A case review of *R (Catt) v Association of Chief Police Officers*

1,474 words

1 Introduction

R (Catt) v Association of Chief Police Officers[1] (ACPO) was a 2015 appeal case heard by the United Kingdom Supreme Court (UKSC). The case revolved around the issues of police creation and retention of information, with the respondents relying on both art. 8 of the European Convention on Human Rights[2] and the Data Protection Act 1998[3] to show that the police had no right to such information.

Firstly, the two items of legislation will be described inasmuch as they relate to the case in question. Then, the case history leading up to the UKSC ruling will be detailed, followed by a summary of the present case. An opinion shall then be put forth as to the quality of the UKSC verdict, followed by a conclusion.

2 Legislation

2.1 European Convention on Human Rights

The European Convention on Human Rights[4] (ECHR) is an international treaty drafted by the Council of Europe in 1950 which came into force in 1953. Art. 8 states that '[e]veryone has the right to respect for his private and family life...'[5] and that '[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society...'.[6]

[1] *R (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] UKSC 9, [2015] AC 1065.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR).

[3] Data Protection Act 1998.

[4] ECHR.

[5] ECHR, art. 8 s. 1.

[6] ECHR, art. 8 s. 2.

In short, public authorities (such as the police) are empowered to breach a subject's article 8(1) rights if and only if they prove that doing so is '(i) "in accordance with law", and (ii) proportionate to its objective of securing public safety or preventing disorder or crime.'[7] This second condition—the issue of proportionality—forms the basis of both parties' cases.

2.2 Data Protection Act 1998

The Data Protection Act 1998[8] (DPA) is a piece of UK legislation giving effect to the EU Directive 95/46/EC.[9] The DPA relates to the possession and processing of data by a 'data controller'.[10] It contains a number of principles with which a data controller is required to comply; the most pertinent here are Principles 3 and 5 which state that data must be 'adequate, relevant and not excessive'[11] and that it 'shall not be kept for longer than is necessary...',[12] respectively.

3 Case History

3.1 The road to the Supreme Court

John Catt is a now-91-year-old male who has spent half a century attending political demonstrations and protests. Whilst there has been no claim of criminal activity on Catt's part, other members of the organising groups have been known to commit criminality. This has led to details about these demonstrations being recorded in Information Reports on the National Special Branch Intelligence System (a.k.a. Domestic Extremism Database), as well as Nominal Reports having been created for major individuals identified within the organisations.

Catt's name was found in multiple Information Reports recording his attendance at these demonstrations. It was revealed, further, that a Nominal Report had at one time been created for him, but that it had been previously deleted in line with departmental guidelines on data retention review when it was determined that Catt was '...someone who ha[d] not committed and [was] not likely to commit offences...'.[13] Catt alleged an interference of his rights under art. 8 of the ECHR, objecting to the Nominal Record having been made in the first place and to his continuing presence in the Information Reports.

Gross LJ rejected Catt's claim, stating that '[t]he reports, the product of overt policing, did no more than record [Mr] Catt's public activities, the very object of which was to convey his views

[7] *R (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* (n 1) s. 6.

[8] Data Protection Act 1998.

[9] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (Directive 95/46/EC).

[10] Data Protection Act 1998, s. 1.

[11] ibid sch. 1 pT 1 s. 3.

[12] ibid sch. 1 pT 1 s. 5.

[13] *R (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* (n 1) para 3.

to as wide an audience as possible'.[14]

T is a female accused of harassment. The alleged victim reported the incident to the police, who served her with a Prevention of Harassment Notice stating that a record of the notice having been served would be held for at least 7 years. T alleges that the notice presupposed her guilt and that retention of the information for 7 years interfered with her ECHR and DPA rights. Whilst claiming that '[i]t seems to me surprising that such information needs to be retained for as much as seven or 12 years',[15] Eady J ruled that he was '...not satisfied that any illegality has been established...in the storage of the warning notices...'.[16]

3.2 Appeals

Both parties appealed their decisions and were heard together in *R (Catt) v ACPO*.[17] Moore-Bick LJ allowed both appeals. In Catt's case, he claimed that '...the systematic collection, processing and retention on a searchable database of personal information, even of a relatively routine kind, involves a significant interference with the right to respect for private life.'[18] In T's case he commented that it was '...only too clear that the continued retention of the information would have been unnecessary, disproportionate and unjustifiable.'[19]

3.3 United Kingdom Supreme Court

The verdict was then appealed by the ACPO and heard by the UKSC, meaning that the ruling would be binding on all lower courts in the UK. The Supreme Court again overturned the previous decision, deciding in favour of the ACPO—unanimously in the case of T and with one dissent in the case of Catt. Lord Sumption JSC's judgement stated that '[t]he retention...of information about other persons such as Catt who were participating in [a recorded] event does not carry any stigma of suspicion or guilt...'.[20] He also ruled that, whilst the quoted retention period of information in the case of T was potentially excessive, a review of the information held had led to its deletion after only two and a half years and showd policy to be acceptably flexible in practice.[21] These views were echoed by the other Justices. In his dissenting judgement on Catt, Lord Toulson JSC could not see '...what value [the police] have identified by keeping indefinitely a record of Catt's attendances at these various events, where he has done no more than exercise his democratic right of peaceful protest.'[22]

[14] *Catt v Association of Chief Police Officers* [2012] EWHC 1471 (Admin), [2012] HRLR 23, para 64.
[15] *R (on the application of T) v Commissioner of Police of the Metropolis* [2012] EWHC 1115 (Admin), (2012) 1 WLR 2978, 27.
[16] ibid 28.
[17] *R (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2013] EWCA Civ 192, (2013) 1 WLR 3305.
[18] ibid 20.
[19] ibid 25.
[20] *R (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* (n 1) para 24.
[21] ibid para 29.
[22] ibid para 35.

4 Thoughts on the verdict

That only Lord Toulson dissented in the case of Catt is startling. The ACPO position that their broad data recording and retention was justified on the grounds of not knowing in advance which attendees would commit criminal acts is flimsy—'worth keeping an eye on at until proven benign' is discomfortingly similar to 'guilty until proven innocent'. Lord Sumption's judgement focused on whether the police *retention* of the information was proportionate, whilst glossing over whether the initial recording itself was justifiable.

Though the data collected amounted to nothing intrusive (recalling Gross LJ[23]), the European Court of Justice ruled in *Digital Rights Ireland*[24] that it 'does not matter whether [information] is sensitive or whether the persons concerned have been inconvenienced in any way [by its collection]' when deciding if the right to privacy has been infringed. Additionally, there exists evidence that the mere *threat* of surveillance is enough to produce a chilling effect on freedom of speech (including freedom to protest).[25]

Finally, whilst professing no intimate knowledge of the intricacies of the Domestic Extremism Database, the notion that a simple find-and-replace operation for Catt's name when he was deemed not to pose a risk would have been unreasonably arduous seems patently absurd.

T's case is rather clearer. As the police were motivated to act—handing out a Prevention of Harassment Notice—it is justifiable that they would want to keep a record of having done so. As the quoted notice states clearly, '[it] does not in any way constitute a criminal record'. The maximum of 7–12 years for retention is excessive in this case, but justifiable in other instances of harassment such as domestic abuse. In the absence of finer-grained regulation regarding retention periods for different forms of harassment, having a time period that is sufficient for the most egregious cases, but that can be truncated at police discretion in more minor cases, seems the best solution.

Lord Sumption was correct to state that T had erroneously chosen to take their issue to the courts, turning 'a straightforward dispute about retention which could have been more appropriately resolved by applying to the Information Commissioner [into] three levels of judicial decision, at a cost out of all proportion to the questions at stake.'[26]

5 Conclusion

The Supreme Court heard two cases in which police data retention was alleged to be disproportionate in respect to the lack of criminality on the part of the claimants. That the Information Commissioner would have been better positioned to hear their complaints was, apparently, lost

[23] *Catt v Association of Chief Police Officers* (n 14) para 64.

[24] Joined Cases C-293/12–C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others (Irish Human Rights Commission intervening)* [2015] OJ C175/6.

[25] Jon Penney, 'Chilling effects: Online surveillance and wikipedia use' (2016) 31(1) Berkeley Technology Law Journal 117.

[26] *R (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* (n 1) para 45.

on one of the parties. Ultimately, the Justices decided that the information recording and retention was justified in both cases on the bases of its non-intimate nature, its non-excessive retention (evidenced by subsequent routine deletions) and its necessity to the proper functioning of the police. In the one case this is true, but the other feels rather more controversial. That only one voice dissented on collection of the information on the basis of reversed presumption of innocence is rather disconcerting.

References

Catt v Association of Chief Police Officers [2012] EWHC 1471 (Admin), [2012] HRLR 23.

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Data Protection Act 1998.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

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R (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland [2015] UKSC 9, [2015] AC 1065.

R (on the application of T) v Commissioner of Police of the Metropolis [2012] EWHC 1115 (Admin), (2012) 1 WLR 2978.