@ISbeards" within it. Nevertheless, the contemporaneous evidence shows that it was found that this allegation was misinformed. The Claimant's mother informed the officers (and reiterated in her letter of 3 June 2016) that she had access to and monitored her 11 year old son's email account, receiving notifications in respect of it on her primary email account, and so she knew that he had not changed his email address. This was not an example of a mother simply disbelieving that her son could be vulnerable to radicalisation. NK gave a clear and cogent explanation as to how she knew that II had not changed his email address and, in circumstances where there was no evidence that he had changed his email address, the officers accepted NK's account.

71. Fourthly, the contemporaneous evidence demonstrates that the allegation that II was "obsessed with killing the PM" was found to be misinformed. I have accepted that the officer with responsibility for closing the case, PC Patel, did not conclude that the source raised her concerns maliciously or in bad faith. It was not proven that II said to the source that he wanted to kill the Prime Minister (or words to that effect), but it is possible he may have done so. However, even if he did, there was also clear evidence that he was not "obsessed" in the way suggested and he was not being, or at risk of being, radicalised. The letter that II had written to the Prime Minister did not prove that he never said to the source he wanted to kill the Prime Minister, but it showed that (even at the age of 11) II understood – and was being brought up to appreciate – both the value of human life and that there were lawful and democratic means by which he could protest or express his political views. Further, the lack of any concern on the part of his former or current school, and the fact that he continued to be interested in his schoolwork and doing well, contradicted the suggestion that he was preoccupied and fixated with the idea of killing the Prime Minister.

72. Fifthly, it follows from fact that PC Patel did not conclude that the source raised her concerns maliciously that the allegation that II "talk[ed] about America being evil" was not proved to be untrue and so may be more accurately described as unsubstantiated. Similarly, although NK's evidence that she did not allow her son to watch Game of Thrones was accepted, it was not proved that he never said to the source he "like[d] Game of Thrones because of the beheadings". The converse was not proved either, but it is possible that he could have said such words even if he had never seen the programme, or conceivably having seen clips (e.g. with friends) without his mother being aware of it.

73. The conclusion that II was not being radicalised, or vulnerable to radicalisation, did not mean that his personal data should have been deleted when the case closed. The nature of the concerns raised was such that it was proper to retain the Claimant's personal data for a reasonable period. The question is whether continued retention is now disproportionate.

74. Whilst is a matter for the Court whether continued retention is justified, significant weight should be given to expert and experienced counter-terrorism officers in the assessment of risk, particularly in the context of as important a duty as preventing home grown terrorism. I accept the evidence of T/Det. Sup. Washington regarding the importance of being able to build up a picture over time. Radicalisation is a process, not an event and so it has to be considered over time. Intelligence and information held by the police (or indeed the security services) is often fragmentary, contradictory and difficult to interpret. It is rare that a snapshot of information taken at one moment in time provides the complete picture.

75. Nevertheless, I have concluded that continued retention of the Claimant's personal data would be disproportionate and unjustified:

    i) Although each of the matters raised by the source was not proved to be untrue, some aspects were proved to be untrue and the case was closed on its merits because it was assessed that there was no cause for concern that the Claimant was being radicalised or was vulnerable to radicalisation. There were sound reasons for reaching that conclusion at the time.

    ii) The source had no contact with the Claimant after November 2015, so the concerns she raised stem from that date, at the latest, when the Claimant was only 11 years old. The Claimant is now 16 years old. Four years and 10 months have passed without any further concern being raised that the Claimant is vulnerable to radicalisation. Notably, that is so in circumstances where his school stated that they intended to monitor his behaviour and would raise any relevant concerns with the Prevent officer. I also note that when the decision letter was sent the Claimant was 14 years old. A further 17 months have passed since T/Det. Sup. Washington made the decision to continue to retain the Claimant's personal data.

    iii) The Defendant has reviewed its records with a view to demonstrating the importance of keeping data following a referral, even if it seems innocuous at the time, and T/Det. Sup. Washington has exhibited three anonymised examples as case studies. It can be inferred that these are the best examples the Defendant could find. In none of the three case studies was there a gap between the initial referral and the subsequent referral approaching the length of time that has passed in this case. In case study one, the second referral was made 2 ½ years after the first; in case study two, the second referral was made 1 year 2 months after the first; and in case study three the second referral was less then 3 years after the first. Moreover, only the initial closure of case study two appears to have been on the basis (as in this case) that there were no counter-terrorism concerns.

    iv) The Defendant contends that the starting point, in accordance with the national policy, is that data of this nature should not be deleted earlier than 6 years. In

> accordance with the policy that is the ordinary period for which data in this category will be retained before being considered for deletion. However, when defending the necessity and proportionality of applying a six-year retention period to the personal data of children, the Defendant asserted in the detailed grounds, correctly, that "the policy framework does not mandate a minimum period of retention – there is a right of review of the necessity for retention, which the Claimant exercised (unsuccessfully) in this case. If retention is no longer required for a policing purpose then the information falls to be deleted on either a triggered or rolling review".

76. The length of proportionate retention is a fact-specific question. In my judgment, on the facts of this case, no policing purpose for continuing to hold the Claimant's personal data has been demonstrated.

77. I also consider that the Defendant has underestimated the impact of the interference with the Claimant's privacy rights entailed in retaining data about his alleged views and statements when he was 11 years old. I accept Mr Talalay's submission that continued retention of the Claimant's personal data is a lesser interference than disclosure of that personal data to third parties. Nevertheless, retention alone means that the data can be accessed by MPS officers, counter-terrorism officers nationally, local authorities and Home Office colleagues, across 10 databases.

78. In addition, as long as the Claimant's personal data is retained, he will continue to fear that it may be disclosed to third parties, particularly universities to which he may apply or from which he may receive offers. In *"The Widening Gyre: Counter-terrorism, Human Rights and the Rule of Law"* (2008) CLJ, 67(1), 69-91, Arthur Chaskalson (former Chief Justice of South Africa) said at 86, in a passage noted with approval by Lord Bingham in *Secretary of State for the Home Department v MB* [2008] 1 AC 440 at [23], that the "consequences of being tagged as a supporter of terrorism" could be "devastating for individuals and their families". There is no guarantee that the Claimant's personal data will not be disclosed to third parties. There may be, as Mr Talalay submitted, "little prospect" in this case of disclosure, but it cannot be described as a fanciful prospect. Retaining the Claimant's personal data engenders fear in a 16-year-old boy that he may be tagged (wrongly) as a supporter of terrorism.

79. My conclusion is, therefore, that continued retention of the Claimant's personal data would be a disproportionate interference with his right to private life and so would breach Article 8 of the ECHR.

G. Data Protection Act 2018

80. Part 3 of the Data Protection Act 2018 ("the DPA"), which transposed into domestic law the Law Enforcement Directive, applies to the processing of the Claimant's personal data. The Claimant contends that retaining his personal data breaches the first, third and fifth data protection principles. In the context of law enforcement processing, those principles are contained in ss.35, 37 and 39 of the DPA.

81. Section 35 of the DPA provides:

> "(1) The first data protection principle is that the processing of personal data for any of the law enforcement purposes must be lawful and fair.
>
> (2) The processing of personal data for any of the law enforcement purposes is lawful only if and to the extent that it is based on law and either –
>
> (a) the data subject has given consent to the processing for that purpose, or
>
> (b) the processing is necessary for the performance of a task carried out for that purpose by a competent authority.
>
> (3) In addition, where the processing for any of the law enforcement purposes is sensitive processing, the processing is permitted only in the two cases set out in subsections (4) and (5).
>
> …
>
> (5) The second case is where –
>
> (a) the processing is strictly necessary for the law enforcement purpose,
>
> (b) the processing meets at least one of the conditions in Schedule 8, and
>
> (c) at the time when the processing is carried out, the controller has an appropriate policy document in place.
>
> …
>
> (8) In this section, "sensitive processing" means –
>
> (a) the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership; …" (emphasis added)

82. Section 37 provides:

> "The third data protection principle is that personal data processed for any of the law enforcement purposes must be adequate, relevant and not excessive in relation to the purpose for which it is processed."

83. Section 39 provides:

> "(1) The fifth data protection principle is that personal data processed for any of the law enforcement purposes must be

> kept for no longer than is necessary for the purpose for which it is processed.
>
> (2) Appropriate time limits must be established for the periodic review of the need for the continued storage of personal data for any of the law enforcement purposes."

84. Paragraph 1 of Schedule 8 to the DPA provides:

> "This condition is met if the processing –
>
> (a) is necessary for the exercise of a function conferred on a person by an enactment or rule of law, and
>
> (b) is necessary for reasons of substantial public interest."

85. The parties dealt relatively briefly with the DPA. It was common ground that the outcome of the proportionality assessment under Article 8 of the ECHR should provide the answer to whether continued retention is "necessary" within the meaning of s.35(2)(b) and s.39(1). For the reasons I have given, continued retention of the Claimant's personal data is disproportionate, is not "necessary" and so it would breach the first and fifth data protection principles. It is unnecessary to consider whether it would also breach the third data protection principle.

86. Mr Bunting contended that the retention of Claimant's personal data would also involve, at least to an extent, "sensitive processing" because the data records the Claimant's alleged political opinions. Mr Talalay contended that the "sensitive processing" provisions do not apply in circumstances where the Claimant's position is that he did not say what is alleged and those statements do not represent his political opinions.

87. In my judgment, it is clear that some of the Claimant's personal data is sensitive. The statements that he had changed his email address to "@ISbeards" and wished to kill the (then) Prime Minister were political, indicating support for Islamic State and opposition to the Prime Minister. It is no answer that they were not the Claimant's political opinions. Just as data concerning a person's sexual orientation is "sensitive" even if it is inaccurate, so too, data recording, for example, that a person has a particular faith or voted for a particular political party is sensitive even if it is incorrect.

88. The material held by the Defendant also reveals the Claimant's religion and so for that reason, too, retention amounts to sensitive processing. As I have found that continued retention is not necessary, it follows, a fortiori, that it is not "strictly necessary" and so would be in breach of the first data protection principle. Given my conclusion that continued retention is not strictly necessary, and having heard little argument regarding the other criteria, it is not necessary to determine whether the conditions in s.35(5)(b) and (c) were met.

H. Public sector equality duty

89. Section 149 of the Equality Act 2010 provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> …
>
> (7) The relevant protected characteristics are—
>
> age; …"

90. There was no dispute as to the law. The public sector equality duty ("the PSED") is to have due regard to the need to achieve the identified goals, not to achieve a result: *R (Baker) v Secretary of State for Communities and Local Government* [2008] LGR 239 at [31], Dyson LJ. The Defendant had to fulfil the duty before and at the time of making the decision to retain the Claimant's personal data. The question whether the decision-maker has had due regard to the relevant statutory need is one of substance not form. The failure to refer expressly to the statute does not of itself show that the duty has not been performed, but equally the duty is not fulfilled by use of a mantra referring to the statutory provision or ticking boxes. See *Baker* at [36]-[37] and *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 at [92], Aikens LJ.

91. Mr Bunting submitted that retention of data relating to children, particularly a record generated by concerns about extremism, is likely to have a greater detrimental impact on a child during his formative years than holding a similar record in respect of an adult. He submitted that there is no evidence that the Defendant undertook any assessment of the Claimant's needs as a child, still less any analysis of what steps needed to be put in place in order to meet those needs.

92. In my judgment, there is no merit in this ground. The Claimant's age, both at the time of the referral and at the time of the decision, and the fact that he was still in his formative years and so more vulnerable than an adult, was at the forefront of the Defendant's reasoning in the decision letter. The Defendant had due regard to his needs as a child, taking the view that it was in his interests to retain the data with a view to safeguarding him from radicalisation. The Defendant's decision did not breach the PSED.

I. Conclusion

93. The continued retention of the Claimant's personal data is in breach of Article 8 of the ECHR and ss.35 and 39 of the DPA. The Defendant's decision did not breach s.149 of the Equality Act 2010.