

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**DIVISIONAL COURT**

**Before: The Right Honourable Lord Justice Edis and The Honourable Mr Justice Lane**

**B E T W E E N:**



**CO/4793/2020**

**THE KING**  
**(on the application of HM)**

**Claimant**

**- and -**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

**AND B E T W E E N:**

**CO/577/2021**

**THE KING**  
**(on the application of (1) MA and (2) KH)**

**Claimant**

**- and -**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

**- and -**

**PRIVACY INTERNATIONAL**

**Intervenor**

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***ORDER***

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**UPON** the Order of Mrs Justice Lang dated 12 January 2021 granting permission to apply for judicial review in the Claim CO/4793/2020 (“**the HM Claim**”)

**AND UPON** the Order of Mrs Justice Foster dated 24 November 2021 lifting the stay ordered by Mrs Justice Lang dated 18 March 2021 of the Claim CO/577/2021 (“**the MA/KH Claim**”), granting permission to apply for judicial review in the MA/KH Claim and joining the claim with the HM Claim

**AND UPON** the Order of Mrs Justice Foster dated 24 November 2021 granting Privacy International permission to intervene by written submissions

**AND UPON** the Court considering the Claimants' joint skeleton argument dated 10 January 2022, and the Defendant's skeleton argument dated 21 January 2022

**AND UPON** the Court considering the Intervener's written submissions dated 10 January 2022

**AND UPON** hearing Tom de la Mare KC for HM, Tom Hickman KC for MA/KH and Sir James Eadie KC and Alan Payne KC for the Secretary of State on 25-28 January 2021 and on 14 October 2022

**AND WHEREAS** for the purposes of this Order "**the Mobile Phone Policy**" refers to an operation carried out by the Defendant whereby:

- i) between at least April 2020 and 23 November 2020, migrants who arrived in the UK by small boat would be subject to a search, as part of which mobile phones ("phones") and SIM cards were seized and retained; and
- ii) the seizure might include an unlawful demand for the PIN number for the phone, under threat of criminal sanction; and
- iii) the phones and SIM cards of those migrants were seized and retained for (a) an unlimited period of time if seized before July 2020; or (b) under a 3 month retention policy if seized after June 2020; and
- iv) until 20 June 2020, all phones and SIM cards were (wherever possible) to be subjected to a full download of data (with a full download also being carried out on certain phones by the Defendant's Joint Debriefing Team ("**JDT**") after that date, up to and including in November 2020); or
- v) from 20 June 2020 until 22 July 2020, save insofar as recital (iv) provides otherwise in respect of the JDT, phones and SIM cards were (wherever possible) to be subjected to a full download of data from the previous 30 days; or
- vi) from 22 July 2020 until 23 November 2020, save insofar as recital (iv) provides otherwise in respect of the JDT, phones were seized and held without being downloaded unless a person of interest was identified on the boat, in which case the

phones and SIM cards from every person from that boat were (wherever possible) subject to a full download of data from the previous 30 days.

**AND UPON** the Court handing down Judgment on 25 March 2022 (“**Judgment**”)

**AND UPON** the Claimants withdrawing the remaining elements of their claims

**AND UPON** the Claimants having agreed with the Defendant confidential terms of settlement in relation to damages, just satisfaction and further relief

**IT IS HEREBY ORDERED:**

**(i) The Claimants’ relief**

1. The Claimants’ claim is allowed for the reasons, and on the grounds, set out in the Judgment.

The Mobile Phone Policy

2. It is declared that the Mobile Phone Policy was unlawful because it was unpublished.
3. It is declared that the Mobile Phone Policy, and any searches and/or seizures of phones conducted pursuant to it, were unlawful because it operated in a blanket way to fetter discretionary powers of:
  - (1) search under paragraph 25B of Schedule 2 of the Immigration Act 1971; and
  - (2) seizure under section 48 of the Immigration Act 2016.
4. It is declared that the Mobile Phone Policy was unlawful because:
  - (1) it was “*not in accordance with law*” for the purposes of Article 8 ECHR (“Article 8”) and Article 1 of Protocol 1 to the ECHR (“A1P1”);
  - (2) it did not provide a lawful basis for the processing of data pursuant to the Data Protection Act 2018 (“the 2018 Act”);
  - (3) insofar as it provided for phones to be retained for a minimum period of three months, it (a) gave rise to a disproportionate interference with Article 8 and A1P1, (b) failed to comply with the requirement for strict necessity under the 2018 Act and (c) failed to comply with the fifth data protection principle applicable under the 2018 Act;

- (4) insofar as it led to the full downloading (ie complete extraction) of data as described in sub-paragraphs iv), v) or vi) of the definition of “the Mobile Phone Policy” in the recitals to this Order, it (a) gave rise to a disproportionate interference with Article 8 and A1P1, (b) failed to comply with the requirement for strict necessity under the 2018 Act, and (c) failed to comply with the third and sixth data protection principles applicable under the 2018 Act.
5. It is declared that any searches of persons for phones and/or SIM cards made pursuant to the Mobile Phone Policy were unlawful on the basis that any such search was in pursuance of the blanket policy of search for phones for evidential purposes, and was not based on paragraph 25B(2) or (3)(a) of Schedule 2 to the Immigration Act 1971.

#### Section 48 of the Immigration Act 2016

6. It is declared that section 48 of the Immigration Act 2016 does not enable seizure of an item of property that comes to light during the search of a person.
7. It is declared that any seizures of mobile phones and/or SIM cards identified through a search of a person made pursuant to the Mobile Phone Policy were unlawful on the basis that they were predicated on the use of section 48 of the Immigration Act 2016, which did not enable the seizures in these cases.

#### PIN numbers

8. It is declared that the phone seizure receipts used by the Defendant from the middle of 2016 to April 2020 did not correctly record the legislative framework in the Regulation of Investigatory Powers Act 2000 and were therefore unlawful.
9. Without prejudice to paragraph 8 above, it is declared that, insofar as any officer applying the Mobile Phone Policy suggested that, absent judicial intervention under section 49 of the Regulation of Investigatory Powers Act 2000, an individual was under a legal obligation to provide a PIN number upon request, whether orally or in writing, under any threat of any criminal sanction, such conduct was unlawful.

#### Data Protection Impact Assessments

10. It is declared that, for the reasons given in the judgment, the Defendant’s data protection impact assessments did not comply with section 64 of the 2018 Act.

## The Claimants

11. By reason of paragraph 5 above, the searches of the Claimants were not sanctioned by paragraph 25B(2) or (3)(a) of Schedule 2 to the Immigration Act 1971 and were unlawful.
12. By reason of paragraphs 2, 3, 4, 5, 6, 7 and 10 above, it is declared that the search, seizure, and retention of each of the Claimants' mobile phones and SIM cards were unlawful, as was, in the case of MA and KH, the extraction, retention and use of data therefrom.
13. By reason of paragraph 8 above, it is declared that the demand made of MA for his PIN number to access his phone was unlawful.
14. It is declared that the search, seizure and retention of the Claimants' phones and, in the case of MA and KH, the extraction, retention and use of data therefrom constituted a breach of Article 8 and A1P1, as it was not in accordance with the law for the reasons set out in paragraphs 2, 4(1), 4(2), 6 and 7 above.
15. It is declared that:
  - (1) the extraction of data pursuant to the Mobile Phone Policy in relation to KH and MA was unlawful under the 2018 Act, and constituted a breach of Article 8;
  - (2) the subsequent retention of data extracted from the phones of KH and MA was unlawful under the 2018 Act, and constituted a breach of Article 8;
  - (3) the Claimants' phones were retained longer than necessary, contrary to the fifth data protection principle applicable under the 2018 Act.
16. Pursuant to section 47 of the 2018 Act, the Defendant shall take all reasonable steps to erase or have erased the data extracted from the devices of KH and MA, including the "intelligence report" in respect of KH, and any record, reproduction, or derivation of it; and the Defendant is to subsequently confirm in writing to KH and MA that their data has been erased.
17. Insofar as it is applicable, the Defendant shall notify all recipients of MA's and KH's data of the erasure and/or rectification of that data, as required by section 48(9)(a) of the 2018 Act, in order that those recipients rectify or erase the same data, as required by section 48(9)(b) of the 2018 Act. Where such notification occurs, the Defendant shall subsequently confirm in writing to KH and MA that section 48(9) has been complied with.

**(ii) Dissemination of the Judgment and Order**

18. The Defendant shall publish on a Home Office website an electronic copy of this Order (with a link to the Judgment) as soon as possible following receipt of the sealed Order from the Court; and shall maintain that copy and link on the website until at least 12 months after its appearance.

19. For all cases:

(1) in the period 1 April 2020 to 22 November 2020 (inclusive), where the Mobile Phone Policy has been applied to an individual; and

(2) in the period 23 November 2020 to the date of this Order, where section 48 of the Immigration Act 2016 has been relied upon as the legal basis to seize a mobile phone from a migrant who has arrived in the UK by small boat,

the Defendant shall use all reasonable endeavours to bring to the attention of each person (whether by letter, email, text or message or to known addresses or numbers or otherwise) whom the Defendant believes was subject to a search and/or seizure of a mobile phone, in writing: (i) the Judgment; (ii) this Order; (iii) the statement: *“If you have not taken legal advice on your position, you are strongly advised to do so now”*.

**(iii) Costs**

20. The Defendant shall pay forthwith the Claimants’ costs of the proceedings, on an indemnity basis up to and including 24 November 2021, and on a standard basis thereafter, to be the subject of detailed assessment, if not agreed.

**(iv) Final matters**

21. Liberty to parties to apply on notice in writing for further order or directions.

Dated: 14<sup>th</sup> October 2022

BY THE COURT