

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2013

Before:

LORD JUSTICE MOSES
MR JUSTICE WYN WILLIAMS

Between:

Susannah Mengesha	<u>Claimant</u>
- and -	
Commissioner of Police of the Metropolis	<u>Defendant</u>

Mr Michael Fordham QC and Mr Iain Steele (instructed by **Christian Khan**) for the
Claimant
Mr Dijen Basu (instructed by **Directorate of Legal Services, Metropolitan Police Service**)
for the **Defendant**

Hearing date: 2nd May, 2013

Judgment

Lord Justice Moses:

1. On 30 November 2011, amongst those attending a public sector trade union march was the claimant, acting, with others, as a legal observer. She is a law graduate and was a member of the “Bar in the Community” scheme at the Bar Pro Bono Unit. In the afternoon the police observed trespass and damage taking place in Panton House close to the Haymarket. At 3.50 p.m. Chief Superintendent Wise authorised containment in Panton Street which, at its western end, runs into the Haymarket. No one disputes but that the containment was justified because serious damage and a breach of the peace had occurred and officers reasonably apprehended an imminent further breach of the peace. Chief Inspector Taylor was containment manager. About 100 people were contained, amongst whom was the claimant.
2. Since containment is only lawful to prevent an imminent breach of the peace in circumstances where there are no other means by which that imminent breach can be obviated, the police must review and assess the grounds of containment and bring it to an end once an imminent breach of the peace is no longer anticipated. At that time an authorisation under s.60 of the Criminal Justice and Public Order Act 1994 was in place. This permitted constables in uniform to stop any pedestrian and search him for offensive weapons or dangerous instruments, whether or not there were grounds for

suspecting that that person was carrying such weapons or articles (s.60(4)(a) and (b)). At about 4.24 p.m. Chief Inspector Taylor, the containment manager, considered that the risk of an imminent breach of the peace was diminishing, but took the view that those within the containment area should be searched as part of a controlled and disciplined release from containment. Again, there is no dispute but that the search of those under the provisions of s.60 was lawful.

3. For the purposes of the search, six officers were deployed at the exit of Panton Street to funnel those leaving the containment to a place where the searches could be conducted. At 4.58 p.m., once the resources were in place, Chief Inspector Taylor directed those contained along the funnel to the point of search and release with the aid of illuminated dot matrix signs reading “you are being released, turn left”.
4. It was at this point that the events took place which form the subject matter of this claim for judicial review. At 5.05 p.m. Chief Superintendent Wise decided that those who were being released from the containment would be filmed and asked for their details. He took the view that that would help in any subsequent post-incident investigation to identify persons involved in criminal acts. He adds, in his statement, “this would prevent the containment being maintained for a protracted period of time, whilst offenders were identified within the crowd”. Chief Inspector Taylor was not party to that decision. Those who filmed and questioned persons being released were not under his command.
5. On moving from Panton Street where she had been contained, the claimant was held in a separate area, surrounded by police officers, and filmed. She was asked to give her name and address and date of birth. She attempted to ask what police power was relied upon authorising the police to film her and ask her details. Those questions were not answered until she had been filmed and given her details. The claimant describes the process as being oppressive, aggressive and intimidating. But the manner in which the film was taken and questions asked is not central to this claim.
6. At the heart of this claim lies the contention that the identification of those who had been contained in Panton Street was required of each individual as the price of being permitted to leave. It is not disputed by the Commissioner that to require an individual to give personal details and to submit to filming for the purpose of identification as the condition for release from containment is not lawful. It will be necessary to analyse the legal foundation for this correct concession. But the dispute in this case centred on whether, as a matter of fact, the Commissioner is correct in asserting that the claimant voluntarily gave her particulars and submitted to filming. To resolve this issue it is necessary to set out further factual details.
7. The claimant had received the impression from the lead legal observer, Michael Goold, that the police were requiring identification details and submission to filming in exercise of a statutory power. At 5.12 p.m. Michael Goold, a law graduate and pupil barrister, asked a police officer if those being contained could leave. He was told that they would be allowed to leave one at a time and that “people were required to have their details and images taken before being released”. At about 5.22 p.m. he witnessed two young demonstrators being pushed back into the containment. They said they had been sent back because they had refused to give their names to the police. When he himself was filmed and asked for his details he was informed that he was being required to give those details pursuant to s.50 of the Police Reform Act.

This empowers a constable in uniform who has reason to believe that a person has been acting in an anti-social manner to require a person to give his name and address. The Commissioner does not now rely upon that power. But it is of significance that the police at the time believed that they were seeking details of identification and filming those leaving the containment in pursuance of a statutory power. Another legal observer worker has also made a written statement saying that officers told him that they were legally entitled to search him and take details. That this was the belief of the officers is also confirmed by the evidence of the claimant that at 4.30 p.m. an officer addressed the crowd and stated that everyone would be required to have their face photographed and their details taken if they wanted to leave.

8. The evidence, in my view, is overwhelming that those leaving the containment were required to give their details and to be filmed before they were allowed to be released. That is confirmed by Chief Superintendent Wise's own statement that containment would be prolonged for a protracted period had not those details been provided and that filming taken place. I should record that no evidence has been adduced by the Commissioner to contradict the evidence that a named officer had announced that everyone would be required to be identified as the price of release. Nor has any officer conducting the process made a statement that he or she believed that the identification procedure was merely voluntary. The Commissioner asked the court to view a video of the claimant which, it was suggested, would show that she was submitting to the process voluntarily. My assessment was that the video showed the contrary. It confirmed to me that all those taking part, whether the police or those who had been contained, were behaving under the impression that there was no choice as to whether they should give their details and be filmed for the purposes of identification.
9. That impression would have been reinforced by the circumstances. The demonstrators and legal observers were lawfully contained. They had no choice as to whether to leave Panton Street until they were gradually and in a controlled manner discharged. They were lawfully funnelled towards the point where they were to be lawfully searched. The police were entitled to require them to be searched as they left. Interposed between the containment and the search was the process of identification, by giving names and addresses and dates of birth, and being filmed. The very circumstances suggest that that was part of containment lawfully imposed and search lawfully required. Indeed, as I shall have cause to remark, initially the response of the Commissioner was to assert that the process of identification was "part and parcel" of the containment. The circumstances and actions of the police establish that the claimant did not submit to the process of identification voluntarily.
10. That, in a sense, resolves the first part of this application. But in the light of the Commissioner's initial response and because it is directly relevant to the second issue as to retention of the film taken as part of the process of identification, it is as well to spell out the reasons why it was not lawful to require those who had been contained to give their names and addresses and dates of birth and to be filmed as part of the process of identification as the price for release.
11. Although the Commissioner has accepted that the police were not entitled to extract personal details or submit to filming as the price of release from containment in his written skeleton argument, that did not appear to be the stance taken earlier in the detailed grounds for contesting the claim. In that document, the Commissioner

contended that the process of obtaining identification was “part and parcel of the containment”. It was part of the lawful controlled release policy and a “necessary but very brief adjunct to the containment”. The Commissioner’s argument appeared to have been based on a significant misapprehension as to the lawful scope of his powers. First, the police are not entitled to arrogate to themselves such action as they regard reasonable to prevent a breach of the peace. That was the argument advanced by the Chief Constable when passengers were stopped, searched and turned back, on their way to a demonstration at an air base in Gloucestershire (*R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55 [2007] 2 AC 105. Carefully defined powers have been conferred on police officers by statute:

“It would, I think, be surprising if, alongside those closely defined powers and duties, there existed a common law, power and duty, exercisable and imposed not only by and on any constable but by and on every member of the public, bounded only by an uncertain and undefined condition of reasonableness.” ([52] per Lord Bingham

Lord Bingham observed that any extension of police powers should be a matter for legislative enactment and not judicial decision ([53]).

12. There are specific statutory powers conferred by s.50 of the Police Reform Act 2002 in relation to requiring a person to give their name and address where a constable in uniform reasonably believes that an individual has been or is acting in an anti-social manner. Section 64A of the Police and Criminal Evidence Act 1984 confers power to take photographs where a person is in a public place but under arrest for crime investigation purposes. It is unacceptable that a civilian photographer on instruction from the police should be entitled to obtain photographs for investigation and crime investigation purposes outwith the power conferred by s.64A of the 1984 Act as the price for leaving a containment. Although the common law has sanctioned containment it has done so in only restricted circumstances. This is designed to avoid uncertainty and the potentially chilling effect on freedom of assembly and expression to which Lord Mance drew attention in *Laporte* [141]. Containment is only permitted where a breach of the peace is taking place or is reasonably thought to be imminent. It is a method of last resort where other possible steps to prevent a breach of the peace would be ineffective (*Austin v Commissioner of Police of the Metropolis* [2007] EWCA Civ 989 [2008] QB 660 at [20], [35] and [119(2)]) and it must be proportionate (*R (Moos) v Commissioner of Police of the Metropolis* [2012] EWCA Civ 12 at [39] and [95]). It is clear, therefore, that containment is not permissible for some purpose other than to prevent a breach of the peace which is taking place or reasonably thought to be imminent. In particular, it is not permitted as a means of ensuring that the identification of those contained has been obtained by questioning and by filming. It is the limited and confined purpose for which containment may be imposed which reveals that containment for the purpose of obtaining identification is unlawful. It was not lawful for the police to maintain the containment for the purposes of obtaining identification, whether by questioning or by filming. It follows that it was not lawful to require identification to be given and submission to filming as the price for release. In *Laporte* it was observed that the action of the police in turning coach-loads away from the demonstration could not be justified by the refusal

of the claimant to give the police her name and address. Lord Bingham remarked that her refusal, however irritating, was entirely lawful [55].

13. Nor could the police rely upon their undoubted statutory power to search pursuant to s.60 of PACE 1984. That section confers no authority to obtain the name and address or other identification of those being searched. If Parliament wished to impose such a requirement, it could do so by adding to the powers conferred by that section. The Commissioner points out that prior to 7 March 2011 PACE Code A required information as to the name of the person searched, his description and self-defined ethnic background [4.3]. In *R (Diedrick) v Chief Constable of Hampshire Constabulary* [2012] EWHC 2144 (Admin) the court rejected a complaint by the claimant that it was unlawful for the Home Secretary to cease to require monitoring and recording those who were stopped by the police and asked to account. But the absence of any statutory power to obtain identification in the circumstances in this case establishes conclusively the unlawfulness of the police action in requiring the claimant to be filmed and give her name and address and date of birth before she was released from containment.

Voluntary Identification

14. By the time of the hearing the argument advanced on behalf of the Commissioner was that the claimant had voluntarily given her name and address and date of birth and had been filmed. I have already concluded that, on the evidence before me, the claimant did not act voluntarily. The jurisprudence on which the Commissioner relied does establish that the police are entitled to ask a person to give his name and address, even where there are no grounds for suspecting them of committing any offence. Indeed, this court concluded that an appellant was guilty of obstructing a police officer in the execution of their duty when on being questioned and asked about his movements earlier in the day the appellant responded in an abusive uncooperative and hostile manner (*Ricketts v Cox* [1982] 74 Cr. App. R 298 at page 301). Nothing I have said is intended to detract from the principle accepted by this court in, for example, *Rice v Connolly* [1966] 2 QB 414 and *Donnelly v Jackman* [1971] WLR 562 as to the lawfulness of requests made by the police and that if those who refuse adopt an aggressive or obstructive manner, they will be liable to be arrested, either for obstruction or for assault on a constable in the execution of his duty. It is the conclusion that the process of identification was not voluntary that renders the actions of the police unlawful.
15. In *Diedrick (q.v.) supra* Kenneth Parker J observed that police officers have no power to require a person to Stop and Account but are not obliged to inform a person that he need not stop [9]. This raises an interesting issue as to whether a constable is acting unlawfully when he requests a person to stop and identify himself in circumstances where it reasonably appears to that person that an obligatory demand is being made of him and that he has no alternative but to comply. Mr Basu, in argument on behalf of the Commissioner, suggested that it would be unlawful for a policeman who required a person to identify himself to pretend that he was doing so in pursuance of a lawful power and, by extension, seemed prepared to accept that if the circumstances were such as to give the appearance to the requested person that he was under compulsion to answer, that too may render the request unlawful.

16. This case does not require that issue to be resolved. The facts, as I have found them, reveal that the police were obliging those contained to identify themselves, both by answering questions and by being filmed. For that reason, it is unnecessary to resolve, as a matter of legal principle, the extent to which the police may act unlawfully if the circumstances might suggest an obligation to comply. That issue, which may be important, can await another day. I express no view one way or the other.

Filming and the Retention of the Film

17. The film of those required to identify themselves was to be retained for six years. An imaging operations manager for the directorate of Forensic Services says that the CDs were retained for that period because it was “the limitation period for civil actions in respect of false imprisonment and malicious prosecution”. Since I have concluded that the images and personal details were unlawfully obtained that is, in a sense, the end of this part of the case. If they were unlawfully obtained they cannot be retained in any circumstances. But even if it might have been possible to justify their being retained for a short period in order to investigate crimes committed during the course of the investigation that period has long since passed. The Commissioner did not dispute that their continued retention was unlawful because the arrangements pursuant to which they had been retained were unpublished and *ad hoc*. No policy, let alone any rules, has been devised or published setting out the circumstances in which such images and details may have been retained. For that reason alone the Commissioner rightly conceded this part of the claim.
18. Nevertheless, it is worth setting out why the retention of the images and personal details was unlawful, quite apart from the fact that they were obtained unlawfully for the reasons I have identified in the first part of this judgment.
19. It is important to distinguish the circumstances in which the claimant and others were filmed from general filming of a crowd on the street. Even where there was no reasonable expectation of privacy, Article 8 of the ECHR will be engaged where public authorities collect and retain personal data (see *R on the Application of Catt v The Association of Chief Police Officers of England, Wales and Northern Ireland and Others* [2013] EWCA Civ 192 [28] and [30]). In this case individuals not under arrest were required to be filmed individually in close-up, from front and back, and to give their names and addresses and dates of birth, to be linked with the future police use. There can be no doubt that in those circumstances Article 8 was engaged and it was incumbent upon the Commissioner to justify the collection and retention of the film and personal details. In *R (Wood) v The Commissioner of Police of the Metropolis* [2009] EWCA Civ 414 [2010] 1 WLR 123, the Court of Appeal accepted that merely taking photographs of a person in a public place did not engage rights under Article 8.1 but the taking and retaining of photographs by the police “visibly and with no obvious cause...is a good deal more than the snapping of the shutter. The police are a state authority...the claimant could not and did not know why they were doing it and what use they might make of the pictures” [45]. Those circumstances led the court to conclude that Article 8 was engaged.
20. Once Article 8 was engaged, it becomes apparent that the taking and retention of the images and personal details was not in accordance with the law. As Lord Collins pointed out in *Wood*, whilst there is a published policy by the Metropolitan Police of

overt filming and photography, there is no such published policy on the retention of images and personal details. In those circumstances, the interference with the claimant's rights enshrined in Article 8 could not be said to be "in accordance with the law" [98]. The decision of this court in *R (C) v Commissioner of Police of the Metropolis* [2012] EWHC 1681 (Admin) [2012] 1 WLR 3007 is dispositive of this case, as the Commissioner conceded. In that case, photographs were taken pursuant to the power conferred under S.64A(1) of PACE 1984. The complaint related to their retention. The court concluded that the code of practice on the management of police information and the guidance was disproportionate and thereby an unjustified interference with the claimant's rights under Article 8. This case is *a fortiori*. Since there was no statutory power to take and retain the photographs and no arrangements, let alone any published policy applicable to such a case, the Commissioner cannot justify the retention of the images and personal details.

21. For those reasons, I would grant the application to move by way of judicial review and await written submissions as to the form of order to be made. With the same sense of responsibility she has demonstrated throughout her conduct as legal observer, the claimant does not seek any form of just satisfaction other than this vindication of her claim.

Mr Justice Wyn Williams:

22. I agree.