

IN THE COURT OF APPEAL

Appeal No: \_\_\_\_\_

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2018] EWHC 975 (Admin) and [2022] EWHC 1630 (Admin)

B E T W E E N:

THE QUEEN

on the application of

LIBERTY

Appellant / Claimant

- and -

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(2) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Respondents / Defendants

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CLAIMANT'S GROUNDS OF APPEAL ON THE EU LAW CLAIM

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References to the Divisional Court's judgment on the Stayed EU Law Claim and the Non-Part 4 EU Law Claim take the form 2022 J §para.

References to the Divisional Court's judgment on the Part 4 EU Law Claim, *R (Liberty) v Secretary of State for the Home Department and another* [2018] EWHC 975 (Admin), [2019] QB 481 take the form 2018 J §para.

**Ground 1: General and indiscriminate retention and access regimes**

1 The Divisional Court erred in finding at 2018 J §138 and 2022 J §140 that the “**bulk provisions**” in the Investigatory Powers Act 2016 (“**IPA**”), namely, Part 5, Part 6 Chapters 1 to 3 and Part 7, and in addition Parts 3 and 4, are not “*general and indiscriminate*” within the meaning of retained EU law. The Court should have held that these provisions provide for the “*general and indiscriminate*” collection and retention of data and that, accordingly, retained EU law requires them to have certain safeguards.

- 2 In addition, in relation to Part 7, the Divisional Court erred in finding at 2022 J §139 that Part 7 of the IPA does not fall within the scope of retained EU law. The Court should have held that, at least to the extent that Part 7 may authorise the retention of data obtained under other powers in the IPA (eg under s 225), it falls within the scope of, and must contain the safeguards required by, retained EU law.

**Ground 2: Prior independent authorisation for access**

- 3 The Divisional Court erred in finding at 2022 J §145 that, in relation to access to data obtained under the bulk powers which is accessed for a purpose other than national security, the requirement for prior independent authorisation of access established by Joined Cases C-203/15 and C-698/15 *Watson v Secretary of State for the Home Department* and *Tele2 Sverige AB v Post-och telestyrelsen* [2017] QB 771 and *Watson v Secretary of State for the Home Department* [2018] QB 912 is satisfied by the need for approval to be obtained from a Judicial Commissioner for the issue of a bulk warrant. It should have held that this requirement is not satisfied, so the IPA is to that extent incompatible with retained EU law.

**Ground 3: Equivalent protection under the Charter of Fundamental Rights / general principles of EU law**

- 4 The Divisional Court erred in finding at 2022 J §150 that, insofar as the provisions of the IPA do not comply with the requirements of Articles 8 and 10 of the European Convention on Human Rights (“ECHR”), including as established by the judgment of the Grand Chamber in *Big Brother Watch v United Kingdom* (App Nos. 58170/13, 62322/14 and 24960/15), it does not follow that the IPA does not comply with the requirements of Articles 7 and 11 of the Charter of Fundamental Rights and/or equivalent general principles under retained EU law. The Court wrongly failed to consider whether (irrespective of whether or not the CJEU is bound by a decision of the ECtHR) relevant retained EU law provides equivalent protection. It should have held that it does, and that the IPA is accordingly incompatible with it.

**BEN JAFFEY QC**

**DAVID HEATON**

**SOPHIE BIRD**

12 August 2022

**BHATT MURPHY**