

**IN THE INVESTIGATORY POWERS TRIBUNAL**

**B E T W E E N : -**

**MR BARRY MCCAFFREY (1)  
MR TREVOR BIRNEY (2)**

**Claimants**

**-and-**

**CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND (1)  
CHIEF CONSTABLE OF DURHAM CONSTABULARY (2)  
SECURITY SERVICE (3)  
GOVERNMENT COMMUNICATIONS HEADQUARTERS (4)  
SECRETARY OF STATE FOR NORTHERN IRELAND (5)  
SECRETARY OF STATE FOR THE HOME DEPARTMENT (6)  
SECRETARY OF STATE FOR THE FOREIGN COMMONWEALTH AND  
DEVELOPMENT OFFICE (7)  
COMMISSIONER OF POLICE OF THE METROPOLIS (8)**

**Respondents**

**NATIONAL UNION OF JOURNALISTS**

**Intervener**

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**PRESS SUMMARY**

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*NOTE: This summary is provided to assist in understanding the Investigatory Powers Tribunal's decision in this case. It does not form part of the reasons for the decision. The full judgment is the only authoritative reasons for the decision. The judgment is available at [Judgments - The Investigatory Powers Tribunal](#).*

*References in square brackets are to paragraphs in the judgment.*

**Judgment of the Tribunal by Lord Justice Singh (President of the Tribunal) and Lady Carmichael with whom Mr Stephen Shaw KC agreed**

**Background to the case**

1. This case involved two Claimants, Mr Barry McCaffrey and Mr Trevor Birney, both of whom are journalists based in Northern Ireland. The Claimants produced a documentary film entitled *No Stone Unturned*. The film is about the murder of six unarmed men by members of the Ulster Volunteer Force at the Heights Bar in Loughinisland, County Down on 18 June 1994. When they were making the film, the Claimants met on a number of occasions with the Police Ombudsman for Northern Ireland ("PONI"). PONI was carrying out an investigation into the Loughinisland murders. PONI's report was published on 10 June 2016. One of the findings in the report was that collusion between the Royal Ulster Constabulary

and the Ulster Volunteer Force was a significant feature of the murders. PONI concluded that the investigation into the murders had been undermined by a wish to protect informers, even if they had been involved in committing the murders. [1]-[4]

2. Before the Claimants' film was released in the United Kingdom, members of PONI watched the film. They became aware that the film included two PONI documents that had not been disclosed by PONI. The Chief Constable of the Police Service of Northern Ireland ("PSNI") commissioned Durham Constabulary to investigate what appeared to be the leaking of those two documents (Operation Yurta). The senior investigating officer was Detective Superintendent Darren Ellis [6]-[7]
3. A search warrant was granted by HHJ Rafferty authorising the search of the Claimants' homes and business premises. At a later date, the Divisional Court in Northern Ireland held the search warrants against the Claimants were unlawful; there was no overriding requirement in the public interest which could have justified an interference with the protection of journalistic sources ([2020] NIQB 55; [2021] NI 387). [8]-[9]

### **The proceedings before the Tribunal**

4. In June 2019, both Claimants issued section 7 proceedings (that is proceedings under section 7(1)(a) of the Human Rights Act 1998 ("HRA")) and made complaints to the Tribunal on the basis that they thought it was likely that the warrants executed against them were "not the only attempt made to identify their confidential sources". [10] The Claimants were not aware of conduct that had taken place against them in 2013 and only became aware of that conduct when the Tribunal investigated [12].
5. The proceedings and complaints were initially directed against the First to Seventh Respondents [10]. In February 2024, the Eighth respondent ("the MPS") was added as a Respondent. This was because during the course of the proceedings it had come to light that the MPS had conducted an investigation in 2012 (Operation Erewhon) into alleged leaks of confidential information by staff of the Office of PONI to the First Claimant and to Vincent Kearney, a BBC journalist who has brought separate proceedings (which are not determined in this judgment) [13].
6. In June 2012 the MPS made applications for communications data under section 22 of the Regulation of Investigatory Powers Act 2000 ("RIPA") for data relating to eight telephone numbers, one of which belonged to Mr McCaffrey (the First Claimant in these IPT proceedings). The application was approved by the designated person, a detective superintendent ("the 2012 authorisation"). Within those data were details of Mr McCaffrey's calls with Mr Birney (the latter being the Second Claimant in these IPT proceedings). Further to their investigation, the MPS produced an Operation Erewhon Report. [16]-[19]
7. In June 2018, officers of Durham Constabulary working on Operation Yurta contacted the MPS. The MPS provided a report from Operation Erewhon to the Durham officers. In August 2018, an MPS officer sent a Durham officer a spreadsheet of communications data obtained in Operation Erewhon with an attribution list. It included some of the communications data obtained in Operation Erewhon, but none for Mr Birney. [20]
8. In September 2013, Mr McCaffrey received information that PSNI was investigating allegations that a senior official in the force had received what appeared to be illegal payments from a recruitment agency. Having contacted the PSNI press office for comment, Mr McCaffrey was asked to delay any reporting of the allegation since PSNI had a covert operation in place against the official which was due to be completed within three days. Mr McCaffrey agreed to postpone. After a further editorial discussion a number of days later,

Mr McCaffrey decided that he could not delay publication indefinitely and notified the PSNI press office of that. [21]

9. On 26 September 2013, a PSNI detective constable lodged an application under section 21 of RIPA with the purpose of “*identify[ing] a PSNI employee who has passed police information to a journalist*”. A detective superintendent granted the application the following day (“the 2013 authorisation”). The police obtained access to ten pages of Mr McCaffrey’s outgoing call data from 7 September 2013 to 26 September 2013. [22]
10. On 31 August 2018, an application for Directed Surveillance Authorisation was made by a detective sergeant of PSNI and granted by the Chief Constable (“the 2018 DSA authorisation”) The application narrated that an individual was suspected of supplying material to journalists. The Senior Investigating Officer requested surveillance for one week from 31<sup>st</sup> August 2018 with the objective of the surveillance being to establish whether or not [redacted] meets with either of the Claimants (Mr McCaffrey or Mr Birney). The 2018 DSA authorisation was cancelled on 18 September 2018. The Claimants submitted that the authorisation was unlawful. [33] – [37]
11. On 1 September 2018, PSNI submitted a preservation request to Apple Inc in respect of data for the account linked to Mr Birney’s Fine Point Films email address. It was accompanied by an Emergency Law Enforcement Request (“the Apple Request”). Durham Constabulary was named as the law enforcement agency making the request. Apple agreed to preserve the account and a mutual legal assistance treaty process was initiated. The preservation period was extended on two occasions. PSNI did not acquire any data from Apple. The Claimants’ argument was that the request to Apple was an unlawful attempt to avoid the safeguards of the statutory regime for the compulsory preservation and acquisition of data from a communications provider. [39]-[40]
12. The First Respondent formally conceded that the application for the 2013 authorisation for the First Claimant’s communications data under section 21 of RIPA did not contain effective safeguards in relation to the First Claimant’s Article 10 rights in that (1) the 2007 RIPA Code did not provide effective safeguards in a case in which the purpose of an authorisation under section 22 of RIPA was to obtain disclosure of a journalist’s source and (2) the designated person did not apply a stricter test, or heightened scrutiny, or give any express consideration to the public interest in the protection of the confidentiality of journalistic sources (“the First Respondent’s concession”). [24] and [89]
13. The Eighth Respondent formally conceded that the 2012 authorisation and the subsequent passing of the First Claimant’s communications data to the First Respondent (by way of the summary contained in the Operation Erewhon closing report) and Second Respondent, it breached the First Claimant’s Article 8 and 10 rights on the limited basis referred to in the First Respondent’s concession (“the Eighth Respondent’s concession”). [28]-[29] and [90] – [91]
14. The First and Eighth Respondents accepted that the conduct which gave rise to their respective concessions was unlawful, so as to entitle the Tribunal to grant remedies in respect of that unlawfulness.
15. During the substantive hearing the Tribunal heard evidence from Mr Ellis, the Senior Investigating Officer. The Tribunal concluded that Mr Ellis’ motivation and subjective state of mind in August 2018 are not relevant to the decisions they have to make as to the lawfulness of the 2018 DSA authorisation or the making of the request to Apple. [42]-[71]
16. The Tribunal upheld the First Claimant’s complaint to the Tribunal against the Eighth Respondent in relation to the 2012 authorisation, determining that the 2012 authorisation

was unlawful on the basis of the Eighth Respondent's concession. The Tribunal determined, however, that in relation to the 2012 and 2013 authorisations, the absence of prior judicial authorisation did not give rise to unlawfulness by virtue of section 6 of the Human Rights Act 1998. [111, 139-142]

17. The Tribunal dismissed the Second Claimant's complaint to the Tribunal against the Eighth Respondent in relation to the 2013 authorisation as the mobile phone concerned did not belong to the Claimants, but belonged to a limited company. [95]-[100]
18. The Tribunal upheld the First Claimant's complaint to the Tribunal against the First Respondent in relation to the 2013 authorisation, determining that the 2013 authorisation is unlawful on the basis of the First Respondent's concession. The Tribunal dismissed the Second Claimant's complaint to the Tribunal in relation to the 2013 authorisation. [101]-[104]
19. The Tribunal upheld the First and Second Claimants' complaint to the Tribunal in relation to the First Respondent's granting of the 2018 DSA and found that the 2018 DSA was unlawful at common law and is incompatible with the Claimants' rights under Article 10 of the European Convention on Human Rights. The Tribunal determined, however, that the absence of prior judicial authorisation did not give rise to unlawfulness by virtue of section 6 of the Human Rights Act 1998. [105]-[111]
20. The Tribunal determined that it has jurisdiction pursuant to sections 65(2), 65(4)-(5) and 65(7) of RIPA, to consider and determine the Claimants' complaints to the Tribunal in relation to the Apple Request but dismissed the Claimants' complaints in relation to the same. [115]-[132].
21. The Tribunal also dismissed the Claimants' complaint to the Tribunal that the First, Second and Eighth Respondents unlawfully obtained information and communications data by non-statutory means. [133]-[138]
22. Pursuant to section 68(4)(b) of RIPA 2000, no determination was made in favour of the Claimants in respect of their complaints against the Second, Third, Fourth, Fifth, Sixth and Seventh Respondents. [143-144]
23. In terms of remedy, the Tribunal ordered that the unlawful 2012 and 2013 authorisations and the unlawful 2018 DSA be quashed; that there be no award of damages to the First Claimant in respect of the unlawful 2012 and 2013 authorisations but that the First and Second Claimants are each to be awarded just satisfaction damages in relation to the unlawful 2018 DSA in the sum of £4,000 [112]-[114].

## **Background information**

The Investigatory Powers Tribunal, which was established by Parliament in 2000, is an independent judicial body that provides the right of redress to anyone who believes they have been the victim of unlawful action by a public authority using covert investigative techniques. The Tribunal has a UK-wide jurisdiction.

Further information about the Tribunal is available at [About the Tribunal - The Investigatory Powers Tribunal](#). Judgments of the Tribunal are available at: [Judgments - The Investigatory Powers Tribunal](#)