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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MATTHEW DOWD FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE POLICE SERVICE OF NORTHERN IRELAND

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Donal Sayers KC and Mark Bassett (instructed by Owen Beattie & Co, Solicitors) for the applicant
Paul McLaughlin KC and Philip Henry (instructed by the Crown Solicitor's Office) for the Respondent

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SCOFFIELD J

Introduction

[1] At the time of the commencement of these proceedings, the applicant was a remand prisoner awaiting trial. The application relates to events which occurred on 16 January 2020. On that date, the applicant was arrested and detained for a period in Musgrave Police Station. The issue in this case is the legality of his having been recorded by closed circuit television (CCTV) with audio capability in the police station on that date. The applicant wishes to challenge the practice or policy on behalf of the Police Service of Northern Ireland (PSNI) whereby it permits or undertakes the CCTV recording of the words or conversations of those present in certain areas of police stations, in this case the custody suite. The core issue in the case is whether there is an adequate legal basis for such recording.

[2] After these proceedings were issued, in October 2020, the PSNI published a new Review, Retention and Disposal (RRD) Schedule. The applicant acknowledges that this policy document, together with the Data Protection Act 2018, provides a lawful and proportionate system of retention of data – in the event that there is a power to *capture* the relevant data – which is consistent with the principles of legality

upon which he relies. The issue in this case therefore is a narrow, albeit important, one: was there an adequate legal basis for the PSNI to capture data in relation to what the applicant said in the custody suite?

[3] Leave to apply for judicial review was granted by Treacy LJ. Mr Sayers KC appeared with Mr Bassett for the applicant; and Mr McLaughlin KC appeared with Mr Henry for the respondent. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[4] There is no material dispute between the parties with regard to the relevant facts. The applicant was initially arrested on 16 October 2019 on suspicion of burglary. He was bailed to return on 20 January 2020. However, the applicant was then arrested again by police at 1:10am on 16 January 2020 on suspicion of attempted murder arising out of a serious stabbing incident. He was arrested shortly after the incident and placed in a forensic suit to preserve his clothing. He was conveyed by police to Musgrave PSNI Station which, since its renovation a number of years ago, houses the primary custody suite in Belfast.

[5] The applicant was accepted into custody on suspicion of attempted murder, possession of controlled drugs and possession of a bladed weapon in public. The custody record notes his having disclosed to the custody sergeant that he suffered from a range of conditions including bipolar disorder, mixed personality disorder and PTSD. He indicated that he had taken a range of prescription medication and illegal drugs, as well as a significant amount of alcohol. He appeared intoxicated and was expressing suicidal intentions. It was determined that he required to be examined by a healthcare professional. At 3:18am he was assessed by a medical practitioner to be fit to be detained but not fit for interview. Later in the course of the morning, the applicant was assessed as not being fit for interview until 2:00pm that day.

[6] In the meantime, around 2:20am, the incident occurred which has given rise to the issue in these proceedings. The custody record contains entries in relation to two unsolicited remarks made by the applicant. At 2:31am, the applicant is recorded as having said, "That fella stabbed me twice last year." Then, at 2:54am there is an entry relating back to 2:20am. It is noted that: "at 2:20 hours while in the toilet next to the search room the [detained person] made the following comment: 'If that cunt's not dead I'll kill him stone dead.'" This comment was noted to have been said in the presence of two civilian custody detention officers, who were escorting the applicant to the toilet. It is recorded in the custody record as direct speech; and appears to have been recorded by one detention officer (who is identified by number in the custody record), with it being noted that another officer, similarly identified, was also present.

[7] The comment was reported to the investigating police officers. On the same day, an officer made a formal request to access the relevant CCTV footage. That request was granted, and it was revealed that the comment had been captured by the

audio component of the CCTV system. A further request was then made for a copy of the recording. This evidence was included in the file which was later sent to the Public Prosecution Service (PPS), which in turn included it within the depositions in the applicant's criminal case. Both detention officers who heard the comment also provided statements to this effect. In the meantime, the applicant was interviewed under caution on the evening of 16 January 2020. Amongst other things, the comments made by him whilst in custody were put to him in interview. He was also informed that the police were in possession of CCTV footage which included audio recording.

[8] The applicant was later charged with attempted murder; possession of a Class C controlled drug; possession of a bladed article in a public place; and making threats to kill. In due course he pleaded guilty to causing grievous bodily harm with intent, to the offence of possession of a bladed article and to making threats to kill. The attempted murder count was left on the books. No application was made to exclude the evidence obtained from the CCTV and audio recording system; and it formed part of the evidence against the applicant in relation to the threat to kill charge. In due course, the applicant was sentenced to an extended custodial sentence of eight years' imprisonment.

[9] As to the recording system with which this case is concerned, the respondent's evidence indicates that the custody suite in Musgrave Street PSNI station was renovated several years ago, and the new CCTV system was installed with the capability for audio capture. It was designed to comply with Home Office guidelines and best practice, which are discussed in further brief detail below. The respondent has indicated that similar systems have been installed in other PSNI custody suites (although it has not been possible to retro-fit this type of system in every custody suite in Northern Ireland).

[10] The operation of the CCTV system and its functionality have been described in detail in evidence filed on behalf of the respondent by Chief Superintendent Jones, the Acting Assistant Chief Constable with responsibility for custody. There are CCTV cameras with audio capture operating in (what might be described as) all common areas of the custody suite. This excludes legal consultation rooms, medical examination rooms, shower rooms and areas such as staff rooms and toilets, etc. Prisoner cells are also covered by a different system, which provides a visual CCTV feed but no audio recording. The CCTV system operating in the common areas is not targeted at any particular area, person or incident. Rather, it operates on the basis of (what is referred to as) "universal capture."

[11] In all areas of the custody suite in which the CCTV system operates, signage is prominently displayed alerting detainees and other members of the public to this fact. Photographs of the signage in the Musgrave Street custody suite were exhibited to the respondent's affidavit evidence. They are brightly coloured and provide relevant information both in writing and pictorially (with symbols representing both a camera

and a microphone). Several signs state: "CCTV with AUDIO is recording within this Custody Facility." More detailed information signs read as follows:

> "CCTV recording with sound is in operation to create a safe environment for officers, prisoners and all individuals in the custody suite, to provide evidence to substantiate or rebut any allegations made in relation to offences either within or without the custody suite and for the improvement of performance and quality of service.
>
> The CCTV system is controlled by the PSNI [telephone number given]."

[12] The CCTV can be live-monitored from a monitoring room which has a bank of ten screens and the capability to access any live camera footage. That room is locked and staffed by controllers other than custody suite personnel. Videos may be viewed live in real-time only, with no power to record or play back. Staff in the monitoring room also control automatic locks to cell doors and other secure areas. All access to the monitoring room is recorded in logs. Custody sergeants can also monitor the live video feed from cells.

[13] The video and (where applicable) audio footage is captured and recorded automatically over a 90 day timescale, after which it is overwritten. If any footage is required for a policing purpose, a formal application to view the footage is made and is subject to approval by a custody sergeant or an officer of higher rank (at district commander level if a request is made by a third party). The CCTV recording is stored on a computer hard drive which is located in the CCTV equipment room. This is an unstaffed room which is locked, with access controlled to authorised personnel where permission to enter has been given by a custody sergeant. Again, access is recorded and logged. More details of the precise operation of the system are included in the policy documents discussed below.

Summary of the parties' positions

[14] The kernel of the applicant's case in these proceedings is that the policy of the respondent to record, by way of CCTV, conversations which occur in custody suites is unlawful because there is no adequate legal basis for it. It is contended that this practice is not expressly permitted by Part VI of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("the 1989 Order"); that it is not guided by or covered by the codes of practice published under the 1989 Order; and that there is no other statutory or common law basis for the practice. On that basis, and on the additional basis that the lack of any guidance or code of practice means that the 'quality of law' test is not satisfied, it is further contended that any such recording is in breach of article 8 ECHR and/or articles 7 and 8 of the EU Charter of Fundamental Rights (CFR). Finally, it is contended that the respondent's actions are in breach of EU obligations

in relation to data protection. As noted above, all of these grounds are directed to the initial capture of the information by way of recording; not to its later retention or use.

[15] The respondent concedes that there is no statutory basis for the operation of CCTV within the custody suite. Nonetheless, it contends that there is an adequate legal basis for its practice based on a combination of statutory and common law powers; and that the manner in which the power operates is sufficiently clear and transparent to meet human rights standards. The focus of the respondent's argument was upon its common law power to obtain and store information for policing purposes.

Relevant policies

The PSNI Service Procedure re CCTV in custody suites

[16] My attention has been drawn to a number of policy documents relevant to the issues in this case. In the first instance, the respondent's case is that the operation of CCTV in custody suites is governed by a published PSNI Service Procedure, SP 49/2007 'Custody CCTV Standing Orders' ("the Service Procedure"). The purpose of the Service Procedure is to inform police officers of the custody CCTV systems and to give guidance on their operations. It commences by noting that the Independent Commission on Policing for Northern Ireland (the Patten Commission) recommended that video recording with sound be introduced into custody suites.

[17] The Service Procedure explains the features of the CCTV system described above and the internal PSNI controls for monitoring and accessing the footage. The purpose of the CCTV system is described as follows, namely:

> "To create a safe environment for police officers, prisoners and all individuals in the custody suite, to provide evidence to substantiate or rebut any allegations made in relation to offences either within or without the custody suite and for the improvement of performance and the quality of service."

[18] As noted above, the document explains and describes the key features of the CCTV system. Amongst other things, it defines the areas of the custody suite in which CCTV will operate; it informs the public that the system has video and audio capture capabilities (except for coverage in the cells which is limited to visual capture only); and it also makes plain that the system operates at all times (with no input from custody staff) and how footage will be monitored. It specifically notes that all persons entering the custody suite for whatever reason should be informed that they will be recorded by the CCTV system whilst in the area.

[19] The Service Procedure also explains that footage captured on CCTV in this way will not be used as a surrogate for existing police powers to take photos or

capture audio for the purposes of identification of suspects or comparison. Other policing powers should be used and alternative CCTV audio opportunities outside the custody suite should be explored first, with a warrant under the Regulation of Investigatory Powers Act 2000 (RIPA) if required. If no other options are available, a RIPA warrant for use of CCTV for this purpose should be obtained, which would only operate prospectively from the time of the authorisation. If the suspect has left police custody and CCTV footage is proposed to be used for identification, this requires authorisation from the district commander in charge of the custody suite assessing the matter individually, including whether there are any viable alternatives and human rights considerations, with legal advice if appropriate.

[20] The Service Procedure has a short section entitled 'Legal Basis' which is less than clear on precisely how the legal basis for the power is said to arise. It notes that the Standing Orders contained within the Service Procedure should be read in conjunction with PACE Code of Practice C, the Data Protection Act and RIPA. It also states that the CCTV system does not replace or absolve police officers of any obligations under the 1989 Order.

[21] The PSNI also has a further guidance document entitled, 'Custody CCTV Guidance: Reducing Offending and Safer Custody.' This is in similar terms to the Service Procedure but in a more summary form. The respondent's evidence also contained copies of its Service Instruction on Records Management and the RRD Schedule referred to at para [2] above.

Other relevant non-PSNI policies or guidance

[22] The respondent has also pointed to PACE Code of Practice C issued under the 1989 Order, para 3.6 of which provides as follows:

> "If video cameras are installed in the custody area, notice shall be prominently displayed showing cameras are in use. Any request to have video cameras switched off shall be refused."

[23] In addition, reference has been made to a range of further police policy documents. These include: (a) the section on CCTV in the College of Policing publication, 'Detention and Custody'; (b) Chapter 12 of the Home Office Technical Standards Design Guide for Police Custody Suites; and (c) the Association of Chief Police Officers' (ACPO) Guidance on the Safer Detention and Handling of Persons in Police Custody. The applicant accepts that these documents address the standards, objectives and benefits of the technology but nonetheless contends that they do not identify or provide a sufficient legal basis for its use. In other words, they explain the *reason* for installing a CCTV system with audio in such facilities but do not provide a *legal basis* for doing so. However, there is no significant dispute that these documents describe policing purposes for the use of CCTV in custody suites and that the PSNI practice is consistent with them.

[24] The College of Policing's professional practice guidelines for the operation of CCTV in custody suites provides a range of advice, including in relation to the areas where CCTV cameras should not operate and also the minimum areas in which audio recording should operate (namely, the custody desk and in the breath testing area). It also notes that certain areas may be visually covered but, because of the need to protect legal privilege, should not have audio-recording or audio-monitoring facilities. These areas are rooms set aside for private legal consultation or general interview rooms. It is noted that the CCTV for the custody officer's desk and the evidential breath analysis device room "must contain audio." Additional guidance is contained on other areas where CCTV can be used to record activity; access to images; detainee privacy and pixelation for cell WC areas; etc.

[25] The Home Office document provides for the use of CCTV with audio capability throughout custody suites and for it to operate "continuously and uninterrupted", with a recording maintained for "a minimum of 31 days and configured to automatically overwrite the oldest images and audio in rotation." Section 12.6 on 'CCTV and audio' includes the following:

> "CCTV cameras should be provided to all locations as described elsewhere within this design guide and, where so indicated, those locations should also be provided with ceiling mounted microphones to enable accurate audio recording of events.
>
> The CCTV and sound recording system should be designed and installed to provide economical operation of a fully integrated CCTV and sound system that gives continuous monitoring and recording of the required areas…"

[26] The ACPO guidelines, which apply in both England and Wales and Northern Ireland, again address the use of CCTV in custody suites. They contain recommendations for the use of CCTV in custody suites in a manner which appears to align with the PSNI policy. It is recommended that CCTV may be used both for monitoring the welfare of detainees and for the prevention and detection of crime. This document also provides guidance on matters such as the areas to be covered or not covered by visual and audio recording; the live monitoring of footage; access to recordings and the retrieval of footage; the use of signage; and related matters.

Relevant statutory provisions

[27] There are few statutory provisions which are directly relevant to the issue which falls for consideration in these proceedings. That is because the central point made by the applicant is that there is no statutory provision which authorises the audio recording of which he complains. In the course of submissions, I was treated

to a wide-ranging overview of various provisions of the 1989 Order (in support of the applicant's contention that no provision of that Order assisted the respondent). I need not rehearse in any great detail the content of those submissions.

[28] The most relevant power in this context is probably that contained in article 64A of the 1989 Order, under the heading 'Photographing of suspects etc.', as amended by the Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007. It provides, in material part, as follows:

> "(1) A person who is detained at a police station may be photographed—
>
> (a) with the appropriate consent; or
>
> (b) if the appropriate consent is withheld or it is not practicable to obtain it, without it.
>
> …
>
> (2) A person proposing to take a photograph of any person under this Article—
>
> (a) may, for the purpose of doing so, require the removal of any item or substance worn on or over the whole or any part of the head or face of the person to be photographed; and
>
> (b) if the requirement is not complied with, may remove the item or substance himself.
>
> (3) Where a photograph may be taken under this Article, the only persons entitled to take the photograph are constables.
>
> (4) A photograph taken under this Article—
>
> (a) may be used by, or disclosed to, any person for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or to the enforcement of a sentence; and
>
> (b) after being so used or disclosed, may be retained but may not be used or disclosed except for a purpose so related.
>
> …

(6) References in this Article to taking a photograph include references to using any process by means of which a visual image may be produced; and references to photographing a person shall be construed accordingly.

(6A) In this Article, a "photograph" includes a moving image, and corresponding expressions shall be construed accordingly."

[29] The effect of sub-paragraphs (1)(b), (6) and (6A) is such that the applicant accepts that, provided this is done by a constable, there is statutory authority for the police to record and retain a moving visual image of the applicant without his consent whilst he was detained in a police station. The power to do so without consent is not conditional upon it being impracticable to secure that consent. That is why this case is focused upon the use of CCTV with audio capacity. It is that element of the recording which the applicant contends is not, and cannot be, authorised by article 64A.

The key issues for consideration

[30] I accept the applicant's submission that the PACE Codes of Practice are intended to provide guidance in relation to the use of police powers but that they cannot, themselves, create a police power which does not already exist in law. The Department of Justice, in publishing Code C, appears to have assumed that the operation of CCTV in custody suites is lawful. However, that cannot be determinative of the issue; nor do I consider it to be of any particular assistance in the interpretation of the 1989 Order.

[31] A key contention on the part of the applicant is that the 1989 Order is a comprehensive, exclusive and exhaustive code governing the powers of the police towards those detained by them. Since the type of recording which is at issue in these proceedings is not there expressly authorised, he submits that there is no scope for finding a legal basis for such a power. This is a powerful and, at first blush, attractive submission. Part V of the 1989 Order regulates the detention of suspects and Part VI regulates the questioning and treatment of persons by police. A wide range of police powers are provided for within these provisions, particularly at articles 57-64A. None of these provide express legal authority for the audio recording of suspects generally within the custody suite. Several of the Codes of Practice are potentially relevant, including Code C in relation to the detention, treatment and questioning of persons; Code E on audio recording of interviews with suspects; and Code F on visual recording with sound of interviews with suspects. Albeit Code C refers to the use of video cameras in the custody area (see para [22] above), this cannot itself confer any power upon the police to use such a system.

[32] The applicant therefore submits that there is no further scope, in respect of matters which are addressed by or in the contemplation of the 1989 Order, for the assumption of additional powers by the police. This is bolstered by a submission that the exercise of state power to invade the privacy of a person should have clear authority of law and should not be authorised in statute by general or ambiguous words. In the applicant's submission, additional powers to infringe the rights of a detained individual cannot be implied into the 1989 Order.

[33] The key difference between the analyses of the parties is their starting point. The respondent observes that the applicant's starting premise is that the PSNI is not permitted to use CCTV within a custody suite without express statutory authority. For its part, the respondent submits that this is an incorrect premise since "it fails to consider the long-standing common law powers of police which pre-existed and survived the enactment of PACE." In the respondent's submission, these include the power to make overt use of photography and to capture images, and indeed audio, for policing purposes.

[34] I accept – and consider that the authorities discussed below support – the proposition that the police continue to have certain powers at common law which can operate alongside or in tandem with additional statutory powers. In addressing the substance of the applicant's challenge in these proceedings, it seems to me that the correct analysis is to approach the matter in three stages:

(1) First, is the respondent correct that police common law powers are adequate to provide a legal basis for the type of recording which is under challenge in this case? If not, that is the end of the matter.

(2) However, if police common law powers could provide a legal basis for the challenged practice, it is then necessary to ask whether those powers have been abrogated or excluded by the terms of the 1989 Order.

(3) If not, the final question is whether the extant common law powers relied upon by the police are adequate to meet the requirements of human rights standards, in particular as to foreseeability and transparency.

[35] I address each of these matters in turn below.

The legal basis for the recording

[36] The respondent's submissions focused on the nature of powers which, as a matter of common law, are recognised as attaching to the office of constable. Mr McLaughlin relied upon statements of principle in authorities such as *Glasbrook Bros v Glamorgan County Council* [1925] AC 270 and *Rice v Connolly* [1966] 2 QB 414 to emphasise the obligation on the part of police authorities to take all steps which appear to them necessary for keeping the peace, for preventing crime, and for

protecting property. That only goes so far, since the police can only take such steps as are lawful. However, the common law has long since recognised a variety of steps which may lawfully be taken by police officers in pursuit of those broad purposes.

[37] The common law powers of the police to use overt photography as a means of discharging their duties was considered and expressly recognised by the Supreme Court in *R (Catt) v Association of Chief Police Officers* [2015] 2 WLR 664. That case concerned photographs taken by the police of persons participating in a public demonstration. The primary issue in the case related to the regime for retention of information by the police (which is not an issue in the present proceedings). However, the court also addressed the police power to capture and gather information and photographs. Lord Sumption said this (at para [7]):

> "At common law the police have the power to obtain and store information for policing purposes, ie broadly speaking for the maintenance of public order and the prevention and detection of crime. These powers do not authorise intrusive methods of obtaining information, such as entry on private property or acts (other than arrest under common law powers) which would constitute an assault. But they were amply sufficient to authorise the obtaining and storage of the kind of public information in question on these appeals."

[38] The respondent also relied upon the further case of *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 as another authority which recognised the common law powers of the police to use photography for the discharge of their functions. This related to a photograph taken by the police of the plaintiff when he was in custody. The plaintiff had multiple convictions for theft and the police used the photograph which had been taken by disclosing it to shop owners in the area who were concerned about thefts. Laws J struck out a claim of breach of confidence on the part of the plaintiff. He proceeded on the basis that police were entitled to take and use the photograph for police purposes, providing the use made of it was reasonable and that only legitimate police purposes were being pursued in the taking and use of the image. A further authority in this regard, where the claimant had been photographed by police in the street after leaving a meeting, is *R (Wood) v Commissioner of the Metropolis* [2009] EWCA Civ 414; [2010] 1 WLR 123. Although the police actions in that case were found to be disproportionate, Lord Collins again observed (at para [98]) that the taking of such photographs was lawful at common law.

[39] In *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058; [2020] 1 WLR 5037, a case which returned to these themes after the decision of the Supreme Court in *Catt*, the Divisional Court again held that the police have common law powers to capture images for police purposes. The Court of Appeal found that the widespread capture and use of images for automated facial recognition (AFR) was not in accordance with law; but the respondent relies upon the fact that there

was no appeal on the findings about the existence of common law powers to use cameras for policing purposes (see the Court of Appeal judgment at para [38], referring to the "common law powers of the police to obtain and store information for policing purposes").

[40] The Divisional Court – Haddon-Cave LJ and Swift J at [2019] EWHC 2341 (Admin) – discussed the issue at paras [68]-[78] of its judgment. Having referred to the common law duty to prevent and detect crime which rests upon constables at common law, the court observed that there is a corresponding common law power to take steps in order to prevent and detect crime. This general power of the police "includes the use, retention and disclosure of imagery of individuals for the purpose of preventing and detecting crime", as demonstrated in the *Wood* case (see para [70]). The court went on (at para [78]) to discuss the decision of the Supreme Court in *Catt*, and in particular Lord Sumption's statement (referred to at para [37] above) that, at common law the police have the power to obtain and store information for policing purposes, *viz* broadly speaking for the maintenance of public order and the prevention and detection of crime.

[41] The Divisional Court then said this (at para [73]):

> "It will be apparent from the passages highlighted in the judgments in *Rice* and *Catt* that the extent of the police's common law powers has generally been expressed in very broad terms. The police did not need statutory powers, eg to use CCTV or use body-worn video or traffic or [automatic number-plate recognition] cameras, precisely because these powers were always available to them at common law. Specific statutory powers were needed for eg the taking of fingerprints, and DNA swabs to obviate what would otherwise be an assault."

[42] In *Bridges*, the capture of facial imagery, including biometric data, was not considered by the Divisional Court to be an intrusive method of obtaining information in the sense used by Lord Sumption in *Catt.* There was no *physical* intrusion or interference with the person's rights vis-à-vis their home or bodily integrity. The police's common law powers were therefore "amply sufficient" in relation to the AFR technology; and they did not need new express statutory powers for this purpose (see para [78]). In the Court of Appeal, the Court noted (at para [84]) that:

> "… the police have long used techniques to gather information which are undoubtedly in accordance with the law. For example, they have the power to observe what they see in a public place, to record that information and to retain it in their files. Just as the human eye can observe a

person in a public place, so the police have the power to take photographs of people."

[43] Nonetheless, the Court of Appeal did not accept the defendant's submission in *Bridges* that the use of AFR technology was analogous to the taking of photographs or the use of CCTV cameras (see para [85]). This was for a variety of reasons, including the novel nature of the technology, its sweeping coverage, the sensitive nature of the personal data so recovered and its automated processing. Too much discretion was left to police officers in terms of who would be captured and where the technology would be deployed.

[44] The authorities mentioned above dealt primarily with the capture of images only – although it is significant that, in *Bridges*, there was a reference to there being no need for statutory powers to authorise the use of body-worn video which routinely involves audio capture. When one turns to the question of 'audio rights', the respondent's submissions emphasised the relatively weak common law protections available to such rights by dint of which, prior to the Human Rights Act 1998, there was no general tort of invasion of privacy and such rights were protected primarily by a combination of the law of breach of confidence, copyright, trespass and nuisance.

[45] Bearing in mind the description of the police's powers at common law set out by Lord Sumption in *Catt* (see para [37] above), it seems to me that the resolution of the issue of whether the respondent was authorised to record audio of the applicant resolves to a question of whether the PSNI in the present case was using an intrusive method of obtaining information (which would not be permitted by those broad common law powers) or, on the other hand, merely recording public information (which would be authorised). In my view, this case falls somewhere along that continuum but within that portion of the spectrum where the common law police power to obtain and store information authorises the relevant information-gathering.

[46] I have come to this conclusion taking into account the following considerations:

(a) This was plainly not a classic instance of use of an intrusive method of obtaining information. It was not undertaken covertly; nor in circumstances where it amounted to or involved an assault on the applicant.

(b) The element of intrusion is simply that, having been placed under arrest, the applicant did not have a choice about his presence in the custody suite. But that intrusion is authorised, quite separately, by the police powers to arrest and detain which are found within the 1989 Order.

(c) It is significant that the CCTV system was operating overtly and in circumstances where the applicant was, or should have been, well aware of its

operation through prominently displayed signage. There was nothing surreptitious about the operation.

(d) Although the custody suite is not a public place, it is also not an area where, generally, an individual who has been detained can reasonably expect to enjoy privacy. This is, of course, context specific; and there will be areas within the custody suite where a detained person *can* expect a degree of privacy. In terms of listening to or recording what the detained person says, these are principally spaces designated for legal and medical consultations. Mr Sayers accepted in his submission that the common areas of the custody suite were something of a "hybrid" situation. It must be a secure area, but there will be a variety of individuals with access to it: police officers, detainees, legal and medical professionals, persons answering to their bail, etc. Perhaps more importantly, once placed under arrest and detained, an individual cannot expect to have the usual privacy they would otherwise expect because of the highly controlled nature of the environment and situation. The capture of information in this context is more analogous to information-gathering in a public place than to observation in one's home.

(e) The information capture in the custody suite is not targeted at the applicant. Nor indeed is the use of such cameras within police custody suites investigative in nature, designed to secure evidence in relation to the alleged offence for which the individual has been arrested.

(f) It is significant, in my view, that if the exchange in this case had been captured on body-worn video, because a police officer present had decided to activate their body-worn camera for some reason, this would have been permitted under common law powers.

(g) The overt use of CCTV cameras by police in common areas of the custody suite is also analogous to their use by a private property-owner, for instance in a shop or workplace, for the purpose of preventing or detecting crime.

(h) The key issue is then whether the recording is carried out for legitimate police purposes. The functions referred to it at para [17] above plainly fall within this.

[47] Although the applicant has sought to present this case as one involving a failure of the statute book to keep pace with emerging technologies, in my view its proper resolution requires a focus not upon the means by which the applicant's words were recorded but, rather, upon the true nature of the infringement of which he complains. At its heart, this is a complaint that his words, plainly spoken in the hearing of others of whose presence he was aware, ought not to be preserved. But just as the police have power to take photographs to record what the human eye can see (see the observation from *Bridges* at para [42] above), so too in certain circumstances do they have the power to record what the human ear can hear.

[48] The applicant also relied upon the observation of the European Court of Human Rights (ECtHR) in *S v UK* (2009) 48 EHRR 50, at para 112, that the protection afforded by article 8 would be "unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests." But this case is not, in truth, about any new or intrusive scientific or technological advancement. Rather, given the applicant's concession in relation to the legality of the capture of moving images of him whilst detained (see para [29] above), it is simply about whether the police can record words spoken out loud by the applicant in common areas of the custody suite.

[49] For these reasons, I would hold that the capture of the applicant's voice on CCTV in this case is within the broad common law powers of the police to capture and record information for legitimate police purposes in certain situations. Had it been necessary, I would also have held that the capture of the applicant's image in these circumstances on the custody suite CCTV was also within those powers. As the case was presented, however, I do not need to decide this.

Was this common law power removed by PACE?

[50] The next question is whether, notwithstanding that common law powers *could* authorise the recording in this case, the 1989 Order operates such as to exclude the exercise of any such power within a custody suite. I have not been persuaded that it has.

[51] The applicant is right to observe that the 1989 Order has been amended on a number of occasions to take into account the emergence of new technology which can be used for the purposes of the detection and prevention of crime. These include matters such as video-conferencing; the use of x-rays and ultrasound scans; video recording of police interviews; photographing suspects; and provisions relating to DNA profiling. However, that is not the issue. The question is whether the 1989 Order abrogates or excludes the common law power discussed above to obtain and store information. As to that, the applicant has also submitted that a custody suite is "clearly not an environment in which police can claim an entitlement to do any act which is not expressly prohibited." Again, however, in my view this misstates the real issue. If police enjoy a power at common law to obtain and store information in the form of the audio recording at issue in this case, the question is whether this power has been restricted or removed by the provisions of the 1989 Order. Put another way, has the 1989 Order supplanted any available common law powers which may otherwise have been available to the police within a custody suite? This is ultimately a matter of statutory construction.

[52] The introduction of the 1984 Act in England and Wales and the 1989 Order in Northern Ireland were plainly very significant in terms of the regulation of police powers. Unlike some other statutory codes however, the PACE provisions were overlaid upon substantial common law powers enjoyed by the police which had

developed over many years. I accept the basic proposition advanced by the respondent that it cannot simply be assumed that the 1989 Order swept away all common law powers which might arise. In order to determine whether that is the case one must search for an express abolition of the relevant power and/or an implied abolition or disapplication of those powers because they are inconsistent with some statutory provision.

[53] In addressing this issue, it is instructive to note that there are a number of express indications within the 1989 Order that pre-existing common law police powers were intended to survive its having been made. Significantly, for instance, article 19(4) and (5) expressly abolish some but not all of the common law police powers to enter premises without a warrant. Mr Sayers says that these provisions represent the *preservation* of a common law power, carrying the implication that other common law powers are abrogated; but I do not accept that submission for two reasons. First, article 19(4) expressly abolishes certain common law powers. Albeit it is subject to the saving in article 19(5), the purpose of the provision is to abolish common law powers which, presumably, would not otherwise have been abolished without such provision, applying the presumption that Parliament does not legislate in vain. Second, it seems to me that the basic starting point as a matter of principle is that Parliament should not be taken to have intended to legislate to remove common law powers on the part of the police, which have been held to exist in the public interest, without clear words or by way of necessary implication. The PACE regime is both designed to provide the police with some additional powers and, undoubtedly, to increase protections for detained persons when certain powers are exercised. It does not follow, however, that Parliament should be taken to have intended that all other common law powers were driven from the field.

[54] Similarly, in article 54 (which falls within Part VI of the 1989 Order), *some* pre-existing statutory and common law search powers are abolished; but this was done in an express and targeted manner. There is no general provision within the 1989 Order expressly repealing pre-existing common law powers. The mere fact that new powers were conferred on police and new requirements were imposed as part of a major package of reforms does not, of itself, indicate an intention to create an exclusive code of police powers which would do away with powers long recognised by the common law, either in custody suites or elsewhere.

[55] The respondent relied upon the fact that PACE Code of Practice C expressly recognised in a number of provisions that CCTV cameras may be in operation in the custody suite, namely para 2.1 (which refers to "any audio or visual recording made in the custody area…") and para 3.6 (which refers to video cameras being installed in the custody area, indicating that notices to this effect should be prominently displayed). I do not consider that these particular provisions are of much, if any, assistance to me, since (a) they do not make clear that any such recording would be in the exercise of preserved common law powers; and (b) in any event, they may be erroneous as a matter of law in relation to the extent of police powers (albeit the codes are required to have been laid before the Houses of Parliament in England and Wales

and the Northern Ireland Assembly in this jurisdiction). The very most that can be said is that neither legislature considered such a reference to be obviously incongruous with the legislation which had been passed.

[56] The more substantive point made by the respondent is that the provisions within the 1989 Order provide detailed regulation of police *investigative* powers and impose of mandatory minimum standards. In many cases, the provisions deal with express powers for *intrusive* personal investigation or examination, subject to a number of conditions. In various instances these powers are required because the conduct involved would otherwise amount to an assault: for instance, the conduct of intimate searches (article 56); certain types of scanning (article 56A); the taking of fingerprints (article 61); the removal of footwear for examination (article 60 1A); and the taking use of intimate and other samples (article 62 and 63). The power to remove clothing for the purpose of investigative photography (see article 64A(2)) falls within this category. The power to take these additional steps does not remove other pre-existing powers enjoyed by the police. Nor does the requirement to tape-record or video-record interviews, to be effected by further order (see articles 60 and 60A), carry the implication that all other powers to tape or video record outside the interview room are excluded.

[57] The closest that the applicant may be able to point to as a provision which may be suggested to indicate that common law powers are excluded in this context is article 35(1) of the 1989 Order, which provides that, "A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this Part." However, that provision – both in context and on the basis of its wording – relates to the power to detain, that is, the length and legality of an arrested person's detention. It also relates to Part V of the Order; whereas it is Part VI which deals with how persons should be treated by the police whilst in detention. There is nothing within Part VI which appears to me to indicate an intention that any other common law power exercisable by the police is excluded within a custody suite. For instance, as I have noted above, if an incident occurred at the booking-in desk and a constable activated their body-worn camera to record video and audio of what was occurring, I cannot see why that would be unlawful simply because of the location of the occurrence.

[58] I do not consider that there is anything within the 1989 Order which is inimical to the exercise of the common law power identified above such that its exercise is excluded as a matter of law in this case.

Article 8 ECHR

Is article 8 engaged?

[59] The PSNI's key submission in respect of article 8 was that there was no interference with the applicant's article 8 rights which was required to be justified in any respect. It contends that "the use of untargeted CCTV and audio recording

technology within a custody suite for primarily non-investigative purposes does not amount to an interference with the article 8(1) rights of a detained person", taking into account the background feature that a detained person is in any event within police custody. The respondent's fall-back submission is that, even if there is an interference with the applicant's rights, that interference is in accordance with law and justified.

[60] The applicant accepted in the course of his submissions that the existence of a reasonable expectation of privacy has been held by the UK Supreme Court to be the touchstone in determining whether article 8 ECHR is engaged: see *Re JR38's Application* [2015] UKSC 42 and the *Catt* case referred to above. He nonetheless argues that a review of the Strasbourg jurisprudence reveals a clear and consistent line of authority that a reasonable expectation of privacy is not an indispensable requirement of the Convention for article 8 to be engaged or breached. He relies in particular upon *Catt v United Kingdom* (2019) 69 EHRR 7, in which the ECtHR reached a different conclusion on the privacy challenge than did the UK Supreme Court; and *PG v UK* (2008) 46 EHRR 51, at para 57, as authority for the proposition that the creation of a systematic or permanent record of what would otherwise be a public act can be sufficient to engage article 8 protection. The respondent submitted that the question of an individual having a reasonable expectation of privacy is an important factor but not the exclusive one in terms of engagement of article 8. The issue was addressed in the more recent case of the Supreme Court in *Sutherland v HM Advocate* [2020] 3 WLR 327, at paras [31] and [51] and following. The issue of reasonable expectation of privacy remains an important and at times decisive factor but is not determinative.

[61] In considering the application of article 8 in this sphere, I was referred to the case of *Perry v UK* (2004) 39 EHRR 3. That was a case where a suspect in a number of robberies had been evading participation in an identity parade. Having been brought to the police station again for interview, he was filmed by the custody suite camera which was kept running at all times. Significantly, the camera had been adjusted for the specific purpose of taking clear pictures of the applicant during his visit. This video was then shown to various witnesses, along with videos of volunteers imitating the applicant's actions, as a means of identifying the offender. The trial judge allowed this evidence to be admitted and the applicant's appeal was unsuccessful. He brought a complaint to the ECtHR.

[62] The Strasbourg Court dismissed the government's argument that the applicant's article 8 rights were not infringed. The government had argued – as does the respondent in this case – that the applicant had no reasonable expectation of privacy in the custody suite and, in particular, the communal administrative area through which all suspects had to pass. The court considered that the "ploy" adopted by the police, with the alteration of the camera angle and the applicant having no indication that the footage was being taken for investigative purposes, meant that the applicant's article 8 rights were infringed (and, indeed, violated on the facts of the case). Importantly, however, the court appears to have proceeded on the basis that

this would not have been the case if a visible CCTV camera was simply used in a "normal" way. At para 40-41, the court said this:

> "As stated above, the normal use of security cameras *per se* whether in the public street or on premises such as shopping centres or police stations where they serve a legitimate and foreseeable purpose, do not raise issues under art 8(1) of the Convention. Here, however, the police regulated the security camera so that it could take clear footage of the applicant in the custody suite and inserted it into a montage of film for other persons to show to witnesses for the purposes of seeing whether they identified the applicant as the perpetrator of the robbers under investigation…
>
> The court recalls that the applicant had been brought to the police station to attend an identity parade and that he had refused to participate. Whether or not he was aware of the security cameras running in the custody suite, there is no indication that the applicant had any expectation that footage was being taken of him within the police station for use in a video identification procedure and, potentially, as evidence prejudice to his defence at trial. This ploy adopted by the police went beyond the normal or expected use of this type of camera, as is demonstrated by the fact that the police were required to obtain permission and an engineer had to adjust the camera…"

[63] The first sentence of the passage quoted above provides highly persuasive support for the respondent's submission that the applicant's article 8 rights were not engaged. It may be that this is the better analysis, and that the applicant's article 8 challenge should go no further. However, on balance I consider that the respondent's contention that the applicant's article 8 rights were not engaged or interfered with should be rejected. I found this a difficult issue to resolve. As the debate in a number of cases (including between the majority and minority in *Re JR38)* indicates, it is often not a straightforward question. I accept the respondent's submission that a person who is lawfully detained in custody and who voluntarily communicates with (or in the presence of) police personnel is not engaged in an activity in respect of which he enjoys a reasonable expectation of privacy. He cannot expect that such conduct will remain private between him and the police personnel with whom he communicates, certainly if the words spoken do or may amount to a criminal offence. At the same time detained persons, whether in police custody or in prison, retain their personal autonomy and the capacity for some measure of personal interaction with others which is capable of engaging article 8 rights. Most importantly, the systematic capture and recording of images and audio of the applicant whilst he is in police

custody – a situation not of his own volition and one of particular vulnerability – appears to me an instance where he is entitled to article 8 protection.

[64] The respondent accepts that image capture can amount to an article 8 interference, although not in every case: context is key. Most of the Strasbourg cases – such as *Sciacca v Italy* (2006) 43 EHRR 20 and *Peck v UK* (2003) 36 EHRR 41 – relate to the publication of images which have been obtained by the police, rather than the initial act of capturing those images. *PG v UK* (2008) 46 EHRR 51 addresses voice recordings. That case focused on intentional recording for investigative purposes, in which the court considered it significant that the voice recording was to be analysed for such purposes. Nonetheless, there was a recognition that a permanent record being made of someone's image or voice can represent interference with article 8 rights (see paras 57 and 59).

[65] The involuntariness of the applicant's attendance at the custody suite is in my view not, as the respondent submitted, a factor pointing away from article 8 being engaged but, rather, a factor which distinguishes it from cases where the individual is voluntarily engaging in a public setting. It is also significant in my view that the ECtHR has considered that the overt use of general CCTV and audio recording outside a police station *can* engage article 8 in certain circumstances which would usually be considered relatively public spaces: see, for instance, *Antovic v Montenegro* [2017] 11 WLUK 675 and *Lopez Ribalda v Spain* (2019) 49 BHRC 248.

[66] Albeit, in the circumstances of this case, the interference is at a low level (certainly when considered against the backdrop of the applicant being detained and the audio recording operating only within the certain areas of the custody suite), it seems to me that the capturing of the applicant's image and voice in a systematic and retrievable format does amount to an interference with his article 8 rights which requires to be justified. I have taken into account the wide range of factors which the respondent urged upon me in reaching a view on this issue, including the nature of the setting in which the activity took place; the issue of consent; the nature of the activity in which the applicant was engaged; the overt nature of the image and audio capture; the generalised rather than targeted nature of the capture; the fact that the capture was not for the purpose of processing or extracting personal biometric data; the fact that the capture is not for investigative purposes, such as voice image comparison; what happens to the footage; etc. I do not consider that the applicant had a reasonable expectation of privacy in relation to words spoken in the presence of detention officers. Nonetheless, the impugned recording goes far beyond that; and I think it right to proceed on the basis that the image and audio capture in this case did interfere with the applicant's article 8 rights. I also note that the ECtHR in the *Murray* case (discussed below and upon which the respondent relies) accepted that there was an interference with article 8 rights in comparable circumstances.

Were the applicant's article 8 rights violated?

[67] The basis upon which the applicant contends that his Convention rights were violated in the present case is that the interference was not in accordance with law, in the sense of having no basis in domestic law and on the further ground of any such basis not satisfying the Convention requirement of legality. The requirement that an interference with a qualified right must be "in accordance with law" does not merely require an identifiable legal basis in domestic law for the measure but also relates to the quality of that law. For the reasons given above, I have determined that the recording in this case does have a legal basis as a result of the common law powers enjoyed by the police; and that the relevant power in this regard has not been abrogated by the 1989 Order. That provides the legal basis for the interference with the applicant's article 8 rights. The remaining question is whether that legal basis is sufficient to satisfy the Convention's quality of law requirements.

[68] The respondent has relied heavily on the case of *Murray v UK* (1995) 19 EHRR 193 in this regard. The facts of that case are evident from the proceedings in this jurisdiction: see *Murray v Ministry of Defence* [1987] NI 219. The plaintiff's family failed in civil proceedings against the military for a series of actions which included entry into their home, search, questioning, detention in the police station and also taking photographs without consent and in circumstances in which she had not been charged. The Court of Appeal found that the taking of photographs without violence in the absence of consent was permissible under common law powers and was therefore not actionable. The case went on appeal to the House of Lords on other issues. However, eventually, the applicant pursued a complaint in the ECtHR. As part of this, she complained about the taking of photographs without consent and contended that this was not in accordance with law. The ECtHR held in that case that the relevant common law powers were sufficient to satisfy the Convention requirement that interference be "in accordance with law."

[69] At para 88, the court said this:

> "… The taking and, by implication, also the retention of the photograph of the first applicant without her consent had no statutory basis but, as explained by the trial court judge and the Court of Appeal, were lawful under the common law (see paras. 26, 30, 39 and 40 above).
>
> The impugned measures thus had a basis in domestic law. The Court discerns no reason, on the material before it, for not concluding that each of the various measures was "in accordance with the law," within the meaning of article 8(2)."

[70] Predictably, this has been met with an assertion that the Strasbourg case law has developed in relation to the 'quality of law' requirements since the case of *Murray*. However, in the case of *Wood* (*supra*) the English Court of Appeal, agreeing with the first instance judge, rejected the submission that the Strasbourg analysis in

Murray in respect of article 8(2) did not take account of authorities which emphasise the requirements of accessibility, foreseeability and certainty: see paras [50]-[52] of that judgment. In particular, it was pointed out that the *Murray* case was decided *after* the seminal decisions of the Strasbourg court in *Sunday Times v UK* (1979) 2 EHRR 245, *Silver v UK* (1983) 5 EHRR 347 and *Malone v UK* (1984) 7 EHRR 14; and that the ECtHR upheld the earlier decision of the Commission which had itself referred to the *Malone* case. In that case, the taking of a photograph in the street was authorised by common law powers: see paras [54] and [98]. Laws LJ was persuaded the interference was in accordance with law, holding that the degree of precision required of the law will depend upon the subject matter and the nature of the intrusion. Dyson LJ and Lord Collins of Mapesbury preferred to express no concluded view on this. However, more intrusive photography had been so authorised in *Murray.* In the *Sunday Times* case, it had also been accepted that common law powers can be sufficient for Convention purposes (see para 47).

[71] In recent times the Court of Appeal in this jurisdiction – in a case concerning the capture of images of children in the course of a police recording of a house search, *Re AS1's Application* [2021] NICA 55 – has noted that "the capacity of the common law to achieve compliance by state agencies with the "in accordance with the law" requirement has been recognised by the ECtHR" in the *Murray* case (see para [26] of the judgment of McCloskey LJ). The Court also noted, referring to *Catt* in the Supreme Court, that the quality of law requirements could be met by a combination of sources, including the common law, statute and relevant provisions of Codes of Practice (see para [25]). In the circumstances of that case, the Court of Appeal was satisfied that the common law power to photograph without consent for a legitimate policing purpose augmented other sources of law upon which the police were able to rely in the situation (for example, to authorise the search): see para [37] of the judgment.

[72] The respondent contends that the relevant requirements – of accessibility and foreseeability – are satisfied by the combination of common law powers referred to above and, as necessary, the relevant Service Procedure. (The PSNI contends that these are further augmented by the references to CCTV within the PACE Code of Practice; but accepts that this provides only modest assistance.) It is well established that the transparency and foreseeability requirements can be satisfied by 'soft law' frameworks, such as those set out in policy, provided they are sufficiently accessible.

[73] In the present case, there is no reason why the applicant could not identify the relevant common law power – expressed simply as the power to obtain and store information for police purposes and identified in authorities such as *Catt*, *Wood*, *Bridges* and *AS1* – with the benefit of professional assistance, if required. The Service Procedure is a publicly accessible document which sets out the circumstances in which CCTV and audio will be used in custody suites. Recourse to this document would make plain how the system operates and what a person present in a custody suite could expect by way of CCTV recording.

[74] This analysis is also, however, somewhat artificial in that (a) a person in the position of the applicant is likely to be present in a custody suite pursuant to powers of detention, rather than because they have freely chosen to go there; and (b) the position in the custody suite is made abundantly clear through the use of prominent signage. In other words, once a person finds themselves in the Musgrave Street custody suite, the operation of the CCTV system (of which they could inform themselves by prior consultation of the Service Procedure) will be obvious to them.

[75] In light of the modest nature of the intrusion and the uncomplicated nature of the operation of the CCTV system, I consider that the legal basis for the interference with the applicant's rights is sufficiently clear, foreseeable and accessible to be in accordance with law for the purpose of the Convention.

[76] The applicant properly did not advance a contention that the use of the CCTV system which is at issue in this case did not pursue a legitimate aim; nor that its operation was disproportionate to any legitimate aim pursued for the purpose of article 8(2). It is clear that the use of the CCTV in the way described in the respondent's evidence can perform a number of legitimate functions, not least acting as a protection of the rights of detained persons. I accept that its presence can provide a deterrent to inappropriate or abusive conduct, whether by police officers themselves, detained persons or members of the public. Where an issue arises or incident takes place, the footage can provide objective evidence and help to resolve disputes about events within the custody suite or about the accuracy of differing accounts about this. It can also assist with matters such as reporting matters to the Police Ombudsman for Northern Ireland, or providing evidence for her consideration, in the event of a complaint or a serious incident such as a death in custody. The vulnerability of the applicant and others in his situation, a factor upon which he heavily relied, is also an important factor justifying the use of CCTV in the circumstances when one has regard to the fact that one of its purposes is to guard against mistreatment of police detainees by police officers.

The EU law argument

[77] The applicant further relied upon his rights to privacy and data protection under articles 7 and 8 of the European Union Charter of Fundamental Rights (CFR), the interference with any such rights having occurred before the end of the transition period on 31 December 2020. The applicant submits that his image and voice are personal data; that the PSNI was both data controller and data processor; and that the capture, retention, and retrieval of the information amounts to a processing of his personal data. The applicant's submission was that the right to privacy and data protection under the CFR were equivalent to those rights protected in the Law Enforcement Directive (Directive (EU) 2016/680). It was accepted that these rights have been fully and effectively implemented in the UK domestic legal order in Part III of the Data Protection Act 2018. Again, therefore, this aspect of the applicant's case was directed only to the legality of the initial capture of information relating to him.

[78] The applicant submitted that these EU-law derived rights are distinct from the protection provided by the ECHR with regard to their scope, effect, level of protection and available remedies. In making this submission he relied in particular upon the opinion of the Advocate General in the *Graham Dwyer* reference (C–140/20), at para 38. In particular, he submits that it is clear that the right to privacy and data protection under these provisions does *not* require that there have been any reasonable expectation of privacy on the part of the individual concerned, the threshold question being only that the personal data relates to any identifiable person. I have, however, already held that the applicant's article 8 rights were interfered with, notwithstanding that he did not enjoy a reasonable expectation of privacy in relation to the incident in question.

[79] The submissions made in respect of the failure to adhere to the quality of law test in respect of article 8 ECHR were simply repeated in the context of the data protection provisions. I accept the respondent's submission that, ultimately, this ground of challenge operates in parallel with the Convention challenge and does not impose any additional or materially different obligation. I therefore reject it for the same reasons as outlined above in relation to the Convention ground.

Conclusion

[80] In conclusion:

(1) I accept the respondent's case that the capture of audio in this case had a legal basis in the exercise of the police's common law power to obtain and store information.

(2) That is not to say that it might not be better, as a matter of policy and to promote legal certainty, for such powers to be placed on a statutory footing. I would encourage consideration of such a development.

(3) I would also emphasise that this conclusion relates only to the recording of the applicant in the particular circumstances of this case. I have not been required to adjudicate upon any broader issue, nor do I purport to do so. The fact-sensitive nature of the issue may be such that a different conclusion might be reached in relation to the capture of data in relation to a detained individual in other circumstances (for instance, in other parts of the custody suite where a much greater expectation of privacy may arise).

(4) Having found that the respondent's common law powers are capable of providing the legal basis for the intrusion in this case, I also find that those powers have not been abrogated or abolished by the provisions of the 1989 Order.

(5) I accept the applicant's contention that the recording of him did represent an interference with his rights under article 8 ECHR. However, I have further concluded that the respondent's common law powers, in conjunction with the publicly available guidance and policy issued in relation to the use of CCTV in common areas of custody suites, is sufficient to meet the 'quality of law' requirements of the Convention. I did not consider that the applicant's reliance upon EU law materially added to his Convention challenge.

[81] Having not found any of the applicant's grounds of challenge made out, I dismiss the application for judicial review. I will hear the parties on the issue of costs.