

DFF

Digital Freedom Fund

The Digital Freedom Fund (DFF) supports partners in Europe to advance digital rights through strategic litigation. This is one of a series of case studies, which highlight the work of DFF's grantees working to protect digital rights.

Key actor

Liberty

Liberty is a UK-based campaigning group working to protect civil liberties and promote human rights. It carries out its work through a combination of test case litigation, lobbying, campaigning and the provision of free advice. As an independent membership organisation, Liberty relies on the support of over 11,000 members who believe that everyone in the UK should be treated fairly, with dignity and respect. Liberty's network of campaigners, lawyers and policy experts work together to protect rights and hold the powerful to account. Liberty also empowers others to defend their own rights and the rights of their family, friends and communities.

An area of crucial importance to Liberty is fighting mass surveillance. It believes that surveillance should be targeted and limited to specific circumstances where an individual is reasonably suspected of having committed a serious criminal offence or other wrongdoing.

Liberty has worked alongside The National Union for Journalists (NUJ), which is concerned about the dangers of mass surveillance for journalists in the UK. NUJ also intervened in the case as well as working with Liberty to submit a witness statement from an undercover journalist on the impact of mass surveillance on their profession. Other experts in the legal and technology sectors also submitted witness statements.

The legal team in this case consisted of: Megan Goulding, Liberty; Shamik Dutta, solicitor from Bhatt Murphy; Martin Chamberlain QC, Ben Jaffey QC, senior counsel; and David Heaton, junior counsel.

The Queen (on the Application of Liberty) v. Secretary of State for the Home Department and Secretary of State for Foreign and Commonwealth Affairs

Case facts at a glance

Court:

High Court of Justice, Queen's Bench Division, Divisional Court

Judgment date:

29 July 2019

Case outcome:

In July 2019, the Court found that the powers contained in the Investigatory Powers Act contain sufficient safeguards for journalistic and legal communications. When this decision was reached, the European Court of Human Rights (ECtHR) was considering a landmark case on mass surveillance that could throw new light on the shortcomings of the Investigatory Powers Act. Liberty awaits the decision of the ECtHR before appealing the Court's decision of July 2019

Background to the case

In 2016, the UK government formalised and expanded its powers of surveillance by passing the Investigatory Powers Act (IPA). The Act gives the UK state the most sweeping surveillance powers of any democracy. It provides for the collection and storage of anything at all that anyone shares online, even personal communications such as phone calls and emails, whether or not that person is accused of any wrongdoing. And, shockingly, it gives the authorities the power to hack into people's devices and computers to gather information.

Liberty filed its original challenge against the IPA in February 2017. It was partially successful in the judgment provided by the Court in April 2018, which found that the IPA was, in some respects, incompatible with EU law. As a result, the IPA was amended. But Liberty's subsequent attempt to challenge what is known as the "bulk powers" in the IPA (i.e. the overarching powers to hack, intercept communications, and gather vast quantities of data, potentially from the entirety of the UK population) was unsuccessful. Liberty will appeal that judgment once the European Court of Human Rights decides a separate, but related, case.

Despite the blow of losing the case on "bulk powers", an unexpected outcome of Liberty pursuing this case was that it unearthed evidence of extensive breaches of the IPA (and previous surveillance legislation), the UK's domestic counter-intelligence and security agency. MI5 had breached important safeguards around the deletion of data, and possibly also copying/accessing data and the protection of legally privileged data and failed to report these failures to the government and watchdog. Liberty, in partnership with Privacy International, has brought a separate claim against MI5 before the Investigatory Powers Tribunal.

“The Court recognised the seriousness of MI5's unlawful handling of our data, which only emerged as a result of this litigation. The security services have shown that they cannot be trusted to keep our data safe and respect our rights.

Megan Goulding, Liberty

Creating public awareness of the chilling effects of mass surveillance

Liberty has made important strides forwards with generating public awareness and debate about the UK government's grossly unjustified approach to mass surveillance. One strategy for increasing public engagement has been to consistently refer to the IPA as the 'Snoopers' Charter', a catchy title that speaks to the intrusive, unwarranted nature of the Act. This makes it more memorable and relatable and has been repeatedly picked up by media outlets reporting on the case.

A key strand of Liberty's communications strategy moving forward is to disrupt the pervading narrative put forward by the UK government that people must trade their privacy in exchange for securing their safety. Liberty highlights that people can have both. Its approach has been to launch a media campaign disseminating information on the case via social media, on its blog, posting court documents on the Liberty website and regularly issuing press releases. This concerted public information and media campaign is helping to elevate the importance of a basic expectation to the right to privacy and freedom of expression in the UK.

“ We try to give examples of the types of information that people deserve to keep private—just normal types of communications that anyone would want to keep to themselves—like their phone calls to their mum, or their emails. We try to explain that it's perfectly normal, and not sinister, to want to keep these things private. It's OK to want privacy.

Megan Goulding, Liberty

A surveillance law more suited to a dictatorship than a democracy

It is a shocking fact that the UK's surveillance laws are more akin to that of a dictatorship than a properly functioning democracy. Jim Killock, executive director of Open Rights Group, commented that the UK “has unprecedented powers to monitor and analyse UK citizens' communications regardless of whether we are suspected of any criminal activity.”

The expert witnesses in this case have helped to add greater detail and demonstrate the severity of the impact the IPA has on professionals, such as journalists and lawyers, and particularly on confidential communications between journalists and their sources and lawyers and their clients. Ian Cobain, an investigative journalist, emphasised how important it is to maintain the confidentiality of his sources, especially when publishing articles on public interest issues. If sources think their private communications to a journalist will be intercepted by the government, exposing them to possible retribution, then they will be dissuaded from coming forward in the future. This clamping down is likely to have a negative effect on people's willingness to expose government abuse or malpractice. This is also the case with the legal profession, where the IPA powers have a chilling effect on clients' ability to seek confidential advice, or engage in privileged communications.

Liberty is hopeful that ultimately this litigation will result in a declaration from a UK court, or the European Court of Human Rights, that the IPA is unlawful. But, even if it is successful, the next step will be to ensure that the IPA is replaced with a new law that respects rights and only targets people suspected of wrongdoing.

“ We've won cases at Liberty and then nothing changes. We know that we can't sit on our victories.

Megan Goulding, Liberty



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DFF's role



Financial assistance

DFF provided financial support for Liberty to take on this case.



DFF strategy meetings

Liberty participated at DFF strategy meetings. These have helped to guide its digital rights litigation strategy.



DFF workshops

Liberty staff has attended DFF workshops in Berlin and Montenegro and, more recently due to the Covid-19 pandemic, a virtual workshop online. These have provided valuable opportunities to share and learn with other organisations.

“ DFF's Berlin workshop in February 2019 was helpful, in particular the opportunity to meet with others working on tech and human rights, especially those bringing challenges against mass surveillance. It was great to share and receive information, tips and advice.

Megan Goulding, Liberty