



# **Rage against the Machine – remedies for protesters**

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# Conditions on Protests

- Processions - Section 12 of the Public Order Act 1986
- Assemblies – Section 14 Public Order Act 1986
- Parliament Square – Sections 12 & 14 Public Order Act, Police and Social Responsibility Act 2011 and local byelaws



# Misuse of Bail

- The growing use of strict pre-charge bail conditions in the protest context is a worrying trend and has been condemned by campaign groups and by a UN Special Rapporteur on the rights to freedom of peaceful assembly and of association.
- Recent examples – Dale Farm eviction 2011, anti –BNP and Anti-EDL protests in 2013.
- Critical Mass July 2012 also an example of misuse of bail albeit not strictly speaking in a protest context.



# Potential Civil Action for Compensation

- There are a number of potential civil action for compensation available to protesters depending on the specific facts of their case:
- Assault & Battery:
  - Battery: is the intentional or reckless use of force;
  - Assault: reasonable apprehension that a battery is imminent;
  - Assault or battery if police not acting within powers or force excessive in the circumstances.



# Potential Civil Action for Compensation

- False Imprisonment

- Detained without lawful authority;
- Lawful detention can become unlawful if police fail to inform protester of reason for arrest as soon as practicable or if excessive (e.g. Critical Mass);
- S.24(5) PACE – necessity to arrest.
  
- ***O’Hara v Chief Constable of Royal Ulster Constabulary [1997] AC 286, [1997] 2 WL 1, HL***
- ***Davidson v Chief Constable of North Wales & Anor [1994] 2 ALL ER 597***



# Potential Civil Action for Compensation

- Malicious Prosecution
  - Claim brought maliciously;
  - Without reasonable and probable cause;
  - Court proceedings concluded in the claimant's favour;
  - Damage suffered.
- ***Copeland v Commissioner of Police of the Metropolis [2014] EWCA Civ 1014***: The correct test to identify the appropriate prosecutor in a malicious prosecution claim is whether they were '*instrumental in bringing the prosecution.*'



# Potential Civil Actions for Compensation

- Misfeasance in Public Office

- Criteria for misfeasance in public office outlined in ***Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1 HL***
  - Conduct must be that of a public officer exercising power in that capacity;
  - Intended to injury or knowingly or recklessly acted beyond their powers;
  - Caused damage;
  - Should have known it would cause damage of this kind.
- Often overlap with false imprisonment and malicious prosecution claims.



# Potential Civil Actions for Compensation

- Human Rights Act (HRA)1998
- Claims under the Human Rights Act particularly relevant to protesters: -
  - Article 3: Inhumane and degrading treatment (overlap with assault and high threshold);
  - Article 5: Deprivation of liberty (overlap with false imprisonment claim, but developing area);
  - Article 8: Right to private and family life (conditions of imprisonment and release of data);
  - Article 10: Freedom of Expression;
  - Article 11: Right of Freedom of Assembly and Association;
  - Article 14: Discrimination.





# Potential Civil Actions for Compensation

- Relevant Considerations

- Interplay between HRA and domestic law and developing case law;
- HRA Declaration;
- Domestic awards have traditionally been more generous than HRA awards;
- The possibility of aggravated and exemplary damages.



# Potential Civil Actions for Compensation

- Practicalities

- Funding?
- Case Management of Group Action:
  - Group Litigation Order appropriate (CPR Part 19)?
  - Test Claimants/ Lead Cases – dealing with common/ generic issues;
  - Working with other firms acting for other claimants;
  - Cost Budgeting;
  - Proportionality (CPR 44) – costs can be reasonable and necessary, but still disproportionate.



# Judicial Review vs Private Law

## Advantages

- Quicker
- Cheaper
- Protesters are keen to use it in an attempt to change policing of protest

## Disadvantages

- Claimants has to accept Defendants account so unsuited to cases where there is significant factual dispute
- Courts are reluctant to interfere with operational policing decisions

***Sher v the Chief Constable of Greater Manchester and Others [2010] EWHC 1859 (Admin)***



# Kettling

***R (on the application of Moos) v Commissioner of Police for the Metropolis*** [2012] EWCA Civ 12 Court upheld the police containment of protesters at Climate Camp during the G20 demonstrations in 2009.

***Austin & Ors v UK*** [2012] ECHR 459. The ECHR held that the use of “kettling” or “containment” does not constitute a deprivation of liberty for the purposes of Art 5 provided its use is “unavoidable as a result of circumstances beyond the control of the authorities...necessary to avert a real risk of serious injury or damage and...kept to the minimum required for that purpose”.



# Kettling

- ***R (Mengesha) v Commissioner of Police for the Metropolis [2013] EWHC 1965 (Admin)***
- The Police cannot lawfully make the provision of personal details a general condition for the release of people from containment;
- The Police cannot lawfully require individuals to submit to being closely filmed for identification purposes as a condition for release;
- The retention of photographs or film footage taken in such circumstances will be unlawful.



# Data Retention

## DNA & Fingerprints

- The Protection of Freedoms Act 2012 introduced a new regime governing the retention of biometric data (fingerprints and DNA). The Act came about as a consequence of ***S & Marper v the UK [2008] ECHR 1581***.
- A person arrested or charged with a minor offence will have their DNA and fingerprints automatically deleted on conclusion of the proceedings.
- Those arrested but not charged with a qualifying offence, i.e. serious offences, will also have their biometric data deleted automatically unless the force applies to the Biometrics Commissioner for retention of that material for 3 years. In those circumstances, the individual can make representations to the Biometrics Commissioner for deletion.



# Data Retention

- This leaves two situations in which applications for early deletion of data can be made:
- Where biometric data is held and a person (with no convictions) is given a penalty notice for disorder (which is not a conviction under PACE).
- Where material is held from a person arrested and charged with a qualifying offence and the application for early deletion is made within the normal three year period for retaining that data. Grounds for deletion in these circumstances are difficult to establish. **(See National Police Chiefs' Council - Deletion of Records from National Police Systems - Annex A)**



# Data Retention

## Photographs and PNC Records

- The retention of custody photographs and entries on the police national computer are not covered by the **Protection of Freedoms Act 2012**. However, there is a record deletion process and individuals can apply to chief officers.
- In ***R (RMC and FJ) v Metropolitan Police Commissioner and others* [2012] EWHC 1681 (Admin)** the Court held that it was disproportionate for the Defendant to retain photographs taken on arrest in the police station for long periods of time in cases where the individual was subsequently not charged and/or not convicted of any offence.





# Data Retention

## Other police databases

- ***R (Catt) v Commissioner of Police of the Metropolis and ACPO and R (T) v Commissioner of Police of the Metropolis***
- The Supreme Court found that the state's systematic collection and storage of data about an individual in retrievable form is an interference with the individual's right to respect for private life and must be justified under Article 8(2). The Court went on to find that the legal regime governing the police's retention of data satisfied the legality requirement of Article 8 and thus is compatible with the Convention. Therefore, there was no breach of either Mr Catt's or Ms T's rights and the appeals were allowed. (Mr Catt has stated he is planning to appeal to the ECHR).
- Paras 4, 34 & 45 suggest that the way to challenge information held is a SAR and then raise objections with the Information Commissioner not JR.



# Police Complaints

## New Legislation

- *The IPCC (Complaints & Misconduct) (Contractors) Regulations 2015*: From 08.04.15 complaints, conduct matters and DSI matters in relation to contractors dealt with under this regulation;
- *The Police (Conduct) (Amendment) Regulations 2015*: Came into force on 01.05.15 with exception of Reg 4, which came into force on 13.03.15 and Reg 5, which is coming into force on 01.01.16;
- IPCC revised their Statutory Guidance to Police Service on Handling Complaints in May 2015.



# Police Complaints

## Why Pursue a Police Complaint?

- Police complaint may lead to an apology and disciplinary action being taken against police or member of staff.

## BUT:

- It is extremely rare for disciplinary action;
- The quality of the reports are hugely variable;
- Is a police complaint the correct vehicle if challenging operational policing decisions during a protest?
- A complaint is likely to delay the civil action;
- Historically there have been issues with police officers resigning during a police complaint to avoid misconduct proceedings.



# Data Protection Act (DPA) 1998

- Controls how personal data is used/ processed by police;
- S.4(4) imposes a duty on the police to abide by 8 DPA principles;
- Part IV details exemptions;
- Applicant must make an application in writing and pay £10 fee;
- 40 days to comply with request;
- DPA and Article 8 ECHR (right to private & family life) overlap;
- The DPA can be used:
  - To ascertain information held by police;
  - To claim compensation if there has been a breach of the DPA causing damage;
  - To rectify, block, erase or destroy inaccurate data (s.14 DPA)



# Data Protection Act (DPA) 1998

## Can a DPA claim only be pursued if there is a financial loss?

- **Johnson v MDU [2006] EWHC 321 (Ch)**: it was held that s.13(1) damages was only intended to cover pecuniary loss arising from DPA breach. However once a financial loss is established; this enables non pecuniary losses to be claimed too;
- Article 8 ECHR does not require a financial loss.



## Data Protection Act (DPA) 1998

- ***Anthony Crooks v Chief Constable of Essex Police [2015] EWHC 988 (QB):***  
Successful claim under DPA and Article 8 ECHR after Essex Police issued a press release of the 10 most wanted suspects. This included a photo of the claimant, whom rape allegations had been made. The Court found that this was not proportionate or necessary. A proportionate response would have been for the police to release the claimant's name and say the police wanted to contact him. The Claimant was awarded £67,750 (majority of award LoEs)
- ***R (on the application of Catt) v Commissioner of the Metropolis & Anor: R (on the application of T) v Commissioner of Police of the Metropolis [2015] UKSC 9***



# Freedom of Information Act (FOIA) 2000

- Creates a general right to information held by public authorities including the police;
- There is a presumption of disclosure, but a request can be refused on grounds:
  - Proportionality – costs and staff time;
  - Vexatious;
  - Repeats previous request from same person
- Part II FOIA details exemptions – ‘class based’ or ‘prejudice based’
- Neither confirm nor deny response;
- Reform? Article in Financial Times 21.06.15: Gove plans freedom of information crackdown.



## Information Commissioner's Office (ICO)

- The Information Commissioner's Office (ICO) has a general duty to investigate complaints from members of the public who believes an authority such as the police has failed to respond correctly to a request for information either under the Data Protection Act 1998 or Freedom of Information Act 2000;
- ICO website:  
*'The UK's independent authority set up to uphold information rights in the public interest, promote openness by public bodies and data privacy for individuals.'*





## Information Commissioner's Office (ICO)

- The ICO cannot pay out compensation to an individual;
- Under section 55A to 55E of the DPA 1998 (introduced by the Criminal Justice & Immigrations Act 2008), the Information Commissioner may serve a monetary penalty notice (up to a max of £500,000);
- 18.05.15: The ICO issued South Wales Police with a £160,000 fine for losing a video recording linked with a sexual abuse case;
- The ICO can issue undertakings, enforcement notices and prosecutions. It monitors data breach trends.



# The Future

- Undercover Policing of Protest Groups
  - Critical HMIC Report dated 14.10.14 on undercover policing in England and Wales;
  - Public Enquiry in relation to undercover policing ongoing;
  - Ongoing litigation – civil actions.
- Further Funding Cuts?
  - Conservative Manifesto: *'We will continue to review our legal aid systems, so they can continue to provide access to justice in an efficient way.'*
  - £12bn welfare cuts to be announced at next Budget;
  - More protest?



# The Future

- Scrapping the Human Rights Act 1998?

- Conservative Manifesto: *‘We will scrap Labour’s Human Rights Act and introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK. The Bill will remain faithful to the basic principles of human rights...’*
- Queen’s Speech 27.05.15: *‘My government will bring forward proposals for a British Bill of Rights.’*

## Reform of Stop & Search?

- Conservative Manifesto.

- Reform of Strike Ballot Rules

- Queen’s Speech on 27.05.15.

