2018

IN THE MATTER OF PRPOSED AMENDMENTS TO THE DATA PROTECTION BILL

OPINION

1. In my Opinion dated 26 January 2018 (with which this Opinion must be read) I considered the compatibility of what was then clause 168 of the Data Protection Bill, as brought from the House of Lords on 18 January 2018, with the right to freedom of expression and information contained in Article 10 of the European Convention on Human Rights (ECHR) and Article 11 of the Charter of Fundamental Rights of the European Union (the Charter). Clause 168 was closely modelled on section 40 of the Crime and Courts Act 2013 (a controversial provision which the Government has since decided will not be brought into force). The main difference between the two provisions was that section 40 of the 2013 Act deals with claims for libel, slander, breach of confidence, misuse of private information, malicious falsehood and harassment[1], whereas clause 168 dealt with claims for breach of the data protection legislation.

2. For the reasons I developed in that Opinion I concluded that clause 168 was incompatible with Articles 6, 10 and 14 ECHR and Articles 11, 21(1) and 47(2) of the Charter. For that reason I advised that if it had been enacted it would have been liable to be struck down by the UK courts on the basis that it was inconsistent with directly applicable EU law, and/or liable to be found by the European Court of Human Rights (ECtHR) to be in violation of the ECHR.

3. I summarised the vice of clause 168 in paragraphs 13 and 14 of my Opinion as follows:-

   "If the media defendant <u>is</u> a member of an approved regulator, the court *must not* award costs against it, unless the issues in the claim could have been resolved by the arbitration scheme of the approved regulator or it is just and equitable to make a different costs award: clause 168(2). Accordingly the general rule will be that a claimant suing a media defendant who is a member of an approved regulator will not be able to recover his costs, win or lose, in any case where the claim could have been resolved using the arbitration service, unless the defendant has refused to use the arbitration service. By contrast, if the defendant <u>is not</u> a member of an approved regulator, the court *must* award costs against it, unless the issues could not have been resolved by arbitration using an arbitration scheme of an approved regulator or

[1] See section 42(4) of the 2013 Act.

it is just and equitable to make a different award of costs: clause 168(2). This means that where the defendant is not a member of an approved regulator, the general rule will be that it will be ordered to pay the claimant's costs, whether or not the claim has succeeded.

It is therefore clear that clause 168 imposes a much less favourable costs regime in claims for breach of the data protection legislation on media defendants who are not members of an approved regulator. Clause 168(3) creates a presumption that such defendants (unlike defendants who are members of an approved regulator) must pay all the costs of the claim, that is their own and the claimant's costs, whether the claim succeeds or not. There is no doubt that the markedly less favourable costs regime imposed on defendants who are not members of an approved regulator will have a chilling effect on the journalistic activities of publishers who have chosen not to join IMPRESS. They will inevitably be less willing to investigate and publish articles about living individuals which might attract claims for breach of the data protection legislation. That chilling effect will have an impact even where a publisher believes it has grounds to defend such a claim, because the effect of clause 168(3) is that it will be unlikely to recover its costs even if the claim fails."

4. I pointed out in paragraph 15 of my Opinion that it is well established that financially disadvantageous measures of this sort in connection with litigation can amount to an interference with the media defendant's right to freedom of expression and information under Article 10 ECHR and Article 11 of the Charter. It matters not that whether the chilling effect can be shown to have impacted on the particular facts of the case, since it is the potential chilling effect which matters. At paragraph 17 I concluded that the interference created by clause 168 with the Article 10 ECHR/Article 11 Charter right of freedom of expression and information could not be justified under Article 10(2) ECHR and Article 52(1) of the Charter where the imposition of the disadvantageous costs regime on a category of media publishers was based solely on their lawful and principled[2] decision to join IPSO and not to join IMPRESS.

5. For closely related reasons I concluded at paragraph 19 that the interference with the media publishers' rights of freedom of expression and information arising from the imposition of a disadvantageous costs regime on those publishers which have chosen to join IPSO and not to join IMPRESS was also contrary to the prohibitions on discrimination contained in Article 14 ECHR and Article 21(1) of the Charter respectively. I also concluded at paragraphs 23-25 that the element of compulsory

[2] In *R (News Media Association) v Press Recognition Panel* [2017] EWHC 2527 (Admin) it was recognised that the position of IPSO in declining to seek recognition from the PRP as an approved regulator was a "principled" one.

arbitration which clause 168 involved was incompatible with Article 6 ECHR/Article 47(2) of the Charter.

6. Shortly after my Opinion on clause 168 was made available that clause was rejected by the House of Commons.

7. However, three very similar new clauses have now been put forward (NC 7, NC20 and NC25 in the Notices of Amendments given up to and including 3 May 2018. Each of these new clauses has the same essential vice as clause 168 which was addressed in my previous Opinion – each imposes a much less favourable costs regime in claims for breach of the data protection legislation on media defendants who are not members of an approved regulator. Each of these new clauses creates a presumption that such defendants (unlike defendants who are members of an approved regulator) must pay all the costs of the claim, that is their own and the claimant's costs, whether the claim succeeds or not.

8. Whilst the three new clauses have minor variations in my view it is clear that each of them is incompatible with Articles 6, 10 and 14 ECHR and Articles 11, 21(1) and 47(2) of the Charter for the reasons explained in my previous Opinion. It follows that if enacted each of these new clauses would be liable to be struck down by the UK courts on the basis that it is inconsistent with directly applicable EU law, and/or liable to be found by the European Court of Human Rights (ECtHR) to be in violation of the ECHR.

9. The minor variations between the clauses in my view make them more, rather than less objectionable. For example, NC20 exempts from this punitive costs regime publishers which publish "predominantly in specific regions or localities" – a transparent (and in my view arbitrary and unjustifiable) discrimination against the national press. Similarly NC20 singles out publishers organised on the basis of a lawful commercial model (those which generate profits for their shareholders). These features of the new clauses only serve to make it clearer that the punitive costs regime for which they provide is incompatible with the prohibitions on discrimination contained in Article 14 ECHR and Article 21(1) of the Charter.

I shall be glad to advise further on any matter arising if so desired.

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4 May 2018