NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 51/2023
[2024] NZSC Trans 4

MAHIA TAMIEFUNA
Appellant

v

THE KING
Respondent

Hearing:	6 - 7 March 2024
Court:	Winkelmann CJ Glazebrook J Ellen France J Williams J Kós J
Counsel:	S J Gray, E P Priest and S C Shao for the Appellant P D Marshall and A J Ewing for the Respondent B J R Keith, J M Hayward and A de Joux for Privacy Commissioner as the Intervener

CRIMINAL APPEAL

MS GRAY:

E ngā Kaiwhakawā o Te Kōti Mana Nui ko Ms Gray ahau, ko Ms Priest ahau and ko Ms Shao ahau, appearing for the appellant.

WINKELMANN CJ:

Tēnā koutou Ms Gray, Ms Priest and Ms Shao.

MR MARSHALL:

Tēnā koutou e ngā Kaiwhakawā, ko Marshall māua ko Ms Ewing, e tū nei mō te Karauna.

WINKELMANN CJ:

Tēnā kōrua Mr Marshall and Ms Ewing.

MR KEITH:

E ngā Kaiwhakawā, tēnā koutou ko Ben Keith tōku ingoa me Amy de Joux tēnei mō Te Mana Matapono Matatapu. Keith and Ms de Joux for the Privacy Commission, may it please the Court.

WINKELMANN CJ:

Tēnā kōrua Mr Keith and Ms de Joux. Ms Gray, we have a preliminary question for you about your client's name, firstly, is it spelt correctly?

MS GRAY:

It is.

WINKELMANN CJ:

It is?

MS GRAY:

Yes, I have had that question asked many times but that is the correct spelling.

WINKELMANN CJ:

Okay thank you, and the second is how does your client pronounce it?

MS GRAY:

His name is Mahia Tamiefuna.

WINKELMANN CJ:

Tamiefuna, okay thank you.

MS GRAY:

Your Honours, what is proposed is that I will address the first question on which leave was granted and Ms Priest will address the second ground pertaining to section 30 and Ms Shao is here to correct all our mistakes.

WINKELMANN CJ:

That is a heavy burden.

MS GRAY:

She does carry a very heavy burden. So the two grounds your Honours, are firstly, whether the Court of Appeal was correct to find the photographic evidence was improperly obtained and secondly, whether the Court of Appeal was correct in admitting the evidence under section 30 of the Act. For the reasons that we will traverse this morning, the appellant's response to those two questions are yes, to one and no, to the admission of the evidence.

I was intending just to very briefly traverse the facts. I know your Honours will be aware of it but I'm just aware this is being live streamed and so to give context to what follows, I was going to just briefly outlined what happened when the photo was taken.

On the morning of the 2nd of November 2019, two men robbed a man in his home. CCTV footage at the property captured two male offenders, one who was clearly identifiable and another who was not because the top of his cap covered his face. That man was Mahia Tamiefuna. Later that day, the same

unidentified male, Mahia Tamiefuna, still in the same clothes, was captured by CCTV at a local petrol station but again he couldn't be identified, his face was still obscured by the cap.

We now come to the critical events which are the focus of this appeal, three days later at around 4 am, Mahia Tamiefuna was travelling in a private vehicle when it was pulled over by the police for the purpose of conducting a routine check pursuant to 114 of our Land Transport Act. Mr Tamiefuna was in the front passenger seat. Each of the three occupants were asked to provide their names and their personal details, which they did. The driver of the vehicle was found to be driving on a suspended licence and so the police then impounded the car. This meant the three men had to exit the car and they began to remove their belongings and place them on the sidewalk.

Detective Sergeant Bunting at that point took a photo on his smartphone of Mahia Tamiefuna. The photo was close up, it is accepted that he did this without any consent, it is accepted that he did this without warning, even warning Mr Tamiefuna that his photo was about to be taken and he certainly didn't tell him that the photo was going to be uploaded on the NIA database which as your Honours will know can be accessed by all serving police officers in Aotearoa New Zealand.

Importantly, at the time his photograph was taken, Mr Tamiefuna was wearing the similar if not identical clothes as the unidentified man that had committed, with another, the aggravated robbery. With this evidence Mr Tamiefuna was convicted and your Honours will know I am sure the history of the actual proceedings.

Previous courts have all agreed that Mr Tamiefuna was not doing anything unlawful when the photo was taken and the officer agreed in his evidence that the purpose of the photograph was for an intelligence noting in the NIA and that's at paragraph 31, your Honours, of the appellant's submissions, footnote 34. The fact that Mr Tamiefuna was not doing anything unlawful when

he was photographed is key to this case. It is foundational to our argument on the first ground.

The appellant says that this case is significant because it raises issues of fundamental rights of individuals in New Zealand where they intercept with purported police powers. The appellant says it has importance because we live in a digital world and we all know that there are evolving technologies available to the police which can be utilised to collect information about New Zealanders. New Zealand is a free and democratic society and the Bill of Rights is the statutory framework by which we safeguard those rights.
1010

As stated in the long title of the Bill of Rights, which I am sure your Honours are familiar with, is to affirm, protect, and promote human rights and fundamental rights, and that is at paragraph 89 of the appellant's submissions.

In the case of *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 the then Chief Justice Elias said that the Bill of Rights had a transformative effect in New Zealand and it also ensures that New Zealand is complying with our international obligations on human rights, and again that was a comment made by the then Chief Justice Elias in *Hamed* at paragraph 36 of the same page.

So having set the scene of the importance of the New Zealand Bill of Rights I now turn to focus on our arguments. Was the evidence improperly obtained? Under section 30(5) of the Evidence Act 2006 evidence is improperly obtained if it is obtained in breach of an enactment or rule of law, and that's appellant's subs, paragraph 27.

Stating the obvious, we say the photograph evidence in this case is improperly obtained because it's in breach of section 21 of the Bill of Rights Act 1990. The taking and subsequent retention of this photograph amounted to an unreasonable intrusion into Mr Tamiefuna's reasonable expectation of privacy. Section 21 guarantees New Zealanders, all New Zealanders, the right to be free from unreasonable search and seizure.

KÓS J:

Is this your only (**inaudible**) as to illegality? In other words, but for section 21 was the photography of Mr Tamiefuna lawful?

MS GRAY:

No, we say the taking of the photograph was not lawful.

KÓS J:

Apart from section 21?

MS GRAY:

Correct.

KÓS J:

So what's the underpinning for that argument?

MS GRAY:

Well, that there's no statutory power in New Zealand which authorises a police officer to just take a photo of anyone. It's –

KÓS J:

The police operate with both common law and statutory powers.

MS GRAY:

I do get into the common law and statutory power arguments further on in my submissions.

KÓS J:

That's fine. Come to it when you want to.

WINKELMANN CJ:

And you also I think rely on privacy legislation too, don't you?

MS GRAY:

We do.

GLAZEBROOK J:

Just possibly more for the Crown than for you although there could be a distinction between the taking and the keeping of the photograph for intelligence purposes in terms of legality, and I think you touch on this in your submissions but just so that that's on the table.

MS GRAY:

Yes, well, we say the legality ends when the police make a decision that no proceedings are going to be initiated, and we say that that was clear, notwithstanding what Detective Sergeant Bunting says about the items of property. He accepts that they were not investigating a particular crime, they did not suspect Mr Tamiefuna of a particular crime, and we say in those circumstances there was no lawful authority to take the photo and the illegality of that is exacerbated when it is loaded on the NIA police intelligence system.

WINKELMANN CJ:

So what I'm interested in in relation to Justice Glazebrook's question is could you say that the search is not just the taking of a photograph but also the storage on the NIA because the search is an unreasonable intrusion into privacy? It can be a look, it can be a photograph, but could it also – is there some capacity in the word search to stretch to include – because you could say that the troubling thing here is not just the taking the photograph, it's the storage on the NIA, so is that whole thing best conceptualised as a search?

1015

MS GRAY:

Yes, we say that the search is the taking of the photo and the uploading.

GLAZEBROOK J:

So it's really the taking of the photo for the purpose of uploading is unlawful, not the taking of the photo simpliciter, I suppose is – well I know you say the taking of the photo simpliciter is unlawful as well but just noting there could be a distinction between taking a photo, just an ordinary surveillance photo on the street because you're concerned there might be some trouble coming and

taking a photo for the purpose, in the absence of the person doing anything wrong and putting it on a database.

MS GRAY:

Yes, sorry your Honour, what was the question?

GLAZEBROOK J:

Well it wasn't a question, well I suppose it was a question to say is there a distinction because the police and for that matter city councils and all sorts of people now have surveillance and CCTV which is there to protect the public and also to investigate crimes that might happen and anybody walking along the street, getting out of a car, walking out of their house will be captured on that CCTV.

MS GRAY:

I do come to that in the latter part of my submissions. They don't appear in the appellant's written submissions because we hadn't then been in receipt of the respondent's but we do go on to, well I go on to address where it's intelligence noting and where it's not.

GLAZEBROOK J:

So what do you say about the intelligence noting?

MS GRAY:

We say that the police can of course collect information, we say that, but it has to be authorised by a statutory power.

WILLIAMS J:

So you reject the idea of a common law basis for police intelligence gathering?

MS GRAY:

No we accept that the police can gather intelligence but intelligence ends where search begins basically.

GLAZEBROOK J:

I'm sorry?

MS GRAY:

Well intelligence ends where search begins.

WILLIAMS J:

But if search is taking a photo, then intelligence gathering cannot include taking photographs?

MS GRAY:

We think that is arguable that – because the offensive aspect of what happened is that the officer singled Mahia Tamiefuna out for no good reason and took his photo.

ELLEN FRANCE J:

So you're not suggesting for example that this court said in *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145 for example that the police officer could take a photograph of the undercover transaction of purchasing the tinnie, you're not suggesting that's not permissible?

MS GRAY:

Well no because there they're investigating a crime.

ELLEN FRANCE J:

Well I'm just trying to understand where you draw the line.

MS GRAY:

Yes, well intelligence gathering is, we say, falls short of that standard of having a reasonable belief that a crime has been committed or is about to be committed.

KÓS J:

So if the photograph had been taken because he wanted to investigate Mr Tamiefuna over some potentially stolen batteries and a handbag, that would've been okay?

MS GRAY:

Yes, that would've been because he had reasonable grounds to suspect there was stolen property. He would be in effect – he would've been taken down to the police station, I would have imagined, been in police custody and his photo could be taken.

WINKELMANN CJ:

So there would have to have been reasonable grounds?

MS GRAY:

Yes, we say that.

GLAZEBROOK J:

Reasonable grounds to suspect?

MS GRAY:

Yes.

GLAZEBROOK J:

A crime has been committed.

1020

MS GRAY:

And we say that the police practice, which we know is happening in New Zealand, of taking photographs of people in public without good cause and then uploading it onto a national database breaches a person's reasonable expectations of privacy in their dealings with the police.

GLAZEBROOK J:

What do you say about CCTV that's just there for the very purpose of protecting the public because the people know the CCTV's there but also for the purpose if something does happen of picking up the people, and do you say if the City Council does it it's fine, if a private person does it it's fine but if the police do it it's not fine or do you say the police can do that?

MS GRAY:

No, we say the police can do that.

GLAZEBROOK J:

Well, what's the difference?

MS GRAY:

Because, one, they will be putting CCTV and, say, taking Auckland for an example, it will be Fort Street, it will be Vulcan Lane, Queen Street, the lower part, which we know are hot-spots for trouble, and there are hundreds of CCTV cameras there. We don't say that that is unlawful because the public don't have a reasonable expectation of privacy in those circumstances. We all know that there are cameras and we are being surveilled. But, secondly, it's not targeted at an individual who is not doing anything wrong. It's indiscriminate, and the CCTV footage, the camera just rolls over, rolls over, rolls over, and then if something happens the police can go back and get that CCTV footage, but we say that doesn't offend at section 21 because people don't have that reasonable expectation of privacy, it's not targeted to an individual.

WINKELMANN CJ:

It's not stored against their name.

MS GRAY:

It's not stored against their name. My understanding is CCTV footage from cases I've been in has a limited life. In terms of downtown Auckland the longest I know is six months.

KÓS J:

So it's three elements: it's the taking of the photograph, it's the retaining of the photograph and it's the nomination, it's being retained against the name of a person. It's those three elements in combination that you say creates the unlawfulness?

MS GRAY:

We say that is unlawful. Clearly, we say, very clearly unlawful.

KÓS J:

The first alone might not be, for instance, the CCTV footage which is just the photography, but it's the retention on the database and the nomination against Mr Tamiefuna's name that makes a difference?

MS GRAY:

Yes, we accept – we don't say it's just the photo. We say it's the photo and any uploading of it. But the appellant would not concede that going up to a person, close range, pulling out your camera, you're a police officer, and take a photo of a person, say it's not uploaded, we would say that is in violation of section 21. That breaches a social norm.

WINKELMANN CJ:

Because, you're saying, that there are no reasonable grounds to believe this person – that's assuming there are no reasonable grounds to believe this person is involved in offending at that point?

MS GRAY:

Exactly. The officer had no – there was no purpose to it.

WILLIAMS J:

What if the CCTV, indiscriminate CCTV in Fort Street is overlaid with face recognition software so that there is a constant stream of who's there that's available? So there is nomination by AI, not by an individual police officer.

MS GRAY:

Well, yes, again we would say that it would be difficult to say that there had been in – reasonable invasion –

WILLIAMS J:

Why?

MS GRAY:

– intrusion into that person's privacy.

WILLIAMS J:

Why?

MS GRAY:

Well, basically for the reasons that I said before is that it's indiscriminate, people know that cameras are there, it's a known place where –

WILLIAMS J:

But if the technology is running a constant stream of identification, not just – so it's indicating that so-and-so with a criminal record walked down Fort Street at 2.30 am and then –

MS GRAY:

Sorry, I misunderstood your Honour. No, we would object to that.

1025

WILLIAMS J:

But that's done by AI, not by an individual police officer.

MS GRAY:

Yes.

WILLIAMS J:

It seems to me not, you know, an unreasonable kind of supposition, if not now then probably in three years' time. So the question I have is how do we

effectively divide between the analogue scenario you've given us and the electronic scenario that I've given you.

MS GRAY:

Well I guess what I would say to that, your Honour, is that there shouldn't be facial mapping of CCTV footage known to be taken in a city's hotspot.

WILLIAMS J:

So the use of that software would be unlawful and in breach of section 21 for all people filmed?

MS GRAY:

No, no, we say that that does not invade a person's expectation of privacy. It's not active surveillance as such. It's just there in the event that a crime may be committed and it's a valuable tool for the police.

WINKELMANN CJ:

Also public safety, because in those areas policing units are deployed if there is violence going on.

MS GRAY:

Yes, but –

WINKELMANN CJ:

CCTV footage and facial mapping is quite a long way from where you're at.

WILLIAMS J:

Well that's my question, is it, in its practical effect, because what would happen is person A at 2.30 am on Fort Street is subsequently found to be suspected of committing an offence at 2.35 am on Queen Street and the machine has stored that information, including the identification, bingo. In practical terms it's actually little different to Mr Tamiefuna's scenario, except that you didn't have a live constable taking the picture.

MS GRAY:

No but with the CCTV footage scenario, we say that that can run because of the reason that I said before. I would say that that should not be subjected to facial mapping until that point that a crime is committed. So say there is a shooting down in Fort Street, they can go back –

WILLIAMS J:

Yes, yes.

WINKELMANN CJ:

I think the answer to the question is that the CCTV footage at the time it's being collected is not in breach because it's not targeted at the individual.

MS GRAY:

Yes.

WINKELMANN CJ:

And that's the distinction.

MS GRAY:

That's the distinction.

WILLIAMS J:

Yes, my question is I wonder whether that's a distinction at all because ex post facto targeting made possible by much more sophisticated technology might suggest that that distinction is illusory today, even if it wasn't 10 years ago.

MS GRAY:

No, yes, sorry your Honour, I hope I've made our position clear.

GLAZEBROOK J:

And you limit this to the police however, I think because, you know, people take shots all the time of people in the street, we don't have to get permission in

order to do that. Obviously it would be polite to get permission if you're taking a particular person but –

MS GRAY:

Yes, I mean what the law says in, I think that's in *Hamed* is the public can do things that's not unlawful, like going up and taking –

GLAZEBROOK J:

Actually I think that's only the Chief Justice in that case who has that view of the police power but –

MS GRAY:

Well the Chief Justice does cite other authorities and I'll perhaps ask Ms Shao to bring them in.

GLAZEBROOK J:

Well certainly the authorities would suggest that the public can take photos in public.

MS GRAY:

Yes, but the police is an agent of the state and what we say is the police can't just go ahead and do what the public can. The public can do anything that they're not prohibited from doing, on the other hand the police can only act where they have a recognised power and that's because they're agents of the state and that's an important safeguard for New Zealanders.

1030

KÓS J:

I mean this all seems to scream out for some kind of legislative framework that goes beyond simply section 32 of the Policing Act 2008.

WINKELMANN CJ:

It's called the Search and Surveillance Act 2012.

KÓS J:

Well if we've got a search, so it's still a partial framework.

MS GRAY:

So I'm sure your Honours will interrupt me if I'm repeating myself or what I'm saying is superfluous.

GLAZEBROOK J:

No we should be apologising for interrupting you.

MS GRAY:

Oh no, not at all.

GLAZEBROOK J:

I just wanted to make, now I can understand the boundaries of the argument, so thank you.

MS GRAY:

Well we say in terms of section 21, Mr Tamiefuna's reasonable expectation of privacy was intruded by the taking of that photo and the uploading onto the NIA database and we say that firstly, because of the purpose of the photograph, the role of the police agents for the state and the nature of the photograph. Secondly, the appellant will say that –

GLAZEBROOK J:

Is that the nature of close up, is that the –

MS GRAY:

It is, not telling him he was going to take it.

GLAZEBROOK J:

Yes, no I understand.

MS GRAY:

Secondly, the appellant will say that the search was unreasonable and therefore in contravention of section 21 of the Bill of Rights Act in light of the unreasonableness in which the photograph was taken. The primary focus at this stage is on the absence of any lawful authority for the search, whether in statute or common law. Non-compliance with the Privacy Act 2020 we say is also relevant at this point in assessing whether the taking and retention of the photograph offended Mr Tamiefuna's reasonable expectation of privacy.

WINKELMANN CJ:

May I just interrupt you again, what about the fact that the policeman used his authority as a policeman to require the person – require Mr Tamiefuna to come out of the car and thus render himself photographable?

MS GRAY:

Well he –

WINKELMANN CJ:

So it's not a normal New Zealander situation, the context is essentially policing.

MS GRAY:

Well he had to get out of the car because it was going to be impounded and they were going to have to make their own way home.

ELLEN FRANCE J:

So the police officer didn't say: "Get out of the car", did he? I was just trying to remember from his brief.

MS GRAY:

I'll ask Ms Shao to locate that part in the evidence. My recollection is, and I'll confirm this, your Honour, is that they got out of the car when they were told it was going to be impounded, not because they were –

WINKELMANN CJ:

My point is it's a policing context.

MS GRAY:

It is, yes.

WINKELMANN CJ:

So the circumstances of the taking of the photograph were created by the policing context.

MS GRAY:

Yes.

KÓS J:

And of course Mr Tamiefuna wasn't required to give his name and address.

MS GRAY:

No.

KÓS J:

Because he wasn't the driver.

MS GRAY:

No, exactly. So I'm going back to my overview, and finally, I'll address your Honours on the respondent's contention that the legality of the photo can be justified with reference to the common law powers to gather intelligence. Stating the obvious and I think it will be obvious from our brief discussion a few minutes ago, is that the appellant's position is that all powers of search should from a principled basis be sourced in statute and accordingly the intelligence gathering activities in reliance on the common law will only be permitted to the extent that it does not invade a reasonable expectation of privacy and that's where we say intelligence gathering ends when search begins and we say that that's a good yardstick, you know, Justice Williams, and assists in identifying for example where someone is captured on a CCTV footage downtown, that's

not a search, we say, that's good policing, that's intelligence gathering, good policing, it's what New Zealand would expect the police to do but it's not targeted at an individual.

1035

WINKELMANN CJ:

At the time it's done?

MS GRAY:

At the time it's done. It's only if an offence is committed they say: "Hey let's go and get the CCTV footage." They could then do the facial mapping then, we say or whatever other investigatory tools are available to them.

WILLIAMS J:

So the distinction is at the time it's done because of course in modern technological terms, surveillance can be targeted not indiscriminately but at every individual, the computer power means indiscriminate, nothing is indiscriminate anymore, everything is targeted at everyone, right?

MS GRAY:

Mmm.

WILLIAMS J:

So if that's the case, then your distinction is the timing of the targeting which must be said is a fairly subtle distinction. I can see why you would make it, but you do need to, just in terms of the overall running of the system, you do need to have a strong argument for why that situation is different to technology that allows discriminating universal surveillance.

MS GRAY:

Well yes, I mean I think if it's universal surveillance, you mean of all New Zealanders?

WILLIAMS J:

No, you see your point about Fort Street was it's indiscriminate but it's not necessarily so if the computer power is such that you're actually discriminatingly surveilling everyone on that street, it's not random anymore because the software now means nothing is random.

MS GRAY:

Mmm.

WILLIAMS J:

You see the point?

MS GRAY:

I think so.

WINKELMANN CJ:

So you would say for instance, in CCTV footage, if that is done post fact but use targeted outside of a legitimate policing purpose, well that's also illegitimate, but if they're doing it in the course of investigating a crime, that's legitimate?

MS GRAY:

Yes, absolutely. I mean we would expect the police to do that. So I've taken a little bit of time actually getting to my submissions. What you just heard is my short summary, so get comfortable because now the rest of it.

KÓS J:

You've been targeted.

WINKELMANN CJ:

What paragraph are we at in your submissions? We're through the facts, right?

MS GRAY:

Yes, well actually I kind of wrote out – okay paragraph 26 of the appellant's submissions. There was a search and I'll go through these quite briskly

because I've already really spoken to them in the course of our discussion but Mr Tamiefuna highlights that the police were not in the process of investigating or detecting an established crime when the photo was taken. DS Bunting, and this is referred to at the appellant's subs, paragraph 31, footnote 34, pointed to generalised suspicions of stolen property but these were accepted to only be suspicions and not sufficient to reach the reasonable grounds to suspect. He frankly admitted that the taking of the photo was for intelligence purposes and that it was to be uploaded on NIA.

The permanent Court of Appeal said at paragraph 57, and the reference there is our submissions, paragraph 26, footnote 24, is that: "People have a general expectation that the police will not take photographs for subsequent ID purposes in the absence of a proper police purpose. There must be a general expectation that individuals will not be treated as suspects or criminals by the police until there is a reasonable foundation to do so."
1040

The appellant would further submit that it would be difficult to envisage a situation where New Zealanders would be prepared to accept that police can take a close photo of you on a completely arbitrary basis as they go about their work. This applies regardless of whether you are a person with criminal convictions or not, and we do highlight that if it was to be a situation where the police can go round willy-nilly taking photos and storing them on the national database, that could allow for discriminatory practices, it could allow for racial profiling, it could allow for targeting of individuals where there's no actual reasonable grounds to suspect that they had done anything wrong.

Here, I refer to the Court of Appeal's analysis on reflecting on the intention and purpose behind section 21 which represents, if you're not doing anything wrong, a right to be left alone, and that was stated by the then Chief Justice Elias in *Hamed* at paragraph 10 and it's referenced in the appellant's submissions at paragraph 60, and there, unless there is a legitimate police purpose for the taking of the photo consistent with its core functions under section 9 of the Policing Act or otherwise, there is an inherent danger,

which I touched on before, of discriminatory practices and possibly racial profiling.

GLAZEBROOK J:

That was a minority view though, wasn't it, relying on the Chief Justice there?

MS GRAY:

Yes.

GLAZEBROOK J:

So you say we should accept the Chief Justice's view over the majority, and overrule the majority?

MS GRAY:

We do. We say that that's –

GLAZEBROOK J:

All right, that's fine. You're allowed to make that submission.

WINKELMANN CJ:

Your argument doesn't really depend on it though, does it?

MS GRAY:

No. It's just what – the comments that are made by then Chief Justice Elias we say support our position, and recognise the dangers in such practice and also, yes, I was just going to say, and the importance of the Bill of Rights.

WINKELMANN CJ:

Because your other formulation is not that every power has to be tied down to a specific statutory provision, et cetera, but rather that police have the powers that they've been recognised to have under statute and in common law.

MS GRAY:

We say in terms of search we think that…

WINKELMANN CJ:

In terms of authorising search?

MS GRAY:

We think that is covered by the Search and Surveillance Act.

WINKELMANN CJ:

Well, there are common law ancillary rights though, aren't there?

MS GRAY:

Yes. That's the key word, I think, your Honour, is they're ancillary to a statutory power.

ELLEN FRANCE J:

Well, is that the case, in terms of *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 for example, what was the statutory power there?

MS GRAY:

For…

ELLEN FRANCE J:

For taking the inventory.

WILLIAMS J:

This was the collection after a car crash.

MS GRAY:

Yes, I remember. So, no, with *Ngan*, yes, that would be the exercise of a common law power. There's a crash –

ELLEN FRANCE J:

Yes. No, no, that's why I'm asking you. I don't think in that case it was linked back, apart from the general sort of policing power.

MS GRAY:

Yes, yes.

ELLEN FRANCE J:

It wasn't linked back to any other specific statutory provision. It was a common law power associated with the police powers.

MS GRAY:

Correct.

WINKELMANN CJ:

But it's ancillary to core police duties?

ELLEN FRANCE J:

Yes, yes.

WILLIAMS J:

Ms Shao's correcting you.

MS GRAY:

Correct. But actually in *Ngan* –

WINKELMANN CJ:

Ms Shao has got something to say to you, I think.

MS GRAY:

So taking *Ngan*, for example, we would say contrary to that decision that at the time, you know, he picks up the backpack and the pouch and opens up the pouch, we would say that it was arguable that that was an invasion of privacy because it's a closed personal item. He – in terms of an inventory they collect all the money, sure, count it, but they could have just photographed the backpack and its contents.

ELLEN FRANCE J:

Well, so are you saying the Court was wrong in *Ngan*?

WINKELMANN CJ:

In part of it, as to part.

MS GRAY:

Pardon?

ELLEN FRANCE J:

Well, it's not as to part – it's…

WILLIAMS J:

It's the key.

WINKELMANN CJ:

Mmm, the key?

MS GRAY:

We say that was a search.

1045

WILLIAMS J:

But that's – I mean you said, you know, the Brandeisian – the right to be let by the state is what Chief Justice Elias used as the lynch phrase but that's really just another way of saying where there's a reasonable expectation of privacy, the state should not intervene without a statutory power.

MS GRAY:

Yes.

WILLIAMS J:

Because the common law won't save them. Now on particular facts there might be a debate about that as you're having in *Ngan* but the basic proposition is that in the absence of a statutory power, the expectation of privacy, if there is one, will prevail and the common law will not override it.

MS GRAY:

Yes.

WILLIAMS J:

Reasonable expectation.

MS GRAY:

Yes, because we don't accept that there's a common law power of search, we say that the Search and Surveillance Act has taken care of all that. We can't think of a scenario where – we couldn't think of a scenario which is not covered by the Search and Surveillance Act in terms of a search. So common law powers of the police, like attending a road accident, just as happened in *Ngan*, collecting all the property, another one, directing traffic where there's say congestion or problems, there's been a disorder, police can go and direct traffic.

GLAZEBROOK J:

I mean just thinking of a traffic accident, taking photos of the people who are hanging around after the traffic accident in case they might be witnesses and following them up later.

MS GRAY:

Well I think if it's not loaded on the NIA database and it's just for the purpose of obtaining evidence as to what happened in that car accident, that would acceptable because there's been –

GLAZEBROOK J:

Okay, so it really is the uploading for no reason related to law enforcement that you object to?

MS GRAY:

Yes, and I think in those circumstances I would expect the police officer to approach the person and say: "Look can I take your photo, we need to speak to you about what happened and this is the purpose for why we're taking the photo."

WINKELMANN CJ:

It isn't just the uploading, it's the whole context, it's the taking the photo without a proper law enforcement reason, a legitimate law enforcement reason because there's no – as you say, a legitimate law enforcement reason might have been that the policeman had reasonable grounds at that point to believe an offence had been committed but that wasn't – that context didn't exist, so it is the taking of a photograph in a targeted way and the uploading?

MS GRAY:

Yes, we say that's one sort of continuing breach of Mr Tamiefuna's privacy. I had briefly also touched on the role of police as agents of the state and I'm still on the issue as to whether or not there was a search and I think I said earlier that what private citizens can do, it doesn't mean the police can do it, unless they had a statutory power.

A similar view was expressed by Lord Justice Laws in *R (on the application of Wood) v Metropolitan Police Commissioner* [2009] 4 All ER 951 at paragraph 45. It appears in our submissions at paragraph 43, footnote 51. And there it said that: "Where a photograph of a person is taken, the fact that police are behind the other side of the lens renders it a good deal more than the snapping of a shutter."

WINKELMANN CJ:

What paragraph is that, sorry?

MS GRAY:

Paragraph 43, your Honour, and it's footnote 51. It's paragraph 45 of the actual judgment.

GLAZEBROOK J:

Sorry, I didn't catch the name of the case?

MS GRAY:

Wood.

WINKELMANN CJ:

If it's 43, we don't seem to have 43 on the screen, do we? What part of 43?

MS GRAY:

Paragraph 45, your Honour.

WILLIAMS J:

Of course Lord Justice Laws did let this in on discretion, didn't he, in dissent? 1050

MS GRAY:

Yes. I mean we say there's different differentiation and reasonable expectations between a member of the public and a police officer and we say that because that recognises all the additional powers that the police have that a private citizen doesn't, and we say it was significant to this ground that it was taken by a police officer.

The third point, your Honours, is the nature of the photograph and this is where I'm turning to the biometric aspect of photographs. The Court of Appeal noted, that's at the Supreme Court casebook, page 23, that the taking of photographs is undoubtedly capable of breaching reasonable expectations for privacy because it represents a fragment of a person's biometric image and therefore attracts a higher expectation of privacy in comparison say to a mere notation in a notebook.

A photo captures the unique image of an individual. As your Honours noted, it can be subject to facial mapping and other technologies. That heightens, we say, an expectation of privacy.

KÓS J:

Isn't it just a very, very good note. In the hearing two days ago we had people in court making drawings of the participants, so there's a notation which is that Mr Tamiefuna presented with rather unusual brown trousers, said to be

important, another one would be a drawing of him and the third, far more accurate, is the photograph, aren't they just degrees for notation?

MS GRAY:

No, I disagree with that. I respectfully submit that a photograph goes much further than that. It's part of a person's biographical information.

WINKELMANN CJ:

Your point is that now it's something very special because of facial mapping, the point that Justice Williams is making?

MS GRAY:

Yes, that's what makes it even more dangerous.

WINKELMANN CJ:

And you can't facially map a sketch.

MS GRAY:

Mmm.

WINKELMANN CJ:

Maybe you can.

GLAZEBROOK J:

It depends how good it is.

WINKELMANN CJ:

I doubt it but –

GLAZEBROOK J:

That's the problem with some of that facial mapping as well, at the moment, at this stage where you could be relying on it anyway.

WILLIAMS J:

You do get into this paradox that the effect of such a principle is you can rely on the less reliable material but you can't rely on the really reliable material.

MS GRAY:

Correct, where certain conditions are met. They don't suspect a crime's been committed. That's the difference I think, your Honour.

WINKELMANN CJ:

Well isn't the difference collection?

MS GRAY:

Well there's that as well.

WINKELMANN CJ:

That's the fundamental difference, isn't it, because you're not talking about what may have been on the NIA, you're talking about how it's collected. It's great if they've got photographs that they're allowed to be collected and you can keep, but it has to be lawfully collected.

MS GRAY:

Yes.

WILLIAMS J:

But you see the flip side of that is there's no question that a note describing Mr Tamiefuna was not problematic, even without his consent, outside the car.

MS GRAY:

Mmm. Well we do say there is a distinction between a notation and the taking of a photograph because a photograph is – it goes to the core of who you are, it goes to your identity. As was said in *Aubry v Éditions Vice-Versa* [1998] 1 SCR 591 at page 52, and this is cited at paragraph 738 of the appellant's bundle, that: "The right to privacy guaranteed via section 5 of the Quebec Charter, every person has a right to respect for his private life, is to protect a

sphere of individual autonomy which includes the ability to control the use of one's image."

1055

So that image belongs – the image belongs to me and unless I'm committing a crime I am the one that decides when someone else can take that image because it is a photograph of a unique human being and an identifier. It's a highly personal record.

KÓS J:

Well, it didn't cut much ice in *Hosking v Runting* [2005] 1 NZLR 1 (CA).

GLAZEBROOK J:

Yes.

KÓS J:

At the end of the day if you walk out into the street, if you walk out into a public place, your photograph is liable to be taken unless you go in –

GLAZEBROOK J:

And published.

KÓS J:

And published.

MS GRAY:

Mhm. By who? By the police?

KÓS J:

No.

MS GRAY:

No. That's where we say there's a distinction. It's the state agent, absent a statutory power, authorising the taking of the photo that makes it a search.

ELLEN FRANCE J:

Well, that doesn't help though in distinguishing between a photo and other notations and other descriptions of a person's appearance, for example.

MS GRAY:

Well, the Police Act says when a photo can be taken and –

ELLEN FRANCE J:

No, no, my point is a different one.

MS GRAY:

Sorry.

ELLEN FRANCE J:

I'm simply saying that your proposition that it's the State taking the photograph doesn't of itself distinguish between a photograph and some other form of notation of a person's appearance.

MS GRAY:

Yes. We say a photograph is different.

ELLEN FRANCE J:

Well, why? Because it's…

MS GRAY:

Because for the reasons I said earlier it's biometric data and biometric data in New Zealand, the collection of it is prescribed for by statute, DNA, for example.

WILLIAMS J:

What makes it biometric data? Is there a definition of that?

MS GRAY:

Ms Shao will just have a look at that, your Honour. We think it is actually defined in that joint report. But it is definitely identified as biometric data.

WINKELMANN CJ:

So the Privacy Commissioner has said something about this, has the Privacy Commissioner?

MS GRAY:

About?

WINKELMANN CJ:

In that report that you've referred to us in the materials.

MS GRAY:

Joint report of the IPCA and Privacy Commissioner cited at paragraph 35 of the appellant's subs draws a distinction between photographs versus basic intel notings.

I mean at its heart we say that taking someone's photo close up is a greater intrusion into their privacy than just writing down what they happen to be wearing.

GLAZEBROOK J:

Can you just give us the page number on that…

MS GRAY:

The Privacy Commissioner?

GLAZEBROOK J:

Yes, or paragraph number. They do have paragraph numbers.

MS GRAY:

Paragraph 20, your Honour.

KÓS J:

Yes, paragraph 20 is your best support, I think.

MS GRAY:

Thank you, your Honour.

WINKELMANN CJ:

Sorry, did you give the paragraph in the Privacy Commissioner's report?

KÓS J:

20. "Photographs of individuals are not, and cannot be treated as, the same as 'intel notings'. A digital photograph is not a description of an individual, it is an exact biometric image of that individual and no other." That's the point you're making.

MS GRAY:

Yes.

WINKELMANN CJ:

Yes, which is the point you've been making.

MS GRAY:

Yes, and it –

WILLIAMS J:

If you interrogate that – I mean that's obviously true, unless the description is a perfect description in a thousand words to replace a picture, as they say, but apart from that stating the obvious what really is the difference?

1100

MS GRAY:

Well we say there is a greater intrusion of someone's privacy when they walk up to you and take your photo and collect your image, we say that is a greater intrusion than making notes in a notebook: "I saw Mahia Tamiefuna, he was with so and so", they might take down his clothing, but to photograph somebody who is not doing anything wrong and then upload it on a national database is not something that we say New Zealanders would expect.

WILLIAMS J:

But you'd upload the notation on a national database too.

MS GRAY:

Yes, but –

WINKELMANN CJ:

But can you take it any further than what you've said already and what the Privacy Commissioner has said here or in this joint report, which is two points, it's an exact image?

MS GRAY:

No, I can't say any more there. The only thing –

WINKELMANN CJ:

And it's actually searchable now with data mapping and that's about all you can say, isn't it?

MS GRAY:

Exactly, it is. The only other thing –

GLAZEBROOK J:

Also of course they go on to say that in support of your point in terms of it's not even much use at paragraph 22, for the reasons they state.

ELLEN FRANCE J:

Well in this case here, for example, taking a detailed description of the clothing could have had the same relevance as the photograph in the criminal proceedings potentially.

MS GRAY:

I mean I'm not seeking to open up another can of worms but –

ELLEN FRANCE J:

No, no, no I'm just trying to understand the distinction you're drawing.

MS GRAY:

I wouldn't rule out categorically that a detailed notation in a police officer's notebook wouldn't be a search if uploaded onto NIA.

WINKELMANN CJ:

But you don't have to make that argument.

MS GRAY:

I don't have to make that argument but I would say that possibly that could be argued. Your Honour is asking the difference and we say the photograph goes much further because it's biometric but in any event, if this was a very detailed notation and is uploaded to the NIA, possibly that would be an invasion of someone's privacy.

KÓS J:

I mean in some ways this all comes back to the question of what is a search and a search in terms of *Hamed* is about an unreasonable intrusion into a reasonable expectation of privacy and to some extent that depends not on what happens precisely at the moment the photograph was taken but what happens to the photograph.

MS GRAY:

Yes.

KÓS J:

And that's the difference here, it's a sequence, it's the three things, it's the photograph plus the upload or retention plus the nomination. In other words it's collected by his name.

MS GRAY:

Yes.

KÓS J:

Those three things together and that's different I think from simply a report that Mr Tamiefuna was wearing brown trousers and sitting in a blue Falcon with distinctive five spoke wheels.

MS GRAY:

Mmm, yes, thank you, your Honour.

WINKELMANN CJ:

But you've got quite a long way to go, so where are we at in your submissions?

MS GRAY:

Okay, I will try and speed up, you know. At page 11, your Honour. So just to recap, it's a search because of the purpose and the basis of the photograph, secondly, it's a search because it was taken by police, absent a statutory power, three, it's the nature of the photograph itself which turns on the biometric image and a far greater intrusion into somebody's privacy and then just some ancillary, actually ancillary matters, was the Court of Appeal said that, and I think this is uncontroversial, that the fact that he was on a public road, it's a factor, but it's not determinative and also the fact was that he was on the road pursuant to legitimate police action. I think I'll perhaps – I was going to refer to a couple of overseas authorities but I think given the time I've taken so far I might move –

WINKELMANN CJ:

No, that's all right, I'm quite happy for you to take us to authorities, very interested in that.

1105

MS GRAY:

We say that our permanent Court of Appeal's conclusions are consistent with the findings by the Court of Appeal in the UK. There are cases where police photography breaches a reasonable expectation of privacy and that's the case of *Wood* where he was attending an AGM. The police – there'd been trouble or they were expecting trouble, so they had a police presence. They

photographed Mr Wood as he was leaving the AGM and uploaded it onto their equivalent of our NIA, and there that was held to be an unreasonable expectation of privacy and it was the taking of the photograph and the uploading –

WINKELMANN CJ:

"A reasonable expectation", "a reasonable expectation of privacy"?

MS GRAY:

Yes. *Catt v United Kingdom* (2019) 69 EHRR 7 (ECHR) is another case in the European Court and that's referred to in the Court of Appeal judgment and can be found at the respondent's bundle at page 672, and that really does –

WINKELMANN CJ:

So *Wood* is interesting and it really treats the – well, it's just an expectation of privacy case really, isn't it?

MS GRAY:

Yes, and just indiscriminately taking a photo of somebody who's not doing anything wrong just on the streets of London.

WINKELMANN CJ:

Yes, they find it's a breach of Article 8.

MS GRAY:

They do. Yes, he's just going about on the streets of London, nothing happened, he did nothing wrong, but they still stored his photo.

WINKELMANN CJ:

Of course –

WILLIAMS J:

You were earlier saying that indiscriminatory surveillance is acceptable, it's the discriminating form of surveillance that is not.

MS GRAY:

I'm not saying all –

WINKELMANN CJ:

That wasn't indiscriminatory and Mr Wood was part of a group they were targeting.

WILLIAMS J:

So it was discriminating as per Mr – maybe you just used the word differently. Pass on.

MS GRAY:

Then, I mean the Court of Appeal, our Court of Appeal judgment refers to the European Court of Human Rights for *Catt*, and that's in the respondent's bundle of authorities too, and that really deals – the focus of that decision is very much focused on the retention of the information, whether or not that's excessive, whether it's unjustifiable retention and breaches a reasonable expectation of privacy, and there they held it did.

WINKELMANN CJ:

Sorry, is that *Catt*?

MS GRAY:

Catt, *C-A-T-T*.

GLAZEBROOK J:

It's up on the screen.

MS GRAY:

Mr Catt was, I think, 94.

WILLIAMS J:

91.

MS GRAY:

91.

WILLIAMS J:

Yes, that was –

MS GRAY:

A life –

WILLIAMS J:

A useful plaintiff.

MS GRAY:

A life-long protestor.

WILLIAMS J:

And that's a lot of protests.

MS GRAY:

Still at the age of 91, go him.

WILLIAMS J:

Quite.

MS GRAY:

But interestingly in the United Kingdom they do have restrictions on their database. I can't spout them off by heart, but our one is completely and utterly unregulated but in the UK their database is subjected to reviews, material is deleted, you can – yes, that is a distinction with our one and in a way I think adds to our argument, the just unlimited dissemination of information about a person.

WILLIAMS J:

The Privacy Commissioner has no jurisdiction over the NIA?

MS GRAY:

The Privacy Commissioner?

WILLIAMS J:

Yes.

MS GRAY:

Yes.

WILLIAMS J:

Does?

MS GRAY:

No, sorry, what do you mean by jurisdiction, your Honour?

WILLIAMS J:

Well, you said it's unregulated.

MS GRAY:

Yes.

WILLIAMS J:

My question was does the Privacy Commissioner have no jurisdiction over the NIA?

MS GRAY:

I don't believe so.

WILLIAMS J:

Ms Shao?

1110

WINKELMANN CJ:

He would do, he would just – because it's a State agency, it's just – and there are privacy principles that allow the collection of information for policing purposes.

MS GRAY:

Thank you, I may get Ms Shao to take over.

WINKELMANN CJ:

Mr Keith can assist us with that I feel sure.

MS GRAY:

Yes. So that's covering in a rather convoluted way, all the points we say establish very clearly that it was a search. Turning now to whether the search was unreasonable. We say –

WINKELMANN CJ:

Was there any part of *Catt* you wanted us to look at, have you taken us to a particular part? No.

MS GRAY:

No, not really, no sorry, your Honour.

WINKELMANN CJ:

Oh okay, the whole thing?

MS GRAY:

The whole thing. So now we're turning to the second – so we say yes, there was an intrusion into Mr Tamiefuna's privacy, secondly, I turn now to was it unreasonable and we say the Court of Appeal was correct to find that it was unlawful and unreasonable. As your Honours will know, if it's unlawful, it generally will be unreasonable unless it was just a very technical – a technical issue.

Also a lawful search may be unreasonable if it's conducted in an unreasonable or offensive way but by and large a search is unreasonable if it is unlawful and this was clearly unlawful because there was no lawful basis for the search under the Search and Surveillance Act and we don't believe that the respondent is suggesting otherwise. There is no suggestion that this was a consent search and the appellant submits the only remaining statutory power that could be arguably relied upon is the provisions in the Policing Act, sections 32 to 34, but clearly the circumstances were not met there because the preconditions in the Policing Act, under section 32(2) had not been made out. Mahia Tamiefuna was not under detention, let alone lawful detention for committing a criminal offence. The appellant submits the fact that parliament has specifically enacted 32 to 34 of the Policing Act demonstrates a contemplation that these are the only circumstances in which public police photographing could be lawful.

GLAZEBROOK J:

Again I'm probably just asking about CCTV in these circumstances or any other photos that are taken publicly, at a scene of a traffic accident or –

MS GRAY:

Sorry your Honour?

GLAZEBROOK J:

Well if this is the only time you can take photos, there's an awful lot of unlawful photos taken by the police in circumstances that you say are okay.

MS GRAY:

Yes, I sort of have an answer to this, but if I may come back to it, your Honour, I just need to refer to the Act, but in any event in a criminal context the taking of the photographs, the retention of them, the destruction of them are specifically authorised by the Policing Act.

1115

The third ground as to why we say it was unreasonable is because it contravened the Privacy Act and I wasn't really intending to go into that because

the intervener I expect will cover it. It is in the written submissions. The Court of Appeal held, as your Honours will know, three principles of the Privacy Act and we say that that's important in an assessment as to whether or not the search was reasonable. So it's unreasonable because it wasn't authorised by statute, the Search and Surveillance Act, and it was in contravention of the Privacy Act and it did not comply with the Policing Act. Those are the main three reasons why we say it's unreasonable.

Turning my focus now perhaps to answer pre-emptively the Crown's position that taking Mr Tamiefuna's photograph was intelligence gathering. As I'm sure is clear, we reject outright that the police can randomly take photographs of people in the absence of cause on the basis that it's just intelligence gathering. The Crown say it was not a search, it represented a gathering of intelligence, a power sourced in the common law and necessary to enable the police to carry out its duties and functions under section 9 of the Policing Act and that's at paragraph 30 of the respondent's submissions.

We fundamentally disagree with the assertion that taking a photo was intelligence gathering. We say that there has to be a statutory authority to carry out a search and we don't consider there is a common law power of search.

WINKELMANN CJ:

So your point is this is a search and there needs to be a statutory or common law power for such and there is none that apply in this case?

MS GRAY:

Correct and it can't in any shape or form be described as intelligence gathering.

WINKELMANN CJ:

Well I suppose it can be but you're saying it's just intelligence gathering that amounts to a search?

MS GRAY:

Yes, so as I say intelligence ends where search begins.

KÓS J:

I'm not sure I understand that expression but what this does seem to be is some form of covert creation of an identity database, the members of whom will likely be people who have already come to the attention of the police because they're the people whose names are going to flag and be recorded. I doubt I'll be on it.

WINKELMANN CJ:

I don't think he was making a joke.

MS GRAY:

I'm not sure I can say the same.

WINKELMANN CJ:

I don't think it was a joke.

MS GRAY:

I'm not sure I could say the same but it would be going way, way back, not recent times.

WILLIAMS J:

You should stop digging Ms Gray.

KÓS J:

But my point is what are the implications of this because this is a form of database, it is a form of intelligence gathering and it seems to be the sort of database that section 34(2) of the Policing Act has in mind there being some pretty clear controls over, for instance if proceedings are not brought against the subject, who has had to give their photograph when in custody, the photograph has to be destroyed. Well this looks like quite a good workaround to section 34(2) if the Crown is right in this case because it creates that form of database without the controls that section 34(2) provides, which is review and destruction if no proceedings are brought. So the bigger implications of this are

really important. It is a form of intelligence gathering, it is a form of identity database and that's what we have to wrestle with.

MS GRAY:
Mmm.

KÓS J:
You're not disagreeing with me I take it?

MS GRAY:
No, no and for example there will be plenty of people, stating the obvious, there will be plenty of people on that database where they have been convicted on many crimes, that's legitimate that that can be put on the database. We're not saying the database doesn't have its use nor it's improper. The police do need a place to gather and retain information. It's just where they act unlawfully to get the information and upload it on the database is objectionable, we say.
1120

WILLIAMS J:
Well they'll have a photograph of Mr Tamiefuna from his past errors.

MS GRAY:
Yes.

WILLIAMS J:
And they can look at that.

MS GRAY:
Yes.

WILLIAMS J:
But unfortunately those photographs probably didn't show him wearing the cool brown trousers and the particular cap that were important in this particular case.

MS GRAY:

Yes.

WILLIAMS J:

That was very useful to them, as the Judge said, it drew three strands of evidence together.

MS GRAY:

Well it was the clinch pin basically. It was the Crown case, without it there was no case against Mr Tamiefuna.

WILLIAMS J:

Yes, we can take it that whatever other photographs there were of Mr Tamiefuna that were legitimately retained on the database didn't provide that information, otherwise they would've been used.

MS GRAY:

Mmm, yes I agree, your Honour. So, just collecting my thoughts, your Honour, we say that in this case it's clearly not intelligence gathering because it's a breach of section 21 of the New Zealand Bill of Rights Act and we accept that police do have common law powers of policing but we would argue they're ancillary to a statutory power which is either in the Search and Surveillance Act or the Policing Act. So that was all I really was intending to say about the difference between intelligence gathering and search. Oh yes Ms Shao is saying that there can intelligence gathering but that ends where impermissible search begins.

So I've just got some final comments to make and that's really in response to the floodgates argument. If the Court were to condone this practice or allow the practice of arbitrarily taking somebody's photo and uploading it on the database, we say that does risk a floodgate which in the words of Justice Cooke in *R v Jefferies* [1994] 1 NZLR 290 (CA), (1993) 1 HRNZ 478, at the appellant's bundle page 119, that: "Police officers may reasonably act outside the law is to sow dangerous seeds." And it is hard, I suggest, to say where it would all end

if the police were able to do this, given all the technologies that have been – are advancing.

We ask this court to emphatically endorse the Court of Appeal judgment on section 21. It is accepted that in this case, putting aside section 30 arguments that may have resulted in Mahia Tamiefuna getting away with a serious crime and the appellant does not for one moment say that that is a good thing and on behalf of Mr Tamiefuna, the harm and distress that was caused to this victim of his offending is understood, appreciated and regretted but the appellants say to legitimise this practice under the guise of intelligence gathering would provide licence and would be effectively an end justifies the means approach, and that's not consistent with a free and lawful and democratic society.

1125

Cohesiveness and the upholding of fundamental human rights is an important foundation of a free and democratic society. Individuals must respect and trust state agencies and in turn state agencies must respect New Zealanders and their rights, and when that happens, the appellant submits, we have a peaceful society and one that's free of repression, and if you look beyond the borders of New Zealand it's clear that the countries that do recognise people's fundamental human rights are the countries which are free from oppression and are democratic and there are freedoms of movement, association. Fundamental rights are respected and by doing that you allow a society to thrive.

If this practice was allowed I suggest it would clearly undermine the trust and faith in the police, and ensuring the police don't abuse their power, either consciously or inadvertently, is key to trusting them, and actually it's the respect and trust of the police that enables them to actually carry out the important job they have of investigating and detecting crime, but you only have an effective police force if it has the trust of the community it serves and I would submit the greater the trust the greater the police effectiveness.

Throughout New Zealand, every day, there are civilians giving evidence in every courtroom who have provided a statement to the police and who willingly turn up to court and give evidence and they do that because they have regard for the police and the job they do.

Even in respect of people who have criminally offended I would suggest the same reasoning applies. We know that crimes in New Zealand are by and large committed by people who are marginalised, they are disenfranchised and they're disadvantaged. In my respectful submission, if they're not caught fair and square according to law then that sense of marginalisation will deepen. An important principle in the Sentencing Act is to hold an offender accountable and I think it would be very difficult for an offender to hold themselves accountable when they considered they weren't caught by lawful means, fair and square, that somehow the police did something unlawful, as a result of it they were convicted, and it is only when a person takes account of their crimes that they can rehabilitate. They go hand in hand.

So on so many spheres we say that, of course, it's unpalatable that someone may get away with a serious crime but there are wider interests at stake here and it's a slippery slope if you start letting the police do things which are not lawful.

ELLEN FRANCE J:
Would it be different on your argument if he'd been asked if he consented and he said he did, to the taking of the photograph?

MS GRAY:
Yes.

ELLEN FRANCE J:
And would he have had to have consented also to the uploading on the NIA?

MS GRAY:

What I think would have to happen is, yes, I think the officer would say: "Mr Tamiefuna, may I take your photo? I'm going to upload it on our national database." And I can categorically answer on behalf of Mr Tamiefuna he would have said a hard "no".

So that's really the submissions, your Honour, that I was intending to make.

WINKELMANN CJ:

Ms Priest will start after morning adjournment on section 30?

MS GRAY:

Ms Priest. I hope they were of assistance. I'm sorry if they became muddled at times.

KÓS J:

Not at all.

WINKELMANN CJ:

No, it was very helpful, thank you.

We'll take the morning adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.53 AM

MS PRIEST:

Thank you. On behalf of the appellant I will address the Court on the second issue which was whether the Court of Appeal was correct to admit the evidence, the photographic evidence pursuant to section 30 of the Evidence Act 2006. The Court will be aware from reviewing written submissions that following a review of Court of Appeal case law statistically that a new test is proposed.

Effectively we seek a policy message from this Court, that unlawfully obtained evidence should not be admissible as much as it currently is.

WINKELMANN CJ:
Well that's a very wide policy message.

MS PRIEST:
Yes Ma'am. The effect of *R v Shaheed* [2002] 2 NZLR 377 (CA), of course this Court will be aware, was to close that door somewhat to ensure that more evidence was ruled admissible while the Court advised that they didn't anticipate any difference in outcomes overall as a result of *Shaheed*. We see, and perhaps as predicted by authors Scott Optican and Peter Sankoff, that that was precisely what has happened.

The decision of this court in *Hamed* has not set out clear guidance on the way each of the factors pursuant to section 30 should be individually applied and what we are left with, in my submission, is very much judge by judge, case by case outcomes, all cases of course are discussed and determined by their idiosyncratic facts and circumstances.

Our analysis of Court of Appeal decisions from 2006 through to the end of 2023 found that over 80% of improperly obtained evidence is admitted pursuant to section 30 at the Court of Appeal level.

A factor that was apparent from undertaking that analysis was that the specific words "effective and credible system of justice", were not mentioned in the balancing exercise in more than 50% of these cases and when further analysis is undertaken, broader public policy considerations, which in my submission are inherent in an assessment of a credible and effective system of justice, was only engaged within 13% of all rulings and it is off the back of this that a new test has been proposed.

Interestingly the Law Commission is in a similar position to us. The submission I ultimately make is that the timing is right for section 30 to be revisited. We

see, when we review the Law Commission reports, the first review back in 2013 at page 939, para 4.10. We see at 4.10, the Law Commission's comment back in 2013 that the evaluative nature of the section 30 balancing process means that different judges may come to different conclusions on the evidence. There is a reference there to Justice Gault's statement in *Hamed*, all of the factors in section 30(3) call for value judgments that may well depend on inclinations of particular judges, as will the comparative weighting to be accorded those factors.

This is aptly demonstrated by the number of judgments and appeals on the application of section 30 to date. It is likewise evident from *Hamed,* the only Supreme Court case to have considered section 30 in detail, where admissibility fell to be determined by differently constituted majorities on the different types of evidence.

And further at 4.16, on page 945, the Law Commission back in 2003 indicated that there were areas where interpretation of the factors was not yet fully settled and they gave examples of what offences were serious, centrality of the disputed evidence to the prosecution case and the consideration of what the implication of alternative techniques being available would have on any section 30 balancing exercise, whether they favoured admission or exclusion.
1200

If we then turn to the second Law Commission review in 2019, this is at page 953, paragraph 7.5, again in this review there was no recommended amendments to the Act, however the Law Commission concluded again that the section 30 balancing exercise was necessarily fact specific. They did suggest that there may be merit in conducting a broader review of the policy underlying section 30 in response to concerns expressed by submitters that this section is skewed too heavily in favour of admitting properly obtained evidence.

And again at the bottom a final point under 7.5, the Courts should be left at this point, they say, to develop guidance on the factors to be taken into account and the approach to be taken in civil proceedings.

Again at page 691 of the same review, paragraph 7.49…

WILLIAMS J:
Do you mean 991?

MS PRIEST:
Sorry, 961. I've a bad habit of transposing numbers on my feet. I apologise. At 7.49 through to 7.52. So we see here what the concerns were of the profession at this point in time. 7.49, the Public Defence Service suggesting that the current application of section 30 was heavily skewed towards admitting improperly obtained evidence, noting that the seriousness of the offence and the centrality of evidence to the prosecution case have a tendency to become overwhelming factors with the result that improperly obtained evidence is rarely excluded.

And then at 7.50, a similar point by now Justice Eaton made on behalf of the New Zealand Bar Association, confirming defence lawyers' dissatisfaction with the current state of application of section 30 which is being seen as balancing in favour of admitting evidence.

Again 7.51, members of the judicial advisory committee, albeit without commenting on the desirability of the outcome, did also comment on the tendency of the current application of section 30 to admit evidence.

7.52, at this point, 2019, the Law Commission again did not propose any amendments but instead again indicated merit in a broader review of the policy approach to section 30.

WINKELMANN CJ:
Sorry, what year is this?

MS PRIEST:

This is the same report 2019. This is the second review from the Law Commission. So that was some five years ago now.

Then if we turn now to the 2023 issues paper out last year inviting comment from the profession on section 30 and if we can turn, please, to page 983 at paragraph 7.25 at the bottom, and it does carry over the page, the last sentence there: "Perhaps reflecting the uncertainty created by the balancing test, there are many appeals relating to section 30 and frequent split decisions in the appellate court," so as at last year this was a concern of the Law Commission.

7.26, the Law Commission undertook its own statistical assessment of some cases. We see at the second sentence in paragraph 7.26 that they undertook a snapshot case study reviewing High Court, Court of Appeal and Supreme Court decisions over a four-year period, 2019 through to the end of 2022, to gain a general sense of how section 30 was being applied. They, of course, suggested caution be taken, as I do with my statistics for this Court, but they do note that, at 7.27, of the 70 decisions in which evidence was found to be improperly obtained it was admitted in 38 cases, admitted in part in two cases and excluded in 30 but they go on at 7.28 to find that the courts are considerably more likely to exclude defendant statements compared to other evidence and so of the 17 decisions relating to defendant statements, the evidence was only admitted in three cases and in part in one and so when those confessional – that confessional evidence is put to one side and the remaining 54 cases presented quite a different picture, the evidence being admitted in full in 35 cases, admitted in part in one and excluded in only 18 cases.

1205

KÓS J:

That's quite a different statistical outcome though from the one you present Ms Priest. The importance of this statistical material is this is first instance decision making as opposed to appellate decision making where there is a specific challenge to the section 30 decision made below.

MS PRIEST:

I accept that in part Sir, but of course the majority of section 30 cases are arguably heard in the District Court and that was excluded from the Law Commission's study also. It is of course a criticism of the Crown no doubt to the Law Commission study as well as my own but what I can say anecdotally is that we are now in the routine position of advising clients yes I think that the search was unlawful but I also give you the advice that it's more than likely going to be admitted nonetheless and we're in a position now where something being section 30ed in, is now a phrase, it's become a verb, to be section 30ed and in my submission this is, well it's a matter for this Court as to whether that is the correct policy message that we should be sending through our decisions and in my submission it's plain from this issues paper that the Law Commission are sufficiently concerned about the application of section 30, that they in fact get to the proposal of, well there's two alternatives, but in appendix A they set out a proposed amendment to section 30 in order to fix what they perceive to be these problems.

WILLIAMS J:

Are you moving on to, well let me ask this question, you may want to park it and pick it up later in matters, are we seeing similar trends in cognate jurisdictions on exclusion in relation to improperly obtained evidence?

MS PRIEST:

I would like to park that and I'm happy to address that later. Certainly I've not undertaken statistical analysis of international cases but I can speak in a general sense to that at the end, thank you. So in my submission, in terms of setting the scene for where we're at with section 30, we have had a massive pendulum swing with *Shaheed.* The facts of *Shaheed* of course, rendered it in my submission the perfect case, the abduction and rape of a 14 year old girl where the centrality of the evidence became critical to the prosecution, had that evidence been ruled inadmissible, completely the prosecution could not continue and from that point, of course, the balancing test was developed and then mirrored in section 30 of the Evidence Act.

The Court in *R v Williams* [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA) attempted to provide guidance on of course the *Shaheed* principles. The decision itself seemed to somewhat straddle the enactment of the Evidence Act but of course the application, because section 30 echoed or mirrored *Shaheed*, the decision in *Williams* was very helpful in terms of providing strong guidance and we do endorse a *Williams*-like test from this Court. We understand that the issues are very difficult but what I can say is the issues being very difficult at this level make them near on impossible at a lower court level in the District Courts, in the absence of strong guidance from this Court as to the way that they need to be interpreted.

ELLEN FRANCE J:

Could we look, Ms Priest, at the parts of *Williams* that you say should be applied?

MS PRIEST:

Rather than going through the actual – it's more the type of analysis that was undertaken in *Williams* that I endorse, but I have –

ELLEN FRANCE J:

Well I'm interested in seeing that type of analysis.

WINKELMANN CJ:

If you're going to rely on *Williams,* you need to take us to it and show us what it is.

1210

MS PRIEST:

Yes, all right. I can give an example. So if we turn to page 228 of the appellant's bundle, at paragraph 104 we see, in general, the heading: "How should the balancing test be conducted?" and then over the page at page 299 near the top we have that heading: "Nature of the Right," and then what the Court has done is they've gone through and under that right they've effectively

considered or helped the lower Courts with how the nature of the right can assist them with any sort of analysis.

We then turn over to 230 and we have the "extent of illegality" and again the Court goes through in a series of three or four paragraphs setting out the interpretation of that section.

Now I think that through the passage of time our position on the interpretation of these particular aspects of section 30 has developed but the point I make about *Williams* is the framework within which this Court set out interpretation of each factor is very helpful for the lower Courts because we can go to a single place in order to get guidance on the interpretation, and as to the actual interpretations which I invite the Court to make, I will be addressing them in respect of five key factors which are relevant to Mr Tamiefuna today.

KÓS J:

So you're suggesting a – I mean the *Williams* framework fundamentally differs from the statute because it has a different framework.

MS PRIEST:

Well, in my submission, not really, Sir, because it does completely – it's interpreting *Shaheed* and section 30 effectively mirrors *Shaheed*. So in my submission those factors in *Shaheed* which have been drawn and then put into the section 30 framework, almost word-for-word, there were a few exceptions, in that way we can effectively use that type of framework going through each of those section 30 balancing factors to provide guidance to the lower Courts as to when they favour inclusion or exclusion and with some examples to try and assist the lower Courts to have consistency in approach.

WINKELMANN CJ:

So there are three models, I think, that have been discussed related to the appellant's case. One is the model which is suggested by the Law Commission which is starting with, starting point inadmissible, not a presumption that that's

where you start, I think, but you might be able to help me with exactly what the Law Commission says.

Then there's your model which is just the explanation of the different factors in *Williams* but you're not suggesting there's overriding structure, is there, from that?

And then the third model is the model that Mr Keith suggests which is a model which is responsive to the requirements of the Bill of Rights Act.

So you're contending for *Williams* out of those three models?

MS PRIEST:

Perhaps a hybrid, to have a bob each way. In my submission I propose – so I don't endorse the Law Commission proposed appendix A which – there's actually two options included in that. One is a prima facie exclusion rule and the other one is not, but they effectively propose moving to a public-interest test away from an effective and credible system of justice test. In my submission there's very little between the meanings effectively and changing the words, I think, doesn't assist really because it's still going to require the Court to interpret them and an interpretation of what a credible and effective system of justice is. We're perhaps much further down the line with that and this Court could provide additional guidance on that in terms of the broad public policy, step back, third step proposal which I have put before the Court, rather than the Law Commission, in my submission, they simply are – they want to change some of the particular criteria under section 30 which should be considered but then ultimately they wish to move to a public interest balancing test with or without a prima facie exclusion, and they offer both options because, of course, it's an issues paper, one put out there for public consultation, and I think that consultation has been complete but we haven't received the third review to date.

1215

ELLEN FRANCE J:

So in terms of the system of justice aspect, what does your test add to what say Justice Blanchard said in *Hamed*?

MS PRIEST:

I can just jump to the credible and effective system of justice now, if that would be of assistance.

WINKELMANN CJ:

I'm not just quite clear from your submissions about what's different about what you're suggesting and what *Hamed* is, which is the system which is producing the test which you say is producing these outcomes. I think we'd all be assisted by that being made clear.

MS PRIEST:

Yes, I understand. When we undertook our statistical analysis of the cases, we found that the Courts in the decisions that we analysed did not even mention the need for an effective and credible system of justice, those words, in around 50% of cases, it was simply not part of the judgment. In my submission failing to consider this prevents the Court looking at these wider public policy considerations. Of the 30 rulings which did include reference to a credible and effective system of justice, around 13% meaningfully discussed it from a broader public policy perspective. In my submission that is important and that has already been recognised in the case law to date but in practice it is not being adhered to.

ELLEN FRANCE J:

Well I suppose that leads me to ask why is more required than the Court, for example, reinforcing the need to look at that factor.

MS PRIEST:

Yes no, and that's precisely what – perhaps that's all that is needed. I think there are two things that are needed here today, one is for a very strong message about the need to meaningfully consider an effective and credible

system of justice but the second point that I make or the first point that I made is that we need some additional guidance on the meaning and the weight to be placed on five key factors for real evidence under section 30.

WINKELMANN CJ:

On that first point, taking into account the need for the Court - the Court to take into account the need for a credible and effective system of justice, I'm interested to hear what you have to say about this because what strikes me when I read the authorities, is that the authorities have stated quite clearly this is not to be used to discipline police and that must be so it's not a disciplinary tool but do the authorities reflect an engagement with the need with the system aspect of that? So there is, of course, if we have a system of justice there are incentives that operate within that system and so if the evidence is consistently being admitted, then that does not create a very significant incentive within the system for the police to take great care with the lawfulness of their investigative techniques and when I read the authorities and if you were discussing this in an American context you would be talking about the moral hazard created by admitting the evidence. That's not a language we use but it's that concept that the Courts have to be aware of the moral hazard of saying something is unlawfully obtained but yet it can be used in the case. So is there a discussion in the cases about that moral hazard aspect?

MS PRIEST:

Well I think that's part of the problem, one, there seems to be very limited meaningful discussion of a credible and effective system of justice at all on a broader public policy level. Sometimes they talk about it in a very narrow case specific way but talking about those two competing interests is rare and one is about the public interest and bringing offenders in general, in a broad sense to justice and of course this is what's said in *Hamed*, against the public interest in ensuring the justice system does not condone improprieties in gathering evidence and gives substantial effect to human rights and the rule of law. So those are the competing interests. I don't think there's anything controversial about that, that's reflected across other Commonwealth jurisdictions, but the issue we have in New Zealand, in my submission, is that we are placing too

much weight on factors which favour admission, the seriousness of the offending and the nature and quality of the evidence but in particular whether the evidence is critical to the Crown case and that has been given, in my submission, too much weight against the nature of the breach, the nature of the impropriety and whether any alternate methods are available.

1220

So it's effectively the rule of law principles on one hand, if you like, and the need to ensure that we don't condone improprieties. I mean we have to remember that section 30 is only engaged when evidence has been improperly obtained. That's our starting point and so each and every one of these cases that permits the evidence to be used nonetheless on some level is condoning that or enabling that.

So I think – so to answer the question, are they being meaningfully considered, not often, 13% of all cases we found meaningful consideration. But what we did find in the statistics is that where these matters, these broad public policy issues were meaningfully discussed, that we had roughly 50% of evidence excluded and 50% admitted, and so –

WILLIAMS J:

It may simply mean that in those cases that issue was live and it counted and in the other cases it wasn't and it didn't, and without some sort of qualitative analysis of the cases we can't know which. The numbers in some ways can hide as much as they explain and that's what we have to be careful about.

MS PRIEST:

Yes.

WILLIAMS J:

So this is no criticism because, you know, criticism, well, there's no point in criticising it. The resources required to do the job that I think probably needs to be done will be well beyond you and your legal aid, but it would've helped if, in addition to the numbers, there were at key points "for examples" so that we

could see exactly how qualitatively these conclusions from the numbers are being played out in particular cases.

MS PRIEST:

Just to your Honour's point that perhaps this issue isn't engaged in all of the cases, in my submission I consider that this is precisely the point, a consideration of a credible and effective system of justice is compulsory, it's mandatory, in every single section 30 assessment –

WILLIAMS J:

Yes, yes, of course.

MS PRIEST:

– and it's not – that's not occurring.

WILLIAMS J:

Right, but –

WINKELMANN CJ:

What you mean by that –

WILLIAMS J:

Can I just make this point? That, of course, is true but if you change the system and say: "Every time you must consider this," you generally don't shift the result. You just get the trotting out of the standard line and then moving on to the thing that's really on the Judge's mind. So a tick-box exercise probably won't produce the shift that you're seeking.

MS PRIEST:

Well, in my submission, were this Court to give a strong direction about what that means, that it's not just about the facts of this case but that decision-makers are required to step back and consider the wider implications of their decision on the system of justice, on bringing offenders, plural, the collective, to justice, both of those. I think that having the, well, forcing the Courts to pause and

reflect on that may have a different outcome and the reason I can say that is because our analysis of the cases seemed to reveal that. It's a correlation I accept. I can't say that it's causative because I'm not the judicial officer who's making the decision.

WINKELMANN CJ:

So when you say "engagement" you're not just saying, you know, referring to it and just stating two or three sentences. You're saying engagement with the values that underpin that consideration and that –

MS PRIEST:

Correct. That's the 13%.

WINKELMANN CJ:

And the 13% of cases you can see where the Judge has paused and said, well, if we always let this evidence in then there's no incentive for police, and it's not to suggest that police are going to consciously, et cetera, go about wrongdoing but it's just a system operates in response to incentives?

MS PRIEST:

That's correct and I think important to note that in those cases where it was meaningfully considered we still had 50% included and 50% excluded, so the Courts have been conscious, it doesn't just favour exclusion, or, sorry, or admission of evidence. It does cut both ways.

GLAZEBROOK J:

Can I – sorry?

MS PRIEST:

Yes. No, I apologise.

1225

GLAZEBROOK J:

No, once you've finished. I'm just looking at paragraph 142 and especially 145 and 146 of *Williams*. Is this the sort of guidance that you're looking for because it was under the heading "proportionality", and it discusses the range of cases where you may or may not exclude, making the point quite carefully that the administration of justice could be brought into disrepute at 143, which comes from *Shaheed* of course.

MS PRIEST:

Yes, exactly, so one –

GLAZEBROOK J:

But is this the sort of analysis that you're suggesting the Courts – because it is on the books I suppose, although it's difficult to know where *Williams* sits now.

MS PRIEST:

Yes. In light of *Hamed*, in my submission, on a practical basis *Williams* provides very limited assistance to practitioners, in light of *Hamed* which has –

GLAZEBROOK J:

Is there anything in the *Williams* analysis you think have – because you said I think before that times have moved on and I'm sure they have, is there anything particularly in the *Williams* analysis of the *Shaheed* test that you say now should be changed?

MS PRIEST:

Yes, and that comes down to the individual factors which perhaps I'll speak to next with your Honour's leave.

WINKELMANN CJ:

I just note that what is at 142 of *Shaheed* is one of the recommendations of the Law Commission, one of their possible amendments to amend the test to make it clear, section 30, to make it clear. They ask whether 32(b) should be amended to provide the Judge must determine whether exclusion is

proportionate to the impropriety and then they go into their public interest business.

MS PRIEST:

Yes, but I mean on this point of *Williams*, do I endorse what *Williams* says about the effective and credible system of justice, I do and I look at 143, we see Justice Blanchard from *Shaheed*: "A system of justice which readily condones serious breaches of rights committed deliberately or in reckless disregard of the accused's rights, where police conduct has been grossly careless will not command the respect of the community. On the other hand, the administration of justice could be brought into disrepute if every breach leads inevitably to exclusion of crucial evidence which is reliable and probative of serious crime." And again, down at the bottom of 146, the last two sentences of that: "Even in such cases, due consideration would need to be given in the balancing exercise to the risks of the integrity of the system. A system that condones deliberate breaches of the law, for whatever motive risks losing moral authority." So I do endorse the views of *Williams* but the difficulty is that with *Hamed* of course following *Williams* and there being such diverse interpretation and opinions in *Hamed* and effectively *Williams* is almost put to one side in *Hamed*, it's not really grappled with and so as practitioners trying to apply section 30 as best we can, *Williams* at the moment has very little authority.

GLAZEBROOK J:

What I was really asking is you want us to – to the extent you want us to endorse *Williams,* can you tell us which bits of *Williams* you don't want us to endorse?

MS PRIEST:

Yes, it was more the framework of *Williams*, I like the framework of *Williams*, that was the point I was trying to make, just with the headings and then the particular –

WINKELMANN CJ:

How does that framework relate to section 30? Are you saying you like the way that *Williams* addresses each of the considerations in section 30?

MS PRIEST:

Correct, correct, with the headlines. So for example back on page 241, which is just back one page, we see the heading.

GLAZEBROOK J:

Well it looks at each of the factors and says whether they're pro or con.

MS PRIEST:

Correct.

GLAZEBROOK J:

And then it does a proportionality analysis, which do you say is equivalent to looking at a credible system of justice or do you say there should be something more or less or –

MS PRIEST:

I would invite the Court to go further than what *Williams* did and to effectively put in place a very explicit third step which would incorporate these aspects around what is a credible and effective system of justice and ensure that it is a mandatory consideration in every section 30 decision.

KÓS J:

That's your paragraph 142?

MS PRIEST:

Yes, yes Sir.

ELLEN FRANCE J:

Well in terms of the effective and credible system of justice, do you have any difficulties with what Justice Blanchard says at 187 in *Hamed* about that?
1230

MS PRIEST:

No, I endorse that. The difficulty is, without it being expressly stated by this Court that it's a third step, it's a mandatory consideration for the Courts to step

back and take into account these broad public policy decisions and of course in this we see that endorsement of *R v Grant* [2009] 2 SCR 353, which in my submission must be right and this Court has repeatedly endorsed and recognised the decision of *Grant* as being applicable, but what we're having is just all of this exists already but despite that, it's simply not being addressed by the Courts in a meaningful way and in my submission that may help mitigate what I say is a problematic application of section 30. I make no – I don't pull back or hesitate when I say that in my submission section 30 is not operating in a fair way, if we are admitting so much evidence which is improperly obtained, it tells me that the seeking of conviction is overwhelming the rule of law and our requirement that the police – I mean the police, their job is to operate within the rule of law.

WINKELMANN CJ:

So I think actually your answer is putting it more broadly than Justice Blanchard is stating it there because he's talking about the longer term repute of the administration of justice and you're bringing in something which is connected but has resonances that this paragraph may not explicitly draw out which is in relation to the rule of law.

MS PRIEST:

I mean they talk about the administration of justice and the damage to the repute of the justice system, in my submission that's just the flipside of ensuring adherence to the rule of law by all, including the police. So perhaps said a different way, no doubt more eloquently by the Court.

WINKELMANN CJ:

It's a very eloquent paragraph, yes.

MS PRIEST:

Yes, it is. But I think we're saying the same thing a different way Ma'am. The issue is, as I said, ensuring that the Courts consider it because it seems, on our analysis, that when they do, the results are more likely to be evenly balanced with that 50/50 inclusion/exclusion.

WILLIAMS J:

But take this back a couple of steps in the plumbing, at least insofar as iPhones are concerned, it does seem to me that what's really needed is some very clear rules about how those things can be used and if that's the case, at least the iPhone related evidence admission issues probably won't come to court at all. I mean we tend, because we're courts, to focus on what happens in court, but in fact key decisions are made long before they get anywhere near us and whatever we say will impact on that point in the pipeline as well and we need to really bear that in mind.

MS PRIEST:

Just so I'm clear Sir, when you talk about iPhones, just the specific context that you're thinking of?

WILLIAMS J:

This case.

MS PRIEST:

This case, so taking a photograph, a policeman using an iPhone to take a photograph?

WILLIAMS J:

Correct, because I was quite struck by the joint report saying there are actually no guidelines on what you can do with your iPhone, apparently.

MS PRIEST:

Well and now we have digital notebooks which this Court may or may not be aware of but this is a new development.

WILLIAMS J:

Sure, so do we.

WINKELMANN CJ:

No, the police have a major initiative based around digital notebooks.

WILLIAMS J:

Yes, so my point is we can be talking about section 30 as much as we like but actually a primary safeguard is well before section 30 and whatever we say here ought to have a fundamental effect on that and we need to be aware of it.

MS PRIEST:

Correct, it's always a circular argument though because any policy that's developed of course, this Court may deem to be infringing on rights to be free from unreasonable search for example. So –

WILLIAMS J:

Sorry which policy are you talking about?

MS PRIEST:

Any policies around say police being able to use iPhones to capture photographs of people.

WILLIAMS J:

Well the one thing you'd be very confident about is whatever the policy is, it would have to be consistent with the law. So whatever law is espoused by this Court will affect not just the way judges deal with section 30 but also, and much more so, the way in which constables on the beat use their phones.

MS PRIEST:

Yes, and I think that's a point that Justice Kós also made, that there is certainly a need to consider all of these new technologies, iPhones being one, CCTV, facial recognition software. We see that more and more developing and so I do agree that we're getting to a place now where we're trying to deal with really modern technologies which were never anticipated, of course, when these laws were –

1235

KÓS J:

We've also got body-worn cameras.

MS PRIEST:

Yes, on bodies, yes, and we have taser cameras.

WINKELMANN CJ:

And the point I've been trying to interest you in, but I don't think I have, is that the approach we take to section 30 will have implications for how punctilious police are because it will create incentive, systemic incentives, which operate at a systemic level in terms of how punctilious they are –

MS PRIEST:

Yes.

WINKELMANN CJ:

– because if you can breach, if you can improperly obtain evidence but be reasonably confident it's going to come in in 80% of cases…

MS PRIEST:

Yes, and we see that, I think, reflected in the police materials which have been filed with this where the police are teaching their officers that as long as there's not a substantial departure from the law they should be all right. In my submission that's reflective of section 30 and its application and what I would hope is that the police are taught not to break the law, to only work within the confines of the law, not to substantially comply with it but to 100% comply, because their job, like ours, is to operate within the law and to apply the law and so, in my submission, there is a much higher standard expected of the police. It's negligent if they do not know the law, in my submission, because that is their job, to know it and to apply it and to enforce it.

WINKELMANN CJ:

Well, I mean, that might not be true in every circumstance because there's an awful lot of law.

MS PRIEST:

There is an awful lot of law, that's fair.

Perhaps then I could turn back to the five factors which in my submission ought to be considered by this Court in terms of analysis just briefly. So the submissions which I wish to make relate to the five factors. The first factor relates to the importance of the right breached and the seriousness of intrusion. We noted that in the analysis undertaken that of the 114 rulings 102 of them involved a breach of fundamental rights. Where a breach of fundamental rights or other privacy rights was regarded as moderate to high the Court nonetheless admitted evidence in some 66% of those cases. In my submission, what this tells us is that insufficient weight is being placed on this very primary and fundamental consideration which is a breach of ordinarily a right protected under the New Zealand Bill of Rights Act and, of course, they are rights of individuals against the state.

The Court of Appeal, of course, has held in this case for Mr Tamiefuna that the right breached was an important one and evidence was nonetheless admitted. But, in my submission, the adjustment, if you like, that's needed in terms of considering the importance of the right breached and the seriousness of intrusion generally is simply an endorsement of the fact that this can't simply be given lip service. Real substantive weight needs to be placed on this fact and recognised that we are here because evidence has been improperly obtained and that there has been a significant individual right breached for us to even be here grappling in section 30 ordinarily.

GLAZEBROOK J:

Williams would say that you can nevertheless grade these rights. Do you say you can't?

MS PRIEST:

No, I do think you can grade the rights, but I think it's important to ultimately still recognise that a low-level breach is still a breach of a fundamental human right and for us to have got to section 30 that determination has been made. Of course, these factors have to be balanced against each other but again some

guidance with examples from the Court may be of much more assistance to the lower Courts going forward.

1240

KÓS J:

But this is not just some sort of constabulary bumbling which we might pass through. This is a fundamental system. This is a database system. It's all about, to my mind, far more about the retention and nomination of the material than it is about some cop taking a snap on the roadside. Isn't that what's really important here, and that makes a very different scale of breach potentially, if it's a breach.

MS PRIEST:

In terms of the rights as they – if I can perhaps apply this to Mr Tamiefuna.

KÓS J:

Well, it's not just Mr Tamiefuna. That's my point.

MS PRIEST:

Correct. Yes, I mean obviously broader public policy going forward which I will get to, effective and credible.

KÓS J:

Well, he's not the only person who's recorded on this database.

MS PRIEST:

Yes. No, I think what I submit is a real issue here that the Court does need to grapple with is privacy expectations in public places. Where – our private spaces are closely protected already with clear boundaries between the state and individual, such as my home, my phone, my car. Public spaces have not yet been determined and I submit that equal protection of privacy from the state, these are Big Brother concerns, are increasing in the technological age. Facial recognition, as indicated by Justice Williams, number plate recognition, these are things which the public are concerned about. They're concerned about the

state having this information, not private enterprise but the state. To minimise an expectation of privacy from the state in public spaces, in my submission, would – it is an unreasonable search, it is an unreasonable infringement on expectation of privacy when it's done by the state, and in the event that the Court were to allow this effective database of people's photos under the guise of intelligence to start being created and then we follow on with facial recognition software which is immediately identifying people and loading images of where they are, what they're doing, who they're with, against another database or perhaps the same one, it is a floodgates argument and there are real concerns given the exponential development of technology that, in my submission, this Court needs to be I think mindful of in this particular case.

So in this the intrusion was determined by the Court of Appeal not to be a very serious one because the photograph was taken in a public place where he had a reduced expectation of privacy. In my –

WINKELMANN CJ:

And without objection.

MS PRIEST:

Yes. In my submission, there's an error in that because underpinning, of course, any privacy breach are fundamental freedom of movement and freedom of association, and private citizens ought to be free from intrusive data collection by the state without good reason, without lawful reason.

WILLIAMS J:

But not from intrusive data collection by private companies seeking to mine that for profit, and in fact on-selling it to other corporations for the same purpose?

MS PRIEST:

Well, and this is something we've talked about in preparation is, for example, Facebook, if someone has a public Facebook profile they inherently consent through ticking boxes and conditions that all of their images, all of their material on that, may be used for all sorts of purposes and if it's –

WILLIAMS J:

Yes, but if I use my credit card to purchase yet another really bad tie, then that information sits in the database of the company from whom I have purchased it and that company if it chooses, without asking for my consent, can sell that information to really bad tie companies around the world and does.

MS PRIEST:

Yes, I mean –

WILLIAMS J:

I didn't, I haven't consented to that, certainly not, you know, buying ties on Facebook.

GLAZEBROOK J:

You probably have actually because you probably ticked some box that said you did consent to it but…

WILLIAMS J:

Well, if I did tick it I didn't know I was ticking it.

GLAZEBROOK J:

No, exactly, but among the –

MS PRIEST:

No, I understand, but I guess what I would come back to in response is that the New Zealand Bill of Rights Act is to protect individuals from the state, and so fundamental rights don't extend to whether your tie company has any regard for your rights and in the same way that if I'm at –

WILLIAMS J:

Well, they do, actually, they do because the Human Rights Act applies to everybody even if BORA doesn't and draws me to the point that I think we do need to be mindful of and that is that stuff is changing really quickly and to – although I'm quite sympathetic to the basic ideas you're advancing, to require

the state to stay in the stone age while the rest of the world is operating in the space age may just be a silly idea and it may be that there are better ways of controlling wrongful exercise of state power than requiring it to stay analogue when everyone is not.

1245

MS PRIEST:

In my submission though Sir, that would be a matter for the legislature to grapple with.

WILLIAMS J:

I guess that's right.

MS PRIEST:

In terms of at the moment there is no lawful basis for this and that is the regime within which we must assess today's case.

WINKELMANN CJ:

And the Courts are bound by the Bill of Rights Act as well as we develop the common law.

MS PRIEST:

Yes.

WILLIAMS J:

Yes but my point is really a credible system of justice has to be credible in totum.

MS PRIEST:

Mmm, I agree with that.

WILLIAMS J:

There's no point in us, and I'm not suggesting this is necessarily the case but I do think it is something we need to think carefully about. There is no point in us coming up with a regime that disregards the reality in which we live, albeit

for really good reasons and with the best of intentions, that's what we need to be careful about.

GLAZEBROOK J:

But that's not really a section 30 issue because the section 30 issue is predicated on the fact we've already found it unlawful and unreasonable.

WILLIAMS J:

We may differ over that because it may well be I think a section 30 issue, maybe a whole lot of other issues too but it may well be a section 30 issue.

WINKELMANN CJ:

Can I ask you about the without objection point, what do you say about that?

MS PRIEST:

For Mr Tamiefuna?

WINKELMANN CJ:

Mmm.

MS PRIEST:

In my submission where the state is gathering either intelligence or undertaking a search, as we assert here, in the absence of a power to do so, they must advise that the consent needs to be obtained.

WINKELMANN CJ:

So I thought you would say something like this young man is not going to object.

MS PRIEST:

I think Ms Gray has already said he would object.

WINKELMANN CJ:

No, no, he would object if asked for permission but that's quite a different thing to standing there when a policeman gets out a phone and takes a photograph and objecting.

MS PRIEST:

Oh yes, oh no, I don't think it's –

WINKELMANN CJ:

It's a different power dynamic.

MS PRIEST:

Correct.

WINKELMANN CJ:

If a policeman said: "Well I'd like to take a photograph, may I please and it's going to be stored in the National Intelligence", of course he'd object, but this is not that circumstance.

MS PRIEST:

No, sorry I misunderstood.

GLAZEBROOK J:

But he may not, because he may think that you have to do it because the policeman is asking you which is –

WINKELMANN CJ:

Yes, and if he contradicts the policeman who knows how it goes. So I just wondered –

MS PRIEST:

It's that cloak of authority, I 100% agree, that I think it's unrealistic to expect a person to protest if a police officer asks you to do something, particularly when you've had prior dealings with the law, you do what you're told. If they ask you for your name and phone number, you don't say: "I'm not giving it to you." It's a bold citizen who says: "Well I'm not going to give it to you." They're probably law students and lawyers but normal people on the street are unlikely to assert their rights because they don't know them and I think it's unfair and unrealistic to expect people to know their rights and have to assert them, I think the

obligation is on the police to ensure that people's rights are respected and in this case that would have involved an affirmative request for consent in my submission. I'm not sure if that answers –

WINKELMANN CJ:

It does answer my question, thank you.

MS PRIEST:

All right, the next factor is the nature of the impropriety and in summary what we have now in the law is a real focus on the intention of the police when they undertake or when they – they break the law if you like. It focusses on good faith, bad faith and recklessness, which is all about intention. In my submission, and thankfully supported by the Law Commission, I propose that not only intention but also knowledge should be factored into this, knowledge being negligence and carelessness. It is certainly hinted at in some cases but it has not been explicitly set out by this Court as something which would assist in determining the nature of the impropriety in a particular case.

In this case, of course when we apply it to Mr Tamiefuna, the Court found that it was unlikely that Detective Sergeant Bunting was aware that he was encroaching upon the appellant's rights and they held he was acting in good faith, even though his conduct was not properly authorised by law. They said that Detective Bunting did not take the photograph knowing it was unlawful to do so, however, he ought to have been aware. So we're into this sort of negligence type of category, ought to have been aware that the laws in place surrounding the photography of individuals in public were unclear and in the absence of an express authority to capture that data, it is our submission that he ought not to have done that and the decision to do it anyway was careless or negligent, when we think about knowledge.

1250

In my submission the courts, I think quite understandably, are very careful not to undermine the credibility of police officers doing their work to protect the community. So when one focusses more on knowledge, rather than intent, it

allows them to, I think, take more care of what they should have known and it's perhaps more easily explained in the search warrant application decision. So we've had cases where the police have obtained a search warrant for a cellphone but they haven't obtained the accompanying warrant for intangible data on that phone. Now they thought that they were doing it right, they were not, when they're detective senior sergeants and detective inspectors, people of significant rank with significant experience, in my submission, we can say that they should have known and that they were negligent in not knowing that they needed to include all of that information in the search warrant for example.

GLAZEBROOK J:

I mean it's slightly difficult in this case to say this had to come to the Supreme Court to know whether it was legal or not and the constable should actually have known that the law was uncertain in the absence of anything telling him when he could or couldn't use the cellphone and in fact with a project that says use your cellphone all the time to collect this information or whatever that app is.

MS PRIEST:

Yes, I mean in my submission, because the police, their job is to, as I said, to apply the law strictly, rigidly, in the absence of an express authority, my submission is that he shouldn't have done it.

GLAZEBROOK J:

Well I understand that, but –

MS PRIEST:

And so there's a recklessness in that and doing it without knowing for sure it was lawful. So that's the submission that I make.

KÓS J:

Well and apparently without any guidelines if the joint report is right.

MS PRIEST:

Sorry Sir?

KÓS J:

And apparently without any guidelines if the joint report is right, which is frankly pretty extraordinary.

MS PRIEST:

Yes Sir.

KÓS J:

But we'll hear from Mr Marshall on that.

GLAZEBROOK J:

Well of course *Williams* was written in the absence of there being any guidelines in police in respect of applications for search warrants.

MS PRIEST:

Yes, yes, and that's the point I think that the law has changed, it's not just as easy as endorsing the particular aspects of *Williams* but rather the framework.

The third, I am skipping over this but of course it is also contained in the written submissions, but the nature and quality of the evidence, this is of course a controversial section under section 30 because there was a deliberate decision by – when the Evidence Act was enacted to remove the centrality of the evidence to the Crown case from section 30 but despite that, and I think it was endorsed in *Hamed*, that factor has come back in and it very often is a very significant factor favouring admission.

In our analysis, in 85% of rulings the nature and quality of the improperly obtained evidence was regarded as highly important to the prosecution case and evidence was admitted in 82% of those cases, so there's a correlation there but on the other hand in the 4% of cases where the evidence occupied a lesser role in the prosecution case, the evidence was admitted in only 20% of those

cases and so what that tells us is that there's a real focus or large weight has been placed on the centrality of the evidence to a case.

WINKELMANN CJ:

And what about what also comes in under this heading all the time is the nature of the evidence, so courts are more likely to exclude evidence where the defendant has been conscripted against themselves, as against this kind of evidence where it's kind of reliable, it's reliable evidence.

MS PRIEST:

Yes, I mean I accept in this case it's reliable, it's a photograph. The point that Justice Williams made, that the photograph is more reliable than the NIA entry itself, that's accepted. So the nature of the evidence is that it is identification evidence, the quality of it is that it is reliable but the issue which comes to the forefront it seems in all of these decisions is do the Crown need it to prove the charge? And what's happening, in my submission, when we look at the cases it is being given disproportionate weight and there is a very strong correlation where this factor is present, it tends to be ruled inadmissible, irrespective of the other rule of law factors.

WILLIAMS J:

Ruled admissible?

MS PRIEST:

Ruled inadmissible.

WINKELMANN CJ:

I suppose this conscripted one is that there is – when your defendant is conscripted against themselves, the system views that more sceptically, not just because – not more sceptically, more grimly, not just because of reliability issues but also because of the fundamental principle to the right to silence et cetera.

1255

MS PRIEST:

And we've excluded those cases from our analysis. We've only undertaken analysis on search cases for that reason because that nature and quality of that evidence tends to have this – I mean it has obviously weight and that's right it must have significant weight but what we found with the analysis is that it's got disproportionate weight and a very strong correlation with admission, irrespective of the other factors and that's that balancing point that we make.

WILLIAMS J:

That takes us back to your starting point which is the underweighting of legality.

MS PRIEST:

Yes.

WILLIAMS J:

The underweighting of the lawfulness consideration.

MS PRIEST:

Correct, and that's why, yes, so we simply seek from this Court a statement about caution and that where the evidence is critical to the Crown case that it ought not overwhelm all of the other factors. You'll see the Law Commission proposal in appendix A is to remove it altogether. They say that instead the seriousness of the offence will be sufficient. In my submission that's – I don't endorse that, my submission is that the centrality of evidence to the case is always at the forefront of a mind of a judge and in my submission I would rather that that is expressly and transparently assessed through the evaluative section 30 process, rather than removed entirely and then other reasons used to admit the evidence, when really that at its heart is one of the real reasons why evidence is admitted that is improperly obtained.

GLAZEBROOK J:

I mean you could say that the centrality makes it worse because you're relying totally on illegal evidence as against legally obtained evidence, legally and reasonably obtained evidence, if you're talking about the product of a search.

MS PRIEST:

Yes.

WINKELMANN CJ:

And the same with the seriousness of the offending because if it's serious offending, the police should take great care to make sure they're using lawful means so they don't run into difficulties.

MS PRIEST:

Yes.

GLAZEBROOK J:

Which is a point made in *Williams* I think which says it can go both ways.

MS PRIEST:

Yes.

WILLIAMS J:

I wonder whether, in the absence of a presumption against admission where you have substantive unlawfulness, which of course was rejected, specifically rejected, we place quite a burden on individual judges Monday morning in the District Court in Kaikohe or Manukau or Gore, to say despite the gotcha, our constitutional values mean you walk because that's the obligation we're imposing on those judges. One can see at a human level why judges would be reluctant to take that step.

MS PRIEST:

Yes Sir.

WILLIAMS J:

And so I wonder whether passing that responsibility onto judges in individual cases, in the absence of clear and firm rules of law, either in statute or in leading authorities, is fair.

MS PRIEST:

I agree Sir.

WILLIAMS J:

But you have to be ready to wear the consequences of that, which of course the Courts were not in *Shaheed*. They rejected that approach because it was causing too many obvious criminals to walk.

MS PRIEST:

And it was particularly amplified in the facts of *Shaheed.*

WILLIAMS J:

That's right, so I just wonder whether you can have – is it possible to have anything other than one or the other? Either you have a discretionary approach in which people who have clearly committed the offence are likely to be convicted on the basis of evidence that isn't outrageously unlawful or you have a very clear rule that says if it's unlawful, at least substantively so, it may not be admitted.

MS PRIEST:

I mean that's obviously the pre *Shaheed* position to have the prima facie exclusion rule.

WILLIAMS J:

But the point is neither is perfect.

MS PRIEST:

No, no.

WILLIAMS J:

Each will have a price.

1300

WINKELMANN CJ:

Well can I just bring you back, well it seems to me that connects to the point I was making about paragraph 187 of *Hamed* because that talks about the reputation of the administration of justice and damage to the administration of justice and a judge sitting there is going to have an acute consciousness of the reputation of the administration of justice if they – their focus will be upon the standing of the courts and the system of justice if people have evidence collected in respect of them, they look like they've done serious offending but they're allowed to go free and my point is if you don't articulate the other broader systemic operations, operating incentives, that just all ends up being focussed upon the reputation, that tends to – and even if you articulate that, it still favours admission because the administration of justice, you can read the newspaper any day, people do not like those who there is credible evidence of having offended, going free without facing charge.

MS PRIEST:

What I would say is that a credible and effective system of justice is not limited. Public perception is one aspect of that but there are a number of other stakeholders who participate in the system of justice, defendants, legal counsel, the judiciary, the police, we're all part of that and so in my submission while we may upset the public from time to time by ruling evidence inadmissible and somebody is not convicted as a result, sometimes we need to favour that and what we've got at the moment, in my submission, with these statistics with 80% of evidence being ruled admissible after it's been improperly obtained by the police, we have a very clear message, in my submission, from the profession, from I guess representing defendants, through the Law Commission and of course on Mr Tamiefuna's behalf, this is not working in the way that a credible and effective system of justice ought to and so that is the ultimate policy decision for this court, are you happy with the 80/20 or do you agree with the bar when we say that having matters section 30ed in routinely, police being taught that they just have to not substantially depart from the law and it will be okay, whether we are endorsing a credible and effective system of justice or whether we're undermining it and in my submission we have had a big pendulum swing with *Shaheed* and with section 30 and we need to pull it back,

in my submission and the way, when we did the analysis that it seemed to us to do that, is that when judges who have taken of course judicial oaths, step back and do that broad public policy consideration, they are checking themselves and we end up with a correlation of 50/50, which at least goes some way to correcting, we say, the problem that we see now.

WINKELMANN CJ:

Now, Ms Priest, it is 1.02, have you finished do you think?

MS PRIEST:

I have probably just a couple of topics.

WINKELMANN CJ:

Do you need to apply them to Mr Tamiefuna's case?

MS PRIEST:

Yes I do, the other factors.

WINKELMANN CJ:

We will do that when we come back. And then Mr Keith, would it be appropriate for you to go after the appellant?

MR KEITH:

We have conferred and it seemed most sensible for us to go third if that suits the Court.

WINKELMANN CJ:

I mean my thought and I know at least Justice Kós' thought, is that it is more sensible for you to go after Ms Priest but was there some logic behind that?

MR KEITH:

Well two factors, my learned friends had had a brief discussion but I hold them to it. So two factors where the logical – first, we do have something to say about, well we have had something to say in written about both parties to the appeal and I'm also conscious that a number of questions have come up, even

in the course of this morning, that we will do our best to have noted and respond to. I suspect it may be similar to the Crown or it is possible that it will occur for the Crown and that was the main reason for proposing to go then, third rather than second.

WINKELMANN CJ:
It might be the Crown has some things they wish to say following you.

GLAZEBROOK J:
Well we have allowed them to do that.

ELLEN FRANCE J:
Well could we talk about it.

WINKELMANN CJ:
Well what I think we're going to do is talk about it over lunch but you should be ready to go, Mr Keith, but we'll have a chat about it as a group. I must say I still don't understand why, from the logic you've just explained, why third, because most of your submissions tend to be supportive of the appellant.

MR KEITH:
It's more that, sorry if I'm repeating myself at all.

WINKELMANN CJ:
Well have a go at repeating yourself, you never know I might understand it better the second time.

MR KEITH:
But I think, and obviously I'm very much in the Court's hands, it's not – certainly some of the points that we have made are supportive of arguments or support another ground arguments.

WINKELMANN CJ:
Yes I'm not suggesting you're – yes.

MR KEITH:

But the other point is, as the Court has already indicated, that the reason we are here is that this is a case in which the Court is grappling with some very wide issues of wide consequence, as well as some quite difficult issues and we may be able to assist on some of those. I do anticipate that there may be questions that arise in the Court's questions and in exchanges with the Crown in which we might also have a point but obviously we're in the Court's hands.

WINKELMANN CJ:

Right, thank you.

COURT ADJOURNS: 1.06 PM

COURT RESUMES: 2.19 PM

MS PRIEST:

Thank you. I was addressing the individual factors in section 30 and making comment on the law as it stands and then applying them to Mr Tamiefuna's particular circumstances. If I could just briefly return to the nature and quality of the evidence and it is submitted ultimately that whether the evidence is critical to the prosecution case that ought not trump section 30(3)(b) and 30(3)(e) which are about the nature of the impropriety and also whether alternative methods might have been available to obtain the evidence and of course those two factors are intrinsically intertwined.

I do draw the Court's attention to comments made by Scott Optican and Peter Sankoff at 1175 of the bundle, the appellant's bundle and it starts about the second sentence in that second paragraph, it says: "Whether it is real or confessional proof, surely it is the way that evidence was obtained by the police and not what was obtained that should fundamentally guide the decision to exclude it under the Bill of Rights." And this seems to be echoed in the Law Commission issues paper of 2023 at pages 999 to 1000, where at paragraph 7.100 the Law Commission comments that in *Shaheed* the Court had indicated that the centrality of the evidence to the prosecution case was a

relevant factor but when the evidence bill was introduced, section 30(3)(c) originally included the words “in particular whether it is central to the case for the prosecution”, however, these words were deleted on recommendation of the select committee and there is of course comment there of the Green MP about explaining the reason that factor was removed which states: “The fact that the prosecution relies on that evidence to get the conviction makes it even more important –”

MS PRIEST’S COMPUTER SCREEN FREEZES

MS PRIEST:

So I was just reading the comment from the Green MP about the fact that: “The prosecution relies on that evidence to get the conviction makes it even more important that we exclude it, otherwise we create this enormous temptation for investigating agencies to deliberately breach rights because that is the only evidence they will get.” And so this has of course been included by the Law Commission in this 2023 paper.

If we scroll down to 7.103, the Law Commission comments that cases have continued to equate section 30(3)(c) with the centrality of the evidence to the prosecution case and they treat it as a significant, if not determinative factor and they say that that was borne out in their snapshot study of cases and certainly that’s the same in our assessment of the cases also and then they go on ultimately to suggest in their appendix A that this actually be excluded specifically from this section were they to amend section 30 as it currently stands.

1425

So in terms of the application for Mr Tamiefuna on the nature and quality of the evidence, I simply make this point that apart from this evidence there was no basis at all to prosecute Mr Tamiefuna and this is particularly important, given this was a pre-emptive gathering of evidence, rather than the usual gathering of evidence post-charge.

Turning then next to the seriousness of the offence, on our analysis almost 80% of cases found the seriousness of the offence to be a factor favouring admission and of these cases 87% ruled the evidence admissible. So the presence of this factor correlated strongly with the admission of evidence, with overwhelming weight placed on the seriousness of the offence and I do of course remind the Court of the comments in *Williams* at page 242, paragraph 146, where they discuss the balancing of the interest but when they talk about the seriousness of the offence: "we say almost inevitable because we cannot rule out a possibility that even in such cases where the evidence is reliable, highly probative and crucial to the Crown case, the public interest may be seen to outweigh the breach in cases involving very serious crimes and especially those involving major danger to public safety", and the examples they give are serial rapists, murderers or major drug offenders. Again in the Law Commission report we see this factor was also identified as one often favouring admission.

On Mr Tamiefuna's behalf, it is submitted that a recalibration of this factor of the weight that is placed on this factor is needed with less focus placed on the seriousness of the offence and the nature of the unlawfully obtained evidence. There needs to of course be that corresponding increase in focus on the breach of fundamental rights, the nature of police impropriety and whether other investigatory techniques are available in order to respect the integrity of the rule of law.

Now as we apply this particular factor to Mr Tamiefuna's case, it seems the Court of Appeal have not applied the *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 assessment of seriousness of the offence, they've simply noted that this was a serious offence. Now it's not disputed that this was serious, it was a home invasion type burglary but it is important if one undertakes the *Underwood* assessment to note that the starting point for Mr Tamiefuna was one of six years and in my submission falls far short of the serial rapist, murderers and major drug dealers that were contemplated when this factor ought to favour admission or carry significant weight in that balancing exercise and so in my submission the Court has not adequately undertaken that

evaluative exercise as is required by *Underwood* but secondly have placed too much emphasis on the seriousness of the offence, given that six year starting point.

Finally, back to the availability of other investigatory techniques, and I would like just briefly to draw the Court's attention to the decision of *M (CA84/19) v R* [2019] NZCA 203 and I ask that we go to page 593, paragraph 50. This was the case where fingernail clippings were taken from an accused, along with DNA and at paragraph 50, under the heading of "other available investigatory techniques", the Crown acknowledge the constable could have sought the appellant's consent but did not do so and there was no alternative mechanism that was available to take body parts in New Zealand and there had been a fairly comprehensive assessment of the law prior to this point in the case.

1430

At 51: "this consideration we regard as of fundamental importance. We do so for this reason. The law has provided no statutory mechanism for the compulsory taking of human parts or samples, other than the Criminal Investigations (Bodily Samples) Act 1995. It follows that the appellant had an absolute right to refuse consent to the taking of fingernail clippings. The practical effect of granting a section 30 based permission to admit the unlawfully obtained evidence is to create a non-statutory exception to a statutory regime which required consent. We are not prepared to do so, rather we consider that such a course is inconsistent with the inherent right of the appellant to consent, buttressed by section 21 of the Bill of Rights Act", and so I do rely upon that and then if I apply that to Mr Tamiefuna's case, and I do apologise, this is not in the written submissions. The Court of Appeal of course identified that the factors under 30(3)(a) through (d) were most relevant in the case and noted that the remaining factors, including paragraph (e) were not relevant but in my submission, paragraph (e), whether there were any other investigatory techniques available, is highly relevant in this case and for the reasons which are set in *M v R*, it is my submission that there was no alternative lawful way to

obtain the photograph of Mr Tamiefuna and therefore this would favour exclusion of the evidence in this case.

The only other matter to assess in terms of application to Mr Tamiefuna is the credible and effective system of justice and the assessment of that by the Court of Appeal. The Court of Appeal, and this is volume 1, page 43, in the judgment at paragraph 103 did consider the need for an effective and credible system of justice. They said it's not a consideration that invariably favours the admission of improperly obtained evidence, they say, but it clearly does so here, given our conclusions about the seriousness of the intrusion, which they determined was low and the nature of the impropriety which was also deemed to be low. However, if one turns to -

WINKELMANN CJ:

Well what do you say that the statement itself suggests that they're not thinking about the other side of that?

MS PRIEST:

Correct, it's certainly a one sided, well they've effectively pitted them against each other rather than considering the two opposing broader public policy considerations that are part of a credible and effective justice consideration, I agree with that.

GLAZEBROOK J:

Well I suppose what they're saying though is given they say the intrusion was low and the nature of the impropriety low, then a credible system of justice does favour inclusion and I'm not sure you could necessarily fault that.

MS PRIEST:

I wouldn't fault that if I agreed with their determination.

GLAZEBROOK J:

So you're saying they were just wrong in what they put into that?

MS PRIEST:

Correct, so in terms of the seriousness of the intrusion as I've already submitted that the expectation is high, yes.

GLAZEBROOK J:

So if it was low and the nature of the impropriety was low, then one would think that a credible system of justice may favour admission, that was all I'm saying but you're saying that their input into that is wrong?

MS PRIEST:

That's correct and then also if one looks at paragraph 101, if we just scroll up, in my submission perhaps implicitly, not in an explicit way, the Court has actually turned its mind to the impact on a credible and effective system of justice from the opposing viewpoint where they say: "We think it likely that Detective Sergeant Bunting would not have been aware that he was breaching Mr Tamiefuna's rights and we would not characterise the impropriety involved as deliberate, reckless or done in bad faith." So that's very case specific, that's talking about the nature of the impropriety and the impact on his rights, given those findings, but this is the interesting sentence, in my submission: "A different conclusion might in future be justified if police continue to take photographs of persons in circumstances not properly authorised by law." And in my submission what this is, is the Court acknowledging that when you step back and take a broader public policy or look at this through a broader public policy lens that this behaviour cannot be tolerated and it said, in that particular sentence which I've just read out, and so in my submission had this court paused and undertaken that very deliberate step of considering both parts of the effective and credible system of justice, the way that they butt up against each other and whether, on a much more collective or systemic level, this behaviour is acceptable, in my submission, it ought to have fallen in favour of exclusion of the evidence.

1435

KÓS J:

I suspect that's reading too much into it.

MS PRIEST:

Perhaps Sir.

KÓS J:

Well it's a very commonplace sentence that one, and it's usually the point that distinguishes between bumbling by a constable and what is effectively the cynical repetition. You see that in very many section 30 cases, you will have seen it yourself.

MS PRIEST:

Yes and I mean obviously the ultimate conclusion that we reached that favours admissibility is not just predicated on a failure to explicitly and deliberately undertake this assessment of a credible and effective system of justice but also on those failures to appropriately interpret those earlier – each of those balancing factors which are case specific, which I've already addressed with the Court.

KÓS J:

Well as I say I think this case will be on bumbling.

MS PRIEST:

I'm sorry Sir?

KÓS J:

I think this case will be on bumbling because this is a systemic failure.

MS PRIEST:

Yes. So the ultimate submission is that while there was short-term interest in ensuring that Mr Tamiefuna was brought to account for the offending, it is submitted that the long-term interests of society and of the integrity of the justice system must prevail and that an effective and credible system of justice would require the evidence to be excluded in this case and to paraphrase the majority in *Grant*, which of course has been endorsed by this Court, Chief Justice Elias in *Hamed* at least, the long-term integrity and effectiveness of the administration

of justice sometimes requires exclusion of evidence, despite the public clamour for conviction and we submit that Mr Tamiefuna's case demands this.

Sir, the only additional matter was the issue of international law Sir. I have not undertaken an assessment of how often evidence is ruled to be admissible or inadmissible but I have got the tests available. Certainly the Commonwealth countries have often similar balancing tests to what we have in New Zealand. Australia has more of a prima facie exclusion rule, one that has to be tipped over in order for evidence to be admitted.

WILLIAMS J:
And it's statutory.

MS PRIEST:
It is. Well it's a little bit tricky because of the different states but there's the Uniform Evidences Act which governs most of the states and it states that such evidence is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that's been obtained in a way in which the evidence was obtained.

So the test is, you know, it's a prima facie, well it's a hurdle for the Crown to overcome if you like but the remaining primary jurisdictions, Canada, Scotland, Ireland and UK have balancing tests very similar to New Zealand, where they do balance the same considerations that we have under the effective and credible system of justice but as to the actual application of them, I have not undertaken any research or read any articles how it's working in practice but happy, if we can assist the Court any further with that, we're more than happy to. Unless the Court has any questions, those are the submissions.

WINKELMANN CJ:
Thank you Ms Priest. So I should say Mr Marshall and Mr Keith, I think the panel is content for us to proceed in accordance with the agreement you'd reached.
1440

MR MARSHALL:

May it please the Court, the Crown's position on this appeal is that it is lawful for police constables acting in the course of their duties to record information about their interactions with people, including taking photographs of who or what they can see. We say there is no rule of law that provides that police may only make such records where investigating a crime that has actually occurred because the police are under a duty to prevent and detect future criminal offending and in order to do so are entitled and we would say indeed expected to collect information for its potential intelligence value.

To the extent the Court of Appeal failed to recognise these broader but still core duties of the police it fell into error. Now I propose to address the Court on the first question, whether the photograph was improperly obtained, and in doing so I intend largely to follow the structure of our written submissions. My learned friend, Ms Ewing, will address the Court on the second question with the exception of any questions the Court has in relation to the privacy, the information privacy principles, that will be her province.

So the four topics that I will traverse, first the purpose for which this particular was taken, second, the common law power of the police to collect information, including taking photographs, third, the residual freedom of constables to act as a citizen may lawfully act and fourth, section 21.

Turning then to the purpose of the photo and this in our submission is the starting point, must be the starting point for the analysis on this appeal. We say far from this being random police photography as the Court of Appeal termed it, this was a photograph undertaken for a particular purpose in quite particular and unusual circumstances. Now the officer, unusually perhaps, gave evidence twice on this topic, first before Justice Moore in the High Court and then at trial before Justice Paul Davison.

He was clear – the second transcript your Honours will have seen is more fulsome than the first. He was clear in that evidence that the reason for making the intelligence noting and the photograph was a part of that noting, were his

suspicions that at that time some of the property in the vehicle may have been stolen property and he explained, gave at least five reasons why he held that suspicion. The first was that all three occupants in the vehicle had recent criminal history for offending involving the taking of property. Mr Tamiefuna himself was on release conditions, having recently been released from a prison sentence but all three had recent convictions for criminal offending, the officer said, involving property offending and other serious things.

The officer also noted, particularly at the first hearing, that the fact that Mr Tamiefuna was on release conditions raised a question of whether he was complying with those conditions. He said he couldn't check that from the information available to him, but it was a question that arose for him.

So the first reason, and a powerful one in my submission, were the convictions of all three men in the car. The second was simply the time of the morning. It was approximately 4.30 in the morning and very few vehicles were on the road. He didn't elaborate on that, but one can readily interpolate that the concern was that good things tend not to happen, to put it colloquially, in the very early hours of the morning. But more importantly the officer saw in the car suspicious items of property.

So inside the car he saw a woman's handbag but there were no women in the car and he asked for an explanation for that and the explanation given was that it belonged to, I think Mr Tamiefuna's sister who he'd been drinking with earlier in the night. Of course the officer wasn't bound to accept that explanation, it was a suspicious circumstance and beyond that the officer saw four car batteries and suspicions relating to those were not just simply the fact that they were car batteries which he said in evidence were commonly stolen items because they could be sold for scrap metal but that there were four of them. It wasn't a case where a person had perhaps a spare battery in the boot but there were four car batteries present in the vehicle. Now the officer said it was the combination of all those circumstances, no one on its own, not simply that they had criminal records, not simply the time of morning, but all four or five factors together that led him to make the decision to make an intelligence noting.

1445

WILLIAMS J:

He doesn't follow up on any of those, does he?

MR MARSHALL:

His evidence is that he would've expected his junior officer in the car to follow up.

WILLIAMS J:

What does his junior officer say?

MR MARSHALL:

She didn't give evidence.

WILLIAMS J:

There you go.

WINKELMANN CJ:

Did he ask his junior officer – did he give evidence that he asked his junior officer to follow up?

MR MARSHALL:

No, he said he didn't know whether she followed up or not.

GLAZEBROOK J:

Well, he said she was supposed to but he had no idea whether she had or not, didn't he?

MR MARSHALL:

Yes. He's a detective sergeant.

KÓS J:

Yes, below his pay grade.

MR MARSHALL:

Perhaps, Sir, perhaps. But he certainly said he expected that it would've been her role to follow up in relation to that.

WILLIAMS J:

But we have no evidence of any following up?

MR MARSHALL:

We don't, Sir, no.

GLAZEBROOK J:

And you do have findings against you on this, don't you?

MR MARSHALL:

I don't –

GLAZEBROOK J:

To say that it wasn't actually taken because of those circumstances but just a general intel. It certainly wasn't taken in terms of suspicion of an offence. There are findings against you on that.

MR MARSHALL:

We could perhaps go to the High Court decision. As I interpret the argument in the High Court, my learned friend's point to the officer was that he was gathering evidence pre-emptively about a particular offence on the basis, I think, that evidence gathering is more likely to be a search than intelligence gathering.

GLAZEBROOK J:

You'll gather we're having a slight difficulty with the difference between intelligence gathering and search and what – where one begins and one ends and…

MR MARSHALL:

Well, I'm not sure they're on the same spectrums, your Honour, intelligence gathering and search. I mean a search can lead to intelligence whether or not it's a search.

GLAZEBROOK J:

Well, I think that's…

MR MARSHALL:

Yes, I think the distinction is unhelpful, in my submission. The use of the term "intelligence" is perhaps where confusion might arise, because this was far from general intelligence. It wasn't just information that he thought might be interesting or about people he thought may be of interest to the police. It was not that far attenuated from a possible criminal investigation. It was particular intelligence about particular people who had a particular history, a particular type of history, of criminal offending and indeed one of them had just committed a traffic infringement, not simply driving with a suspended licence but driving after having been forbidden to drive, and there were indications indeed that there was stolen property in the vehicle. The officer wasn't challenged on the basis that he suspected this was stolen property. I don't think there was any finding that he wasn't motivated, it wasn't seriously in contention that he held those suspicions about stolen property.

KÓS J:

The trouble with this argument is the closer you come to reasonable suspicion as to criminality the closer you get to section 34(2) and the Policing Act and the obligation then to destroy where you don't proceed and, of course, they didn't proceed here. I know your argument on that, about compulsion, but you are getting closer to that field.

MR MARSHALL:

Yes, I mean the closer you get to reasonable suspicion, yes. I mean there would – an arrest power would have arisen.

WINKELMANN CJ:

What is exactly the officer's evidence about why he took the photographs? Was it to follow up investigation of suspected offending or was it to enter the photograph on the intelligence database which he immediately did because Justice Davison seems to proceed on the basis that it was the latter?

MR MARSHALL:

The officer's evidence is at page 12.

WINKELMANN CJ:

Yes, that would be helpful.

1450

MR MARSHALL:

At the top there: "Why did you take the photo?" "I took the photo…made a decision to complete an intelligence noting via my police mobility device and the photograph was to go along with that, noting basically to record the appearance of the occupants and their vehicle at that time." Of course, the officer took photos not only of the occupants but also of the vehicle and the property, some of the property that he saw.

ELLEN FRANCE J:

Just following up though on Justice Glazebrook's question, isn't the finding at paragraph 50 of Justice Davison's judgment against you? I mean that's in the context of saying it's not a search but…

MR MARSHALL:

And that's why I say the – because it was advanced for a quite particular reason which was that it was more likely to be a search if he was gathering evidence of particular offending. I don't read that finding as calling into question the suspicions that the officer held and the detailed reasons that he gave.

ELLEN FRANCE J:

No, but it is a finding that the obtaining of the information and making the intelligence noting was just that, recording of information against the possibilities.

MR MARSHALL:

Yes, so we don't dispute that what the officer was doing, he was recording information on the basis that it might be relevant to a future investigation.

WINKELMANN CJ:

Yes, but there is a distinction between him having recorded information to carry on and investigate a possible offence and him recording information for storing on the national database.

MR MARSHALL:

The information could well have been put in the database in case reports of stolen batteries came in, for example.

WINKELMANN CJ:

So he's suspicious and so puts it in the database?

MR MARSHALL:

He's suspicious of particular offending by particular people and it's entered, it's recorded. Now I said earlier that he wasn't challenged on whether it was done for stolen property. He was. His answer is at 19 of his evidence and he refers to the intelligence noting itself and says, and in summary: "You'll see I recorded those items in the intelligence noting. I wouldn't have gone to – there was a lot of property in the car" – I think it's down the bottom, at line 23: "I wouldn't have taken the time to write about it if I didn't have that suspicion because obviously, other items in the car which I didn't make notes of."

WINKELMANN CJ:

So were there photographs of items in the car, detailed photographs?

MR MARSHALL:

The only photograph we have, presumably because it was the bundle produced for trial, is the one of Mr Tamiefuna, standing by a, it looks like a large –

WINKELMANN CJ:

Yes, in beside the boom box or something.

MR MARSHALL:

A large speaker, yes. But his evidence was he took multiple photographs.

WINKELMANN CJ:

For the purpose of putting it on the national database, so it's not – it's suggesting he's not thinking about immediately going to try and find whether those are imported items that are missing. He just thinks it's suspicious and – because it wouldn't be – unless it's very detailed he wouldn't have, could've, that evidence wouldn't have been sufficient for a further investigation in respect of that offending.

MR MARSHALL:

Well, I suppose the answer to that is the intelligence – and the United Kingdom Supreme Court make this point in *Catt* – intelligence is the collection of pieces of a jigsaw. It's very difficult to tell where any one piece will fit in at the time it's collected, what it's value will be. I mean ultimately the value of this photograph was immense. It was a critical –

WINKELMANN CJ:

Yes, but that's intelligence but what I'm testing you on here is whether he was investigating, whether he was collecting it against the possibility that when he looked into the details of those belongings further he would discover that actually they'd been stolen, or was he just collecting this photograph because he thought this conduct was suspicious and therefore there should be a photograph of this man on the system?

MR MARSHALL:

Well, I think the answer is somewhere in the middle, your Honour. To the extent that the first option implies that he was intending to undertake an actual investigation into the property, I don't think the evidence supports that, but I also don't accept that it was simply retained on the basis of generalised suspicion. Suppose the Crown's point is that it was particularised suspicion, and it's always been a case for the police how they devote their resources, so it may well be in certain situations that follow-up inquiries were made in relation to suspicious activity. It may be in other cases that the material sits in the police record system and is available to be consulted should further information come to light. 1455

WINKELMANN CJ:

So that really amounts to, and tell me if I'm putting words in your mouth, it's suspicious activity, so he's a person – it's not an expectation the person is going to be convicted in relation to these items because it's not detailed enough, it's just a thought that this man, his behaviour is suspicious and therefore it would be good to have his photograph in the system?

MR MARSHALL:

That it would be good to have an intelligence noting recording the interaction with the police.

WINKELMANN CJ:

That he had suspicious goods and here's his photograph?

MR MARSHALL:

Here's his appearance at the time and here's the property, the other occupants of the car. But the intelligence noting connects all those pieces and it's the connection of those that is useful, in my submission, rather than pulling out any particular detail from that noting.

GLAZEBROOK J:

What relevance was it to anything what he looked like at that time? Because it can't be relevant to the batteries or any of those other things can it?

MR MARSHALL:

We don't have any evidence on how he anticipated those particular photos might prove relevant in a later investigation, but then I suppose there's the *Catt* point.

GLAZEBROOK J:

I'm just saying there wasn't any doubt as to his identity was there?

MR MARSHALL:

He verified his identity through the intelligence app.

WINKELMANN CJ:

So going back to Justice Glazebrook's question, the relevance of his photograph was that the police had decided because the three of them had these goods in the back of the car, he was a suspicious person and therefore there should be a photograph of him on the NIA, along with some notation that he'd been stopped in a car with some suspicious goods?

MR MARSHALL:

It seems to me that the photograph was subsidiary to the notation itself. The notation was the record of that interaction, the registration number, the names of the people involved, the property that was seen, the explanation that was given.

WINKELMANN CJ:

Well can you just answer my question, was it a fair account of what I just said? There should be a notation of the interaction with this particular person, if we take the photograph out of it, there should be a notation of the interaction with this particular person because his conduct was suspicious, so there should be

a record of him and the conduct, just against some future development, some future crime et cetera?

MR MARSHALL:

Yes, I think the answer, that captures most of it, but the only thing that I would add into that is that it wasn't that this was expected to be relevant just in relation to some future incident, but that there were actual suspicions about criminality in this instance.

KÓS J:

I think he makes that clear at page 13 of his answer, two reasons fundamentally, the suspicious circumstances and their criminal convictions.

MR MARSHALL:

Yes.

KÓS J:

Well the latter seems to be more generalised.

MR MARSHALL:

Yes, but legitimate, in my submission.

KÓS J:

Yes, in relation to the suspicions he could have had, I mean Justice Glazebrook's point is right, he had identified himself but the photograph would also pin him to the location in case someone came along and said – in case he came along and said: "Well actually that wasn't me, someone else gave my name."

MR MARSHALL:

Yes, and it may well have been that there was other property in the car that may have become relevant to that investigation. A picture records much more information about the circumstances than simply noting down items that the officer thinks at the time might be relevant.

WINKELMANN CJ:

So it might be relevant in an investigation of those items?

MR MARSHALL:

The particular items in the car, yes, that seemed to be the reason that he gave, particular property he suspected was stolen. He didn't rise to a reasonable suspicion because he could have arrested if there was a reasonable suspicion but in our submission there must be an intermediate step before that point where the police are entitled to collect information that may well lead to something more.

WINKELMANN CJ:

Can they arrest on reasonable suspicion?

MR MARSHALL:

Yes reasonable suspicion and charge in fact on reasonable suspicion.

WINKELMANN CJ:

So it goes to what, a suspicion?

MR MARSHALL:

A suspicion based on more than mere conjecture one might say, an articulatable suspicion. So as I say the point being made about the purpose here is that we say the Court of Appeal's reasoning really hangs on its factual conclusion that the officer was acting for no good law enforcement reason and they at one point described this as random photography. The Crown's position is that's simply not available on the evidence. The officer gave his law enforcement reasons, there's no suggestion he was acting other than for a law enforcement reason.

1500

Now our submissions then turn, this is my second topic, to the police power to gather information, whether you describe it as information or intelligence is perhaps a moot point but the fundamental point we make here is that it has

always been recognised at the core of the duties of constables, is not simply bringing offenders to justice but also detecting and preventing. The Policing Act, section 9 itself recognises both law enforcement and crime prevention as functions of the police.

We also say that it has always been the case that police officers have common law powers usually attaching to those duties and I simply note for your reference that the Policing Act itself supports that. So the definition in section 4 of the Policing Act: "Includes the exercise by police employees of the powers they have because they are constables or authorised officers (whether the powers are statutory or given by the common law)."

And section 23(1) as well recognises that: "Nothing in section 18(4)", which gives the Commissioner of Police the powers of an employer effectively: "Nothing in section 18(4) limits or affects the powers and duties conferred or imposed on the office of constable by common law or any enactment."

WILLIAMS J:
I'm not sure how far that gets you though because I mean the common law, you still have to point to something, the common law is still positivist, so where is that?

MR MARSHALL:
Yes, and the clearest – so the first step in the argument is that this was a core police duty.

WILLIAMS J:
What was?

MR MARSHALL:
The detection – collecting of information for the purpose of detecting possible crime.

WILLIAMS J:

Yes, but you have to point, if you want to, to authority for that proposition in leading judgments.

MR MARSHALL:

Yes, I accept that Sir, I will endeavour to do so.

WILLIAMS J:

Good man.

MR MARSHALL:

But I emphasise that point because it seems to not feature in the Court of Appeal's analysis, that the focus of the Court of Appeal's analysis is the investigation of actual criminal offending. They don't seem to recognise that the duties of police stretch far broader than that, it may be collecting information so that crime can be prevented before an offence even occurs, it may also be collecting information to detect crimes that have occurred. The police are not simply a reactive body that start from a standing start once a crime has been reported and then the investigation proceeds from there. The public rightly expects far more from the police.

KÓS J:

So on that basis should there be a photograph of me on the database just in case a tall judicial looking character of later years commits a crime?

WILLIAMS J:

Against pinstripe suits for example.

MR MARSHALL:

And some of the English cases grapple with that question because of course the greater the database the more effective it will be for policing.

WINKELMANN CJ:

Well there has to be some threshold, correct?

MR MARSHALL:

Yes.

WINKELMANN CJ:

And you say there's some threshold here and what do you say that threshold is, because you've set it pretty low?

MR MARSHALL:

For the –

WINKELMANN CJ:

Because most of the time it would be crossed like the famous wafting of marijuana smoke can be crossed a lot of the time, wouldn't it?

MR MARSHALL:

But of course the wafting of marijuana smoke leads to an intrusion into – normally into property, the exercise of warrantless search powers. What we are talking about here involves, in our submission, and we no doubt will come to this, no intrusion into property or liberty.

WINKELMANN CJ:

Well into privacy though, personal expectation of privacy, possibly. It's a circular issue but do you think that argues for a lower threshold?

MR MARSHALL:

Yes, yes, and in fact the *R v Waterfield* [1964] 1 QB 164 test, we set that out in our submissions, is the test that's applied at common law to establish whether a – and the Supreme Court applied this in *Ngan*, whether there is a common law police power to intrude on liberty or property in a given circumstance. So in *Ngan* it was the opening of the pouch that was collected at the side of the road and the test is two-pronged but it only comes into – it's only engaged where the activity is prima facie unlawful, and where the activity is prima facie unlawful that's not the end of the matter for the common law inquiry. There's then two prongs: one where they're acting in the course of a police duty –

1505

WINKELMANN CJ:

So which activity is prima facie unlawful?

MR MARSHALL:

So in *Ngan* it was the opening of the pouch that was collected from the side of the road because it involved an intrusion, and the Court split on this, Justices Tipping and McGrath, from memory, didn't think that *Waterfield* was even engaged because it didn't involve sufficient intrusion into property. The majority, three members of the Court, applied *Waterfield* and held it was satisfied that every member of the public would expect that the police, in collecting property from an accident, would look inside a pouch to determine what items were there that needed safekeeping. The second limb of the *Waterfield* test is whether it's an unjustified exercise of power in association with that duty.

WINKELMANN CJ:

Yes, but the point is when is the common law duty to investigate triggered? It's the threshold question I'm asking. I mean, because it can't just be you don't like the look of someone.

MR MARSHALL:

The cases haven't really addressed when the police may investigate. In fact the Courts tend to steer well clear of those sorts of constabulary decisions.

WINKELMANN CJ:

But this is an area you can't possibly steer well clear of, isn't it, because otherwise you could just be photographing people like Justice Kós and popping them on your database? There has to be something. You have to formulate something.

MR MARSHALL:

There have to be –

GLAZEBROOK J:

In fact many of the cases you refer to it does seem to be: "I'm photographing everybody that I feel like photographing," and a number of those cases raise alarm bells because it's people going about their lawful right to protest.

MR MARSHALL:

Yes, so the argument that I'm making is, first, where there's an intrusion to liberty or property the *Waterfield* test applies and we've set out in our submissions the common law powers that have been recognised around the world in that context at paragraph 33 of our submissions and they're quite intrusive powers, it is in our submission. In Canada the power to search a person incidental to arrest, to enter a dwelling by force to protect life and safety, to detain a person for investigative purposes and to search a person for protective purposes.

WINKELMANN CJ:

But this isn't a broad power to investigate though. There's particular powers in particular circumstances.

MR MARSHALL:

Yes, yes, but in my submission the Courts have never addressed the question of whether the police have a broad power to investigate. It's almost – it comes with the –

WINKELMANN CJ:

What is the – I'm sorry, I – I mean I've read your submissions and –

WILLIAMS J:

That's your problem then, isn't it, because you've –

MR MARSHALL:

Well, they're under a duty. They –

WINKELMANN CJ:

So what's the *Waterfield* – I must have missed it in your submissions, a lengthy discussion of this. Is the *Waterfield* some sort of extension into the power to investigate or what? I'm not quite following. So you might – I'm just asking for your help on this point.

MR MARSHALL:

So *Waterfield* is quoted in *Ngan*.

WINKELMANN CJ:

Which paragraphs?

ELLEN FRANCE J:

It's discussed from paragraph 14 in *Ngan* through to 21, 22.

WINKELMANN CJ:

Is it in the respondent's authorities?

WILLIAMS J:

It's in *Ngan*.

KÓS J:

It's 10 of the respondent's, page 254.

MR MARSHALL:

264 of our bundle.

WINKELMANN CJ:

What paragraph did you say?

ELLEN FRANCE J:

It starts at 14.

MR MARSHALL:

So the test is set out in the quotation there.

WINKELMANN CJ:

So that does rather beg the question, doesn't it?

MR MARSHALL:

Well, as I say, the test is only involved where the conduct is otherwise prima facie unlawful.

WINKELMANN CJ:

Yes, but it's not saying that you have a general right to do it whenever it's prima facie unlawful. It's only in certain designated places where there's statute or common law and that's where you – so it has to fall within one of the categories.

MR MARSHALL:

So at paragraph 12 of *Ngan*, it refers to the extensive common law duties of constables.

GLAZEBROOK J:

You're away from your microphone.

1510

MR MARSHALL:

Paragraph 12 refers to the extensive common law duties of constables and at the core of their duty, which has been described as: "An absolute and unconditional obligation upon the police to take all steps which appear to them to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury."

WINKELMANN CJ:

The problem with your argument though is that you proceed from paragraph 12 to saying that the police have a power to intrude into property wherever they think it is necessary to perform this wide duty, but that's not how the law is developed, it's developed by reference to a statute and acknowledged categories of circumstances under the common law, it's not a broad brush kind of an ability to act in response to a broad conception of police duties.

MR MARSHALL:

No, where it involves an intrusion into private property, yes, I accept that but when one –

WINKELMANN CJ:

So do you say one of the common law powers to intrude upon private property and intrude upon privacy is where you're investigating a crime because the cases don't suggest that there is such power, they suggest that it's limited to circumstances of urgency and public safety, so you have to go and get a warrant otherwise.

MR MARSHALL:

Yes, where it would otherwise be a breach of section 21. So our argument is not that the common law authorises breaches of section 21, our argument is that section 21 is not engaged here, there was no search.

WILLIAMS J:

What I'm trying to work out is what the common law does authorise. That proposition in *Ngan* applied without constraint and restraint, gets us into an entirely different kind of state to the state of Aotearoa it seems to me, so that can't be correct on its broad terms.

WINKELMANN CJ:

And you accept that's not so, don't you? I think you just accepted that to me, that you're not saying that there's a broad power to intrude upon people's privacy et cetera.

MR MARSHALL:

I'm saying the common law wouldn't grant a power that was in breach of section 21 but it doesn't follow that the common law would not empower an action that might prima facie be unlawful but would –

WINKELMANN CJ:

Well the common law does empower police to do some things and we know that and you've given us the cases but it doesn't give them a general power to search people to investigate a crime and so is the pivotal part of your argument that this is not a search?

MR MARSHALL:

Yes.

WINKELMANN CJ:

And it's not a search because what?

MR MARSHALL:

Because it was not an intrusion, an invasion of a reasonable expectation of privacy.

GLAZEBROOK J:

And that's because it was in a public place, is it?

MR MARSHALL:

I have a number of submissions on that but if I could perhaps stay on the common law for a moment.

KÓS J:

Before you do, as I haven't asked a question for a while, you're focussing here on the investigation of crime, well that might be okay in relation to the handbag and the batteries because there was a potential investigation of a crime there, but that went nowhere and at the time this photograph was used it seems to me used in a different sense, not for the investigation of a crime but for the prevention of crime, other crime, future crime as you put it before.

MR MARSHALL:

Well it was used to solve a crime that had happened previously. So the aggravated robbery had happened three days earlier. So it assisted with

detecting the offenders in that instance. So it wasn't – perhaps I'm not understanding, it wasn't used for a preventative purpose in this case at least, it was used to solve a serious crime.

KÓS J:

Right, but a different one.

MR MARSHALL:

But a different one, yes.

GLAZEBROOK J:

I can't quite see why taking a photo prevents crime in the future.

MR MARSHALL:

Well our primary submission is it assists with the detection of crime.

GLAZEBROOK J:

I understand that submission, I just don't quite see how it helps prevent it in the future unless you're going to say: "Keep an eye out for these suspicious characters."

MR MARSHALL:

Yes, yes. I mean I imagine in police stations all over the country photographs of suspicious or characters who are on the police's radar are shared amongst officers before they go out on duty.

WINKELMANN CJ:

So is your argument really not that the common law duty to investigate a suspicion is ground for what is done but really that there was no search so the police could – and therefore them just doing the usual job of investigation and detection and they could do it because they weren't intruding in any way into privacy? They weren't doing anything unlawful or unusual, they were just going about their usual business and this wasn't a search and therefore they could do it?

1515

MR MARSHALL:

Yes, and I accept that it's perhaps a little bit awkward to describe what happened here as a power in any sense really. It may be better simply to conceptualise that what happened here was not unlawful but the United Kingdom courts have described it as a power of the police to collect information for intelligence purposes. So perhaps I take your Honours to – the clearest is in *Catt*, this is at tab 21, page 633, at the bottom of the page under the heading "the domestic legal framework", and this is Lord Sumption who was in the majority on this: "At common law the police have the power to obtain and store information for policing purposes, ie broadly speaking for the maintenance of public order and the prevention and detection of crime. These powers do not authorise intrusive methods of obtaining information, such as entry on private property or acts other than arrest under common law powers which would constitute an assault but they were amply sufficient to authorise the obtaining and storage of the kind of public information in question on these appeals." That public information was Mr Catt's activities, his involvement in political demonstrations, including a photograph of him.

WINKELMANN CJ:

And you say that's the law of New Zealand effectively?

MR MARSHALL:

Yes.

WINKELMANN CJ:

Because it might be thought that taking a photo of someone in a public street is not a search but to then store it in a national intelligence database without some other contextual justification for doing so, probably in New Zealand would be surprised because every society's expectation, reasonable expectations of privacy are different and I can't speak for the United Kingdom's because this argument that you don't need to show any threshold does take you to the point where the police could therefore take a photograph of Justice Kós, who has

offered himself as an example and store details about him on the national intelligence database.

MR MARSHALL:

It would have to be acting for a genuine police purpose and consider that that would be –

WINKELMANN CJ:

But where's the threshold though all the same? They can just say well –

GLAZEBROOK J:

And because you've been taking part in a lawful protest seems to me something that the New Zealand public would certainly find quite abhorrent.

MR MARSHALL:

Well I mean this issue has been assessed both in the United Kingdom and then by the European Court of Human Rights and certainly the fact that this involved political protesting was front and centre in those decisions.

GLAZEBROOK J:

I'm sure it was, that's what makes them so horrifying.

MR MARSHALL:

But in none of those decisions of the European Court questioned the collection of that information. The point at which they differed from the United Kingdom Court related to its extended retention.

WINKELMANN CJ:

This is quite interesting actually because it raises the intersection between the right to protest, the Bill of Rights Act on the development of the common law, so how you're articulating it, if we developed – if we acknowledged that there was this right to take photographs and store data without some sort of threshold, framing threshold, other than a broad power to investigate and detect, then that would, on your own argument, authorise police to go and take photographs of

people who are collecting together for a political purpose at a meeting because the police think that – they've heard there might be trouble at a protest a few days down the way. So what I'm saying to you is that there could be – the relevance to the development of the law in relation to the police powers to photograph and collect data on people of other rights is something we would have to have in mind.

MR MARSHALL:

Yes, and I accept in the context of political protest that those are a difficult balancing act.

KÓS J:

Except the advantage of having me on your database is that if I'm on it everyone will be and you now have a comprehensive database of everyone in New Zealand and that will make the detection of crime so much easier.

MR MARSHALL:

So perhaps if I might compare your Honour to Mr Wood. Mr Wood was a member of the campaign against the arms trade and he attended – police were concerned, not a comparison in terms of political opinion of course.

KÓS J:

Don't be so sure.

WINKELMANN CJ:

Sounds like quite a good cause.

MR MARSHALL:

He attended the AGM of a company associated with the arms industry. The police were concerned that there might be disorder at the AGM. They had received information that there were single shares bought in the company to allow people associated with this group to attend the meeting. The police employed a photographer to stand outside and take photographs of people as they left and as Mr Wood left, he had no history, in fact Mr Catt as well, no

history of criminal offending, no suggestion they've been involved in crime, but the police took photos of Mr Wood as he left the AGM. Now they found a breach of Article 8 in relation to the retention of that information beyond a period of a few days, but they were clear that its collection initially was lawful because of the possibility there might have been disorder in the AGM.

1520

WINKELMANN CJ:

So that there is a threshold there?

MR MARSHALL:

So certainly under Article 8, in relation to retention though.

WINKELMANN CJ:

Well, I think it'd be, if it wasn't going to be retained, why would you allow them to take a photograph?

GLAZEBROOK J:

They were taken as they were leaving by which time there wasn't any possibility of disorder.

MR MARSHALL:

Well, the Court didn't accept that. I mean they recognised that it might come to light later as a – in fact I think one person was ejected from the meeting. But the…

GLAZEBROOK J:

Well, I would have thought the arms industry could look after itself in respect of that.

MR MARSHALL:

Well, they had private security personnel.

WINKELMANN CJ:

They may not have been armed on the occasion.

GLAZEBROOK J:

I don't mean in terms of arms. I just mean in terms of controlling their own meeting.

MR MARSHALL:

Yes, they had private security personnel there and that was one of the reasons the Court gave for why you could be fairly sure within a short period after the meeting that there hadn't been offending committed. But the point is that the courts were clear that it was legitimate to take the photo in the first place against the possibility it might be and Mr Wood is a far more benign character than Mr Tamiefuna. There was – but –

WINKELMANN CJ:

Well, that doesn't help us with development of the law though, does it?

MR MARSHALL:

At the point they – they said after a few days retention was no longer justified because he was no more likely than any other private citizen to be involved in criminal offending, and that in my submission is probably the more effective protection because in *Catt*…

WINKELMANN CJ:

Could that be your threshold?

MR MARSHALL:

Yes, and under the Privacy Act certainly information can't be retained once it's no longer of use for the functions of the agency holding it.

WINKELMANN CJ:

I mean could your threshold be that he had a suspicion but which hadn't reached the ground for arrest, that there had been offending, he collected the photograph against that suspicion but then after a short period of time when nothing resulted in respect of that suspicion he was obliged, they were just obliged to discard it?

MR MARSHALL:

That may apply in some circumstances. We wouldn't say it applies in relation to Mr Tamiefuna, given his serious criminal history and the circumstances in which he was…

WINKELMANN CJ:

So there's another criteria adding in which is that he's a suspicious guy?

MR MARSHALL:

That he has a criminal history, a history of serious criminal – not a suspicious guy. He was on his first strike.

KÓS J:

So that's a database of all people with criminal convictions then?

MR MARSHALL:

As I understand it, NIA, the National Intelligence Application, does, yes, it includes criminal histories of people, princi –

KÓS J:

So I won't be there but any criminal should be there, on your approach?

MR MARSHALL:

They should be, yes, and –

KÓS J:

It's quite a big database. How long for?

MR MARSHALL:

Well, of course, it started with the Whanganui computer Act in the 1970s. It's not new that the police have held databases of information that could be accessed for policing purposes, and I accept difficult issues might come at some point in relation to retention and the European cases show that those are difficult questions. They review the – the member states of the European Convention look at how long retention periods last in relation to particular types

of information and those are difficult questions and highly fact sensitive. The – but before I come to retention, if I could just refer your Honours –

WINKELMANN CJ:

So would you say that they could have just taken a photograph of him and stored it because they didn't like the company he was keeping and they thought that meant he was likely to offend?

MR MARSHALL:

Much – yes, much of police intelligence gathering will be collecting information on the associates of known criminals.

WINKELMANN CJ:

So they could take it on just because he's with, he's – they could take a photograph of him and someone else because he's a known criminal and they want to prove who he's associating with?

MR MARSHALL:

That was – the basis on which the photos of Mr Catt and Mr Wood were taken was their association with entities that were connected with criminal offending, and it wasn't called into question in the UK or in the European and your Honours will see, reading the interplay between the European decisions and the United Kingdom Supreme Court, they don't see eye to eye on this topic but they did see eye to eye on the collection of information about people who have no criminal history simply on the basis that they were – it might be of intelligence value and the paragraph I would want to refer –

1525

WINKELMANN CJ:

So that would mean that if I have a family member who has been convicted of a crime, then they could take a photograph of that family member and me and store on the NIA because I'm an associate of known criminals. I'm not saying that in a provocative way but that's the reach of it.

MR MARSHALL:

Yes, and that's really the point made by Lord Sumption in *Catt* at paragraph 31, page 644.

WINKELMANN CJ:

So that's taking it further than it would in *Catt* though isn't it, I mean the decisions in those cases because they're based on the detection of crime?

MR MARSHALL:

No, no they're not, your Honour. So the purposes of taking these photos are set out at paragraph 29.

WINKELMANN CJ:

Well isn't it said in *Wood* that they should've been discarded after a few days if it's known that there wouldn't be any offending that they needed to be investigating?

MR MARSHALL:

Yes, so in *Wood* it was related to possible offending in the AGM, although there was also a purpose about arranging I think resources for an arms industry convention that was coming up in a few months' time. Now the majority judges didn't accept that that was actually why the information was collected, the minority judge did and he thought it was proportionate to keep the information for that purpose but in *Catt* the purposes for what Lord Sumption described as, at 29, it begins: "Even a comparatively minor interference with a person's right to respect for private life calls for justification, I therefore turn to the question of why it's necessary to retain such material at all, especially in the case of a person like Mr Catt who has a clean record and for whom violent criminality must be a very remote prospect indeed." And then he sets out the three purposes that were given in evidence. The first was about informing police risk assessments and threats to public order associated with demonstrations. So it's a resourcing question, how should the police respond, how should they resource these sorts of demonstrations?

Second, is the investigation of criminal offences but it also includes identifying potential witnesses and victims. So it's not too narrow to suggest a photograph could only be taken of a person who is suspected of criminal offending, because it may well identify a victim or a witness. The third, much more general, more of a higher level intelligence purpose, to study the leadership, organisation, tactics and methods of protest groups which have been persistently associated with violence and other protest groups, presumably not associated with violence, associated with them. Links between protest groups are potentially important. And at paragraph 30: "These are all proper police purposes."

GLAZEBROOK J:

Yes the police in England thought they were proper policing purposes to have undercover officers infiltrating these and impregnating young women who had no idea they were police officers and then abandoned by them.

MR MARSHALL:

But also the European Court accepted that these were proper policing purposes.

GLAZEBROOK J:

Well so what, why do we have to accept that?

MR MARSHALL:

You don't, but my submission is that it's a developed and sophisticated jurisprudence that's worthy of this Court's attention at least.

WINKELMANN CJ:

Is there material outside of the protest? It seems quite remarkable that this is developing in the protest context. Is there material outside of that, Mr Marshall?

GLAZEBROOK J:

Well especially given the other rights involved and freedom of association.

WINKELMANN CJ:

Which we don't have here.

MR MARSHALL:

No.

WINKELMANN CJ:

Well we do actually have here.

MR MARSHALL:

But the submission is these are harder cases, these are much harder cases in my submission for the Courts than this case here where there is actually suspected criminal offending but even in these harder cases –

WILLIAMS J:

Well I mean one way of thinking your way through this is if you're going to a protest, you're not expecting privacy, quite the reverse, you're expecting publicity. So that's probably not a useful analogue for us and probably *Wood* wasn't either. Also Lord Sumption says in *Catt* there's a history of violence here, so it probably wouldn't be such a bad idea that the police would attend and gather information there. It's a long way from what we've got here.

MR MARSHALL:

But of course Mr Tamiefuna has a history of criminal offending.

WINKELMANN CJ:

Yes, but that's another point. But do you have some cases outside of protest?

MR MARSHALL:

So I don't accept *Wood* was necessarily a protest case. He wasn't protesting at the time. He'd attended an AGM and he'd asked one single unobjectionable question at the AGM.

WILLIAMS J:

He was opposed, wasn't he, saying the police knew that there was going to be opposition to whatever this company was doing.

WINKELMANN CJ:

Well it's an act of protest, we can say that. It's an act of protest to go to an AGM, buy a share, go to the AGM to ask a staged question.

MR MARSHALL:

It may have been. That didn't feature in the reasoning.

1530

WILLIAMS J:

But the point is it's a public engagement and the person's not going to go there to be enraged because they disagree with what's being said at the AGM, whereas our situation is really not like that.

MR MARSHALL:

But it was also Mr Wood's connection to another person who was at the AGM, I think her name was E in the judgment, and had particular concerns about her. So it was his connection to a person who had a history of violence or at least criminal offending relating to that.

But on the other side, Justice Williams, is the chilling effect of taking – and this is why it makes it hard cases because potentially there's a chilling effect in terms of taking photographs of people engaged, exercising their rights to protest.

WILLIAMS J:

Absolutely. So that's –

MR MARSHALL:

But we don't have that here I suppose is my point. I accept the cases are not –

WILLIAMS J:

But we do have people who were engaged in private activity in a car who were made to leave the car and then treated as being in a public place in respect of which they could have their photographs taken. So this sort of situation does seem rather similar to the sorts of situations that the Privacy Commissioner said was unacceptable and this may not be your bailiwick but the joint report said in very similar circumstances, albeit with young people: "Sop doing this, please."

MR MARSHALL:

Well, just one comment on the direct report, Sir, so para 336, they're discussing under the heading "Monitoring Known Offenders" and they- It's in my learned friend's bundle.

WILLIAMS J:

336?

MR MARSHALL:

At para 336, so…

WINKELMANN CJ:

It's on page 1082.

MR MARSHALL:

336. "We therefore do not consider that it is appropriate for Police to photograph an individual based solely on their presence in a public place and their actual or perceived status as a known offender. When Police encounter a known offender in a public place, whether it is appropriate for Police to photograph that individual will depend upon an assessment of the relevant circumstances. For example, encountering an individual with a recent history of convictions for vehicle theft, late at night in a parking building that has experienced a spate of vehicle thefts, would likely be a situation where the taking of that individual's photograph for intelligence gathering purposes could be justified."

WILLIAMS J:

No argument from me on that.

MR MARSHALL:

When in my submission we're quite close to that here

WILLIAMS J:

Really?

MR MARSHALL:

We have an individual with a recent history of property offending, that's the first – in a parking building while he was – he was not in a parking building but he's with property that appeared to be stolen, or was possibly stolen.

WILLIAMS J:

Four batteries in the boot of a car?

MR MARSHALL:

And a woman's handbag with no women in the car.

WINKELMANN CJ:

I can see the force in what you're saying and that's why I was trying to get you to articulate your threshold as being that there is some suspicion there's been offending and therefore you're collecting it for a short period of time à la *Wood* against the possibility of detecting that offence, but you aren't content with that? You take it further.

MR MARSHALL:

I do, your Honour, because even this section in the report is dealing with monitoring known offenders. It's not about investigating particular offences and so I wouldn't want to be –

WILLIAMS J:

Well, there are a number – it refers to a few examples where there are investigations of particular offences and photographs taken, including

photographs taken in the police station, all of which the Privacy Commissioner gave a direction about under the Act, she was so unhappy. I'm not sure how often that happens. I doubt it happens often with the police. So we're not dealing – you know, this is not an uncontroversial area even within the system.

MR MARSHALL:

Yes. I accept that and much of the practices in the joint report have been subject to reasonable criticism and –

WINKELMANN CJ:

So can you show me anything that says it's okay to monitor known offenders without this threshold because the thing that the Privacy Commissioner says there is that they're found in suspicious circumstances. That's a suspicious circumstance being in the carpark building at night.

MR MARSHALL:

Yes, and my submission simply is that maps on here pretty closely. Suspicious circumstances, known offenders, multiple known offenders, and indeed one who's just committed an offence.

WINKELMANN CJ:

Okay, so what about –

ELLEN FRANCE J:

Just going back to *Catt*, the European Court does say, express or make an observation about what they describe as the ambiguity of the legal basis for collection but they don't have to determine that.

MR MARSHALL:

Yes, no, no.

1535

ELLEN FRANCE J:

So it's not a – you'd agree, it's not a complete affirmation of the legality of collection? I mean –

MR MARSHALL:

No, I think it reflects perhaps continental European scepticism of common law as the basis for legal authority and it's different to most systems in Europe.

WILLIAMS J:

Well the common law has a certain scepticism for reliance on itself in this area now so heavily regulated by statute and so subject to core BORA rights. There is a healthy scepticism about this sort of thing because it really does go to core values in the system, whether you're on the continent or in the common law.

MR MARSHALL:

As I say, I accept if the Bill of Rights were engaged here, that certainly the common law would be very slow to authorise an interference with section 21 but before I leave *Catt*, can I just point – and I think I've left it. I just want to record the Court's explanation of the value of intelligence of this nature, about a person who is not a criminal and this is on page 644.

WILLIAMS J:

Of the Supreme Court decision?

MR MARSHALL:

Of the Supreme Court decision, yes. Half way down, this is at (b): "The fact that some of the information recorded in the database related to people like Mr Catt who have not committed and are not likely to commit offences, does not make it irrelevant for legitimate policing purposes. The composition, organisation and leadership of protest groups are persistently associated with violence and criminality at public demonstrations. It is a matter of proper interest to the police, even if some of the individuals in question are not themselves involved in any criminality. The longer term consequences of restricting the availability of this resource to the police would potentially be very

serious, would adversely affect police operations directed against far less benign spirits than Mr Catt. Organised crime, terrorism, drug distribution and football hooliganism", very British: "are all obvious examples. One cannot look at this issue of this kind simply in relation to Mr Catt."

WINKELMANN CJ:

I was just going to say fortunately we're not called upon to regulate the content of the database, we're just called to decide an appeal in respect of the lawfulness of collection of a photograph.

MR MARSHALL:

Yes, yes.

WINKELMANN CJ:

So those are very broad principles.

MR MARSHALL:

Certainly and I accept they're speaking more about the retention there but it's a caution that I want to emphasise is that the risks of – what Lord Sumption is saying there is the risks of too highly, too strictly preventing the police from collecting information that might be relevant, even of people who have no association or no known history of criminality, can apply to many situations beyond the instant facts.

GLAZEBROOK J:

Is that because they just might be criminal in the future or what it is? Because they've got no history of crime, they haven't done anything at the time?

MR MARSHALL:

In *Catt* it's because of the association with organisations that have been associated with criminality.

WINKELMANN CJ:

But generally it often helps to have information about the general circumstances of an offender and an offence and that may in fact involve collecting information about where they live, people they're living with, information such as that.

MR MARSHALL:

Yes, and Baroness Hale at 48, this is page 648, also emphasised at the end of 48: "We don't need reminding since the murder of two little girls by a school caretaker in Soham and the recommendations of the report of the Bichard inquiry which followed, of the crucial role which piecing together different items of police intelligence can play in preventing as well as detecting crime." And then at 50 she says: "Safeguards are certainly needed against the keeping of personal information for longer than is reasonably necessary", and refers to the European jurisprudence.

And just on – your Honour Justice France referred to *Catt* in the European, we don't need to go to it, but para 108 is where the Court affirms that there was no significant dispute about whether the creation and maintenance of the database by the police pursues a legitimate aim. The Court equally considers that it does so, that aim being the prevention of disorder or crime and safeguarding the rights and freedoms of others.

1540

As I say in *Catt* in the European Court, the real nub of the issue was retention beyond a period of some years. A photograph was retained for three years and the other information I think for a minimum of six and then there were reviews and in Mr Tamiefuna's case this information, we don't know how long it would've been retained for, no evidence on that, but it became evidence of serious criminal offending within like under three weeks of when it was collected. It was held for a very short period.

In *R (Bridges) v Chief Constable of South Wales Police (Information Commissioner intervening)* [2019] EWHC 2341 (Admin), [2020] 1 WLR 672, this was a case not involving protest groups, it was the police pilot where they

would set up CCTV cameras and then would run it through an automated facial recognition software and compare images of people at these large public gatherings for all matches against a watchlist of known people of interest and in the Divisional Court –

WINKELMANN CJ:
Sorry what case is this, I lost the thread Mr Marshall?

MR MARSHALL:
This is *Bridges*, tab 18.

KÓS J:
Paragraph 46 of your submissions?

MR MARSHALL:
Yes. Yes and as we say there they are applying *Catt* and *Wood.* The Divisional Court held that the common law powers of information gathering were "amply sufficient" to justify the use of CCTV cameras there. As we say there the Court of Appeal allowed an appeal but not on the collection basis but concerns about how the system was operated and of course *Bridges* is a very different situation involving automatic facial recognition technology, in our submission much more intrusive than what happened here. I won't go through the case –

GLAZEBROOK J:
Sorry, I just missed what you're taking from it.

MR MARSHALL:
So I'm still on the common low power point and the point simply is that the Court in *Bridges* considered the common law powers of information collecting were amply sufficient to deploy those CCTV cameras to monitor these sorts of events.

WINKELMANN CJ:
So in *Bridges* what were they doing? Were they running facial recognition?

MR MARSHALL:

They were.

WINKELMANN CJ:

During the event?

MR MARSHALL:

Yes.

WINKELMANN CJ:

And what kind of event was it?

MR MARSHALL:

It was a number of very large public events, football matches.

WINKELMANN CJ:

So looking for football hooligans.

GLAZEBROOK J:

So known trouble, they were running known troublemakers through, were they?

MR MARSHALL:

Yes, the compiled watchlists and part of the Court of Appeal's concern was about how people got onto the watchlist. But at para 73 of *Bridges*, referring to *Catt:* "It will be apparent … that the extent of the police's common law powers has generally been expressed in very broad terms. Police did not need statutory powers, eg to use CCTV or use body worn video or traffic or ANPR cameras, precisely because these powers were always available to them at common law." And then: "Specific statutory powers were needed for eg the taking of fingerprints and DNA swabs of what would otherwise be an assault." And that perhaps leads me back to where I started which is where *Waterfield* comes in and where statute comes in, where there's otherwise unlawful conduct and interference with liberty or property.

WINKELMANN CJ:

What about, well I mean I'm interested in the body worn video or traffic because that would be recorded interactions, what are the rules in New Zealand about retaining that? Do police impose their own rules or what is it?

MR MARSHALL:

As I understand it the New Zealand Police don't use body worn cameras.

WINKELMANN CJ:

Well they have them on tasers though. Well I suppose that would be crime, that's a crime context, isn't it?

MR MARSHALL:

Yes.

WINKELMANN CJ:

Well it's an exchange with a person, so you'd have to have a record of that.

MR MARSHALL:

Yes, I think the Ministry of Justice bailiffs use body worn cameras as far as my research went on body worn cameras in New Zealand. We say later in the submissions when we're talking about the Australian regime that body worn cameras are very ever present in Australia. I think a couple of years ago they estimated 30,000 were in operation amongst the police there. Those jurisdictions have sometimes passed laws expressly making it lawful to use body worn cameras but when one looks at the parliamentary materials, it's apparent because that's done, not because recording is otherwise unlawful at common law, but because of the risk that you might pick up a private conversation on a camera and thereby infringe rules against intercepting private communications, much like provisions we have here.

WINKELMANN CJ:

We have some decisions, don't we, about police walking onto private property, using handheld cameras as they've gone?

1545

MR MARSHALL:

Yes. We have *Tararo,* a decision of this Court.

WINKELMANN CJ:

Yes.

MR MARSHALL:

A transaction at a tinnie house where the police undercover officer uses a camera, a hidden camera to record that transaction.

GLAZEBROOK J:

And the appellant wouldn't challenge that because that was actually effectively recording a crime.

WINKELMANN CJ:

Detection of crime.

MR MARSHALL:

Yes.

GLAZEBROOK J:

As I understand the appellant's argument.

MR MARSHALL:

No, that's right and the Court of Appeal, as I read the judgment, wouldn't question that either.

WINKELMANN CJ:

That isn't the case I was thinking of though.

MR MARSHALL:

There's *R v Smith (Malcolm)* [2000] 3 NZLR 656 (CA), which was also a hidden camera used where a privacy conscious drug dealer would transact using hand

signals rather than voice, so it was necessary to have a camera to record that transaction. Now perhaps if I could come onto that topic, which is the consistency of this common law power with statute.

WINKELMANN CJ:

Well what is the power exactly? The power to take photographs which are not in a public – so you would – I mean that's probably quite a useful thing to say, you would say you can take a photograph in a public place, police can only take a photograph of someone in a public place.

MR MARSHALL:

Yes, for intelligence purposes. Essentially we'd adopt what Lord Sumption says in *Catt.*

GLAZEBROOK J:

Well what's intelligence purposes?

MR MARSHALL:

Information that may – there's a reason to believe or suspect perhaps, it might prove useful for policing purposes in future.

WINKELMANN CJ:

And you would draw that far more broadly than is drawn by linking it to the detection of a particular crime?

MR MARSHALL:

Yes.

WINKELMANN CJ:

You'd just say if the person has previous convictions, you could take photos of them and their associates?

MR MARSHALL:

And beyond detecting crime, I mean just stating the organisation of protest groups or of motorcycle gangs. Photographs might wish to record who's

become patched in a gang, whether they are ascending the ranks perhaps, who the associates are of a gang. Because as I say society doesn't expect the police to come at crimes flatfooted. Intelligence led policing is a common phrase around the world, indeed the Royal Commission, we quote in our submissions, emphasises the critical role of intelligence in preventing crime and that that comes from police being members of their community.

WINKELMANN CJ:

The only problem with it, is it's so broadly drawn, it could permit anything, couldn't it, in terms of the collection of people's photographs?

MR MARSHALL:

Of public information, yes.

WINKELMANN CJ:

And you say that's the price we pay for policing?

MR MARSHALL:

We say where it's public information with a low expectation of privacy, the police generally have quite broad powers to collect that information, to collect the pieces of the jigsaw that might be relevant to the future detection of crime or for other policing purposes.

KÓS J:

But it seems to have to involve on your approach either current criminal activity or at least a past criminal?

WINKELMANN CJ:

No it doesn't.

MR MARSHALL:

It doesn't Sir.

KÓS J:

No, well what's your threshold?

GLAZEBROOK J:

Or somebody who happens to be chatting to a past –

MR MARSHALL:

A policing purpose under section 9.

WINKELMANN CJ:

So it could be anticipating a crime in the future in the protest context. In England of course at the moment they're very concerned about – they seem to be very concerned about criminal offending by protest groups, so that's why those decisions are so important in England.

MR MARSHALL:

Yes.

KÓS J:

So current criminal activity, a current criminal and –

GLAZEBROOK J:

Somebody who might be talking to a current criminal.

WINKELMANN CJ:

And somebody who the police say might one day be a criminal.

MR MARSHALL:

And *R v Kawall* [2022] OJ No 4622, 2022 ONCJ 475 is an illustration of that. So *Kawall* is a Canadian case where an officer was concerned about a criminal and he noticed that he was associating with a new person. He went up to ask the person to identify himself, who refused, and he took a photograph of him on his phone I believe. That photograph was then later used to solve an assault that had occurred I think about three weeks later, that was captured on CCTV. It allowed them to identify that person and the Canadian Court there had no issue with the collection of that photograph for intelligence reasons.

1550

WINKELMANN CJ:

So it's a current or past criminal, a person associated with a current or past criminal or someone who the police has some sort of grounds to think may be about to be involved in criminal offending?

MR MARSHALL:

Those are certainly proper police purposes.

WINKELMANN CJ:

So they couldn't be doing it for a collateral purpose. The only real limit is it can't be for a collateral purpose I suppose.

MR MARSHALL:

It can be (**inaudible**), yes or a non-policing purpose. Harassment –

WINKELMANN CJ:

I mean it couldn't be harassment or –

MR MARSHALL:

No or motivated out of discriminatory reasons. Now if I can just address the Court briefly on the consistency with –

GLAZEBROOK J:

What about, this is bound to be used for discriminatory purposes due to unconscious bias at the very least and disproportionately against Māori and Pacific Islanders who have disproportionately high criminal conviction rates which can also relate to unconscious bias right through the system and differential policing.

MR MARSHALL:

And that is a difficult issue but it doesn't justify not collecting the information in the first place. I mean the officer here was asked in evidence: "Were you motivated by unconscious bias?" And he said: "No I wasn't", and he gave an

explanation for why he made the intelligence noting in this case. Just in terms of the common law and statute –

WINKELMANN CJ:

Can I ask, if you can do this why do we require surveillance warrants? Well could a policeman sit there and take photographs of people on their front lawn and you'd say not because that would be required – the Search and Surveillance Act.

MR MARSHALL:

It wouldn't your Honour, the Search and Surveillance Act only requires a warrant for observation of a person in the curtilage of their premises where it's greater than three hours in a 24-hour period or eight hours in total for an investigation.

WINKELMANN CJ:

Mmm, so you could go there and take a photograph of them on the front lawn and it's outside the scope of the SSA?

MR MARSHALL:

Yes, you don't require a warrant to do that and you don't require a warrant to take photographs in a public place and we say this in the submissions that the Search and Surveillance Act, in fact the Court of Appeal said in *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729, is premised on the assumption that photography in public places is lawful for the police. Warrants are only required where there's a trespass or where you're taking surveillance of private activity in private premises or private activity, and it has to be private activity, so public activity on one's lawn is not captured but private activity in the curtilage of a private property where it exceeds that intensity threshold that Parliament has set. It is very difficult against that background, in my submission, to suggest that a single unobtrusive photograph of a person on a public footpath is unlawful.

WINKELMANN CJ:

So what did you say the Court of Appeal said in *Lorigan*?

MR MARSHALL:

So they accept – it's at tab 5 of our bundle, paragraph 38, this is Justice O'Regan writing for himself and Justices Arnold and Randerson: "Ms Laracy pointed out to us that the Search and Surveillance Act 2012, which was recently passed by Parliament, proceeds on an assumption that surveillance of a public place in a manner not involving trespass is lawful, and does not require a surveillance device warrant. Parliament appears to have legislated on the basis that no statutory authorisation for such activity is necessary even if the surveillance is a search, given that the decisions of this Court in *R v Fraser* [1997] 2 NZLR 442 (CA) and *R v Gardiner* (1997) 15 CRNZ 131 (CA) appear to remain good law after the decision in *Hamed*," and *Lorigan* was intensive surveillance over I think five or six months of a person's driveway, recording every vehicle day and night, 24 hours coming in and out.

WINKELMANN CJ:

Well didn't they find it inadmissible?

MR MARSHALL:

No they didn't. They found that it wasn't a search where it involved simply a camera. Where it involved night vision, so you could see things that wouldn't otherwise be seen by the naked eye, they found that it was a search but it was a reasonable one because it was lawful.

KÓS J:

So if we come then to section 34(2), we'll just anticipate that argument, the circumstances in which a 34(2) photograph would be taken would seem to meet your – likely meet your threshold of involving criminal activity, a criminal or someone who might become a criminal, even though the charges haven't been preferred.

1555

MR MARSHALL:

Yes.

KÓS J:

But you're required to dispose of them under the Policing Act.

MR MARSHALL:

Where it doesn't result in a conviction.

KÓS J:

Yes.

MR MARSHALL:

Yes.

KÓS J:

Meets your threshold but still have to destroy it. Why?

MR MARSHALL:

Because it's been taken under compulsion.

KÓS J:

Compulsion?

MR MARSHALL:

Yes, because a person has been arrested, is in police custody and they – indeed the section provides the police the power to use force to take the photo and a person who refuses a direction is liable to prosecution for an imprisonable offence. So it's in those circumstances, we say, that the destruction obligation makes sense because it's been taken through compulsion under penalty of law. But it's also important, in my submission, to note that the section also expressly provides that once it's – if it's taken and retained under that section, this is subsection (1), it can be used for any police purpose from that point. So it then is available for general intelligence, in my submission, and the select committee report I think made that clear, that they recommended the insertion of that

subsection (1) because they were concerned that it might otherwise be interpreted as taken only for the limited purpose of that criminal proceeding.

WILLIAMS J:

For the life of the photo? Perhaps I misunderstood you but I thought you said if the photo has been taken pursuant to the Policing Act then it can be used for general policing purposes, but only for as long as it survives.

MR MARSHALL:

Yes, yes. If there's no conviction then it has to be deleted, yes.

WILLIAMS J:

Right. What if Mr Tamiefuna had said: "No, no photos," what then?

MR MARSHALL:

Well, in the constable's evidence, sorry, the detective sergeant's evidence was that people commonly do say: "No," put their hands up, prevent photos taken.

WILLIAMS J:

Right. If he had?

MR MARSHALL:

Well, if he had the officer could not have done anything to compel him to take that photo.

WILLIAMS J:

If the officer had said: "I require this," and Tamiefuna had fled? At that point?

MR MARSHALL:

The officer would be acting unlawfully to require someone to submit to a photo, in my submission.

WINKELMANN CJ:

So in other words you – are you saying effectively it needs consent?

MR MARSHALL:

No, no, I'm saying the officer can't imply that it's compulsory.

WINKELMANN CJ:

Can't exercise physical control over the person to obtain the photos is probably the threshold you're articulating, isn't it?

MR MARSHALL:

Certainly not but also not – I mean the Judges' rules are perhaps a little bit – your Honour's practice note is perhaps a good analogue. I mean the first paragraph of the Judges' rules say the police can ask a question of any – I'm paraphrasing – of any person but they can't suggest it's compulsory to answer. So I accept there would be a problem if the police were trying to collect information from Mr Tamiefuna and suggested it was compulsory for him to give that. I mean that would run into the right to silence.

But short of compulsion the laws never recognise the police have to give – can only collect information with consent.

KÓS J:

And back to section 34(2), if the gentleman who had not been charged left the police station and was out on the pavement, his photo could then be taken again, on your approach?

MR MARSHALL:

Potentially, Sir, and one of the Canadian cases is a person who's suspected of serious criminal offending and goes to great lengths to avoid being photographed in a public place and the police are quite persistent with their efforts to get that photograph, and the Ontario Court of Appeal had no problem, said there's no invasion of rights taking a photograph of someone in a public place. I mean there might be concerns if the police manufactured a situation to escape the statutory regime, I accept that, but if a photograph is not taken under section 32, the police have realised down the track that they actually need a

photo of the suspect, in my submission they are entitled to attempt to acquire that in public, much as they are entitled to surveil –

KÓS J:

Yes, I know (**inaudible** 15:59:32) that situation, mine is you've taken the photograph in custody and you have to dispose of it but as he walks out of the police station onto the pavement you take another photo.

MR MARSHALL:

I see.

WINKELMANN CJ:

It does seem a little bit – I suppose the reason for the destruction in the police station is it's a photograph taken under compulsion.

MR MARSHALL:

Yes, that's our position.

1600

WILLIAMS J:

Well what appears to happen, according to the IPCA and the Privacy Commissioner, is that officers are taking photos not within the NIA system but on their iPhones and they are surviving and not being destroyed.

MR MARSHALL:

Yes, and that's problematic, where it's taken under section 32.

WILLIAMS J:

Yes.

MR MARSHALL:

But it's an interesting point your Honour, because one of the criticisms in that report is the retention on private devices. That wasn't the case here, the officer did everything by the book. He made an intelligence noting, he uploaded it to the system and then it's in the data management auspices of the police and it's

subject to control. It would be more problematic I suggest, if it was simply taken on the phone and retained indefinitely for that officer's own purposes as a constable.

GLAZEBROOK J:

What are the controls? We were just told there were no controls?

MR MARSHALL:

Well the police are subject to the Privacy Act and the joint report and the jurisdiction of the Independent Police Conduct Authority.

GLAZEBROOK J:

But there's nothing like the UK controls in terms of retention, other than in accordance with the Policing Act?

MR MARSHALL:

So the Policing Act deals with a very particularly situation. When one reads the Policing Act, it contains very few powers actually of the police, it's more about organisation of the police. The Privacy Act, I think it's the Data Protection Act in the UK, we have the Privacy Act, provides a similar, in my submission, framework for assessing those issues, those difficult issues about retention, use.

ELLEN FRANCE J:

Under the Whanganui computer legislation there were provisions, from memory, about retention.

MR MARSHALL:

I don't recall your Honour. I was asking my learned friend about this earlier. I think the Act was repealed by the Privacy Act is my recollection.

ELLEN FRANCE J:

Well that's what I was wondering. I can't now recall was the – Mr Keith may know, the conception that the Privacy Act then provided the protection.

MR MARSHALL:

Yes, that's my understanding.

WINKELMANN CJ:

There was an ability to get everything that was held there but only after a certain point in time I think, I don't think – not in its heyday.

MR MARSHALL:

Yes, I have at the early stage in this proceeding, read that statute. It's quite difficult, it's not a modern statute, it's quite difficult to follow devoid from the context at the time but my understanding is the Privacy Act then took over.

WINKELMANN CJ:

Right, well we'll take the afternoon adjournment. How much longer do you think you'll be Mr Marshall?

MR MARSHALL:

Perhaps another hour your Honour.

KÓS J:

Including Ms Ewing?

MR MARSHALL:

Not including Ms Ewing.

WINKELMANN CJ:

Where are you up to? You were about to –

MR MARSHALL:

I think I've covered the Policing Act provisions. I did want to avert to this Search and Surveillance Act provision that the Court of Appeal referred to and then I would like to address the Court on the residual freedom, as we've termed it in our submissions.

WINKELMANN CJ:

That's in paragraph 60?

MR MARSHALL:

Yes, 60.

WINKELMANN CJ:

Not the third source? Is that an attempt to reclothe the third source in something to make it more palatable for some of us? Right, we will take the adjournment.

COURT ADJOURNS: 4.02 PM

COURT RESUMES ON THURSDAY 7 MARCH 2024 AT 10.01 AM

MR MARSHALL:

May it please the Court, where I finished yesterday afternoon was at paragraph 60 of our written submissions and this is an alternative or perhaps parallel submission. In a nutshell it is that even if there were no positive common law power to take the photograph of Mr Tamiefuna, the absence of positive statutory or common law authorisation did not render that action unlawful and the question for this Court under section 30 of course is whether the evidence has been improperly obtained and improperly obtained evidence is defined as evidence obtained in consequence of a breach of any enactment or rule of law. So the question really is whether the police, in so acting as they did, breached an enactment or a rule of law. We did say they did not because there is no rule of law in New Zealand that prohibits constables from acting in the course of their duties without positive authorisation. Now perhaps the most clear statement of this principle is in a relatively recent decision of the Court of Appeal for England and Wales. The relevant passages are quoted at 61 of our written submissions.

GLAZEBROOK J:

It could just of course be an unreasonable search and therefore – so you're dealing with that aspect as well are you?

MR MARSHALL:

Yes, yes, so I accept if it's a breach of section 21, then it would be a breach of a rule of law, yes. So it is in that sense a relatively narrow submission because as I will come to, there are a number of rules of law that apply to police constables that don't apply to ordinary citizens. So the submission is not that a police constable is in exactly the same position as an ordinary citizen, it's simply there is no rule of law that prohibits them acting without positive authorisation, where a citizen could act lawfully in those circumstances.

Now this case *R (Centre for Advice on Individual Rights in Europe) v Secretary of State for the Home Department* [2018] EWCA Civ 2837, [2019] 1 WLR 3002

was a situation where there was effectively an arrangement between the Home Office and the Metropolitan Police Service.

WINKELMANN CJ:

Sorry what's the name of the case?

MR MARSHALL:

It's called *R (Centre for Advice on Individual Rights in Europe) v Secretary of State for the Home Department*, it's at tab 20, the first tab of our second bundle of authorities, beginning at page 604 and the first paragraph, the headnote really summarises what the case was about. Operation Nexus was an operational and intelligence partnership set up between the Home Office and the Metropolitan Police Service, the aim of which was to improve the management of foreign national offending. Under that arrangement foreign nationals in police custody, they arrested on suspicion of committing an offence and were in police custody, would routinely be asked questions by immigration officials or the police about their nationality and the basis on which they were exercising treaty rights to reside in the UK and so the challenge there was that it was unlawful for the police to be involved in questioning for immigration purposes…

1005

And if we turn to page 615 of the bundle, the English Court there is dealing with the power of the police to ask these sorts of questions of detainees and they affirm the lower Court's decision in these terms: "Put simply the Judge was correct to hold that police officers do have power at common law to ask questions of individuals and provide the answers to the Secretary of State in order to assist him in the exercise of his governmental function of enforcing immigration law. There are two reasons for this. First, as a matter of capacity, a police officer has the power to do anything an ordinary citizen can do, including non-coercive questioning of a person in custody; secondly, and in any event, the questioning is for a police purpose."

The Court then – and we would adopt, respectfully, this explanation at paragraph 39: "A police force is no more nor less than a number of police officers each of whom has the same powers and rights as an ordinary citizen, so they may, as a matter of vires, do anything that a natural person could do without the use of coercive powers, including asking questions that a member of the public could lawfully ask", and they go on to recognise that police officers have particular duties and obligations, and powers additional to those of the members of the public, "and specific to their office that 'authorise' the police to do things that would otherwise be unlawful," and there the Court is, in my submission, referring to that *Waterfield* line of authority, but also statutory powers. "However, in our judgment, these duties and powers do not constrain or restrict the powers and rights police officers have as ordinary citizens."

Now, as I said, I'll come to paragraph 40 –

WINKELMANN CJ:

Wouldn't that have to be subject to some sort of qualification because, of course, police officers aren't ordinary citizens? They're clothed with the power of the state.

MR MARSHALL:

Yes, absolutely, and that's paragraph 40, your Honour, and we'd adopt that as well. So the Court rejects – sorry –"We do not accept, as Mr Squires submits to be the case, that it follows from this line of reasoning, that the police are effectively given free rein to ask whatever questions they like, in any circumstance, for any purpose they choose, subject only to the general constraints of the criminal law, on matters such as harassment. The police, like any other public body, are subject to the constraints of public law; they must therefore act reasonably, and in good faith and in accordance with any other public law duties. What they do not have to do however is to find some specific police power to enable them to do something ordinary citizens can do. Nor do we accept that the principle that public bodies must exercise their powers for the purposes for which they are conferred is engaged on the facts. Mr Milford submits, and we agree, that this case does not concern any specific statutory

power conferred upon the police. The issue is a different and anterior one, namely whether the police can exercise the same non-coercive rights and powers as any other natural person." So there are additional constrains on the police, we accept that and –

WINKELMANN CJ:

But that's not really my point. My point is that if a policeman asks a person about their immigration status that's quite different to a citizen asking a person about their immigration status.

MR MARSHALL:

Yes, except that there might be – especially a person in custody but there may well be concerns about that context, but those concerns weren't influential, at least, in this decision.

Now this decision, in my submission, is entirely consistent with the law of the Court of Appeal and this Court over the past 30 or so years. The first of those decisions was *Fraser* which is in our bundle at tab 8, and, importantly, just to introduce these cases, they concern video surveillance, so they're very close to the situation that we have here. *Fraser* was video surveillance carried out by the police of the garden of a residential property. Mr Fraser was in the habit of going into the garden to conceal drugs.

The full Court of the Court of Appeal in a judgment delivered by Justice Gault dealt with the argument that the police needed – the police action was unlawful because they couldn't point to a statutory authorisation for it. The relevant passage is at 244, about half way down, line 31: "We do not accept that the police –"

1010

GLAZEBROOK J:

What's the page number of the actual case, sorry?

MR MARSHALL:

452 your Honour. So midway through that paragraph: "We do not accept the police could have obtained a warrant under section 198 for its video surveillance", and that of course applies here, the police couldn't have obtained a warrant to take Mr Tamiefuna's photograph: "nor do we accept the proceeding without such a warrant was unlawful. Other than section 21 of the Bill of Rights Act, counsel were not able to point to any statutory or common law prohibition against observing or recording on videotape the open area surrounding a residential property and plainly there is none. We find no unlawfulness in the police conduct."

Now the Court of Appeal adopted that reasoning a couple of years later in *Gardiner*, which was more intrusive surveillance, it was video surveillance from an elevated position of the backdoor and kitchen window of a home. So the camera actually saw into the home and the Court nevertheless followed the approach in *Fraser* and the relevant page is 250 of the bundle and they deal in the paragraph midway down with the argument that the ICCPR may have changed the – or the Bill of Rights may have changed the position and I think it was Justice Blanchard for the Court concluded that: "It is a much longer step to argue that either this country's ratification of the Covenant or the enactment of a Bill of Rights which does not adopt the same relevant language has rendered video surveillance (otherwise ungoverned by domestic law) unlawful. Such a radical change to the common law is not to have been taken to have occurred except by direct expression", and he refers to *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] 2 All ER 620, where it is said that it could lawfully be done in terms of domestic law because at that time there was nothing to make it unlawful. "This is the position for video surveillance (without sound recording) in New Zealand. If New Zealand's domestic law does not represent an adequate response to the Covenant, that is a matter for legislative attention." So it adopts the analysis in *Fraser.*

I won't take your Honours to *Hamed* because it would take quite a long time to traverse the various judgments, simply note that the clearest expression of this position is in the judgment of Justice Tipping at paragraph 217, where he

reiterates his view earlier expressed in *Ngan*, that the police were entitled to do what any member of the public can lawfully do in the same circumstances and do not need any specific authority to do so.

Now perhaps more helpfully, the Court of Appeal in *Lorigan*, which I referred your Honours to yesterday, carry out an analysis of *Hamed* and confirm that *Fraser and Gardiner* establish that video surveillance is not unlawful because there is no statutory or common law prohibition against it and at paragraph 29, as I said yesterday *Lorigan* was the surveillance of the driveway to a private property over a period of many months. At paragraph 29: "Applying the analysis of *Fraser* and *Gardiner* to the present case, the covert video surveillance (whether with enhanced-vision equipment or not) was lawful because there was no statutory or common law prohibition of such activity and it would not have been unlawful for a citizen to do the same thing." They go on to say the matter would be different if it involved trespass by the police, and of course that was the principal problem in *Hamed* – it was that the surveillance had been carried out via trespass – but there was no trespass here.

Then the judgment analyses *Hamed* to determine whether the position changed and I won't take your Honours through that analysis, I can't improve on it but we would respectfully adopt that as a position of the law and as I said yesterday, it's also one the Court observed Parliament had effectively endorsed when enacting the Search and Surveillance Act.

1015

Now for completeness, I want to refer to a Canadian case *R v Tessling* 2004 SCC 67, [2004] 3 SCR 432. This your Honours will remember was the use of a camera equipped with infrared imaging capabilities that was used to photograph the outside of a house in order to assist with determining whether marijuana was being grown inside. So the goal was to identify unusual heat distribution within the house that might be associated with a grow operation, and the Supreme Court of Canada held that that was not a search, but the relevant passage I wanted to refer your Honours to because it's consistent, in

my submission, with the approach in England and in New Zealand, is at paragraph 51, 886 of the bundle.

At paragraph 51: "Of course the respondent objects to this form of state surveillance of his home. He points out that if the Crown is correct that what was done with [the thermal imaging technology] in this case is not a section 8 search, it would follow that the police are at liberty to take 'heat pictures' of homes and other shelters wherever they wish, targeting whomever they wish, without any prior judicial authorisation. This is true, but I agree with Justice Stevens, speaking for the minority in *Kyllo*," because the United States Supreme Court in *Kyllo v United States* 533 US 27 (2001) took a different view, they held that equivalent technology did amount to a search under the Fourth Amendment, but he adopts the minority position there which in effect is that "public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odours," et cetera.

So the position, it seems, in Canada, as here, is if it's not a section 8 or a section 21 search and it's not prohibited by statute or common law then it is lawful, and the reasoning of Justice Stevens could, in my submission, be applied here. The officers were not required to avert their senses from Mr Tamiefuna's presence on the public footpath that morning and, as in *Tessling*, it's not simply a matter of noticing the heat escaping from the house but of photographing it.

Finally, in the United States, the *Dow Chemical Co v United States* 476 US 227 (1986) case also provides – adopts similar reasoning. There it was aerial photography taken of a manufacturing plant by the EPA, the Environmental Protection Agency. The Court held that that aerial photography, even though it used relatively sophisticated, or at least commercial grade, photography equipment, was not a Fourth Amendment search and even though the company in question had gone to some considerable lengths to try and protect the privacy of its manufacturing plant because I think there was a very high wall around it and it had refused access to the EPA, so the EPA were trying to get

photographs of something that the company did not want them to see, but the relevant passage for present purposes is at – it begins at 971. The argument was that they were acting outside their statutory powers because it's a statutory body, the EPA, which is a distinction here, because this type of investigation hadn't been specifically authorised, and the Supreme Court points out at 971: "When congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission. Aerial observation authority, for example, is not usually expressly extended to police for traffic control, but it could hardly be thought necessary for a legislative body to tell police that aerial observation could be employed for traffic control of a metropolitan area," et cetera.

1020

The next paragraph: "Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted," and then over the page at 972, they deal with an argument. The argument is that the fact that a power of entry has been given may exclude this power – they reject that, holding: "There's no suggestion in the statute the powers conferred by this section are intended to be exclusive. There is no claim the EPA was prohibited from taking photographs from a ground-level location accessible to the general public." And this is an important passage: "EPA, as a regulatory and enforcement agency, needs no explicit statutory provision to employ methods of observation commonly available to the public at large". And in my submission that line of reasoning, as I accept is in relation to a statutory body, must apply with even greater force to the office of constable. It would be odd if a statutory body governed by a statute had greater powers than a common law constable.

And that leads me to an observation on the office of constable which is at 62 of my written submissions and there's a helpful discussion in Lord Devlin's book, the first chapter of which is in our bundle at page 18 of the nature, the particular nature of the office of constable. The relevant passage is at 1130, beginning midway down that first paragraph: "[The constable] is a forerunner rather than

an ancestor", the parish constable: "but it is significant that the policeman's official title is that of constable. The constable was merely a citizen whose business it was to keep order. It is the duty of all citizens to uphold the law, of course, and the only thing that distinguished the constable in this respect from any other of his fellow citizens was that the law granted him a slightly greater power of arrest. Anyone even to-day can arrest for felony; but whereas the ordinary citizen arrests at his peril and if he takes the wrong man he can be sued for false imprisonment, the parish constable was not liable to the wronged man so long as he made the arrest on reasonable grounds. Some statutes have given the police exceptional powers in specified cases, but there has never been any wide departure from the principle that the policeman is to be treated as if he were an ordinary citizen", and that certainly has echoes in –

WINKELMANN CJ:
I presume he's writing in the '60s and '70s.

MR MARSHALL:
Yes.

WINKELMANN CJ:
And he's talking about an historical position but is there some difficulty with just carrying that forward in a ministerial kind of fashion without taking into account that constables are not just like members of the public, they now have access to extremely powerful, well powerful relatively, computing power through the national intelligence system database, they have technology that was not dreamed of at the time that Lord Devlin was writing that. So is this something we need to look at in context?

GLAZEBROOK J:
Also I'm not sure the history here in New Zealand would actually equate to the history in the UK because their policing is a very weird structure to us, from the outside, and it's historical.

MR MARSHALL:

Yes, over 100 different police forces in the UK.

GLAZEBROOK J:

Exactly.

MR MARSHALL:

Although the Metropolitan Police Service, which I think is by far the majority or at least the largest body, has existed on a statutory basis for 170 years.

WINKELMANN CJ:

And they struggled to get any kind of official standing, so they had to operate initially, you know, as if they were members of the public and then they gained a little bit of statutory footing but it's a different situation to us but more fundamentally this is language before they had their Human Rights Act, it's language before the implications of the ICCPR were considered for our New Zealand Bill of Rights Act because of course he couldn't be talking about that, but it's also before the completely different technological world that police now operate in.

MR MARSHALL:

It is your Honour, and it's really by way of historical relevance. The point though that I would make is that as here the fact that – and as the Court of Appeal in the *Individual Rights* case observed, the fact that Parliament has grafted additional authority, additional powers to constables, to the police, has never been interpreted as implicitly removing their base level of powers as ordinary citizens to the extent that those are powers, and we're not really in my submission talking about powers in that sense but simply the absence of any prohibition on acting without positive authority, and the passage I referred your Honour to in *Fraser* where Justice Blanchard rejected the proposition that the Bill of Rights or the ICCPR had enacted a radical change to the common law is in my submission the case.

1025

We'd also observe quickly that this Court's decision in *Tararo* represents this approach in my submission. So there it was an undercover officer who entered a private property for the purpose of suspected cannabis dealing and this Court had no difficulty holding that the implied licence available to members of the public generally could be used by police for police purposes. So it wasn't a case where the Court discerned a specific licence applicable only to police officers but rather that the police can use the general implied licence that all citizens have available to them.

Also importantly there the decision necessarily proceeds on the basis that that covert video recording could lawfully be done, was lawful without a warrant because the question was whether in exercising the implied licence, did carrying out covert videoing take the officer outside the scope of that licence. The Court said if a warrant were required for that sort of activity, it would've been outside the scope of the licence but ultimately concluded that there was no need for a warrant and it must also follow that it was not unlawful what the officers were doing there.

I said I would touch on – so I accept that describing a constable as a private citizen is really a shorthand for the proposition I put at the beginning of this section of my submissions. It's a shorthand because it doesn't capture the important public law constraints that do apply and as your Honour Justice Glazebrook said, the Bill of Rights is perhaps foremost amongst those but in addition could well be judicial review proceedings. Many of the United Kingdom cases flow from judicial review proceedings of police conduct there, on the grounds of rationality, procedural fairness, legality but also if powers are exercised for an improper purpose. If the Courts were concerned the police were exercising powers for a purpose that was not a proper one, a police purpose, then judicial review proceedings may well be available and a police policy could also be reviewed on (**inaudible** 10:27:58) grounds, if it was inconsistent with the law.

Importantly also of course the police are under at least two oversight bodies, the Privacy Commissioner and the Privacy Act and the Independent Police

Conduct Authority have jurisdiction to determine complaints and damages are available under the Privacy Act. The Privacy Commissioner can issue compliance notices if there has been a breach of information privacy principles or an interference with privacy. So there are a number of additional constraints on the police, we accept, we accept that.

WINKELMANN CJ:

Well I mean if there's been an interference with privacy in a way that the Privacy Commissioner is becoming engaged and seeking remedies, wouldn't that be good evidence it was an unreasonable search?

MR MARSHALL:

It may well, it may well have been a breach of section 21, yes.

WILLIAMS J:

You're not arguing that the Privacy Commissioner has got this and that it's not relevant to admissibility questions?

MR MARSHALL:

The Privacy?

WILLIAMS J:

The Privacy Commissioner is the primary means of regulating and patrolling police activity in this area and there are no admissibility questions, you're not suggesting that are you? Or are you?

MR MARSHALL:

Well my learned friend will address you on the privacy principles but the primary control here in my submission is the Bill of Rights, at least when it comes to the search stage. Perhaps for retention, use, questions like that, then the Privacy Act is much more suited to regulating that.

WILLIAMS J:

They're not necessarily distinct in this context are they?

MR MARSHALL:

The search and the retention?

WILLIAMS J:

Yes.

MR MARSHALL:

Well we say they are, that they are quite distinct.

WILLIAMS J:

Is that Ms Ewing's argument, is it?

MR MARSHALL:

Ms Ewing will deal with the privacy principles. I will deal with section 21 and I can come onto that now. Section 21 begins at para 69 of our written submissions. It is important in our submission to recognise that section 21 is not a general guarantee of a right to privacy. That is a choice that was open to Parliament when it enacted the Bill of Rights and it deliberately chose differently when it didn't adopt the language of the ICCPR Article 17.

1030

Justice Keith in *Hosking v Runting* makes this very point. We can go to that if it would assist. It's at 122 of our bundle, para 181 at the bottom of the page: "It is significant that a general provision on privacy was deliberately excluded from the Bill of Rights. According to the White Paper, because there was not any general right to privacy (although specific rules of law and legislation protected some aspects of it) it would be inappropriate to entrench a right that was not by any means fully recognised, which was in the course of development and whose boundaries would be uncertain and contentious. The lessening of the status of the proposed Bill from an entrenched to an interpretive measure did not lead to the right to privacy being introduced. The extensive existing array of specific rules of law and legislation protecting aspects of privacy had been valuably catalogued for the benefit of those involved in New Zealand's

ratification of the covenant in 1978 and the preparation of the draft Bill of Rights."

So section 21 doesn't, isn't the –

GLAZEBROOK J:

The other Judges in *Hosking v Runting* actually placed a lot more reliance on the ICCPR right to privacy, didn't they?

MR MARSHALL:

Of course, but *Hosking v Runting* was not a Bill of Rights case primarily. It was about a tort – yes.

GLAZEBROOK J:

No, I understand, but in finding the tort of privacy they certainly relied on the international covenants.

MR MARSHALL:

Yes, so my point is a narrow one. It's that section 21 is not the same as Article 17 because as Justice Keith makes the point Article 17 – New Zealand's compliance with Article 17 depends on far more than section 21. It depends on a range of statutory provisions that protect different aspects of privacy.

WINKELMANN CJ:

And the common law.

MR MARSHALL:

And the common law, yes, your Honour, yes.

WINKELMANN CJ:

And also we must not forget section 28 of the New Zealand Bill of Rights Act which says: "An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part."

MR MARSHALL:

Yes, but it is a complicated patchwork of different protections that in sum protect – leave New Zealand and compliance with Article 17. It's an error, in my submission, to attempt to push all of those protections into the section 21 analysis.

WILLIAMS J:

But the flip side is also true, isn't it, that maybe the section 21 analysis isn't the only relevant analysis?

MR MARSHALL:

Perhaps, perhaps.

WILLIAMS J:

Because you've accepted the ICCPR may well affect the common law.

MR MARSHALL:

Yes, perhaps.

WILLIAMS J:

How?

MR MARSHALL:

Well, the development of the common law will need to be consistent with Article 17.

WILLIAMS J:

How, in this case?

MR MARSHALL:

In this case we say there was no intrusion into privacy, so it doesn't assist, and I can come to that because the question under section 21 is whether there was a reasonable expectation of privacy infringed.

WILLIAMS J:

So you say the ICCPR is not engaged because he's on a public street essentially?

MR MARSHALL:

So that is one of the reasons we say it's not engaged, yes.

WILLIAMS J:

Of course.

MR MARSHALL:

In terms of that test, the reasonable expectation of privacy, this Court in *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 made the point you need both. You need a subjective expectation of privacy but it also must be one that's objectively reasonable. Generally, the Courts are prepared to assume a subjective expectation of privacy really to get to the objective question which is the important one for future decisions, and the inquiry there, as the Court said in *Alsford*, is a contextual one requiring consideration of the particular circumstances of a case. But it is very important, in our submission, to recognise that the objective nature of that second limb requires the Court to assess both the extent of the privacy interests engaged but while also having regard to the public interest in safety, security and the suppression of crime, and those words are taken from *Tessling*, from the judgment of Justice Binnie at paragraph 17 under the heading "Striking the Balance", because essentially that's what the Court is called on to do, is to strike a balance between individual privacy and state interests in law enforcement often.

WILLIAMS J:

So that's the –

WINKELMANN CJ:

But it's not just private interests in privacy, is there? There's a state interest in privacy which I think is referred to in one of the Canadian cases about the importance of the state in its various guises, including through the development

of common law, preserving sufficient zone of privacy for people so as to preserve the fundamentals of a liberal democracy.

1035

MR MARSHALL:

Yes.

WINKELMANN CJ:

Creativity et cetera.

MR MARSHALL:

Yes, I accept that. There's a helpful discussion in the decision of *Jefferies,* this is in my learned friend's bundle, the appellant's bundle at 134, it begins at 133 and this is the judgment of Justice Richardson I think, yes Justice Richardson. Down the bottom of the page, discussing section 21: "But rights are never absolute. Individual freedoms are necessarily limited by membership of society. Individuals are not isolates. They flourish in their relationships with others. All rights are constrained by duties to other individuals and to the community. Individual freedom and community responsibility are opposite sides of the same coin, not the antithesis of each other", and this an important sentence in my submission: "The Bill of Rights should not be approached on the premise that the State and those exercising powers on its behalf are enemies of the public good. Certainly, we have been cautious in our grants of powers to the police. A police force not operating under the rule of law would soon become an instrument of oppression and tyranny. But the assessment of whether a particular search is reasonable or unreasonable should not be distorted by taking absolutist positions. The starting point must be that any search is a significant invasion of individual freedom, that how significant it is will depend on the particular circumstances, and that there may be other values and interests including law enforcement considerations which weigh in the particular case."

WINKELMANN CJ:

I mean a member of the public would not go up to someone and stand immediately before them and photograph them, would they, without seeking their permission?

MR MARSHALL:

Well members of the public do take photographs of people in suspicious circumstances.

WINKELMANN CJ:

And often that leads to a breach of the peace actually.

MR MARSHALL:

Well it also leads to convictions for serious offending. In *R v Kuru* [2015] NZCA 414, one of the key pieces of evidence was a photograph taken by a member of the public, actually a Ministry of Justice bailiff, of people leaving a suspicious scene, pulled out his phone and he took a photo and that was –

WILLIAMS J:

Yes, we spent a day or two on that.

MR MARSHALL:

Yes, I'm aware.

WINKELMANN CJ:

Yes, I was just thinking that was from a distance. I was thinking about this, I was thinking about *Kuru* but that's from a distance whereas there is something quite different and personal about someone appearing immediately before you and taking a photograph and in fact it is something that can cause things to kick off. I've seen that, you know, you do see it in public when people are photographed, it is quite an intimate thing.

MR MARSHALL:

Except that it's difficult because the cases really suggest that covert photography is often a greater intrusion than overt photography.

WINKELMANN CJ:

Yes, I mean there's all sorts of different shades of this.

MR MARSHALL:

All sorts of factors, yes. So putting a camera right in someone's face and taking a photo I accept would be a greater intrusion than standing three or four metres back and taking that photo. I think the officer here was a couple of metres back from Mr Tamiefuna and captured his whole person.

KÓS J:

But there's another factor in this, you said that the constable would only take the photograph for proper policing purposes, so he couldn't for instance take a photograph of Mr Tamiefuna because he liked the look of his clothing and wanted to make a record for future purposes where a member of the public could.

MR MARSHALL:

Yes, yes, I accept that, I accept that's a public law constraint on the police.

KÓS J:

That's my question, what's the source of that limitation? Public law?

MR MARSHALL:

Public law, yes.

GLAZEBROOK J:

It's for a proper purpose isn't it, so it has to be intelligence gather – and therefore it has to be intelligence gathering.

MR MARSHALL:

Yes.

GLAZEBROOK J:

I'm not entirely sure where just outside of the powers and intelligence gathering intersect but I think we have your submissions on that.

WILLIAMS J:

Your essential theory of the case is if it's a legitimate police purpose then that is a legitimate, absent the Search and Surveillance Act et cetera, that is a legitimate limitation on the expectation of privacy?

MR MARSHALL:

Yes, that an expectation of privacy wouldn't be reasonable in those circumstances.

WILLIAMS J:

It's a wide, wide circle, isn't it?

MR MARSHALL:

In a public place of course and perhaps that's a submission.

WILLIAMS J:

Well from a public place but not necessarily observing in a public place as *Tessling* and the other cases.

MR MARSHALL:

That's right, as the Search and Surveillance Act recognises.

WINKELMANN CJ:

Can we test that then, can we go right up to Mr Tamiefuna and take a photo right here, so as to get better facial recognition for facial mapping?

MR MARSHALL:

In my submission he'd need a proper purpose to do that sort of thing. Perhaps there was an injury on his –

WINKELMANN CJ:

Well wouldn't a proper purpose, on your analysis, be that this is important intelligence which should be able to be stored in the national intelligence database and it's really very valuable intelligence because then it can be more accurately mapped with new data, new techniques, than something taken at 100 metres?

1040

MR MARSHALL:

I suspect the police would run into difficulties if they were simply taking random photography of people's faces because it might compile a database for facial mapping.

WINKELMANN CJ:

Well that's an interesting concession on your part because it's a slightly different position than you were taking yesterday which is, I mean not random, well –

MR MARSHALL:

Well systematic perhaps. I accept there would be public law issues with that and they are explored in some of the UK cases.

WINKELMANN CJ:

So you say they have to be previous criminals, currently suspected of offending, associates of criminals, so that's a very broad – I think you said that yesterday.

MR MARSHALL:

Yes, yes, it's problematic if there's nothing particular about the person. I did note overnight, just reviewing section 8 of the Policing Act, that national security is one of police functions and national security will inevitably revolve around the collection of intelligence. So that in my submission is a recognition that intelligence, police have national security groups focussed on intelligence. That's of course not the case here but it's just an illustration of the point that intelligence is fundamental to many of the police duties and functions.

In terms of the location on a public footpath, this weighed heavily in *Hamed*, the clearest statement is of Justice Blanchard at para 167 where his Honour observes that generally – surveillance of a public place will not generally be a search "because, objectively, it will not involve any state intrusion into privacy. People in the community do not expect to be free from the observation of others, including law enforcement officers, in open public spaces such as a roadway or other community-owned land like a park, nor would any such expectation be objectively reasonable." I note even Justice Elias, while she disagreed that surveillance of a public space would not generally be a search, this was on the basis that if those observed or overheard reasonably considered themselves out of sight or earshot, secret observation of them or secret listening to their conversations may well intrude upon personal freedom.

KÓS J:

Do you accept, however, that the retention, the ex post use of the material, its retention and its nomination by the name of the subject, can that change the character of what we're dealing with because you're very focussed on what's happening on the street, I'm not really so interested in what's happening on the street, I think you've kind of persuaded me a bit on that one but I'm much, much more sceptical about continued possession and nomination of this material and I think that's what may make it an unlawful search. Do you accept that ex post treatment may alter the initial character?

MR MARSHALL:

No I don't Sir because in our submission the search is at the point that it takes place and the reasonableness of that has never been justified by what happens, what the police later do with the material. That is not to say it's not subject to control. The Privacy Act, it certainly applies to the later use of material but I'm not aware of any decision that has coloured what has earlier happened by reference to how it was later used.

KÓS J:

Well that's – the nature of the intrusion depends very much on what's done with the material surely and the reasonableness of the intrusion. So how can you

simply ignore what happens, you know, in the minutes following and the hours and the days and the weeks and the months following the photography?

MR MARSHALL:

The difficulty is that then section 21 depends on – you could bring multiple actions for a breach of section 21 in relation to the same search, depending on how it's used a month later, a year later.

KÓS J:

And what's wrong with that?

MR MARSHALL:

Well it, in my submission, strains the definition of a search well beyond what it's capable of holding.

GLAZEBROOK J:

But the whole idea behind this was to put it into the database, so it's a later use, it is the actual use that they were wanting to put it for.

MR MARSHALL:

Yes, so I accept the purpose for which a photograph is taken or a search is conducted is relevant to section 21.

WINKELMANN CJ:

I think I asked either you or Ms Gray at the outset if the word "search" had some capacity to stretch to take into account the purpose because of course the purpose for which something is collected does bear upon the significance of the breach of privacy, the expectation of privacy and how reasonable it is. I mean it's a tricky thing.

1045

MR MARSHALL:

Yes, I accept that the purpose at the time is relevant but what I don't accept is how it is then subsequently used is relevant to what has happened.

GLAZEBROOK J:

And I think the point that Justice Kós was making was that if that is the purpose, you can look at whether that purpose is lawful in deciding at least whether the search is unreasonable I would have thought.

MR MARSHALL:

Yes, I accept that.

ELLEN FRANCE J:

See if the officer for example was taking it for his own benefit, you might approach a question differently possibly, which does suggest that the purpose is relevant.

MR MARSHALL:

Yes, and any search undertaken on a pretextual basis or for a collateral purpose unconnected with the reason may well likely run into section 21 problems.

WINKELMANN CJ:

Can I take you back to this point about the closeness of the photography, would you accept that there would be a certain point at which you would have a reasonable expectation that someone would not take a photograph of you without asking your permission?

MR MARSHALL:

The manner in which a search has been undertaken –

WINKELMANN CJ:

No I'm just talking about the particulars of a photograph.

MR MARSHALL:

So my answer is that the way in which it's taken is also relevant. I mean even a lawful search can become unreasonable if it's conducted in an unreasonable fashion and it could be that photography becomes that. It would have to in my

submission be quite extreme circumstances for it to become a breach of section 21.

So the first proposition I was advancing was just in relation to the nature of the public place and the second is the nature of the information collected, that is a photograph, and the Crown submission on this is that simply being observed – more than simply being observed in public, people in modern society must also reasonably expect their image to be captured on photograph or video. As the discussion yesterday revealed CCTV cameras are widespread, they are operated by councils, Waka Kotahi runs a CCTV network, public transport operators run CCTV cameras, taxis run CCTV cameras, I understand even courts have CCTV cameras and perhaps even more relevantly Mr Tamiefuna was himself captured twice on private CCTV cameras on the day of the aggravated robbery, the first in public. The first was from a neighbour's property who ran a high definition camera that pointed across the driveway and out onto the street and the second were CCTV cameras operated by the Z Service Station on Lincoln Road, one in the shop captured Mr Te Pou and one in the forecourt that captured the vehicles that came and the interactions with those people and it's right in my submission to recognise that in those cases it's suspicionless photography.

WILLIAMS J:

It was on their private property except in the case of the neighbour which might be more problematic but you must be taken to accept that you're going to be captured on CCTV.

MR MARSHALL:

On private property?

WILLIAMS J:

In the gas station forecourt, in a shop, in a cab or an Uber.

GLAZEBROOK J:

On the street now I would expect.

MR MARSHALL:

Yes, Waka Kotahi.

GLAZEBROOK J:

And it's a public safety measure as well because it's a preventative measure as I think you say because it will stop people operating in a way that is unlawful – well it will inhibit people acting in a way that's unlawful when they know they're likely to be captured.

MR MARSHALL:

Yes and the European Court in *Peck v United Kingdom* (2003) 36 EHRR 41 (ECHR) recognised that. So that was in the early days of CCTV in the UK and Mr Peck was caught on camera in the process of attempting to commit suicide with a knife. The local council then publicised the photos of him to publicise the effectiveness and the presence of CCTV in the community. That was a breach because they hadn't taken steps to mask his face but the European Court accepted that it was entirely legitimate for them to do it on that, as your Honour says, on that crime prevention basis and as I say *Kuru* is a good example of how hand-held cameras are also ubiquitous in society and are used by people in suspicious circumstances to capture what has happened but it's also not necessarily a development that's of recent origin because of course *Hosking v Runting* decided 20 years ago involved photographs taken in a public place of probably people who I would accept had a greater – that society generally regards as having a greater need for protection, young children, twins taken while shopping in Newmarket on a public street. Justices Gault and Blanchard though did not consider that that was objectionable. They said the existence of their twins, their age and the fact that their parents are separated are matters of public record, "generally there is no right to privacy when a person is photographed on a public street. Cases such as *Peck*," as I just identified, "and perhaps *Campbell*," that's photos of a model leaving Narcotics Anonymous, "may qualify this to some extent, so that in exceptional cases a person might be entitled to restrain additional publicity," and that really is my point, that there may – there are controls on what's done with the information later but they're not suggesting that taking a photograph of someone leaving Narcotics

Anonymous is an unreasonable intrusion on privacy but it may be that the way that it's treated is.

1050

Justice Tipping, just for completeness, this is at 226 for your Honour's reference, also considered it was very strained, "very strained to view photographs as a form of seizure, or indeed search; and, in any event, seizing the image of a person who is in a public place could hardly be regarded as unreasonable, unless there was some very unusual dimension in the case".

The third proposition I want to advance is that the photograph was a reliable record of no more than the officer could personally see.

WINKELMANN CJ:

Well, couldn't the unusual dimension be that it's the police?

MR MARSHALL:

In my submission, no, because the police of all bodies regularly conduct surveillance and record matters of interest to them, and in fact there is a sense in which people may well have less concern about the police taking photographs of them because they know, will know that it has to be for a legitimate law enforcement purpose.

WINKELMANN CJ:

I think you might be stretching things there, Mr Marshall.

MR MARSHALL:

Well, it's unlike *Campbell* where it's a tabloid taking the photo.

WINKELMANN CJ:

Less legitimate concern, is your submission. People should have less –

MR MARSHALL:

Less legitimate concern, yes.

WINKELMANN CJ:

Should have, as opposed to the fact – yes.

MR MARSHALL:

Should have, yes, yes, should have.

I mean also, of course, where the police take it, there are much greater controls on the use of that photograph, especially wider dissemination to the wider public. A member of the public who takes a photo can largely do with it whatever they choose, subject to quite narrow tort constraints. They're not governed by the Privacy Act.

As Baroness Hale said in *Catt*: "If society can trust the police to behave properly, and therefore not misuse the information which they have, there is much to be said for allowing the police to keep any information which they reasonably believe may be useful in preventing or detecting crime in the future," and Lord Sumption in *Catt* also observed that the storing of information by the police on its own doesn't carry stigma. It's not usable or disclosable for any purpose other than police purposes. It's not used for political purposes or victimising dissidents, not available to potential employers or outside interests and there are robust procedures that ensure the restrictions are observed.

In terms of what – that this was a photo of only what the officer could see, this is an important feature in this case because unlike many of the cases, *Lorigan* and tracking cases, it's not a situation where the police have used technology to acquire more information than they would otherwise have reasonably been able to obtain. In *Lorigan* 24-hour surveillance day and night for many, many months would require an enormous devotion of police resource to achieve that level of surveillance, and some of the tracking cases, it follows wherever a vehicle goes for an extended period. Here the officer, I mean he was asked in evidence whether he had activated any functions that enabled him to achieve a better view of Mr Tamiefuna than he otherwise would have had and he said he had not, and he was asked whether he had used night vision settings, he said he wasn't even aware whether his camera had a night vision setting. So

the evidence was it simply recorded what he could see, and in our submission there's a line of cases beginning in the '90s that really reflect this analysis. They are the participant recording cases.

1055

So in the '90s courts all over the world really were grappling with new technology, which is the ability to wire people so that conversations could be surreptitiously recorded. So *R v A* [1994] 1 NZLR 429 (CA) was a conversation where the undercover officer was posing as a hitman. The court held that him secretly recording that conversation was not an unreasonable search and this is at tab 6 of our authorities and the relevant page is at 164. This is the judgment of Justice Richardson, it begins halfway down 164 under the heading "Participant recording: conclusions", and these are all, perhaps all of them are helpful considerations in my submission for this Court.

So the first reason it was not an unreasonable search or seizure – and I should say that doubts continued to be expressed whether this was even properly considered a search but at the time search and seizure and unreasonableness were bundled together. The first conclusion is that it wasn't unlawful and in fact this represents the position in relation to video surveillance as well, there was no prohibition on it, it was not unlawful to secretly record a participant conversation. There wasn't positive authority to do it, nevertheless it was not unlawful.

The second point: "Advances in information technology change our lives and our thinking. Over the centuries societies have come to terms with various far-reaching changes in technology some of which in early days were often considered destructive of some important community values. New Zealanders are well aware of the ease with which discussion may be recorded electronically. They see advantages as well as the risks to fair dealing of doing so. No one can be oblivious to the risk that a new acquaintance may be recording their conversation. Indeed that risk was obviously present [here]. An Orwellian world in which the state has both the desire and facility to record all our private communications would deny fundamental human rights. The right to

be left alone is basic to the flourishing of human personality. Fears of electronic snooping may have a chilling effect on free expression. But as in many other areas of living in today's complex society the social answer in less extreme cases turns on an assessment of all the circumstances rather than on an impossible quest for universally agreed moral absolutes", and he goes on to say that really it's a matter of time, place and circumstance and in my submission that to some extent is an answer to concerns –

WINKELMANN CJ:

I find the statement that no one can be oblivious to the risk that an acquaintance may be recording their conversation rather hard to accept I must say.

MR MARSHALL:

Well in fact here that was what A asked the hitman: "You're not recording our conversation are you?"

WINKELMANN CJ:

I don't think it's an ordinary person.

MR MARSHALL:

No, no, but nevertheless it's – I suppose the point is it wouldn't be a reasonable –

WINKELMANN CJ:

Mr A should not have been oblivious to the possibility.

MR MARSHALL:

Should not have reasonably been oblivious to the possibility and in fact the Supreme Court of Canada took a different approach and found participant recording to be (**inaudible**) on the basis that it would destroy privacy but as your Honour says, I don't think experience has borne that out. I don't think people approach conversations with others on the basis that it might be recorded. So the lawfulness of it –

GLAZEBROOK J:

Well they may do in certain circumstances, so that if it's clearly a dispute that's at issue, an employment situation or something, one would think that that might be recorded but ordinary conversations I wouldn't think you would expect that.

MR MARSHALL:

No, well no, but I suppose my submission is that despite our courts taking a different tack and holding it was lawful to undertake participant recording it hasn't destroyed a sense of privacy amongst the community. The Canadian fears in my submission haven't been borne out in New Zealand by taking a different approach.

And then the third reason, and I won't labour this, but it's a point I was making earlier: "The expectation of privacy is always important but it is not the only consideration in determining whether a search or seizure is unreasonable. Legitimate state interests including those of law enforcement are also relevant." And this is really the point I am making: "Rather than being dependent on the recollection and demeanour of the participants as witnesses, the availability in any proceedings of an untampered with recording of the conversation exactly as it occurred is a protection for prosecution and defence alike", and I'll come back to that, but just while we're on this page, they also caution against practical consequences against holding that this is an unreasonable search and seizure. Officers might not be able to be wired for protection, for safety reasons and that may have some resonance with this Court in terms of body cameras for example. If the New Zealand Police were to follow international developments and introduce body cameras, holding that this was an unreasonable search and seizure would have quite an inhibiting effect.

GLAZEBROOK J:

And that's really safety of not just the police officer but in fact other people.

MR MARSHALL:

Yes and civil liberties. It's been driven I think by civil liberties campaigners, they want a record of police interactions with people but it's a protection for police officers as well against – when complaints are made, yes.

GLAZEBROOK J:

Yes.

1100

WINKELMANN CJ:

One imagines there are guidelines for how they're dealt with.

MR MARSHALL:

Yes, there are but there's not – but, and as I said yesterday, in Australia at least, some jurisdictions have introduced positive authority or declared that it's lawful but that was only because of the risk that it might otherwise infringe on the private communication offence provisions, if you accidentally overhear a conversation.

Following *R v A* was *R v Barlow* (1995) 14 CRNZ 9 (CA), a decision of the full court, and again a judgment of Justice Hardie Boys which Justice Cooke joined. He emphasises that it was reasonable to obtain a surreptitious recording there because it ensured a full and accurate record of what was said and because of avoidance: "Avoidance of the need for reliance on fallible memory…is in the interests of justice for both Crown and defence."

WINKELMANN CJ:

Can I just say, Mr Marshall, we're now an hour into this morning and I think you thought you would be an hour and Ms Ewing would be two hours. We don't have unlimited time.

MR MARSHALL:

No.

WINKELMANN CJ:

It would be quite helpful if you just told us where you're going with the authorities and then we could do them more quickly because it's quite – we're just sort of on a quite pleasant but meandering pathway through a number of –

GLAZEBROOK J:

We've got section 30 as well.

WINKELMANN CJ:

And you've got to do section 30 as well and I take it that Ms Ewing will not be two hours for privacy. I can't imagine so.

MR MARSHALL:

No, no, and this is really the last substantive point because the three most important points are the public footpath, the photograph, but also that it was done without any enhancement or it didn't capture anything that the officer could not otherwise see. It avoided the need for the prosecution to rely on the officer's memory of that interaction. If he had simply gone away and recorded the clothing that Mr Tamiefuna was wearing and he had then been asked to identify him from the CCTV footage, Mr Tamiefuna had denied being there, you would have a very difficult situation where you're relying on a witness' memory of an interaction at night, and that's really what the participant recording cases say.

WINKELMANN CJ:

So this is a public footpath, then you're on to – what were the three points? A public footpath…

MR MARSHALL:

Public footpath, just photography, so you don't have a reasonable expectation you won't be photographed. Public footpath is about observation. Second point is about actual capturing in image form of your presence in a public space. Third is that it was just what the officer could see.

And the participant recording cases, I won't take your Honours through the extra ones, but they also extend to video recording, same rationale applies. So in *R v Smith* the police informer there used a hidden camera to, I referred yesterday, to capture hand signals in a drug deal because of a privacy-conscious drug dealer, and then this Court in *Tararo* applied that same reasoning in relation to the undercover cop at the door of the tinnie house, and your Honours will see that they adopt the American Supreme Court approach in *Lopez v United States* 373 US 427 (1963) and *United States v White* 401 US 745 (1971), which in essence they quoted with approval in *Tararo*: "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that's not susceptible of impeachment." Courts rejected that as a proper consideration.

Final point on whether there's a search that – the Court of Appeal, your Honours will have seen, relied on an Australian provision, Commonwealth provision. We've addressed that in our submissions. I don't propose to take the Court through a statutory interpretation exercise in relation to a foreign statute, but I simply identify that even the Crimes Act 1914 (Cth) itself in section 3D limits the effect of that provision, provides that it doesn't limit or exclude other laws of the Commonwealth or territories relating to search, arrest, detention, seizure and requesting of information or documents from persons. So it's quite tightly cabined off, and also that section 37 of the Surveillance Devices Act 2004 (Cth) expressly provides that law enforcement officers acting within the course of their duties may use optical surveillance devices without a warrant for any purpose provided the use does not involve entry onto premises without permission or interference without permission with any vehicle or thing.

WINKELMANN CJ:

Can I – so you've finished that then, Mr Marshall?

MR MARSHALL:

I've finished that.

WINKELMANN CJ:

All right. Can I ask you a question about something I asked you yesterday which was about what photographs were taken? It occurred to me that it would've been – and you said you thought that the goods in the back seat were photographed, I'm not sure they would've been, were they, because it would have been a search since they were in the car?

MR MARSHALL:

Well, I don't – it wouldn't have been a search, they were in plain view.

WINKELMANN CJ:

Well…

MR MARSHALL:

I don't think they were.

WINKELMANN CJ:

Well, who would have to have been opening the doors and –

1105

MR MARSHALL:

The occupants opened the doors as they were removing some property from the vehicle before it was impounded and that's when the officer saw –

WINKELMANN CJ:

But you don't think the goods were photographed?

MR MARSHALL:

I haven't seen a photograph of the goods, no.

WINKELMANN CJ:

Right.

MR MARSHALL:

The officer was a little bit unclear about what other photographs he took because of course it was just Mr Tamiefuna's photograph that was relevant to the criminal prosecution of him.

WINKELMANN CJ:

So one assumes it was just Mr Tamiefuna's photograph that was retained in the intelligence database. We don't know?

MR MARSHALL:

We don't know.

WINKELMANN CJ:

We don't know.

GLAZEBROOK J:

With a notation though, wasn't it?

WINKELMANN CJ:

We don't know.

MR MARSHALL:

Attached to the notation, we don't know.

WINKELMANN CJ:

We don't know is the answer.

MR MARSHALL:

We don't know, no there was no evidence about the other photographs, although he said – I think he said: "I probably would've taken photographs of the others if they had allowed me to. He didn't recall whether he had or not and "allowed" in that context seemed to be implied that if people object I don't take their photos. So the final topic is simply reasonableness and I really –

KÓS J:

A nice point but he didn't ask.

MR MARSHALL:

Yes he didn't ask but it was a point that carried weight in the High Court, both judgments, that it was done without objection. There's perhaps a spectrum.

On reasonableness, I really am content to rely on my written submissions because many of the points, wilfulness, the extent of the privacy intrusion, participant recording, they really apply equally to the reasonableness assessment. The Court of Appeal in *Lorigan* undertook that same assessment, quite briefly in that context. So unless your Honours have any further questions.

WINKELMANN CJ:

Well you're not saying anything about section 30 then?

MR MARSHALL:

No, my learned friend will address section 30.

MS EWING:

Your Honours, my bailiwick, as Justice Williams put it yesterday, is the privacy principles and their influence on section 21 and section 30 and I'll then address the section 30 balancing test after I've discussed those.

So the Crown position is that in this case the privacy principles had no influence on either the section 21 balancing test or on section 30. And beginning with section 21, the Crown says that for two reasons, first, there was no breach of the principles in this case and the Crown says the Court of Appeal was wrong about that, predominantly because of the approach that it had taken to the extent of the police officer's powers and second, even assuming there had been a breach of the principles, this Court's decision in *Alsford* makes clear that the fact of that breach wouldn't assist in applying section 21.

So I'll begin by talking about the breaches that the Court of Appeal found and to contextualise that I want to take your Honours to the judgment because those findings in the Crown's submission were far from central to the Court of Appeal's analysis.

So starting with the Supreme Court case on appeal at 27, the Court's finding that a search had occurred here occurred before any consideration of the privacy principles and that finding at paragraph 57 was really based just on the circumstances in which Mr Tamiefuna found himself at the time. The fact that he was being photographed by a police officer for, the Court said, identification purposes. So no mention – finding of search occurs before there is any mention of the privacy principles.

1110

And similarly the Court found that the police photography was both unlawful and unreasonable without any resort to the Privacy Act. That finding is at page 31 of the Supreme Court case on appeal.

KÓS J:

Do you want to give me the paragraph number please.

MS EWING:

70. Halfway through that paragraph the decisive point here in finding that the search was unreasonable was the factual setting, being one in which no attempt was made to show the photographs were taken or retained in the context of an ongoing police enquiry or for any other lawful purpose. So section 21 is breached and so far, in considering the two limbs of that test, the Court makes no reference to the privacy principles.

And the discussion of the privacy principles then appears under the heading "other considerations", at page 33 of the Supreme Court case on appeal. At 76 the Court said it was fortified in its conclusion that the right was breached by some other considerations and moving down to page 35, at 79, it noted that following the hearing the IPCA and OPC had released its joint report and the

conclusion of that joint report or one of the conclusions expressed in that joint report was that, at paragraph 79: “Intelligence gathering is not a lawful purpose for photograph taking under the Land Transport Act.” And it was in that context that the Court found three privacy principles had been breached, principles 1, 3 and 9.

So just coming down to paragraph 80, that’s where the discussion of the privacy principles begins and the Crown’s summary here of how these findings of breach occurred is that when they're properly analysed, they really turn on the Court of Appeal’s prior conclusion that the police officer had no lawful purpose to photograph Mr Tamiefuna. They don't add anything independent to that, rather they are derivative from it.

So starting with principle 1, the Court found it was likely that a breach of information privacy principle 1 had occurred. This principle provides that personal information shall not be collected by any agency unless it is collected for a lawful purpose, connected with a function or activity of that agency. So principle 1 requires the police to have a lawful purpose for collecting information. It doesn’t, however, prescribe the lawful purposes for which any particular agency can collect information, rather it leaves those purposes to other sources of law and here the Crown says that’s the common law.

So the finding of breach of principle 1 simply reflected the Court of Appeal’s stance on the lawfulness of the photography in the first place and in that sense it added nothing independent to it.

Coming down to paragraph 81, the following page, the Court considered information privacy principle 3 and found that that principle requires agencies to take reasonable steps, if any that are reasonable in the circumstances to inform the person of various matters and the Court found here that that principle hadn’t been complied with. But the Crown says had the Court of Appeal recognised that the police officer was gathering intelligence to detect crime, had they recognised the lawfulness of that purpose, it would have been apparent that the law enforcement exemption to that principle was squarely engaged.

1115

So principle 3 is not an inflexible obligation, the obligation is to take reasonable steps, if any, in the circumstances, to inform the individual of the various matters and the joint report on this point suggests that when you're applying the privacy principles to police officers photographing someone in public, what privacy principle 3 requires them to tell the individual is the purpose for which the photograph is being taken. That's at the appellant's bundle of authorities, page 1062.

KÓS J:

That obviously wouldn't work in a situation of, for instance, using still shots from a CCTV coverage where there's no actual interaction between the photographer and the subject.

MS EWING:

That's not the context in which the joint report made that –

KÓS J:

Well I appreciate that but I'm thinking about a slightly wider context than the one we're dealing with here.

MS EWING:

I'm not sure I understand your Honour's question.

KÓS J:

Well that telling the purpose depends entirely on there being an interaction between the photographer and subject.

MS EWING:

Correct, although –

KÓS J:

You can't tell them from a camera simply set up on a lamppost, unless you put a large sign up there saying: “We are taking photographs here to use in the NIA.”

MS EWING:

Which – well the Privacy Commissioner suggests that where CCTV is deployed, there should be signage indicating that recording is taking place.

WINKELMANN CJ:

Well there often is, isn't there?

ELLEN FRANCE J:

I was going to say there often is.

WINKELMANN CJ:

In fact I think you see it around all over the place.

MS EWING:

Mmm.

WINKELMANN CJ:

But I imagine the Privacy Commissioner would be able to tell us if it’s not invariably done.

MS EWING:

Yes.

GLAZEBROOK J:

Certainly for private CCTV. Oh no, actually they usually do because it’s a prevention measure, they usually want you to know it’s operating.

MS EWING:

So I was taking your Honours to the paragraph of the joint report that suggests what compliance in this context means. That’s the appellant’s bundle of

authorities, page 1062, paragraph 119(d). Here the joint report suggests that compliance with IPP3 requires reasonable steps in the circumstances to inform the individual about the purpose for which the photograph is being taken and of course compliance with that principle is subject to the law enforcement exception in principle 3, 4(c)(i). If it's helpful I can have Mr Marshall bring up the relevant privacy principles. Your Honours may be familiar with the law enforcement exemption.

WINKELMANN CJ:
Yes.

GLAZEBROOK J:
Was he informed of the purpose for which it was taken?

MS EWING:
Well he wasn't but the Crown says that's because doing so would have prejudiced the detection of offences. So the Crown says the law enforcement exemption to principle 3 was engaged here and the reason the Court of Appeal didn't realise that is because it didn't recognise that the police officer's conduct amounted to a legitimate gathering of intelligence for police purposes.

GLAZEBROOK J:
Sorry I don't understand why the exemption is engaged.

MS EWING:
Because had – it can be inferred, there was no evidence on this point at the hearing because the privacy principles obviously weren't traversed in any detail but the Crown's position is it can be inferred that had the police officer turned to Mr Tamiefuna and said: "I think you've stolen that handbag and I'd like your photograph so that I can hopefully – "

GLAZEBROOK J:
No but that's asking permission, it says you've got to inform of the purpose. You take the photo and you say: "I've taken your photo because it's for

intelligence gathering purposes." I mean I doubt he'd know what that meant but –

MS EWING:

Mmm, which rather begs the question whether –

GLAZEBROOK J:

"And it's going to be kept on a database."

MS EWING:

So principle 3, as I said, isn't an inflexible obligation to begin with, it's an obligation to take steps that are reasonable in the circumstances.

GLAZEBROOK J:

Well it's hardly unreasonable, they're there. On CCTV it might be totally unreasonable to go and track down the person and tell them the purpose of which the stills are being taken but it can't really be unreasonable to say, you just have an ordinary conversation, can it?

1120

MS EWING:

Well if principle 3 applies, but the Crown says the police officer was entitled to depart from those obligations because of the fact that if he'd told Mr Tamiefuna prior to taking the photograph why he was taking it and what it would be used for –

WINKELMANN CJ:

Well that I suppose might engage the brief of the exemption. Perhaps we should look at it.

MS EWING:

Yes. So the law enforcement – there are a number of exemptions to principle 3, for example 4(b) which states that non-compliance would not prejudice the interests of the individual concerned but the one we're discussing here is the

broad exemption in 4(c)(i), to avoid prejudice to the maintenance of the law by any public sector agency, including the detection and investigation of offences.

GLAZEBROOK J:

Well all right, so he says: "Can I take your photo?" Mr Tamiefuna says: "No you can't." He says: "Well I'm entitled anyway so I'm going to and I'm keeping it for the purpose of putting it on the database." Now what's to stop that apart from it might – I just can't understand how it can prejudice unless you say well if he objected I wouldn't take the photo.

MS EWING:

It's not that he would've stopped had Mr Tamiefuna objected, it's that Mr Tamiefuna could have turned, walked away, thwarted the photograph in a number of ways.

GLAZEBROOK J:

Well yes but you take the photograph and then –

WINKELMANN CJ:

So what are we to make of that concession that if they'd objected he wouldn't have taken the photo. Did he say that in his evidence?

MS EWING:

Well it doesn't tell us whether giving Mr Tamiefuna advice about the purpose would have – well if anything it tends to suggest that telling Mr Tamiefuna why the photograph was being taken would have thwarted it being gathered.

WINKELMANN CJ:

Or that there may actually not be a very important law enforcement objective if he doesn't –

GLAZEBROOK J:

No but it – take it and then say afterwards. There's nothing – principle 3 –

WINKELMANN CJ:

No, this is a different point I'm asking about, because it's going back to the exceptions that if he'd asked permission, he says if they don't want their photo taken I'm not taking it.

MS EWING:

It's not a question of permission in my submission.

WINKELMANN CJ:

So was he within the exemption then, if he's actually himself operating within a consent model?

MS EWING:

Well the Crown doesn't accept that there's a consent model operating here, the Crown says the common law empowers the police officer and indeed obliges the police officer to gather information that will be relevant to the detection of crime. The police officer didn't need to ask Mr Tamiefuna's consent to do so because he was not acting unlawfully. There was no trespass, there was no detention, there was no assault and therefore consent is really by the by. The question that principle 3 asks is whether giving the advice that principle 3 would otherwise require would have thwarted the purpose, the law enforcement purpose that the police officer was exercising.

WILLIAMS J:

I'm a little sceptical of that. It had been click, I'm taking this because or I have taken this because, but the advantage of saying so is you then have a contemporaneous record of precisely why the photo was being taken and we're not stuck with having to infer those purposes long after the event in circumstances where those purposes were not referred to in front of Justice Moore on the first assessment of lawfulness, they were only raised the second time, a matter that Mr Marshall spoke to us about. So it could actually have been a significant advantage for police purposes.

KÓS J:

And in addition principle 3(2) says that the steps should be taken before the information is collected or if that's not practicable, as soon as practicable after. Well on your argument it could be done after the photo is taken, that would be the practicable –

WINKELMANN CJ:

Ms Ewing I'm just wondering whether –

MS EWING:

If I can just – I'll just make the point I was about to make about prejudicing the detection of crime. The police officer here believed that certain property had been stolen but had no basis to remove it from these individuals and you might think, had he told Mr Tamiefuna: "I think that handbag is stolen", that the first thing that would've happened is that it would've been disposed of. So there's a twofold prejudice that would've occurred had the individual been told, had Mr Tamiefuna been told.

1125

KÓS J:

That's strange policing, why would they not have impounded the handbag if they thought it had been stolen as evidence?

MS EWING:

Well he suspected it had been stolen but it's obvious from the police officer's evidence that he didn't consider he was in a position to exercise any coercive powers. So he's taking a less intrusive approach.

WINKELMANN CJ:

I'm still wondering if we're actually within the exemption. I still wonder if the police officer is operating on the basis that he's within the exemption because he doesn't think that if there's no consent he's got a right to collect the information.

MS EWING:

Well the Crown says that's the law. The Crown says the position is he doesn't require Mr Tamiefuna's consent to take the photograph. What principle 3 apparently requires, according to the joint report, is to inform the person of the purpose for which the photograph is being taken.

WINKELMANN CJ:

Can we pop that back up, the exemption. Mr Marshall, have you had a glitch?

GLAZEBROOK J:

What I was really going to say is if this is the only breach would it make the search unreasonable if it's otherwise lawful and in accordance with the other principles?

MS EWING:

Certainly the Crown would answer that question no.

GLAZEBROOK J:

Well that's what I would've thought because it's – and it's obviously important in privacy principles that this happens but whether in fact it would make the search itself unreasonable or unlawful is probably slightly more difficult if this is the only breach.

MS EWING:

Agreed.

ELLEN FRANCE J:

That exemption is the one that's reflected in other statutes, isn't it, like the – it's similar to the one in the Official Information Act and so on, so there's presumably considerable material there about exactly what it covers.

MS EWING:

Well *Alsford* discusses it, your Honour, and indicates that the threshold is relatively low, so in that case in order to engage the similar exemption under

principle 11, the police simply had to tell the electricity companies: “We are investigating cannabis offending and we want this information for that purpose.” So they describe the threshold as relatively low.

WILLIAMS J:

If that material – I wonder how realistic that answer that Mr Marshall might have helped you with is really because he’d been pulled over, photographed, has got, if the suspicion was borne out, four stolen batteries and a handbag, which is taken out of the car and put on the footpath, what would you do with them, once you'd decamped from the scene? Hold onto them?

MS EWING:

No, precisely, that’s the Crown –

WILLIAMS J:

Of course not, so there's no prejudice at all, is there? They’d be gotten rid of immediately.

MS EWING:

Well there is, the Crown’s point is if Mr Tamiefuna doesn’t realise that the police officer has that suspicion then he’s far more likely to dispose of the property.

WILLIAMS J:

Yes, well that doesn’t seem to me to be a particularly realistic assessment of what was going on in Mr Tamiefuna’s mind, if they were truly stolen. The first thing he’d say to whoever else he needed to help him was: “We need to get rid of this stuff now.”

MS EWING:

I think your Honour, I may be on the same page, I'm not sure that I'm misunderstanding.

WINKELMANN CJ:

I think you're not on the same page.

WILLIAMS J:

No, because you don't need to be told what the purpose of the taking of the photo was for a relatively intelligent battery and handbag thief to know, having been pulled up and photographed, it's time to get rid of the loot.

GLAZEBROOK J:

Did they take those items with them or were they impounded with the car?

MS EWING:

It's not clear on the evidence.

GLAZEBROOK J:

I wasn't sure what had happened.

MS EWING:

I mean certainly if Mr Tamiefuna had been told why the photograph was taken, you might think he would remove them from the car and take them with him, if he hadn't already.

GLAZEBROOK J:

Because they're quite heavy, batteries.

WINKELMANN CJ:

Car batteries are, yes.

MS EWING:

Although there was a sort of boom box which looked quite big too.

WINKELMANN CJ:

It wouldn't be heavy compared to a battery.

MS EWING:

They were clearly being picked up and there would've been nothing the police officer could have done in that instance.

GLAZEBROOK J:

No, no I understand but –

MS EWING:

So the core submission here really is that the Court of Appeal's finding reflected its belief that the police officer hadn't been engaged in any real law enforcement purpose.

WINKELMANN CJ:

So we understand that about the Court of Appeal, the question is – because also there's a question about whether it should shape the scope of search powers, the privacy principles and that engages *Alsford,* doesn't it?

MS EWING:

Yes, and I'll come onto *Alsford* after I've dealt with the particular breaches here but in summary the Crown position is that *Alsford* has made clear, as your Honour Justice Glazebrook points out, that the low threshold for a breach of the privacy principles means they just don't really take us anywhere in the section 21 context. The section 21 test stands alone and the underlying facts will always be considered but the mere fact of a breach doesn't assist.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.48 AM

MS EWING:

Moving on your Honours to principle 9 which is the third principle the Court of Appeal found had been breached here. That requires that an agency that holds personal information shall not keep that information for longer than is required for purposes for which the information may lawfully be used. So again the Court of Appeal's finding, this is Supreme Court case on appeal page 35, paragraph 82, was that, as noted earlier, the photographs were not taken for the purpose of an investigation so the image should not have been retained and like principle 1, principle 9 doesn't prescribe the lawful purposes for which an

item of information can be retained by any particular agency. Again it leaves that question to other sources of law and here, therefore the Crown says the common law permitted police to hold the photograph for the roughly three weeks that it took for Mr Tamiefuna to be identified.

KÓS J:

But three years also. I mean when does it end? Three weeks is fine, you say, but it wasn't going to be disposed in three or four weeks, was it?

MS EWING:

Yes, well the question of whether principle 9 is being complied with is really for the Privacy Commissioner and there are controls in the Privacy Act 2020 that enable the Privacy Commissioner to either determine a complaint that something has been held in breach of principle 9 or to issue a compliance notice if it considers police are routinely breaching this principle.

WILLIAMS J:

Not for section 30, is that your point?

MS EWING:

Not for section 21, that's the turf I'm on right now.

WILLIAMS J:

Yes, not relevant for admissibility purposes you say?

MS EWING:

Yes, not relevant. So it's not relevant first because it doesn't prescribe any independent boundaries about the lawfulness of retention and second, more fundamentally it's not relevant under section 21, because section 21 doesn't extend that far back. As Mr Marshall said in his submissions, retention is something that's governed solely by the Privacy Act and not by section 21.

WINKELMANN CJ:

Can I ask you this then, on Mr Marshall's case about what's a legitimate police purpose, it must flow through to that, that there should basically be no limit to the time that this is able to be kept because it's a legitimate police purpose to build an intelligence database in respect of former criminal offenders or people who are presently suspected of criminal offending. So that would mean that it should just be able to be taken in perpetuity 20 years perhaps, 10 years, five years.

MS EWING:

The Crown in this case is certainly not advancing a position that indefinite retention - the Crown is not advancing any position about how long something may be retained because we're not –

WINKELMANN CJ:

No, yes I know that but what I'm testing with you is the logic of the Crown's position which is that the Crown says it's a legitimate purpose, police activity to collect this information and store it, for the purposes of storing it on its intelligence database so it can detect and investigate crime and the flow through of that is that it can keep it for a long time, longer than connected to the handbags and the batteries, it can legitimately keep it for a long time.

MS EWING:

All the Crown is saying in this case is that –

WINKELMANN CJ:

No, I'm testing the logic of it with you though.

MS EWING:

Yes, so as I understand your Honour's point it's that the purposes or the law that the Crown has identified would theoretically –

WINKELMANN CJ:

No, the necessary implication of it is if it's a legitimate purpose to build up a police database, just a general database not related to specific suspected offending, then it can be kept for a pretty long period of time.

MS EWING:

Conceivably yes. Everything depends of course on the particular facts and intelligence gathering obviously spans a very wide range of police activities and on the particular facts of a given case it will be different purposes may justify retention for different periods but on the facts of this case the Crown says one, section 21 doesn't ask the question about retention, that's for the Privacy Act and number two, in this case in any event the retention was lawful.

That's all I wanted to say on my first point which was that there is no breach of the principles here and certainly not one that has any bearing on section 21 and I then just briefly want to address this Court's decision in *Alsford. Alsford* makes clear that even if a breach of the privacy principles had been established here, it would not assist in applying section 21.

So the majority position is recorded at the appellant's bundle page 358, at paragraph 64. So the Court explains the test for reasonable expectation of privacy in the paragraph that precedes it and goes on to say: "We do not agree with the approach taken in *R v R* [2015] NZHC 713 that if information is obtained consistently with the privacy principles … there will be no 'search'". So they squarely reject the proposition that the privacy principles influence the question of reasonable expectations of privacy under section 21 and the position is perhaps stated more – a number of places in the judgment say that the determinative or the critical question is simply the test under section 21 – that resort to the privacy principles isn't – inferentially resort to the privacy principles isn't required.

1155

GLAZEBROOK J:

Well isn't it really saying it doesn't diminish reasonable expectations of privacy? So if you comply with the privacy principles, that doesn't mean that you've necessarily got a reasonable search. Why does the reverse happen?

MS EWING:

Mmm, the Court is not saying just that. They say –

WINKELMANN CJ:

Can you take us to the bits where it – because I think, my reading of that, is as Justice Glazebrook said, so you need to take us to the part where you say it actually states a positive proposition.

MS EWING:

So appellant's bundle of authorities 335, paragraph 17. So this paragraph is against the backdrop that the Court has said it will consider the relationship between section 21 and the privacy principles and what it says is the decisive issue is not whether the power consumption records were obtained consistently with the Privacy Act but whether they were as a result of an unreasonable search contrary to section 21 of the Bill of Rights Act. Whether there was a search depends on essentially whether there was a reasonable expectation of privacy in the information and it's apparent, given the very broad scope of the privacy principles, that the Court doesn't see the mere fact of a breach as assisting with that question.

WINKELMANN CJ:

Okay, so that's the part you need to take us to because I do think there is something in the judgment to that effect, but that's of interest I think, which is your argument that the privacy principles don't really help and do not inform.

MS EWING:

Yes, so coming on then to page 349, at paragraph 39, sorry at paragraph 47. So here, sorry Mr Marshall, if you could just show paragraph 46 as well. The context for this ruling is that the Court has just found there was a breach of one

of the principles under the Privacy Act. So there was not sufficient justification for one of the power companies to release the data to the police under principle 11 of the Privacy Act and the Court asks but what, if any, impact does that have and they go on to say, at the bottom of paragraph 47: "The critical question is whether the data was obtained as a result of an unreasonable search or seizure in terms of section 21 of the Bill of Rights. To answer this question it must first be determined whether there has been a search and that depends on the nature of Mr Alsford's privacy interests and the information at issue." And here, as I said, there was a finding that one privacy principle had been breached, that the police had obtained the information by a power company breaching principle 11 but in its analysis of reasonable expectations of privacy, the Court, and coming on perhaps to paragraph 63, 358, said that the critical questions are the nature of the information at issue, here the nature of the relationship between the power companies and Mr Alsford, the place where the information was obtained and the manner in which the information was obtained. So it's those considerations, rather than the mere fact of a breach.

WINKELMANN CJ:

Well Mr Keith is going to test what's stated in *Alsford* but there is an immediate issue, you don't need to think very deeply for this, about how the Privacy Act and the privacy principles it states are not relevant to reasonable expectations of privacy, given that they are the thing that regulates the collection and storage of private information. So how can it not be relevant to what's a reasonable expectation of privacy?

1200

MS EWING:

Yes, so the answer to that is really the scope of the information privacy principles. They are extremely broad, they cover personal information which is information about an identifiable individual, they cover any collection and also retention and use of that information by any agency, so a wide variety of public and private bodies and the Court recognised in *Alsford* much of that information, which includes publicly available information, will not come close to generating

a reasonable expectation of privacy. So that's why the Court said the mere fact of a breach doesn't take you anywhere under section –

KÓS J:

Is your argument that it's not relevant or simply that it's not determinative? If it's the latter I understand it, if it's the former I certainly don't.

MS EWING:

It's not – the argument – in *Alsford* the Court answered that question it seems by suggesting that section 21 stands alone. It wasn't – although it found a breach of the privacy principles, that breach wasn't in any way factored into its analysis of reasonable expectations of privacy.

KÓS J:

So not relevant?

MS EWING:

That seems to be the logic of *Alsford*. So had they –

GLAZEBROOK J:

Well not really because what *Alsford* was saying is just because there isn't a breach of the privacy principles doesn't mean that there's not a breach of a reasonable expectation of privacy.

WINKELMANN CJ:

Although there was a breach.

MS EWING:

But there was a breach and so the converse is also true.

GLAZEBROOK J:

Well I don't see the converse being true, that's the difficulty. I certainly don't see *Alsford* standing for the proposition that the converse is true.

MS EWING:

So I'll start by taking your Honours to the particular parts of *Alsford* that I say support that proposition generally and then I'll talk about the approach that was applied in *Alsford* and where on the facts there had been a breach.

ELLEN FRANCE J:

You do get some support, I suggest, for your approach from the summary at paragraph 73 which deals with section 30 and the interaction with the Privacy Act in a different way from the way in which the Court deals with section 21.

MS EWING:

Yes, so since we're there, this is paragraph 73(d). This is the Court's summary of its findings about how the privacy principles interact with both section 21 and – with section 21 and the critical paragraph here is (d): "In considering whether section 21 has been infringed, the first question to be determined is whether the information in issue was obtained as a result of a search. The answer depends first on whether the person concerned had an expectation of privacy, second on whether it was reasonable." In other words the section 21 test doesn't depend in any way on an analysis of the privacy principles. The two questions can be answered without any resort to the question of whether the principles have been breached.

WINKELMANN CJ:

What about (b)?

MS EWING:

Yes, I accept that – I was planning to talk about section 30 separately, your Honour. So here I'm really focussing on whether it assists with the enquiry under section 21 but it's apparent that the Court thought the most appropriate place to deal with a breach of the privacy principles would be under section 30(5)(c), that is whether the information was obtained unfairly and in that finding they were accepting the position taken by the Privacy Commissioner in *Alsford* which was that was the most appropriate place for the principles to be considered.

WINKELMANN CJ:

Mmm, I didn't know that they – I thought the Privacy Commissioner had submitted in *Alsford* that it was relevant to section 21.

MS EWING:

The Privacy Commissioner's submission is recorded at page 397, paragraph 162. So the Commissioner did submit that principles could be taken into account and I add here that it's apparent that the Court didn't place much weight on that part of the Privacy Commissioner's argument but it goes on to say that: "He accepts that failure to comply with the principles would not be determinative … because … failure to observe the principles does not in itself demonstrate intrusion into a reasonable expectation of privacy." And the reason for that is really captured at paragraph 39 of the judgment in *Alsford* which is at page –

1205

WINKELMANN CJ:

It's what you've covered already, isn't that?

MS EWING:

Mmm.

WINKELMANN CJ:

It's such a broad category of information and circumstance covered.

MS EWING:

That's right, so it covers a huge variety of information and the question that section 21 asks is far more focussed. So it's not the case that breach of the lower threshold under the privacy principles is determinative or really of assistance. So the Court notes at paragraph 39, there's a need for caution, given the breadth of personal information and the range of possible breaches which will cover the spectrum from minor to insignificant.

WILLIAMS J:

The problem is that that's inherent in the nature of privacy itself as can be seen by the exchange between bench and bar over what's private and what's not, what's a reasonable expectation and what's not. This is an inherently fuzzy area and the Privacy Act reflects that but it is trying to draw a line between what the state may do with and about us and what it may not which is exactly what section 21 is about.

MS EWING:

Well the context of two regimes needs to be taken into account in my submission.

WILLIAMS J:

Absolutely, completely agree but it's a bit of a stretch to say it's irrelevant. I agree it can't possibly be decisive but given that Parliament has taken the time to create an entire regime around the very line we're talking about, albeit affecting a whole range of other things, it's got to be helpful at some level or other.

MS EWING:

I'm in no way submitting that underlying facts which are relevant to the section 21 analysis can't be taken into account. So to take an example, the Court in *Alsford* discusses principle 4 of the privacy principles which says that information shouldn't be obtained unlawfully, by unfair means or by means that are unreasonably intrusive into the personal affairs of the individual concerned.

Clearly then there's some overlap but the question is whether there's any assistance derived from the fact of a breach, given the far broader scope of principle 4 relative to section 21. Section 21 already analyses those matters. It analyses –

WINKELMANN CJ:

So you're saying the content of the principles can inform the reach of section 21?

MS EWING:

I say the content of the principles won't generally assist because they are so –

WINKELMANN CJ:

Well can they, can't they and they must because the principles show us what society's values are so they must assist with section 21.

MS EWING:

I might answer that question in the context of this case, your Honour. So if the question here is fundamentally whether the police officer was exercising a lawful purpose in taking Mr Tamiefuna's photograph, it can immediately be seen that principles 1 and 9 don't assist us with that enquiry. They're very high level which is because they're intended to apply incredibly broadly and intended to leave some discretion to agencies in the way that they're applied and a finding – in order to find a breach of principle 1 the Court would, as I explained earlier – a finding of unlawfulness under section 21 would consider that same question, the same question that's posed by principle 1 and it's not of assistance to ask then whether in a different statutory context that provision is breached.

So turning back to the facts of *Alsford,* again that was a case where there was a breach of the privacy principles and the analysis the Court then applied to determine expectations of privacy, took really no account of the fact of that breach.

WINKELMANN CJ:

Can you remind me, was it because that was – it was quite publicly available in some way?

MS EWING:

It was the fact that it wasn't particularly sensitive. It was personal information and so there was a breach in handing it over to police but the Court considered that it wasn't a search because the information in question didn't have the quality that attracted a reasonable expectation of privacy.

WINKELMANN CJ:

And one might think there are other views about that, which Mr Keith is going to urge upon us because the fact that that's now governed by a Privacy Act which means that my next door neighbour can't go and ask for my power information, suggests that the Privacy Act may have created the reasonable expectation of privacy in it.

1210

MS EWING:

Well the Privacy Act sets constraints, it's really a data regulation act, it sets constraints on how –

WINKELMANN CJ:

So I suppose the thing you're not answering and I keep on asking you is the role that the Privacy Act plays in our society in shaping reasonable expectations of privacy and that must be relevant. If we take it out of the facts of this case, that generally it must be relevant to the threshold. I'm not saying determinative but relevant.

MS EWING:

Mmm. As I say the logic in *Alsford* is that the mere fact of a breach, because of the very different threshold and the far broader scope of information involved, doesn't tell us anything.

WINKELMANN CJ:

I know what *Alsford* says but I'm asking you about the general proposition, stepping aside from *Alsford.*

MS EWING:

Well perhaps it's helpful to look at the matters identified in *Alsford* as being relevant to a reasonable expectation of privacy and to consider whether or to what extent the privacy principles might bear on those. So paragraph 63 of the judgment, at 358. So the circumstances that need to be considered when considering a reasonable expectation of privacy are the nature of the

information at issue and I, as the Court noted earlier at paragraph 39, a mere breach of the principles doesn't answer that question because they apply to an incredibly broad category of information. So they don't answer the question whether the information gathered was part of the person's biographical core, that they would seek to prevent from dissemination.

Paragraph (c) refers to the place where the information was obtained. Again the Crown says that's a critical consideration in Mr Tamiefuna's case but none of the privacy principles is sensitive to place, they're of completely general application with the result that they don't give us any concrete guidance on that topic either, they don't tell us anything about reasonable expectations of privacy in a public place which is the core question in this appeal.

And (d), the manner in which the information was obtained. The only principle, so predominantly the principles relate to how information is stored and used but I accept that there's some overlap here with principle 4, the manner in which the information was obtained but again the fact of a – but again principle 4 doesn't really prescribe what is unlawful or what is unfair or what will be unreasonably intrusive, it simply states that agencies shall not use those means. It doesn't offer any concrete guidance in the context of that enquiry and so as the Crown's written submissions say, analysing the privacy principles when you're considering those factors will add length but not depth, it doesn't provide any more detailed rules about what privacy means in the context of section 21 or in the context of those specific enquires. Does that answer your Honour's question?

WINKELMANN CJ:

Yes, although not really because, yes it must be fact specific but all the same, what I'm saying to you is that the operation of the Privacy Act in society ultimately shapes reasonable expectations of privacy, so that must be relevant and so, I mean all I'm saying to you is it may not be determinative but the Privacy Act's structure must be a potentially relevant factor in some cases and it may not be in this case.

MS EWING:

Mmm, I think there'd be a stronger case to say that it has that influence if it prescribed in more detail what privacy means in any particular context but it doesn't and so –

1215

WINKELMANN CJ:

Yes, but that would be to expect it to be displacing section 21 but really all I'm saying to you is that it is shaping public perceptions, what is a reasonably private space or information, and therefore that must be relevant to the values that are being fed into section 21.

MS EWING:

Yes, at the risk of repeating myself, that wasn't the majority's approach in *Alsford*. There was a breach but –

WINKELMANN CJ:

I know that. I'm asking you what your submission is and you just reject that. That's your submission?

MS EWING:

Yes.

WINKELMANN CJ:

No, okay.

MS EWING:

I don't have much more to say on this topic, subject to any glares from Mr Marshall, so perhaps I'll move on to briefly address how the privacy principles influence section 30 and at the risk of being rather boring again the Crown position here is really just based on *Alsford* having recently considered this position, this issue.

So the central propositions in *Alsford* can be summarised as follows. First, breach of a privacy principle doesn't of itself make evidence unlawfully obtained for the purpose of section 30(5)(a).

WINKELMANN CJ:

So are you in your written submissions here?

MS EWING:

No. I can cross-reference if that's helpful, your Honour. The written submissions cover all of this in two paragraphs, so the –

WINKELMANN CJ:

Right, okay.

KÓS J:

Which are those two paragraphs?

MS EWING:

That's an excellent question. I don't actually…

KÓS J:

But you know there are two?

MS EWING:

I know there are two, Sir, yes, that's right. I think it's around the 60s.

WINKELMANN CJ:

Really? We can't still be in the 60s. We've been in the 60s all day.

MS EWING:

One might think the one document I would have before me is our written submissions, your Honour, but I'm sorry, I don't.

WINKELMANN CJ:

You're freestyling.

MS EWING:

Yes.

WINKELMANN CJ:

I think it's definitely not the 60s. That was Mr Marshall's heartland.

MS EWING:

Yes, under "reasonableness", your Honour so paragraph…

WINKELMANN CJ:

88?

MS EWING:

Yes, that's true, it's in the 90s. Apologies, 82 and 83. But those paragraphs don't cover in any great detail the position in *Alsford* under section 30 so I'll simply summarise it now.

First, the Court in *Alsford* said breach of a privacy principle doesn't of itself make evidence unlawfully obtained for the purpose of section 30(5)(a), and the logic of that position was section 11(2) of the 1993 Act which provided that the privacy principles don't confer on any person a legal right that is enforceable in a court of law.

Second, the Court in *Alsford* said in some circumstances breach of a privacy principle may possibly be relevant to, but will not be determinative of, whether the evidence was obtained unfairly in breach of section 30(5)(c) and even in those cases the Court said what will be significant is not the fact of the breach but the underlying conduct.

1220

So in the final point, the third point the Court made about section 30 is that it is possible, or it recognised the possibility, that in some circumstances the privacy principles may be relevant to the section 30(2) balancing exercise. That possibility wasn't picked up on by the Court of Appeal in *Alsford*. It wasn't called

on to determine the section 30 question in relation to the obtaining of the power records because it found they had not been unlawfully obtained or unfairly obtained. So this mere possibility that it would be relevant to the balancing exercise is referred to but not really developed, there's no concrete guidance about what that would look like and the Court noted, fourth, that in either case, whether we're looking under section 30(5)(c) or whether we're looking at the balancing exercise under section 30(2), caution is required, given the principles span a very broad spectrum of culpability and the Court said, this is paragraph 39: "Even where the information at issue is personally sensitive and the breach of the privacy principles is serious, those circumstances may add little to the section 30 analysis". So the possibility is recognised that there could be some relevance at the section 30 stage but even in the case of a serious breach of the principles, the Court said it would be of little assistance and all this is against the backdrop that the underlying conduct, the facts of how information was gathered, will always be considered but because of the different framework that the principles represent, they have a limited sway.

WINKELMANN CJ:

That doesn't really seem –

GLAZEBROOK J:

Isn't that saying they'll just already be considered and therefore you don't add anything by saying it's a breach of the privacy principles which is slightly different from saying they're not influential, isn't it?

MS EWING:

Mmm, the Court certainly recognises a breach of principle 4 may be influential under section 30(5)(c) and that's clear from the structure they set out at paragraph 64 of the judgment which is at page – so before I turn to paragraph 64, which is where the Court explains the flowchart, if you like, of how the section 30 enquiry should be undertaken in such cases, the Court says at paragraph 40: "What is significant to the section 30 assessment is the nature of the conduct at issue, rather than the fact it constitutes a breach of the privacy principles." So no one is saying that the underlying conduct should be siloed

off and not considered but the Court makes clear that it's not the breach that contributes something, it's the conduct itself.

WINKELMANN CJ:

I suppose it's possible for us to take the view that things have moved on, given the place that the Privacy Act and the privacy principles now have in our society.

MS EWING:

This is a very recent decision of this Court, your Honour and the Crown would –

WINKELMANN CJ:

Well it's about eight years old, is it, I think?

MS EWING:

Seven. So there's certainly no obvious change the Crown would say that's cause for revisiting and certainly not in this case where there's no obvious breach in any case.

So coming on then to paragraph 64, that's at – thank you Mr Marshall, apologies for not having the page ready. The framework the Court takes is as follows, first, you ask whether there's a search, if there is you consider whether it's a reasonable search and as the Court explains, that question turns simply on the matters that we've mentioned already, the nature of the information and the place and the way that it was obtained.

So coming on to page 359. If there is a reasonable expectation of privacy in the information there will be a search and the question will become whether it's unreasonable. If there is no reasonable expectation of privacy in the information there will be no search and the issue will simply be whether the requirements of the exceptions are met.

1225

WINKELMANN CJ:

Now I'm just becoming concerned about time because we have to adjourn no later than 3.15. It was a day and a half and the Crown has had a very good run at this and we need to hear from Mr Keith.

MS EWING:

That's entirely fair. Is it helpful perhaps if I move on to section 30 then?

WINKELMANN CJ:

I think it is actually.

MS EWING:

Yes. So in a nutshell the Crown would say on the relationship between section 30 and the privacy principles, any reconsideration of *Alsford* should occur in a case where there's an apparent breach and this is not one. So coming onto section 30 then, and perhaps your Honours I can aim to finish by one, would that be helpful?

WINKELMANN CJ:

Well I was rather hoping that you'd finish in about the next 10 minutes.

MS EWING:

That's helpful, I'll keep it crisp. The Crown position again here, there's two points the Crown wants to make, the first is that the Court of Appeal reached the right outcome here. On one side of the ledger the Court had found a breach of an important right but a minimal intrusion into privacy. A police officer on a public street recorded the appearance of a person he was already looking at and there is no way that breach could be regarded as deliberate or even reckless, given the novel position that the Court of Appeal took on the fact that that constituted a breach of section 21.

KÓS J:

I suppose that depends on whether we think we're just dealing with Mr Tamiefuna or we're dealing with the whole NIA database which has been taken in similar circumstances, that becomes rather more large.

MS EWING:

Yes, if the Court differs about the scale of the impropriety of course it will have to conduct the balancing afresh but as is probably apparent, the Crown position is section 21 doesn't extend that far back. So on the other side of the ledger –

GLAZEBROOK J:

I would have thought it was relatively unreasonable to expect a constable, well a sergeant it was in this case, on the beat, to anticipate that there might be a change in view of taking photos in a public place.

MS EWING:

Absolutely.

GLAZEBROOK J:

And therefore that being reckless or even negligent in doing what, on the basis of the current authorities, would be in fact both lawful and reasonable.

MS EWING:

Indeed, yes. So a minimal case for exclusion on one side of the ledger and on the other side the officer's photography produced crucial and reliable evidence of serious offending, a home invasion, robbery involving two intruders, violence, albeit it limited, theft of a number of high value items, including a valuable car and a predictably traumatic impact on the victim.

So when you stand back from those considerations, this is precisely the kind of case where to exclude the evidence, to effectively acquit Mr Tamiefuna of that offending because he was photographed on a public street, would dent the need for an effective and credible system of justice. So given the views the Court's expressed on timing, I won't take your Honours through the individual

factors, suffice it to say the Crown says subsections 30(3)(a) and (b) weakly supported exclusion, subsections (c) and (d) strongly supported admission and there were no features of this case that suggested admission of the evidence would cause long-term damage to an effective and credible system of justice. So it's straightforward on the Crown view for admission.

My second point is that there is no reason for the Court to go further in this case and reconsider the test generally but before I move onto that point, do your Honours have questions about that first point?

WINKELMANN CJ:

No.

1230

MS EWING:

So the Crown's second point is that there's no reason for this Court to reconsider the section 30 test generally and the appellant's primary argument here appears to be that the pendulum has swung too far, that too much improperly obtained evidence has been admitted, and the Crown says this is not the case to consider overhauling section 30, first because it's hard to imagine a recalibration of that test that would result in the evidence being admitted in Mr Tamiefuna's case. Its "being excluded", sorry.

GLAZEBROOK J:

Surely if the test should be recalibrated, and it's in front of us, that's not – that might be a question for leave but once it is in front of us what is it about this that means we shouldn't recalibrate?

MS EWING:

The absence of any obvious error in the decision that was made in this case. So –

GLAZEBROOK J:

But how do we know if it's done on a non-recalibrated test?

MS EWING:

Well, the appellant's argument really points to the outcomes in other cases to suggest that things have gone wrong and the Crown says –

WINKELMANN CJ:

Well, they do say it's gone wrong in this case too, to be fair to them, Ms Ewing.

MS EWING:

Yes, that's right, and again, for reasons of timing, I haven't addressed and I won't address in detail the errors that they raised. But the second reason there's no reason to reconsider section 30 here is that there is really no sign that things have gone wrong. The statistical analysis that the appellant offers involves taking a check-box approach, or kind of a regression analysis approach, to a balancing test that is intrinsically fact sensitive, that inevitably turns on what is in both sides of the scales rather than some objective measurement of each of the statutory factors in each case, and it rests on an unrepresentative sample of section 30 decisions.

In appellate courts the decisions will necessarily – decisions under appeal where section 30 is concerned will necessarily be more likely to be an appeal against the admission of evidence because of the Crown's more limited exercise of its rights of appeal and to make that point concrete, of the 114 cases the appellant cites, only 10 are Crown appeals. So in other words the sample set is not representative because it's skewed towards cases where there's already been a judicial decision to admit the evidence and in that context looking at rates of admission on appeal or rates of success on appeal doesn't take us anywhere.

WINKELMANN CJ:

The Law Commission was concerned with the data set it saw, wasn't it?

MS EWING:

It is and the Crown would make the same criticisms of the Law Commission's statistics.

WINKELMANN CJ:

Mmm, I mean one can always make criticisms of statistics and in a country like ours we don't have the resources to do the kind of resourced, the kind of nuanced analysis you're suggesting but we can nevertheless look at those figures and say they do paint a very stark picture and if you allow for rates of error it's still a stark picture.

MS EWING:

Well, I align with, or the Crown aligns with, Justice Williams' comment yesterday that what is required is not – is a qualitative rather than a quantitative analysis and so –

WINKELMANN CJ:

And then you'd criticise it for being qualitative and being skewed.

MS EWING:

No, look, if –

WILLIAMS J:

Well, I suggested both actually.

MS EWING:

Well, apologies for misrepresenting you, your Honour, but –

WINKELMANN CJ:

I mean is it quantitative? You're asking for a quantitative analysis with more definition, so more detail and definition.

MS EWING:

So, but I wonder if it's helpful to mention one of the cases that the appellant cites in which –

WINKELMANN CJ:

Well, probably not because it's one of the cases.

MS EWING:

Probably not, yes.

WINKELMANN CJ:

But, I mean, your point I think is that there are very serious – there are cases where, counted in, which obv – the case for admission is overwhelming and they're counted in those figures.

MS EWING:

Yes.

ELLEN FRANCE J:

Well, it's –

GLAZEBROOK J:

I thought you were saying that the cases where the evidence has been excluded are not actually coming before the Court and therefore the 80% is on the basis of cases where it's been admitted and therefore not very surprising because normal success on appeal is about 20%.

1235

WINKELMANN CJ:

No, I was just asking Ms Ewing why she wanted to take us to the individual case.

GLAZEBROOK J:

Oh sorry.

WINKELMANN CJ:

If you want to take us to the individual case please do so.

MS EWING:

Look I'm not sure whether it's helpful or not but what those figures mask is the balancing exercise that was conducted in the individual case and so to take one, I've taken a sample of a case where the appellant's table suggests that the

breach was serious but the evidence was admitted anyway. So this is part of their – this case forms one datapoint in their figures and it's *Finau v R* [2023] NZCA 448.

WILLIAMS J:

Interestingly the Tongan pronunciation of the AU, is not like the Māori pronunciation so in Tongan it's *Finau.*

MS EWING:

Thank you, your Honour.

WILLIAMS J:

Whereas in Māori it would be *Finau.*

MS EWING:

So the police in that case had appropriately sought a warrant for various items and seized the appellant's phone and the impropriety concerned was that they later downloaded some data from it without getting a separate warrant for that phone and the data from the phone provided circumstantial evidence of his involvement in importing methamphetamine and his role had been to obtain the release of a container by threatening to kill the complainant. So he was charged with importing methamphetamine, threatening to kill and possession of firearms and the Court said the intrusion of the right was serious given the high privacy interests in cellphones but this was a genuine mistake by the police officer, there was no deliberateness and no recklessness.

WINKELMANN CJ:

Is that in our authorities?

MS EWING:

No it's not, your Honour, but the quality of the evidence the Court thought was moderate in that it provided circumstantial evidence of his involvement in this, what was on any view, very serious offending and the Court considered in that case the balance favoured admission. Now that's one of the 80% that the

appellant relies on to say that things have gone wrong. The Crown point really here is that you can't assess whether that's right, you can't assess whether the 80% were wrongly decided unless you delve into the facts of every single case. It's not enough to check the boxes and tot them up.

KÓS J:

So do you think Ms Gray's three step approach would be disadvantageous to the Crown?

MS EWING:

The Crown position is it wouldn't change anything, it would replicate the – well perhaps I can put that differently. The presumption of the appellant's argument is that the idea of an effective and credible system of justice can be hived off from the rest of the test, that you can consider proportionality before you get to that point and then afterwards turn your mind to whether admission would damage an effective and credible system of justice. That's not consistent with the text of section 30(2) which makes the need for an effective and credible system of justice a mandatory consideration when you're assessing proportionality. So the text of section 30(2) is the Judge must determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice. So just on the text of section 30(2), the balancing process itself involves consideration of that factor and as the Crown's submissions point out, really the concept of an effective and credible system of justice underpins the balancing test at every point, it determines which way the seriousness of the offending points, it determines what weight should be given to the nature of the impropriety, it's baked into the test, you can't extract out and consider it separately and as a corollary, even if a judge doesn't explicit mention it, it has been considered.

1240

And finally, in this case, the Court did give explicit consideration to the effective and – the concept of an effective and credible system of justice but concluded,

rightly, that in this case there were no features that would corrode confidence in the justice system if the evidence were admitted.

GLAZEBROOK J:

The appellant put quite a lot of weight on the discussion in *Williams*. Is there anything in *Williams* – well, do you accept that the *Williams'* factors might be helpful and then if not, why, and if yes, is there anything in *Williams* that you think is wrong or miscalibrated or….

MS EWING:

Williams remains very helpful guidance for judges in applying section 30 and the balancing test that the – or the structure that it suggested for the balancing test as well as its consideration of the individual statutory factors, in my submission, has survived *Hamed* as an available means of assessing, of conducting the balancing test. So there are two areas where it's no longer good law and those are – sorry, the obvious area where it's no longer good law is in relation to its assessment of the seriousness of the offence, the four-year maximum, but in other respects the Crown says it's in – that the guidance it provides on how the individual factors should be applied is entirely consistent with *Hamed*.

ELLEN FRANCE J:

So, sorry, just to check, you'd said two areas but in fact just the one?

MS EWING:

Yes. I have a recollection that there's something it says about search warrants that's also been – that's also no longer good law, but I'm not –

GLAZEBROOK J:

I think that was a misunderstanding of what *Williams* actually said. I think it – I can't remember but I know what you mean.

WINKELMANN CJ:

But in any case it's not on this point.

ELLEN FRANCE J:

But it's not this –

MS EWING:

It's not in this, it's not live here.

GLAZEBROOK J:

It was a very minor – it was a relatively minor point and had actually been misunderstood and misapplied.

MS EWING:

Yes.

WINKELMANN CJ:

Right, so you have three minutes left.

MS EWING:

Okay, thank you. So perhaps I'll just finish there –

WINKELMANN CJ:

Early?

MS EWING:

– unless the Court has any questions.

WINKELMANN CJ:

No. Thank you very much, Ms Ewing.

MS EWING:

Thank you.

MR KEITH:

E te Kaiwhakawā, tēnā koutou, and can I say first how grateful the Commissioner is and we are for the opportunity to be heard and we are, of course, as I suggested, in the Court's hands. On the question of time, which I

suspect the Court will want to know about, I do have a number of points to make. I will make them as quickly as I can. Rather than engage in a time estimate, I am aware of how limited the time is, I will be as quick as I can but ask the Court not to hesitate, as it won't, in hurrying me along if need be. I don't want to stymie any questions though because this is clearly a case in which the Court is seized of very difficult far-reaching issues and I will just outline those and then get to the specific points arising from the questions and submissions over the last two days. I'll take the Commissioner's written submissions as read.

1245

As the general proposition as to the issues, the common thread to the three questions before the Court, section 21, section 30 and the right to privacy and the privacy principles, is that we have both the substantive and constitutional or allocative question. The substantive question, and this is going back to things that the Bench was just exploring with my learned friend for the Crown, is that the Privacy Act, the information privacy principles do represent a substantive standard and I'll come to the suggestion that they aren't sufficiently detailed but the simple point is it does set out basic social standards, legislated expectations of what information can be used or how it can be collected and to pick up on a theme that is important here, how it can be retained and disseminated. So there are substantive constraints there. The Court is not left fishing or trying to give some content to nebulous concepts, it has that legislated yardstick and that of course is underpinned by Article 17 of the ICCPR and by the comparative caselaw to which we've referred and to which I'll come back briefly.

So first up there are substantive questions here, what is the limit of privacy? And I'll come to the technological challenges to that too. The second, what I call constitutional or allocative, there's a reference in the submissions, I won't take the Court to it, page 14, note 38, *Johnson v United States* 333 US 10, 14 (1948). This is not about whether or not particular investigative tools can be used, to take Justice Williams' comment yesterday, whether the police are stuck with the analogue or the stone age, of course they're not, it's about who decides and how.

WILLIAMS J:

Who decides which age they are stuck in?

MR KEITH:

Whether they can be used, how they can be used. So who gives the authorisation and who imposes the conditions and constraints and one consistent theme in the technological judgments and one can see it for example in references we've given from *United States v Jones* 565 US 400 (2012) and then *Carpenter v United States* 585 US ___, 138 S Ct 2206 (2018), is that one can't simply leave the executive branch or a law enforcement agency to decide how it's going to use a tool and that's that. So Justice Sotomayor for example talking about the concern that GPS technology, very powerful, needs to be regulated and members of the Court have already made reference to the value of statutory schemes such as the particular provisions in the Policing Act and I'll come to some further illustration of just how prescriptive the law can and should be here. It's not to say that individual officers should be engaged in a tick box exercise or that they should be micromanaged through the courts, it is that we can do – the IPPs allow a great deal of regulation, it is possible to supplement those and necessary, we say, to supplement those.

So beyond that point about substantive and allocative components to the right to privacy, there is also the theme, and we've referred to *Hamed* in the written submissions, that these do starkly engage rule of law principles, both in that sense that we must be clear about what is the source of power being exercised, what authorises the data collection in issue or purported to be issued and what are the particular terms, what are the constraints? And when one is dealing with state power, this is a very old principle and I thought twice about, well quite a few times about whether to quote *Entick v Carrington* (1765) 19 State Tr 1030, 95 ER 807, I didn't mean to be picturesque, but those same themes of the state asserting a power to kick in Mr Entick's door and find all sorts of scurrilous things, continues, those are the same values and one sees *Entick*, this was my main encouragement for putting it in, raised not only in extra judicial writing by the Chief Justice and others, but also it is praised in the United States search

and seizure cases as the constitutional case about rule of law, even though it's from England.

The second part of my general comments and then I'll be into the detail, we do have in this instant case, but also at this time, particularly acute importance of those questions. The Court has already made reference to, and I'll have a bit to say about, the ubiquity and ease of information gathering tools. So not only that they're very powerful but also that they're everywhere and again a theme picked up by the United States Supreme Court, they are almost effortless to use.

1250

So *Carpenter*, for example, the case we cite in the submissions about getting mobile phone data, is a very good illustration. Mr Carpenter's movements could be tracked backwards in time off the basis of a data file which was provided, until the Supreme Court said otherwise, without warrant, without any other power being exercised, and, as the Court pointed out, not only is that data ubiquitous, almost impossible to avoid, but also it allows a kind of search, a kind of surveillance, that is unimaginable, not because of its power or its detail but because it goes back in time. One can look at someone you're interested in today, five years ago there was just no means of doing that.

And so when it comes to looking at, particularly as the Court has already noted, principles of common law constabulary powers, I think we do have to bear in mind that categorical change, and I will come to the question about the Whanganui Computer Centre Act very briefly, but the other thing that that made me think of when her Honour, Justice France, raised it, is when we look at that Act it set up a supervising committee with very august membership, including a High Court Judge. It set up an access regime, a damages regime, and it very closely prescribed use and content. That same anxiety would be still more acute here. We are accustomed to databases, we are accustomed to electronic communication, but I don't think, and certainly this is a theme that we also make with reference to *Jones* and *R v TELUS* [2013] 2 SCR 3, the answer is not to lower the threshold of protection under section 21 of the Bill of Rights Act, under

section 30 and under the IPPs. It is to maintain that same level of protection, that same restriction upon state information gathering.

WILLIAMS J:

Why is that the answer? I'm not suggesting that relaxation is necessarily an answer, but whatever the answer is one has to be alive to the life we are in.

MR KEITH:

Yes.

WILLIAMS J:

If you think about the *Dow* case, for example, where overflight was a matter of considerable controversy, now it would be just a satellite image.

MR KEITH:

Yes.

WILLIAMS J:

No one would even know.

MR KEITH:

Yes, and I think one – there are two questions in terms of *Dow*. One is there was a straightforward statutory interpretation question: did the EPA powers as enumerated extend to this? So there was a question of whether there was an incidental power. It wasn't whether or not this was some sort of – it wasn't limited to whether or not this was some sort of search. It was simply: did the EPA in its regulatory capacity, its statute was silent, extend so far?

But the other point I do say and why, in answer to your Honour's broader question, why it should stay the same, why we should be looking to uphold the same protection, these tools are incredibly powerful. One could say that there's no real informational privacy left. It's – we all know, and I can provide the Court with material, Professor Forcese in the paper that we have given you is quite a good illustration – it's possible from a handful of data points now to discern

someone's political orientation, their sexuality, their movements around the world. The Cambridge Analytica scandal was one example of that. Give me someone's online shopping and I can give you who they voted for and probably whom they like to go out with as well. You know, it's very, very exposing, and one can either say: "Well, in that case, why not?" but that's not what the statute says. We still have protections of privacy. We still have protections against unreasonable search. The answer and why I want to – sorry, Sir?

WILLIAMS J:

Well, my question is not whether one holds the line or gives up but in light of these changes what should smart law look like, which is a slightly different question.

MR KEITH:

Yes, Sir. So "smart law", it's a good term, prescribes controls over the adoption of this technology, over the use of the technology, over the use to which data is put, and we do see – I'll come to the *Bridges* case which is an extremely good example. This was the facial recognition in football or other major events crowds. It's a very good illustration of why we are saying these principles and the right to privacy more broadly drives that smart law.

WINKELMANN CJ:

And that law, those principles are informed by what, privacy principles?

MR KEITH:

They are informed by privacy principles and by, in the UK, the Article 8 right, the equivalent to our Article 17 right.

1255

WINKELMANN CJ:

And the interests that those serve, so the answer is not to just let go of the – take your hands off the wheel but actually work out what society needs.

MR KEITH:

Work out and give specific effect to. Why I've mentioned the rule of law is only for histrionic reasons anyway but more specifically that when we say according to law in Article 17, when we say that these limits should be prescribed by law, the *Bridges* case for example illustrates how that can be done and that can be done at a macro level, so in the *Carpenter* case for example, saying no, mobile phone location data shouldn't just be obtained without warrant, you should have to go and persuade a judge you actually need it. So they, at a macro level, said this is a search for fourth amendment purposes but what we really get to and why I say the IPP is irrelevant and why the right to privacy more broadly is relevant, is you don't only have to do that. Section 21 is not the only tool we have either in this case or generally. Section 21 is one aspect, it deals with searches, and that should be read in a way that is informed by and consistent with the right to privacy but that is not the be all and end all.

Section 30 of the Evidence Act can properly be informed by other illegality and that is what the Court of Appeal did exactly here. So whether or not what happened on the side of a road, and I'll say a little bit more about what did happen, was a search, one can at least say it was an intrusion into privacy, there are legal rules that apply to that intrusion and section 30 can apply those no less. Just because section 21 is what we are familiar with, most familiar with, doesn't mean it's the be all and end all and just to illustrate that, and I know I'm coming up to the adjournment so I may end on this point, the database point that a number of members of the Court have made is instructive. So IPP9, information privacy principle 9 says that one can only retain data for as long as it is needed for a lawful purpose and the Court of Appeal in this case said that the lawful purpose for which the photo had been taken had passed or there wasn't one, but we've had discussion about, you know, the investigation didn't carry through. Putting it into a database for who knows how long and I have to say the three weeks or whatever is completely accidental here I think it's fair to say but putting it into a database does engage a privacy interest, whether or not it's the product of a search, it doesn't matter or it's not dispositive anyway. One could collect personal information without a search and CCTV cameras

with appropriate signposts which I am sure they do all do is a very good example.

If one collected months of someone's movements, which it is possible to do with CCTV, it would be hard to say that was a search, you might, you could, but it's much easier, one has a ready tool, one can say: "You collected my photo over how many months and put it in an accessible notified form and then held onto it for however long."

KÓS J:

Well that's why yesterday some of the questioning said well perhaps this is not just a section 21 question but actually a vires question.

MR KEITH:

Well it's a section 30 question because of exactly that, yes.

WILLIAMS J:

Well quite, yes. But another aspect of this which is troubling me is the regulatory framework. This kind of database retention by the executive is ordinarily subject to some measure of regulation pre-eminently, one would've thought, by a state law enforcement agency. We have in section 34(2) of the Policing Act a partial regulatory base but Mr Marshall's argument there is: aha, that is special because it deals only with compulsory submission. I am yet completely convinced of that argument. You would expect this to be the subject of at least some form of regulatory, formal legislature regulatory control.

MR KEITH:

Yes and I say that section 30 read consistently with Article 17 ICCPR and with the comparative caselaw we've taken to you, not only is that a very good idea, it's actually necessary. If you are going to collate this kind of data it has to be done according to law and the law has to be sufficiently prescriptive. Broad constabulary powers, and this is where I think the Crown and we differ fairly strongly, a constable observing something or taking a photo on the side of the road is not – and then uploading it into a database, is not in the same position

as a member of the public, it's not a useful comparison. And I'd also say, and I think this is a good point on which to finish before the break, the focus upon the taking of the photo in isolation without regard to either the preceding statutory context, and I think the Court has asked questions about that and I didn't hear much about it, but that preceding statutory context is, in our submission, highly relevant to how one characterises this.

GLAZEBROOK J:

What was the preceding statutory context?

MR KEITH:

So the fact of the – sorry I was being elliptical.

WINKELMANN CJ:

Land Transport Act stop.

MR KEITH:

The Land Transport Act, the fact that you had a traffic stop and you have not passengers ordered out of the car but passengers obliged to be on the side of the road because of the impounding. So one has the prior and then one has the post and whether – and I take Mr Marshall's point that to turn something into a search because of what happened before or after is possibly counterintuitive. It is what the Supreme Court in the United States did in *Carpenter*, to say going and getting this GPS data amounts to a search because of what it amounts to, what it gives you, so it's no longer just sort of third party phone company data. But whether one does it through section 21 or does it through section 30 and through the IPPs, we say of course you have to look to both of those.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.01 PM

MR KEITH:

May it please the Court, I was –

WINKELMANN CJ:

We've achieved a little bit more time for you, Mr Keith, but we're not going to tell you how much more time.

MR KEITH:

That's prudent, Ma'am.

WINKELMANN CJ:

So (**inaudible** 14:01:39).

MR KEITH:

And I repeat my earlier invitation which is needed to hurry me along.

WINKELMANN CJ:

Well, that was our response to your refusal to say how long you'd be, so…

MR KEITH:

Incapacity to estimate, I think, is a better description but, Ma'am, thank you. I will still be as quick and to the point as I can and do not hesitate either to question or to hurry me along.

I was just closing off the general points about the Commissioner's general proposition that there is a baseline and there are substantive and procedural standards within both section 21, section 30, of course, and the IPPs.

One point I was just going to pick up on and it may be from argument yesterday, I think it was his Honour, Justice Williams, was contrasting the right to or comparing the right to be let alone and the reasonable expectation of privacy, and I thought that was quite a good illustration of how multifaceted personal

privacy is. One can be, and this is the holding, for example, in the *Jones* case, United States Supreme Court, one can have one's privacy intruded upon by – or rather one can be subjected to search by an intrusion into reasonable privacy. One can also be, as in that case, subjected to unreasonable intrusion. So, for example, trespass upon Mr Jones' vehicle. The point is only that, as I say about the differing statutory schemes, it's also important to acknowledge that, for example, as I was saying just before the break, privacy may be infringed by a search but it does not follow that all infringements of privacy must be searches. One can, as with the database of CCTV information, be intruded upon short of that, or by other means, I should say. It's not an either/or.

I have set out – I said I wasn't going to speak to the submissions. I will take those broadly as read and our broad proposition that these are the two statutory provisions in issue before the Court below and before this Court must, in our submission, be read in light of the Privacy Act and in light of the ICCPR right, and I do say later on that the suggestion that these things can stand alone does not, is not consistent with ICCPR art 17, and one reference I did take from this morning, the discussion, dissent actually by Justice Keith in *Hosking*, that one has a range of statutory protections for privacy under New Zealand law. Section 21 is only one of them. That, I think, is the point, that one looks to Article 17, whether or not you need a tort as well, and that was what the Court divided on, his Honour in dissent, but one can look to section 21 to protect privacy. One can also look to section 30 of the Evidence Act. One can also look to the information privacy principles and, as I say, trying to – one commentator called it balkanisation – to split up different realms of privacy regulation does not in my submission make any sense.

1405

WINKELMANN CJ:

So hang on, can you just repeat that, it doesn't make sense to have a balkanised concept of privacy?

MR KEITH:

So to say well there is this sphere which is called unreasonable search which is governed by section 21, there is another sphere under the Privacy Act and this is partly taking the point about *Alsford*. This Court did, and I'll come to what *Alsford* did and didn't actually say, but one thing they did point to was what I call the non-enforceability provision then in section 11.

KÓS J:

You're just saying balkanisation is not an appropriate epithet.

MR KEITH:

No I'm saying balkanisation is a bad idea.

KÓS J:

Oh bad idea?

MR KEITH:

Yes, to say here is – it's probably a metaphor I shouldn't have started down, it wasn't mine.

KÓS J:

Yes I'd get away from that.

WILLIAMS J:

Silos, how about silos?

MR KEITH:

Silos is brilliant Sir, but yes.

WINKELMANN CJ:

Well we all know what you mean, you mean splitting up into little hostile territories.

MR KEITH:

Yes.

GLAZEBROOK J:

And ne'er the twain shall meet in fact.

MR KEITH:

Yes, I say that for example one can't look to a term like unreasonable search and not look to how information is to be gathered under the IPPs. Of course those standards bear on it.

WINKELMANN CJ:

You're not suggesting it's going to lead to World War I though, are you Mr Keith?

MR KEITH:

No, well that's why I like silos just so much more, so there's that. In terms of several specific issues that the Court had raised, a number of members of the Court, I think Justice Glazebrook referred to the difference between taking the photo and retaining it, Justice Kós about the database, the Chief Justice about what came into account in deciding whether something was a search and Mr Marshall was asked some questions about that this morning. I do say that, as I said before the break, the prior step, the statutory framework, the vehicle stop, the taking of the photo on the roadside after the people were obliged to leave the car and the retention are all relevant to whether or not it's a search, whether or not it's an intrusion into privacy and a photo is a good illustration of that. A passing photo that is just taken to preserve an image of the scene and nothing else is done, and it's not following a vehicle stop and search, is of quite different character, just taking that one photo and throwing it away, from what say happened here.

And I'll just give the Court the reference. I should say I'm not going to go to any of the cited materials except if the Court needs me to, we only have so much time but our paragraph 27, I've given the Court a potted version of Canadian and United States vehicle stop caselaw, essentially saying you've got a vehicle stop power, you use that power for that purpose, to launch something off the end of that, you need some new intervening individualised suspicion and I'll come to that.

The wider context on that statutory context and again I've mentioned this in the submissions and I don't think it got much discussed, that vehicle stop point, one reference I have given the Court is Skolnik, our tab 20, it's footnoted towards the end of the submissions, article "*Policing in the Shadow of Legality",* and of course the IPCA and Commissioner, the joint report, what Professor Skolnik, the point Professor Skolnik makes is that people – and members of the Court actually mentioned this yesterday, people interacting with the police may or may not know the limit of the police powers, they may comply for all sorts of reasons, including fear of being arrested or something worse, they may comply thinking they're obliged to. This wider context of having stopped a vehicle and impounded it, and then going along with questions and photography does, in my submission, matter. It also bears out why information privacy principles, especially the awareness and lawful basis is so important and I'll come to the IPPs in detail.

KÓS J:

I'm not sure I understand quite what you're saying. Are you saying that this affects the question of whether they're in a public place?

MR KEITH:

It certainly affects analogies with public place because it is – to say that Mr Tamiefuna is on the side of the road and that's a public place and nothing else arises ignores that prior statutory context that if one is looking to whether it's a search, the fact that the photo was taken consequent on or as a result of practical circumstances occasioned by police is relevant, one can't just focus on the photo.

1410

KÓS J:

Well, if you're foolish enough to go for a drive at 4.20 in the morning with an unlicensed driver you are likely to find yourself in a public place without a car.

MR KEITH:

But what the police then do to you without statutory powers, because it's not been suggested they had any that applied to Mr Tamiefuna –

KÓS J:

Say they're entitled to deposit him on the side of the road because they're entitled to impound the car, there's no challenge to that.

MR KEITH:

Yes, but if that then enables them to take a photo to gather information to look at possessions in a way that they could not otherwise do, that does make a difference, in my submission, to that search analysis.

KÓS J:

Okay, I'm not convinced yet so…

MR KEITH:

Well, if we put it this way, the usual premise that one can be photographed in a public place rests upon the idea that one has, and this is the United States and Canadian line and I think it's mentioned in *Hamed*, one has voluntarily exposed information to the world at large and so on a reasonable expectation of privacy analysis you don't have it. You chose to walk down the street. You chose to carry car batteries down the street. You chose to do whatever. If the only reason you are doing any of those things is because someone else's vehicle has been stopped with you in it, I don't think that reasoning applies. You aren't there voluntarily. You may have made the voluntary choice in the first place to go in a car with someone you shouldn't. The time of day could be explained by anything. Some of us catch planes to the airport at four in the morning or have to go to the airport to catch planes at four in the morning but – I'm not suggesting that here – but I think to say, oh, well, it was voluntary and it was in public, misses that component. Obviously, that will be a question of fact and degree but I think there are some good indicia here that he was in a – to say it, he was in a public place, is not really an accurate description for analytical purposes.

WILLIAMS J:

There's a – well, to take Mr Marshall's point, there's a degree of compulsion, rather similar in some ways to section 34, in the being there. You wouldn't be but for the compulsion.

MR KEITH:

I think, yes, Sir.

WILLIAMS J:

You sound diffident.

MR KEITH:

No, I was just thinking a short answer was a better…

ELLEN FRANCE J:

Although he could've got out of the car and walked away.

MR KEITH:

He could have.

ELLEN FRANCE J:

I'm not talking about what his knowledge of that was but he's not – he's in no sense detained.

MR KEITH:

He's in no sense detained. If he were we would have a whole different – but nor is he choosing to be in that place in public view at that time.

WINKELMANN CJ:

So you could say that an exercise of policing power has actually propelled him onto the street. Not as a consequence, not causatively.

MR KEITH:

Yes.

KÓS J:

I can't distinguish that from his bus having broken down.

MR KEITH:

Well, the traffic stop case law is based on the premise that a common problem, especially with suspicion of stop powers, is that they are then preludes to other things and they can be prefixed to other things and it's impossible to tell because the stopping officer is never going to say: "Well, I didn't have a good traffic reason," or "I didn't" whatever. So…

GLAZEBROOK J:

It's not suggested that's the case here though, is it?

MR KEITH:

No, I'm just saying that the reason why these powers are narrowly construed, why the Canadians and the United States specifically say you carry out the traffic search, you carry out the regulatory step, it's not an, I think, unfounded start of a general inquisition, I think was the language in *R v Nolet* [2010] 1 SCR 851 in Canada, that – in terms of Justice Kós' point, to my mind, if the state has used a compulsory power, it is different from the – that is qualitatively different from being there simply by bad luck. The police went from one to the other, and I think in terms of what one construes of the second bit of state conduct, the photography and so forth, I think one has to at least look to that, to those statutory precursors.

1415

WILLIAMS J:

Can you – what's your specific response to the argument that the police must be able to and routinely do gather intelligence that is not connected to any particular reasonable suspicion of offending?

MR KEITH:

Several answers and I'm sorry, first, we can all think of benign examples or unproblematic examples, members of the Court brought some up yesterday,

we see someone driving down the street who looks from out of town, we see what might be unrest about to break out and the police officer can make a note of that, can possibly even take a photo of it if it's going to be useful. So yes, one can do that but when one gets into intrusive contexts, this is why I'm stressing the relevance of the statutory power first up, then there are constraints. So there may be a constabulary power but it may require the information to be deleted later. It may, depending upon the vulnerability or position of the person being photographed, require more, and this is again where the information privacy principles assist us, but there's no reason not to apply the IPPs, just like everyone else has to do.

If you are collecting information from a person, then telling them that you are doing it and that you don't need – and that they are not obliged to talk to you, is what IPP3 says when it says you give the statutory basis. So there are constraints on that and there's no reason to disapply them. I'll come to the exceptions but as a general proposition, one can't say those just don't apply to police.

WILLIAMS J:

You can see why the police have some difficulty with fuzzy ideas on the side of the street in potentially tense situations, it would be best if the rules that constrained them were very clear, wouldn't it?

MR KEITH:

Absolutely agree with that Sir. But, well two things, one, as I was saying before the break and I will come to in the context of the *Bridges* case in particular, it is possible to have very clear rules. One of the findings in the joint report, just focussing on that particular area of police photography and so forth was that there were not governing principles, there weren't governing policies. So one can have those and in our submission you in fact need to, to comply with privacy rights. So you have nice clear rules.

The other point I just make briefly, and that's probably a good point to turn to the information privacy principles, I don't accept, we don't accept the proposition

that was being put for the Crown that these are fuzzy or uncertain. The requirement, for example, to take reasonable steps to ensure that someone is aware that you are collecting their information, that they understand the basis, including whether it's compulsory of that information collection, it's very clear there are exceptions and they are again clear and prescriptive. They're flexible and accommodating but these aren't nebulous. The detail of IPP3 is significant, it is clear.

So I agree with your Honour's proposition that police on the side of a road should have clarity and you'll see, if your Honour looks at IPP3, there are a number of enumerated exceptions where it's just not practicable to provide information, where it is prejudicial and I'll come to what I say that means but these are clear and practically applicable things and everyone complies with them. This Act applies to any agency holding information, public or private, and they are straightforward rules.

Oh and sorry Sir, the other side of that, in terms of the constabulary powers, information privacy principle 9 does govern retention, so again the constable who takes the photo of the impending disorder on the road, of the crash scene of the whatever, may well be entitled to do that but what IPP9 does is two things, one it requires police or whoever to turn their minds to when they no longer need that information, the other, which is more indirect but it goes to a concern that the Court has emphasised and that we would emphasise is that's actually the protection against the collection of a general database.

1420

Just briefly on discussion of – oh it's actually a good time to talk about information privacy principle 3, so this requirement that you take steps, that you make someone aware of the collection, including knowing whether or not it's compulsory, that the submission from the Crown this morning I think was that well you shouldn't have to do that for Mr Tamiefuna because he wouldn't have co-operated if he had known he was the subject of a criminal investigation. The whole point of IPP3 is that people are making informed decisions, in particular there is no reason why Mr Tamiefuna could not be told: "You are not obliged to

stand here and be photographed", or: "I am taking your photo but you are not obliged to permit it, I don't have a lawful power to do it." That doesn't prejudice anything in terms of tipping him off, the only thing that wouldn't allow him to do would be to say: "Oh I actually know I'm not allowed to be photographed", so one can't read IPP3 and the prejudice to law in that way, that one circumvents the fact that one doesn't have a compulsory power by not telling the subject concerned.

GLAZEBROOK J:

How does that relate to questioning and cautions given which have been held only to arrive on detention?

MR KEITH:

So there are, as I think people have touched on already, yes the judges are also or (**inaudible**) very clearly prescribed and very clearly applicable to people in custody. This is a more general and less onerous principle. It is simply that if anyone collects your personal information, they are obliged and this is the wording of the Privacy Act, it is not something we have made up, it is not something vague, unless one of the state exceptions applies, anyone collecting information must make that person aware their information is being collected, what it's for and what the basis of that collection is.

GLAZEBROOK J:

Well it does go against the questioning case is all I'm putting to you.

MR KEITH:

The questioning cases have sought to extrapolate from judges' rules to other contexts. I am saying that we have a different statutory code here, no less applicable.

WINKELMANN CJ:

Well what about the law enforcement exceptions?

MR KEITH:

So as I say, if it would prejudice, the paradigm example of information collection where notification would prejudice collection is covert surveillance. We don't say: “By the way do you mind if we film your house because we are filming your house for some covert reason?”

WINKELMANN CJ:

Or risk of destruction of evidence.

MR KEITH:

Or risk of destruction of evidence, very good example but simply to say: “I want to take your photo and I have no statutory power to do it”, that doesn’t prejudice anything, or “it’s voluntary” and that is what IPP3 says, it has a specific reference to a statutory basis. So one doesn’t have to go into the detail of “we suspect you of this offence and it would really be a good idea not to co-operate with us”, whatever, but there are those exceptions and they can't sort of cut a hole through the middle of the right to make an informed decision about those things.

Now again, and I'm sorry if this is at all fragmentary, I just sought to make a note of the points the Court had raised. There were questions about why photos are different, how are they different from a description or from a sketch or whatever? Several reasons, photos are specifically regulated as far as the Court has noted already, Policing Act for example creates a specific collection and retention regime and yes those are for photos under compulsion but if you look at sections 32 through 34, photos are singled out, there are restrictions on retention that apply to them that do not apply, for example, to particulars.
1425

We also see in part 7 of the Privacy Act that photos, facial images are separately regulated and so the simple answer is we have statutory recognition and also recognition for example in the, you know, in the European Union General Data Protection Regulation, that biometric information, including facial images, is different and if one wants an explanation for that, there are really

two, one, and we haven't given you this case law, but we can if need be, European Court of Human Rights has repeatedly held that one's face, one's image is at the core of one's biographical information. So there is a sort of philosophical reason.

WINKELMANN CJ:

Well can we have the references for that?

MR KEITH:

Von Hannover v Germany (2005) 40 EHRR 1 is the European Court of Human Rights, we can provide registry with a copy, so there's that. But the other point is one that the Court is already across I think which is facial images allow for not only facial recognition, one thing, but also allow for a degree of analysis to, well what's often termed physical, physiological and behavioural characteristics. A photo is different from a description, you get much more information out of it. In the present case you get information out of it that was critical but that the detective sergeant on the side of the road had no idea about the clothes that Mr Tamiefuna was choosing to wear on that night. So photos are different and I will come to the *Bridges* case in a moment.

The Court was asking about whether timing, so whether you knew beforehand the information was there or only after, I think it may have been Justice Williams in particular. The point about timing does remain critical in that the state should know – should have the justification for the intrusion it's making at the time of the intrusion not afterwards, otherwise one gets into a self-justifying exercise. We found the evidence and so it was justified.

On the question of whether there was a common law power to take, upload and notate or annotate the photo and retain it, the Court sought particularly yesterday, and a bit more this morning, to clarify the basis and extent of the common law power relied upon by the respondent and I know Justice Williams has asked about this already but three more detailed observations just to make. First, the respondent counsel yesterday I think pointed to and there's a reference in para 34 of the respondent's submissions, to incidental power,

search incident to arrest and to powers arising from necessary or other doctrines. So warrantless entry should protect life as a good paradigm example.

The couple of quick points I would make about that, in New Zealand most of those are now codified in the Search and Surveillance Act and one theme in our submissions and one theme I think the Court is already across, is police are not operating here compared to say 1960 when Lord Devlin was writing in some sort of broadly unregulated environment, police now have very substantially codified powers. That's not to say that common law powers don't remain but it's a lot denser environment in which to find those and determine whether they still exist.

And I've already talked before the break about the *Dow* case, an overflight consequential on a statutory scheme. Likewise the AIRE case, *R (Centre for Advice on Individual Rights in Europe) v Secretary of State for the Home Department* [2018] EWCA Civ 2837, [2019] 1 WLR 3002, the questioning of immigrants and detention, well one has powers to question incident to arrest. So one has these powers.

1430

Two further things, it's been noted, including with reference I think to *Lorigan* and the Law Commission report, that in 2007 the Law Commission did not think it was necessary to have the statutory power to photograph in public places. Whether that's still, given facial recognition, databases, the other advances, whether that still remains prudent, is an open question, but in any case it's not an answer to the question of whether the sequence of events, the stop, the photography, the notation, the retention in a database, is authorised. To find that is an incidental common law power, I think, is a stretch, and as a general proposition, the premise that police have an intelligence gathering function and then therefore what they are doing to gather intelligence is authorised, or that they have that duty, I'd note section 11(a) of the Policing Act, that the functions stated in the Policing Act do not confer either specific legal duties or specific powers, so that is a fairly clear indication against that, but also when you think

about things like search incident to arrest or warrantless entry, those have been derived on the basis that in each case one can make out the necessity for police to have that power without a statutory basis. It doesn't stand for a general proposition that police have such powers as are necessary to discharge their functions.

My learned friends for the appellant yesterday took your Honours to the then Chief Justice in *Hamed* in dissent about the need for a positive power and her Honour was not joined in that by the rest of the Court. The point I would make is simply that if one is intruding into privacy, if one is in the interstices of other statutory powers, if one is engaged in an activity like a database or something like that, there is a need for positive power or at least for some form of prescription or regulation.

Further, in terms of that intelligence point, what the Commissioner and the Police Conduct Authority had said in their report and what I think the Court was getting to yesterday, and certainly what the comparative case law bears out, if one is going to engage in photographing or questioning of a targeted individual as opposed to looking out to the street and out the window and just seeing something going on, there needs to be some articulable power and some articulable basis for doing that. It needs to be, I have already mentioned and I'll come to the cite, the individualised suspicion in a traffic stop, for example, to move from the traffic stop to something else. You can't just say, well, crime prevention, national security, whatever, yields a power or yields a justification, and the example –

ELLEN FRANCE J:

Well, sorry, just looking at those functions, there must be some powers that are ancillary to that otherwise you're just looking at a whole different regime, aren't you?

MR KEITH:

There's no question that there are not these various powers. A lot of them now are codified in one way or other but the Policing Act does not displace such

residual common law powers as exist, so I think there is now, for example, in the Search and Surveillance Act powers of plain view search, for example, or plain view seizure, or warrantless search in case of destruction of evidence. Those used to be common law.

ELLEN FRANCE J:

Yes, I'm just looking at some of those other functions, community support and reassurance. Well, that's not codified.

MR KEITH:

No.

ELLEN FRANCE J:

I mean you might say, well, that's not problematic in the sense we're talking about, but it must suggest there are some residual powers.

MR KEITH:

And absolutely there are some residual powers and in many contexts the powers of a natural person are going to be a fair source, so to take the example your Honour has just given of community assurance, there's nothing saying you can hold – in the Policing Act – saying you can hold press conferences to explain that yes, you are policing this or you are investigating this or whatever. Of course police can do that just using powers of a natural person, but there is no intrusion into rights, or unless you inadvertently disclosed information you shouldn't or something, there's no intrusion into rights in carrying those things out.

ELLEN FRANCE J:

Well, there may be. It's just –

MR KEITH:

It's less likely than a search.

ELLEN FRANCE J:

It's harder to think of the examples but…

1435

MR KEITH:

Yes, but I don't disagree that one – but I would say about, particularly in light of section 11(a), those functions are consequential on extant powers, the Act does not itself confer broad based powers to do anything that those functions require and I think that was close to the submission that was being made, at least, that one can look at the function and derive the power, especially around intelligence gathering.

ELLEN FRANCE J:

Well it was put I think more on it's ancillary to or of that nature but I understand the submission.

MR KEITH:

I was just coming to, and I'll give your Honours the reference and no need to go to it, the joint report at page 66, paragraph 336, it's in the appellant's bundle at 1082, this was the example of the police officer photographing a known vehicle thief in a parking building late at night and that was suggested to be unexceptional, or suggested to ground a wider police intelligence function but when one thinks about that example and it actually goes to I think Justice France's point just made, that is unremarkable and also to Justice Williams actually, seeing someone who is known to engage in a particular kind of offending in the place in which they can do that kind of offending, under the circumstances in which that offending is possible, making an observation of them, taking a photo, there is that articulable cause, there is no intrusion into privacy in those circumstances, there is no statutory stop or anything like that or anything like that being carried out and as the joint report went on to say at paragraph – or had said earlier rather, paragraphs 335 to 336, police had described what they were doing, photographing various people as a standard for monitoring individuals but it creates a risk of an overly broad exercise of discretion, unfairness, intrusiveness, targeting of particular groups

and risk of bias and so that was where the joint report of the Conduct Authority and the Commissioner landed, that one can't just, in the language of the Court of Appeal, one can't just casually take a photo of someone because it may be useful for an enquiry that hasn't yet begun.

And just to come back to the traffic stop cases, the particular reference I was going to give your Honours is *Rodriguez v United States* 575 US 348 (2015), that's the most recent decision of the United States Supreme Court, at page 357. It's in the intervener authorities at 486 and that was saying where you have done a traffic stop, you can't then in the instant case, bring in a drug dog to sniff the vehicle as well, unless there's individually supported individualised suspicion, so there needs to be an intervening act, there needs to be cause to take that further step, suspicion of an offence. So that is the standard and in the United States that's the step. It's not intelligence, it is investigation.

In terms of the relevance of the information privacy principles, I'll just touch briefly on what was said about *Alsford.* I think the Court got the point which I would have otherwise made, that *Alsford* is not so categorical as to say that the two are irrelevant to one another or that they are two silos. The language of *Alsford* is very much more – it is unlikely to do anything or you wouldn't undertake similar analysis under section 21.

1440

A couple of points, and I made this in the written submissions in paragraphs 6 through 9, in particular at 9.1 of the written submissions, it is important to read *Alsford* in its quite particular and limited context. Just to expand on what I've said at 9.1 and as the Court will know, so this was about a power company disclosing power consumption information in response to a series of police requests. The particular breach of the IPPs was not found as against police, it was found that the power company did not have sufficient information in respect of I think one of the requests, to disclose the information. The police had not said: "We are carrying out an investigation into drug growing." They could have done, should have done, they just said: "We want it for police purposes", and

that was the breach. The police could have easily provided that justification, so one has a very narrow, very technical breach of the IPPs. Important in explaining some of the Court's language about – from the minor to the major, it is at the minor end.

Here we have a quite different context of essentially whether or not, as held by the Court of Appeal, it was contested by the Crown here, the IPPs apply to the interaction between Mr Tamiefuna and the police officer and if so, what follows and the Court of Appeal did, at some length, refer to the IPPs and they concluded, for a number of reasons, a lack of statutory power, the unreasonableness of the search and the IPPs, that the photography was both unreasonable and unlawful for the purposes of section 30.

So as I say at 9, the Court below and the Court in *Alsford* were directed to different questions but, and this is at paragraph 10, and just to expand on that, the Court in *Alsford* did express doubt that the principles were unlikely to be significant or in terms that the principles were unlikely to be significant in many cases. I do say that the decision of the Court below illustrates how the principles do in fact assist in analysing an interaction between a state agency and an individual. So whether one wants to say well *Alsford* should be revisited in that respect or whether simply different cases provide a different perspective, both are possible.

I'd also say, as someone who works with information law in various capacities, seven years or so may not seem like particularly much but it has been a very large reach in terms of changes in the degree to which we are exposed to and aware of information gathering techniques. I doubt anyone particularly was thinking hard about facial recognition technology or about databases as much as we now do.

The couple of other changes since that time, I'll come to the enforcement mechanisms under the Privacy Act which have changed with the new Act but one thing one can also get from the joint report is the New Zealand Police, possibly to their credit, this exploitation of technology is relatively new for them,

it's not – this kind of photography and so forth and the database are relatively recent innovations in policing, certainly the sort ongoing intelligence photography described in the joint report was a relatively new initiative.

The other point, and I think on this we are saying that you should revisit *Alsford*, there is what I've called the non-enforceability provision in the Privacy Act. So it was in section 11(2), it's now section 31(1) and its terms are essentially that the information privacy principles do not confer upon individuals any enforceable right before the courts.

I don't think, and I've set out at pages 8 and following of the submissions, why that should not continue to be the law. I've set out the standard from *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 about revisiting earlier decisions. The main thing that I would say, and your Honours have my submissions already, but at page 11, paragraph 17 and onwards, the non-enforceability provision does, as was said in, I think, *Alsford* or *Hamed*, I need to check, does contain its own enforcement mechanisms, but –

1445

WINKELMANN CJ:

I think that's *Alsford*.

MR KEITH:

Alsford. Oh, is it in *Hamed* that Justice Blanchard says data protection issues might be dealt with under other legislation, but anyway…

WINKELMANN CJ:

I think so.

ELLEN FRANCE J:

I think so.

MR KEITH:

Also, right. In any case, why I say that point does require revisiting is, first, most widely, the IPPs, the Privacy Act, are the means by which New Zealand gives effect to its Article 17 obligations. The fact that procedurally one has to go, if one wishes to claim solely under the Privacy Act, one has to go through the complaint procedure in that Act and through the Human Rights Review Tribunal or the Commissioner may issue a compliance notice, does not mean that those are not binding legal standards. Certainly, it does not mean that the state is not obliged to comply with them. There's nothing in the Act to say these are optional.

WINKELMANN CJ:

I suppose our international obligations would start to bear upon this too, wouldn't they, because we have to, in terms of the EU, we need to be compliant with a GDR.

MR KEITH:

PR, yes. So there are two points, so there is the Article 17 privacy obligation and, as was said in the excerpt you've been taken to from *Hosking*, these various statutory regimes are all facets of how New Zealand gives effect to that Article 17 right. To say that the Privacy Act is not legally effectual here by virtue of now section 31 I think overstates the position. What it says instead is there is a mechanism under that or a scheme under that Act for giving effect to those obligations. I don't think that precludes it then also bearing on section 30 and that's the point that we are looking to make in contrast to *Alsford*.

The two other points, and this is at page 12 of the written submissions, just in terms of what's been said about *Alsford*, and first up and I think, as I said in opening, section 21 is, of course, only one species of intrusion into privacy and only one species of illegality. One can have highly intrusive gathering, collation, use of personal information contrary to IPP9 that is not a search or that it is difficult to characterise as a search, I should say. So that is our law on large-scale data collection, except for some specifically regulated databases. That's what we have.

There's also a practical issue –

WINKELMANN CJ:

What does that mean for the police intelligence database which we might have a fair estimation, but I might be completely wrong, is not compliant with the requirements of the Privacy Act?

MR KEITH:

We only have the facts we have, Ma'am, and the joint report, which was a very large concentration of resources both for the Commissioner and for the Conduct Authority, did only look at the things that it looked at, so I don't think I can say whether or not the national intelligence database, the NIA, is compliant. What the joint report did find was that the collection, use and especially ongoing retention and review for deletion necessity was not being met in relation to the particular photos that the joint report was concerned with, and the –

WINKELMANN CJ:

So that suggests that their – that suggests a view that – well, it's not just, it's expressing a view that the database is subject to the privacy principles?

MR KEITH:

Well, it's very clearly subject to the – well, these parts of it, and that is a matter of law now. As members of the Court have mentioned, the Privacy Commissioner has, and it's at the back of the joint report, issued what's called a compliance notice, so that's a requirement to take various steps, in relation to the subject matter of that investigation. So it's essentially stopping the casual photography, finding and deleting the photos that are not compliant with the IPPs and training and so forth –

KÓS J:

How does that apply here?

1450

MR KEITH:

So its application here is not one-on-one. What happened to Mr Tamiefuna was not the subject of the investigation by the Conduct Authority. What it does say is in terms – my point about section 11, now section 31, is there is now under the 2020 Act, it was not in the '93 Act, a power by which the Commissioner can say: "I am directing that you the holder of these records do such and such." There is then an enforcement mechanism but there is that formal power to compel and police are complying with that in the context of that particular compliance notice.

WILLIAMS J:

I took your argument to be if the casual taking and retention of photos is problematic in the view of the Privacy Commissioner, then this is altogether worse because it is following on from a stop and a compulsory extraction from a vehicle, et cetera, et cetera – that that context makes the information more sensitive to privacy requirements, is that the point you were making?

MR KEITH:

In short answer, yes, slightly longer answer, when one looks at the information privacy principles and this is what the Court of Appeal did in finding a succession of principles had been breached, that collection in that context was held to breach a succession of principles to do with not informing Mr Tamiefuna, to do with retention, past the point of the purpose for which it had been collected. So that's in terms of principles 3 and 9 under the Act and that's what the Court of Appeal found. So when I was saying before that the information privacy principles are this quite detailed code and set of steps that an agency must go through, this is quite a good example. The Court of Appeal was able to pick up these different information privacy principles and say this step by police did not comply, this step – so they're making aware to Mr Tamiefuna that there wasn't a statutory basis for the photography and so forth, it did not comply. The retention did not comply in terms of principle 9 because its purpose was no longer being served. So yes to sensitivity but it's also much more hands on, much more practical and nuts and bolts than that.

WINKELMANN CJ:

So the principle that might be permitted in circumstances where offending is suspected, there's no authority for that, is there, or is it simply just a matter of logic?

MR KEITH:

There are specific exceptions built into, for example, information privacy principle 3, that you aren't obliged under a listed set of circumstances to comply. Similarly, well the database one doesn't need it because that's framed in terms of retention for the purpose, so there is a – but one point that we make in the writtens is in terms of IPP3 for example. There are exceptions to cover exactly that. Those don't displace these principles so far as police are concerned, what they require police to do, to come back to Justice Williams' point about clarity, they require police to establish that "okay I can't tell or what can I tell this person in these circumstances without prejudicing enforcement of the law" for example.

Oh, and the other thing I was going to say about the compliance notice mechanism is it was suggested, you know, what else has changed since *Alsford*, well since 2020, the Commissioner has had that mandatory power, it did not exist. So, so far as the Court in *Alsford* were proceeding on the basis that section 11 of the then Act and the non-enforceability meant that this wasn't part of the analysis or wasn't a major part of the analysis I think it's better put – I think that is now wrong or now not accurate in light of the statutory change at least.

WINKELMANN CJ:

This is the statutory changes giving them the power to issue compliance notices?

1455

MR KEITH:

Yes. I do say there are other changes warranting revisiting *Alsford* but that is a nice blunt one, that now, just to give the practical point, it wouldn't work I think, it would be a disaster for case management reasons. Someone in

Mr Tamiefuna's case could, if they were enthusiastic and if resources were no question, say well I wish to make a Privacy Act complaint that the operation of the database in which my information was uploaded and from which it was then disseminated and used, is inconsistent with the information privacy principles and that could work its way through the overloaded Human Rights Review Tribunal and so forth.

You could get there with a mandatory order that police delete this information but one important point I did want to make and I think the Court has already mentioned this, section 30 of the Evidence Act is where these issues are regularly brought to the fore, dealt with very robustly by defence counsel, by prosecutors, by the judiciary, for practical purposes, so far as law enforcement information is concerned, section 30 is the ready remedy. To say one should go off into the Privacy Act regime in such cases is not necessary and not workable.

WINKELMANN CJ:

Especially in these days of – any remedies in the criminal context would be uncertain in the light of *Alsford,* wouldn't it, I think?

MR KEITH:

Yes, you'd still have a further enquiry as to whether or not the breach of privacy itself –

WINKELMANN CJ:

Had implications for the admissibility of evidence.

MR KEITH:

Or what those implications were. I think Mr Marshall accepted this morning that an adverse finding under the Privacy Act would be relevant to a section 21 analysis, I think, provided it was serious enough. I'm not sure whether that's the whole position but I think it was said this morning that it could be, that an adverse finding would be material.

And one last thing about *Alsford* and it's again coming back to the – and the information privacy principles, this interaction in Mr Tamiefuna's case is very much – and it's conceptually difficult to conceive of it as a search, it is on the other hand very clearly an exercise in state information gathering. To subject it to the IPPs, as I've said, is no extraordinary requirement, those requirements apply to everyone, to every state agency and every private agency. To give an effect to that, for the reasons we just touched on through section 30, is just to make sense, it's also the letter of the law.

Now just a couple of specific points, Justice Williams was asking about empirical data on exclusion of evidence, that the research that I was able to do at our page 18, paragraph 32 and footnote 51, I've cited what I thought was the best of the Canadian empirical studies and this is Jochelson and Weir. It is an extraordinary piece of scholarship, it is very thorough and two things it does, one, it gives some percentage rates, which do, with all the caveats that the Court has already stressed, does suggest exclusion of evidence is somewhat higher in Canada than it is here, compared to the Law Commission data.

WINKELMANN CJ:

So where is that cited in – what paragraph?

MR KEITH:

That's cited in footnote 51 on page 18. So there are two things there, one is just some raw numbers about exclusion rates and it does suggest that compared to the Law Commission study and I've heard the comment that's been made about that, but it does suggest the Canadian exclusion rate is, at first instance, higher. The appeal rate is roughly comparable to that, that my learned friend's impressive piece of statistical analysis has yielded.

WILLIAMS J:

So does that not – does that suggest that there's something in the Crown's argument that focusing on the appeal decisions isn't really helping us get a clear picture of what's going on?

1500

MR KEITH:

I think I would say the Law Commission data and the comparative Canadian data are stronger because they haven't only looked at appeals but I do think, when one takes the aggregate figures, and particularly the sort of observations made in the Law Commission study paper, I think the Chief Justice called it stark, there does seem to be something of mismatch.

The more useful thing, or that is not unuseful, but the further thing that the Canadian study does and this is I think in terms of what your Honour Justice Williams was suggesting yesterday, my learned friends had undertaken some analysis of where different parts of the section 30 test had been mentioned, had some time spent on them, and I do take the point the Court made, I think, that there will be occasions on which it just doesn't enter into the picture but the Canadian study, and I've given the reference, does suggest that particularly that system concern about bringing the administration of justice into disrepute gets more air time, if you like, in the Canadian decisions. Whether one can say well that yields a more robust exclusion rate, I don't know, but there is some indication between the Law Commission and this that things are not entirely well.

The other point I was going to make about section 30, and this is really that passage in our submissions, as I think the Court had already noted in discussion with my learned friends, the Commissioner's submission in terms of section 30 is that consistent with our broader theme of the right to privacy, is a breach of a right we all know requires an effective remedy, in particular it requires non-repetition and I've given the references, Roach and then Goswami, particularly on page 19, footnote 53.

I think there is a lot to be said too for a premise that having courts go through the reasoning process under section 30 explicitly, isn't just a tick box exercise, I think there is some utility in that, but what we are suggesting or what the non-repetition and remedial approach suggests and this is picking up at paragraph 32 of the submission, is a focus on non-repetition as well. So one looks at what to do about this evidence but the price of that, this is

Professor Roach, the very prominent scholar's suggestion, the price of getting the evidence in may be that the Crown persuades the Court that this will not recur. It can show that we have put in place measures to ensure that the breach is just now and won't be back next week but also in terms of some of the comments members of the Court made yesterday, obviously a remedial approach is consistent with the right to privacy. There is a value, in my submission, in placing the onus on the state to respond to the impropriety, not simply to say well it happened but we'd like the evidence.

ELLEN FRANCE J:

There are cases where the Court has imposed those sorts of requirements.

MR KEITH:

Yes.

ELLEN FRANCE J:

I mean it may not be quite as express in the way you're putting it but – and passing judgments on to whoever is the decision maker for example is part of that.

MR KEITH:

Well if one thinks of the Mr Big cases and things like that, yes. So it's not unprecedented. What I think Roach and Goswami and Weir are advocating for is that – if one has for example an instance like this, if it is found that what the police officer did on the side of the road, without knowing that it was non-compliant either with common law powers or with the information privacy principles, well the Crown can say this is how we will fix that, this is how we can ensure non – or at least encourage non-repetition. "Ensure" might be putting it a bit high.

And a couple of other reasons why a remedial approach is useful, it avoids the moral hazard, I think was the Chief Justice's term, it avoids the sort of case by case assessment and the pressure of the moment and I think it does alter the calculus about non-conviction because it is sheeting home to the state the error,

that's why someone has not been convicted, not the Court but the executive has erred.

1505

And coming back to a theme throughout our submissions as well, it promotes clarity. We aren't left with nebulous powers or police officers having to make it up as they go along or being left with broad doubts. The remedy in most of these cases will be to clarify what the powers are and what the process should be and that too is a good thing.

WINKELMANN CJ:

Can I ask you Mr Keith how much longer you think you will be?

MR KEITH:

I think I've got two points left and they will take me about –

WINKELMANN CJ:

Because I think it might be appropriate to ask Mr Marshall if he has anything to say. But not right now, I mean after you've finished.

MR KEITH:

A couple of last points and these are just particular matters. Obviously I'm very happy to answer any questions. The *Bridges* decision to which my learned friends for the Crown took your Honours yesterday, is to my mind a very useful illustration, partly because it's got a summary of the UK statutory and regulatory position annexed to the back. This is *Bridges*, Court of Appeal, the relevant passages I'll give the reference to in a moment.

First up, the Court of Appeal is saying that facial recognition technology processed photos in a public place were somewhere between ordinary photography and DNA samples. That's at 85 and following.

WINKELMANN CJ:

Whose authorities are these in?

MR KEITH:

This is sorry respondent bundle and it's at page – well the excerpt I just gave your Honours is at page 574 and paragraphs 85 and following and this is *Bridges*, the case about running CCTV footage at large events through a facial recognition system to look for known –

KÓS J:

The football case.

MR KEITH:

Yes, well football and other major events.

WILLIAMS J:

You said 85, did you mean 95?

MR KEITH:

I meant paragraph 85 first up, in technology, somewhere close to *Marper v United Kingdom* [2008] ECHR 1581 (GC), (2009) 48 EHRR 50.

WILLIAMS J:

Is that 574?

MR KEITH:

This is at 574.

WILLIAMS J:

Page 574 of the case, of the authorities.

MR KEITH:

Of the respondent's bundle. I will just bring up my own copy and I will –

WILLIAMS J:

It starts at paragraph 94 on mine.

MR KEITH:

Oh sorry, that should be Sir, 85 is on page 73 of the bundle, page 5060 of the weekly law reports. Then over the page, the Court of Appeal setting aside a decision of the court below because the discretionary powers were insufficiently prescriptive. So when the South Wales Police I think had set up this scheme for information gathering and analysis but they did not have governing policies so that was unlawful under Article 8 of the European Convention on Human Rights.

ELLEN FRANCE J:

So sorry what paragraph is that?

MR KEITH:

That was at 94. And as an example, at paragraph 130, there was no requirement that the location under surveillance be one sought on reasonable grounds that people on the watchlist must be present. So this is coming back to my point that as the Court of Appeal said below, the casual is not permissible, one has to have an articulable reason connected to particular individuals and particular offending.

1510

Two other things in that judgment, first up, 153 of the judgment, this is at bundle 584, the police had actually done a data protection impact assessment but that was found inadequate in the particular circumstances and one thing that did come up yesterday and it's not in the evidence, well there was actually, sorry there was questioning about it, at page 586 of the bundle, pages 5073 of the reported case, paragraphs 178 and following, the other ground in which the data collection and analysis was found unlawful was that there was quite careful assessment, the Court undertook quite a careful assessment of the risk of racial or other bias, noting disparate impact of surveillance on particular groups, just in terms of things that were talked about yesterday, at 182, the concern is not just about conscious bias, I think there's reference to the detective sergeant in Mr Tamiefuna saying he wasn't biased but also about inadvertent bias and at page 592 of the bundle, still in the *Bridges* judgment, that the police had just

not tried to satisfy themselves that the programme they were running didn't have an unacceptable bias.

WINKELMANN CJ:

What was that last paragraph, sorry?

MR KEITH:

It's page 592.

WINKELMANN CJ:

Just the paragraph number is fine.

MR KEITH:

I will just find that, 199, yes. And the same thing about the *Catt*, European Court of Human Rights decision to which you were taken yesterday, a couple of things there. I think a member of the Court may have read this already, paragraph 118, respondent bundle, page 697. The photography of Mr Catt and his entry into a database was found proper, in part because he had after all decided to repeatedly and publicly align himself with the activities of a violent protest group and then at 119 though, and this was the retention point, this off the *Catt* decision, at paragraph 119, the European holding there was not a pressing need to retain the data and they go on to say there weren't proper rules for a maximum and so forth and I think her Honour Justice France had already taken up the point that they noted but didn't rely on the question of whether the powers were insufficiently clear and talked about ambiguity and so forth.

Oh, I should just say that the comment that the European Court is sceptical about common law, I think they're sceptical about everything. They have had to hold that customary law and judicial decisions are properly a source of law too but common law is particularly prone to, as was put here, ambiguity, especially when dealing with unenumerated powers.

One sentence about the Whanganui computer centre, as Justice France has already noted, yes it was superseded by the 1993 Privacy Act and it provided for, among other things, deletion of the particulars – holding and then deletion of particulars of people who had been charged with offences and their photos upon acquittal. It didn't deal with holding of other people but it did only authorise certain things to be put into the computer. One last reference from the joint –

KÓS J:

So did it authorise members of the public?

MR KEITH:

You had a right of access to your own information.

KÓS J:

Yes, but could you take a photograph – could you take Mr Tamiefuna's photograph and simply put it in there when he hadn't been charged?

MR KEITH:

No, because the categories are quite prescriptive. There's a schedule that sets out the kinds of information that could be entered into this computer in Whanganui and it's photos and particulars of people under charge I think.

WINKELMANN CJ:

You better be finishing up now, Mr Keith.

MR KEITH:

Yes, the last reference to the intelligence investigation, so the joint report, this is at the appellant's bundle, pages 1034, it's a useful discussion, we'd say, by the Conduct Authority and the Commissioner about intelligence information gathering, investigation information gathering and also traffic stops. So that's pages 17 through 21 of that joint report.

1515

And I think – this question of scope of section 21 that Mr Marshall and the Court discussed this morning, this is my last point unless the Court has any questions, as I say, I think it is easier to categorise state information gathering that is not plainly a search as falling under the Privacy Act and then engaging section 30. That does involve revisiting that aspect of *Alsford* to some degree, at least the bit about non-enforceability.

So there is a straightforward statutory mechanism, but I do say in terms of what was being discussed this morning that the technological era case law, especially *Carpenter* which was cited in the submissions from the United States and *Spencer v R* 2014 SCC 43, [2014] 2 SCR 212 which the Court cited in *Alsford*, very much an emphasis on what matters for determining whether something is a search is where it leads. So in *Carpenter* saying that GPS data held by a third party was in effect a search because it allowed you to get the same result as a search and so fell, the United States Supreme Court said, under the fourth amendment.

WINKELMANN CJ:

Sorry, what case was that?

MR KEITH:

That was *Carpenter*.

KÓS J:

You've taken us to that before.

MR KEITH:

I've mentioned that already, yes, and that was following on – so the United States Supreme Court first in *Jones* and then in *Carpenter* essentially saying reasonable expectation of privacy is not the only touchstone here. You have to look to other things too. But as I say, I think the more straightforward point is to say that the principles give you a practical legislated code and should be just complied with, and in terms of those I do – I won't go into the detail because there isn't time but when one looks at the terms of the relevant IPPs

that the Court of Appeal was applying they are capable of application. There's a suggestion that they were not sufficiently detailed or that they were too vague.

WINKELMANN CJ:

Yes, we've got that. We have to stop, I think, Mr Keith.

MR KEITH:

Ma'am, most grateful to the Court, thank you.

WINKELMANN CJ:

Mr Marshall, you have 10 minutes.

MR MARSHALL:

Very briefly on some of the cases my learned friend just cited. He referred to para 119 of *Catt* in the European Court, and as I heard him, it may have been that he misspoke, but he said that the Court found there was no pressing need for the police to retain the information. It actually held the opposite. The sentence says: "The Court underlines that its conclusion does not call into question the fact there may have been a pressing need for the police to retain the applicant's personal data for a period of time after it was collected," and then they go on to say that the absence of rules setting a definitive maximum time gives rise to Article 8 problems, so retention was justified there for a period of time for Mr Catt.

In terms of *Bridges*, my learned friend took your Honours to discussion about the automated facial recognition software that was in place there. I simply draw the Court's attention to paragraph 85 where they explain that that discussion is predicated on the basis that this technology means what's happening is different to the taking of photographs or the use of CCTV. So it's that additional technology that resulted –

WINKELMANN CJ:

I think that Mr Keith did take us to that but it's good to have that aspect pointed out.

MR MARSHALL:

So the implication is simply that the taking of photographs and the using of CCTV would be not – would be unproblematic, but it's the facial recognition dimension that caused issues in *Bridges*.

GLAZEBROOK J:

So you're saying it's not the photo, it's the facial recognition, and there should be more regulation of photo recognition, sorry, facial recognition rather than regulation of the photos?

1520

MR MARSHALL:

Yes, yes and as I understand the European had very turgid data regulation provisions, but as I understand it biometric – photos only become biometric information when they're processed to extract biometric information. An image is not itself biometric information and the regulation is of that processing which then extracts biometric data.

WILLIAMS J:

You might have to explain that to an old fellow like me.

MR MARSHALL:

I think the point is you need to do something more with the image in order for it to become biometric data.

WINKELMANN CJ:

They need to measure bits between different parts of your face.

MR MARSHALL:

Yes, yes.

WILLIAMS J:

Or you have to run software over it.

MR MARSHALL:

Yes.

WILLIAMS J:

And that is the facial recognition system.

MR MARSHALL:

Yes, so my point simply is that photographs are not classified, as I understand the position, as biometric data, no.

WILLIAMS J:

No.

KÓS J:

Yes, but you haven't given us any assurance that you don't use facial recognition software or won't use it in the NIA. I would be surprised if you will give such an assurance, it sounds like a very good idea.

MR MARSHALL:

It may well be and I don't know, I can't say.

GLAZEBROOK J:

I think it's certainly a regulation being looked at in terms of the use of facial recognition. As I understand it, it's a live project.

MR MARSHALL:

Well there's been publicity about a national supermarket chain running it routinely. It's an issue that requires attention certainly but not in this case is my point.

WINKELMANN CJ:

Well the Privacy Commissioner has signalled an interest in that, hasn't he?

MR MARSHALL:

Yes, absolutely, quite properly. On the transport context that Mr Keith identified, just very quickly as I understood –

WINKELMANN CJ:

Transport stop?

MR MARSHALL:

Yes, the transport stop context. As I understand it the submission is that there may be a heightened expectation of privacy because of that context. The Crown's position is the converse and that's for two principal reasons. The first is that where the police are acting lawfully, whether they're on a property lawfully, exercising a search power and they see something that they need to seize, it's never been the law that the police – that the privacy interests are heightened when the police are acting lawfully, on a property lawfully or carrying out lawful duties. So that is a general proposition but the more specific proposition is that the Courts have been clear over the years that driving in particular is an area of public life where privacy interests are reduced. I'm not saying there are no privacy interests in relation particularly to the interior of a motor vehicle, you need search powers to search the inside of a motor vehicle, but the statement of principle is in our bundle in the Canadian case of *Wise v R* [1992] 1 SCR 527. I'll just give the reference to the Court, pages 899 to 900 of our bundle and the point made there by the Supreme Court of Canada is that: "Reasonable surveillance and supervision of vehicles and their drivers are essential. Without them, motor vehicles inevitably become instruments of crippling injury, death and destruction. Society then requires and expects protection from drunken drivers, speeding drivers and dangerous drivers", one might say forbidden drivers as well. "A reasonable level of surveillance of each and every motor vehicle is readily accepted, indeed demanded, by society to obtain this protection."

WINKELMANN CJ:

I think you're rather missing the point that Mr Keith is making though, which is that yes that's true but it's to use it as a pretextual – the capacity to use it as a

pretextual basis to harvest this kind of information, the courts can't be blind to that is all he's saying.

MR MARSHALL:

No, it would be improper, I accept, to use that as a pretextual. Land Transport powers need to be used for land transport purposes.

GLAZEBROOK J:

And there's no suggestion here that there was anything other than a proper purpose?

MR MARSHALL:

No. There's a positive finding in the High Court that it was –

WINKELMANN CJ:

But that's not the point, again it's the systemic point. It incentivises the point that the American authorities are making, that they are allowing this, and creates systemic incentives for pretextual stops which cannot be ascertained at hearing. So, you know, the Courts are not all seeing, so it's that systemic incentive point which is the point that the American Court is making.

MR MARSHALL:

Well the – in America you can't carry out random traffic stops, you need some basis. So they have quite a different system when it comes to traffic stops. We have the ability to carry entirely suspicionless traffic stops out. Whether that can be used for a pretextual basis –

WINKELMANN CJ:

Well you don't even need a pretext.

MR MARSHALL:

No.

WINKELMANN CJ:

It's open slather on actually profiling people racially and then stopping them and doing this.

MR MARSHALL:

Well that is a problem but it's not a new problem and it's one the Courts monitor and I mean it was traversed very briefly in evidence here and there's no evidence that he even saw the driver's ethnicity when they decided to carry out the stop but the potential for statutory powers to be used for collateral or pretextual purposes is not a new one and it's one that is within the ability of the Courts to regulate it, but the answer I would submit is not to limit the use of those powers or to prevent lawful other steps taking place in that context.

1525

In terms of reasonable expectations of privacy, I would adopt the point made by your Honour, Justice Kós, that it simply cannot be reasonable for a person to choose to travel with a forbidden driver to then suggest that the fact that the traffic stop was carried out and the car was impounded –

WINKELMANN CJ:

How do we know that he knew that he chose to travel with a forbidden driver? Is there evidence that he admitted that he knew the person had a suspended licence?

MR MARSHALL:

My point's not a subjective one, whether he knew or not. My point is that it's not reasonable for a passenger in a car of a forbidden driver to –

WINKELMANN CJ:

Objectively reasonable?

MR MARSHALL:

Objectively. Society wouldn't recognise it as reasonable for a person to claim a heightened expectation of privacy where they're in a car driven by a forbidden driver.

WINKELMANN CJ:

It's a standard level of privacy, isn't it? Because they're in the car, that's the point, so they're in the car and then a traffic stop compels them out of it.

KÓS J:

If you check with a driver and find that they are licensed and if you get an assurance from them they will obey the law then you have greater assurance you will not be stopped and therefore not deposited out on the street. That's simply how I reasoned it.

MR MARSHALL:

Yes, yes.

WINKELMANN CJ:

We'll have to remember to do that.

KÓS J:

I come from Wainuiomata, Chief Justice.

WINKELMANN CJ:

I don't think you do.

MR MARSHALL:

So that's the traffic context. In terms of my learned friend, the Privacy Commissioner's, submissions on residual freedom, I simply point the Court to para 187 of the joint report which recognises this expressly as a basis for police action.

GLAZEBROOK J:

Paragraph what, sorry?

MR MARSHALL:

187 of the joint report. There's no question in the joint report at least that the police, that police intelligence gathering requires positive statutory or other authorisation. It proceeds on the basis but there are constraints that apply and we agree with that.

In terms of retention in *Alsford*, just identify for the Court that *Alsford* was also a –

WINKELMANN CJ:

Just giving you a two-minute warning.

MR MARSHALL:

Two-minute warning. *Alsford* was also a retention case. So the second issue in *Alsford* was the retention of unlawfully obtained evidence by the police. If the Court recalls there was a search that was carried out unlawfully of Mr Alsford, evidence excluded, proceedings discontinued, so he was acquitted, but the police retained the information they had obtained unlawfully, and the second point before this Court was about really the retention of that information and this Court confirmed that it was proper for the police for intelligence purposes to keep that information and indeed use it to obtain a search warrant years later in relation to Mr Alsford.

On revisiting *Alsford*, the Privacy Commissioner says that the compliance notice provisions in the new Act suggest that that might be a reason for revisiting. Our submission is that the ability to enforce compliance with the Privacy Act existed under the 1993 Act but you had to go through the complaints process and get an order from the Human Rights Review Tribunal. The difference here is that now the Privacy Commissioner can initiate that process without a complaint but it's not a situation where compliance with the privacy principles can now become subject to a mandatory order whereas they couldn't previously. They could under that '93 Act. It's just done in a different way now, and if anything we would say that the fact that there are those compliance notice provisions or the previous power may well give this Court more confidence that

the retention of information is subject, Parliament has made it subject to robust regulation here.

WINKELMANN CJ:

Through the Privacy Act?

MR MARSHALL:

Yes, in the joint report and the compliance notice that was issued there that the police have, as I understand it, complied with. That related to retention and IPP9.

WINKELMANN CJ:

Okay, those are your submissions?

MR MARSHALL:

Very final point, just a reference. When the Court is thinking about NIA, the National Intelligence Application, just caution. We don't have any evidence about quite what that database is. I would just caution the Court about that. There is a description at footnote 45 of the joint report.

WINKELMANN CJ:

Isn't that a little bit strange because in some way your whole submission is based upon how important that database is?

1530

MR MARSHALL:

My real submission is that it goes beyond intelligence. So they record there it's – it's really the police information storage system, it records family violence reports, it records driver licensing information. Intelligence notings, that footnote recognises is a part of the system.

WINKELMANN CJ:

So what is your submission to us then?

MR MARSHALL:

My submission is that NIA performs many functions for the police. We're concerned here just with the intelligence noting function but it exists for many other purposes as well.

KÓS J:

If we go to the section 30 analysis on the implications of excluding the evidence and if that would have significant implications for the operation of NIA, we'd expect to see some evidence from the Crown on that and we just don't have it, apart from footnote 45.

MR MARSHALL:

Well I'm not sure whether this answers the point but the Crown certainly takes seriously any indication that what's happened has been unlawful. Whether it comes in under section 30 or not, I mean the concern normally for the Crown is that it may well have got in in that case but in future cases, if it recurs, you can't rely on the good faith accident issue. So in some ways that's why we're here, that's why the Crown said we want to argue about the lawfulness, even though it was let in under section 30, because the Crown does take very seriously and the Courts do as well, repeated instances of breach.

WINKELMANN CJ:

Well it's also because it's incredibly, you say it's extremely important to the intelligence gathering functions.

MR MARSHALL:

Yes, that's right.

WINKELMANN CJ:

So is it your footnote 45?

MR MARSHALL:

No in the joint report, sorry your Honour. It's brief but it's just to flag it.

GLAZEBROOK J:

Can you also, or you don't have to, but do you want comment on the independent unlawfulness under the Privacy Act, ie the submission that –

WINKELMANN CJ:

We'll be cutting into Ms Gray's –

GLAZEBROOK J:

I'm sorry.

WINKELMANN CJ:

We'll be cutting into Ms Gray's time because we do have to finish at 3.45.

GLAZEBROOK J:

Well –

WINKELMANN CJ:

Just briefly.

MR MARSHALL:

Well I suppose we say that was dealt with under *Alsford.* That's really my answer that the Court said the fact they're not legally enforceable in courts really pushes that to one side. It might be that it's unfairly obtained, they leave open that possibility and that really is our submission that it might fit in there if anywhere. Unless your Honours have any further questions.

WINKELMANN CJ:

No, thank you Mr Marshall. Ms Gray?

MS GRAY:

If I could just firstly refer to some important facts in this case and this is in respect of the stolen property, in his formal written statement Detective Sergeant Bunting does not mention any suspicion of stolen property but he does note the property down. Round 1 in the High Court before his Honour Justice Moore, when Detective Sergeant Bunting was cross-examined, he did

not mention that he had any suspicion of stolen property. His explanation for the taking of the photograph was: "The three people in the vehicle, having subsequently spoken to them, were all identified as criminals or people who have been previously convicted of a variety of criminal offences and so it was prudent from my perspective to complete an intelligence noting, as I said, linking them together to that vehicle and to that place and time and the taking of the photos is part of that." So that was before Justice Moore.

And then before Justice Davison, round two in the High Court, he does raise for the first time the issue of suspected stolen property and I put it to him: "You took the photo of Mr Tamiefuna because he was a criminal", and he said: "No it wasn't solely on that basis, it was a combination of all circumstances, being the people he was with, time et cetera and suspicions around the property." And then he makes further comment about his suspicions around the property, but then at one point I asked him: "And I think you've made it plain, but just to be clear, you didn't suspect Mr Tamiefuna of committing any particular offence, did you?" And he said: "No, no particular offence."

1535

Your Honours, as I think has been made clear, we do not accept in New Zealand there is a common law power to take a photo of an individual under the guise of intelligence. This is what the Crown is asserting is the state of affairs in New Zealand. We haven't been able to find an authority which supports that and the Crown haven't produced one either.

The appellant asks of this court that it not create a common law power to do so. New Zealand is a strongly rights-based society. New Zealanders expect and value being left alone and we say if this Court were to create that common law power, a slippery slope follows and this case actually is a good example of that slippery slope because turning to the grounds that the Crown have advanced, purporting to justify the taking of the photo, is one, Mr Tamiefuna has criminal convictions. The appellant says so what, he's entitled to rights of privacy, just as much as anybody else who doesn't have criminal convictions. Two, he's mixing with two people who have criminal convictions. Well we might think it

would be a good idea for Mr Tamiefuna to reassess who he is mixing with, but that's his decision to make, he chooses who he associates with. The time of night, there are thousands and thousands and thousands of people up at that time of night in Auckland and I don't think I need to comment on the stolen property aspect, having referred to the actual facts, I think your Honours will be aware where the appellant comes from in that regard.

Intelligence, we say, is observation, it's not collecting someone's biometric data which is unique to an individual, like DNA, like fingerprints, and then uploading it on a police database available to all police officers in New Zealand on the basis of intelligence gathering. We say a hard no is required with respect to this practice of the police taking photos of individuals, absent a statutory power and we recognise that there are advances in technology which his Honour Justice Williams has referred to but what we say to that is actually that makes it even more important that a common law right to take photos is not made. We need to be extra vigilant, given the rapid advance of technologies to surveil people.

And if I could just finish with a quote from his Honour Justice Thomas in the *Jefferies* case, his Honour said: "In a society which is increasingly complex and sophisticated and yet dedicated to freedom of thought and action and notions of inviolate personality, human dignity, tolerance, private relationships and shared intimacies, the right to privacy is imperative." And that was all I was intending to say I think. With your Honour's leave, I think Ms Priest would appreciate a brief time.

WINKELMANN CJ:

Yes, you have no more than five minutes Ms Priest.

MS PRIEST:

Thank you, may it please the Court. Four points that I wish to raise in response, firstly, in relation to the Privacy Commissioner's reference to the research in Canada, by Johnson and others on the exclusion of evidence, I simply wish to draw the Court's attention to pages 101 to 104 which is the summary of that

research. What that research tells us is that off the back of the decision of *Grant*, there is still a 62.4% rate of exclusion of evidence. In my submission, this is because of the Canadian focus on broader public policy considerations despite them still having that very similar balancing exercise to that which we have in New Zealand.

1540

The second point I wish to highlight from the Privacy Commissioner materials is the article by Giannoulopoulos and there's a chapter in there called "Reinvigorating the Rights Thesis" which sets out the three different rationales which may underpin law making.

KÓS J:

Can you give us the reference to that?

MS PRIEST:

It's…

WINKELMANN CJ:

It's in the intervener's bundle.

MS PRIEST:

Intervener's bundle, page 748 is the reference I have, and there's three competing or different rationales which underpin the law: the search for truth, rights thesis and judicial integrity. The submission that I make is that while New Zealand's section 30 statute is set up to achieve a judicial integrity thesis like Canada, it is my submission that it is failing to achieve that and has ultimately been drawing on the search for the truth as the fundamental or overwhelming consideration in practice and that's evident in the outcomes which we see.

The third point I wish to make is simply to endorse the submission made by the Privacy Commissioner that the price for admission of evidence may well be a

requirement on the prosecution to ensure non-repetition, and that is endorsed as a submission by the appellants.

The final point in conclusion is in relation to the research which has been undertaken on behalf of the appellants. I accept the criticism in terms of that 80/20 statistic in terms of the analysis but do draw the Court's attention to schedule A where a qualitative analysis of each particular factor which underpinned the admission of evidence is set out and in my submission that analysis is robust. The criticism by the Crown of a single case in my submission does not assist. It is about the overall picture of what is being section 30'd in by the Courts and why. When we –

WINKELMANN CJ:
No one has given us the citation for that case, *Finau*.

MS PRIEST:
It's the first line in appendix A of the appellant's bundle if that assists the Court.

WINKELMANN CJ:
Yes.

MS PRIEST:
It's the first entry.

GLAZEBROOK J:
I also missed, because my computer is playing up slightly and – what's the article that you were referring to, in the intervener's bundle, which one was that?

MS PRIEST:
The first article about the Canadian statistics?

GLAZEBROOK J:
No, the second one, I think.

MS PRIEST:

The second was the chapter from the Giannoulopoulos book and the reference, the page number I've got is 748 and that's actually a citation in there that the earlier research was that Canadian law –

WINKELMANN CJ:

It's at tab 21 of the intervener's bundle of authorities.

MS PRIEST:

I apologise, I don't have my materials with me but I'll get Ms Shao to check that for me. Also just noting in that there's a reference to a 70% rate of exclusion of evidence in Canada in the footnote on page 748 of that particular article. Sorry, I apologise, it's 21 of the intervener's bundle.

WINKELMANN CJ:

Anyway, you're running out of time.

MS PRIEST:

Yes, just back to that final point. Just when we undertook that analysis of the cases we didn't know what it would show and the three-step analysis or three-step test which has been proposed is founded on that correlation which we found between meaningful assessment of the effective and credible system of justice.

There is a clear, in my submission, and increasing dissatisfaction with the application of section 30 and the overwhelming focus in my submission on this search for truth thesis over a rights-based or a judicial integrity thesis. Fundamentally, we invite the Court to answer that call of the profession to recalibrate the section 30 test in favour of one which will result in more evidence being inadmissible where it has been improperly obtained.

May it please the Court.

WINKELMANN CJ:

Thank you. Thank you, counsel. We will reserve our decision and we thank all counsel for their very helpful submissions. We will now retire.

COURT ADJOURNS: 3.45 PM