European Court of Human Rights: Catt v. the United Kingdom

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The European Court of Human Rights (ECtHR) has delivered a judgment on the compatibility of the right to privacy under Article 8 of the European Convention on Human Rights (ECHR) with the collection, retention and further use of personal data for purposes of police intelligence, while two earlier cases reported in IRIS on the bulk interception of personal communications for intelligence purposes and the right to privacy are pending before the Grand Chamber of the European Court of Human Rights (ECtHR) (Centrum för Rättvisa v. Sweden, IRIS 2018-8/3, and Big Brother Watch and Others v. the United Kingdom, IRIS 2018-10/1).

The applicant in Catt v. the United Kingdom has been active in the peace movement for many years and has regularly attended public demonstrations. He participated in demonstrations and meetings organised by labour unions, in a pro-Gaza protest and in several (violent) demonstrations against a United States-owned company which produces weapons in the United Kingdom. Mr Catt was arrested twice at such demonstrations for obstructing the public highway, but he has never been convicted of any offence. In 2010, he made a subject access request to the police under the Data Protection Act for information relating to him. Sixty-six entries from nominal records for other individuals and information reports concerning incidents at demonstrations which incidentally mentioned him were disclosed to him. Those records were held in a police database known as the “Extremism database”. Mr Catt requested the Association of Chief Police Officers (“ACPO”) to delete all entries from nominal records and information reports which mentioned him. As his request was dismissed, he issued proceedings against the ACPO for judicial review, contending that the retention of his data was not “necessary” within the meaning of Article 8, section 2 ECHR. The Supreme Court finally upheld the refusal to delete the data, identifying three reasons for the need to retain the data at issue: (1) to enable the police to make a more informed assessment of the risks and threats to public order; (2) to investigate criminal offences where there have been any, and to identify potential witnesses and victims; (3) to study the leadership, organisation, tactics and methods of protest groups which have been persistently associated with violence. The majority of the Supreme Court was of the view that sufficient safeguards existed to ensure that personal information was not retained for longer than required for the purpose of maintaining public order and preventing or detecting crime. It observed that political protest is a basic right recognised by the common law and protected by

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Articles 10 and 11 ECHR, but that the collection and retention of the data concerning Mr Catt was justified and proportionate, as the material was not usable or disclosable for any purpose other than police purposes, except as a result of an access request by the subject under the Data Protection Act, and it was not used for political purposes or for any kind of victimisation of dissidents. The Supreme Court also underlined a basic principle about intelligence gathering: that it is necessarily acquired indiscriminately in the first instance and that its value can only be judged in hindsight, as subsequent analysis for particular purposes discloses a relevant pattern.

Mr Catt lodged an application with the ECtHR, complaining that the retention of his data by the police was in violation of his right to privacy as protected by Article 8 ECHR. The ECtHR expressed its concern that the collection of data by the police relating to persons involved in “domestic extremism” did not have a clearer and more coherent legal base. It observed that in light of the general nature of police powers and the variety of definitions for the term “domestic extremism”, there was significant ambiguity over the criteria being used by the police to govern the collection of the data in question. After this consideration, the ECtHR focused on the question of whether the collection, retention and use of Mr Catt’s personal data was necessary in a democratic society. The government argued that due to the extensive amount of judicial scrutiny at domestic level, the question of whether it was necessary to collect and retain Mr Catt’s data fell within the state’s margin of appreciation and it was therefore not for the ECtHR to decide. However, the ECtHR was of the opinion that in this case there were “compelling reasons” to substitute its own assessment of the merits of the case for that of the competent national authorities. In the first place, the ECtHR considered it significant that personal data revealing a political opinion fell within the special categories of sensitive data attracting a heightened level of protection. The ECtHR also reiterated the importance of examining compliance with the principles of Article 8 ECHR where the powers vested in the state are obscure, creating a risk of arbitrariness, especially where the technology available is continually becoming more sophisticated. As to whether there was a pressing need to collect the personal data concerning Mr Catt, the ECtHR accepted that there was: it agreed with the UK Supreme Court that the nature of intelligence gathering was such that the police first needed to collect the data before evaluating its value. Although Mr Catt himself was not suspected of being directly involved in any criminal activities, it was justifiable for the police to collect his personal data, as he had participated repeatedly and publicly aligned himself with the activities of a violent protest group. As to whether there was a pressing need to retain Mr Catt’s data, the ECtHR considered that there was not. It referred to the absence of effective safeguards relating to personal data revealing political opinions. The ECtHR emphasised that “engaging in peaceful protest has specific protection under Article 11 of the Convention, which also contains special protection for trade unions, whose events the applicant attended”. In this connection, it noted that the definition of “domestic extremism” referred to the

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collection of data on groups and individuals who act “outside the democratic process”. Therefore, the police did not appear to have respected their own definition (fluid as it may have been) in retaining data on Mr Catt’s association with peaceful, political events, while such events are “a vital part of the democratic process”. Referring to the danger of an ambiguous approach to the scope of data collection in the present case, the ECtHR considered that the decisions to retain Mr Catt’s personal data did not take into account the heightened level of protection it attracted as data revealing a political opinion, and that under the circumstances, its retention must have had a “chilling effect”. Furthermore, the retention of Mr Catt’s data, in particular the data concerning peaceful protest, has neither been shown to be absolutely necessary, nor for the purposes of a particular inquiry. Finally, the ECtHR was not convinced that the deletion of the data would be as burdensome as the government had contended. According to the ECtHR, it would be entirely contrary to the need to protect private life under Article 8 if the authorities could create a database in such a manner that the data in it could not be easily reviewed or edited, and then use this development as a justification to refuse to remove information from that database. On the basis of the foregoing considerations, the ECtHR unanimously concluded that there had been a violation of Article 8 ECHR.

Judgment by the European Court of Human Rights, First Section, case of Catt v. the United Kingdom, Application no. 43514/15, 24 January 2019

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