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By email: Claudia.berg@ico.org.uk
11th June 2021

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Our ref: PC/CEASE

Your ref:

Office: Twickenham

Date: 11th June 2021

Dear Ms Berg,

Pre-action Protocol Letter in the proposed matter of: R (on the application of CEASE) v Information Commissioner

1. This a letter before claim under the Judicial Review Pre-Action Protocol. In accordance with that Protocol, a response is sought within 14 days of the date of this letter.
2. By this letter, our clients explain that the Information Commissioner ("the Commissioner") is unlawfully failing to fulfil her regulatory duties by her continued failure to take regulatory action, or even commence a regulatory investigation, into the processing of the personal data of children by pornographic websites. Such reasons as the Commissioner has given for her failure are legally and factually flawed. Her failure has left a lacuna in regulatory protection for children which could have been filled, exposing children to immense harm and distress through unnecessary exposure to pornography, including extreme pornography.
3. For the avoidance of doubt, it is no part of our client's claim against the Commissioner that she has, or ought to have, regulatory functions in relation to pornographic content, whether under the uncommenced provisions of Part 3 of the Digital Economy Act 2017 or otherwise. Rather, the complaint of our clients is that the Commissioner has expressly recognised an issue of real concern in relation to the processing of childrens' data by pornographic websites within the scope of her existing regulatory functions but has failed to take any steps to address that concern.

Proposed Defendant

4. The Information Commissioner

Proposed Claimant

5. Our client is CEASE (Centre to End All Sexual Exploitation).



6. CEASE is a national human rights charity with a mission to expose and dismantle the cultural and commercial forces driving sexual exploitation in the UK. Established in 2019, the charity seeks to advance understanding of the links between different forms of sexual exploitation - especially prostitution, sex trafficking, pornography and child sexual exploitation - and how it contravenes the human rights of men, women and children.

7. CEASE believes that the easy availability of hardcore porn and its widespread consumption has a proven damaging effect on the social, emotional and physical health of individuals - especially children - and society as a whole.

Legal Advisors

8. The proposed Claimants' legal advisor is Paul Conrathe of Sinclairslaw. 32 Candler Mews, Amyand Park Road, Twickenham, Borough of Richmond, TW1 3JF
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The decision under challenge

9. Our client considers that the ongoing failure of the Commissioner to investigate or take enforcement action against pornographic websites processing children's data, in breach of the UK GDPR and the Data Protection Act 2018, is unlawful.

The legal context

10. For the purposes of this letter, reference is made to the provisions of the retained version of Regulation 2016/679/EU, known as the "UK GDPR". Although the Commissioner's continuing unlawful failure to act pre-dates the commencement of the UK GDPR, there is no presently relevant material difference as between the provisions of the GDPR as applicable prior to 1 January 2021 and the UK GDPR subsequently. The UK GDPR is retained EU law.

11. Article 57(1)(a) of the UK GDPR provides that "the Commissioner must...monitor and enforce the application of this Regulation". Linked to this, Article 51(1) provides that the Commissioner "is responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing...". Article 57(1)(b) obliges the Commissioner to promote awareness and understanding in relation to processing of personal data, adding that "Activities addressed specifically to children shall receive specific attention". The Commissioner's performance of the duties set out in Articles 51(1) and 57(1)(a) is not dependent upon a specific complaint being made to the Commissioner by a data subject.

12. The Commissioner is afforded an extensive suite of regulatory powers in Article 58 UK GDPR to enable her to fulfil those duties.

13. In Case C-311/18, Data Protection Commissioner v Facebook Ireland Ltd (EU:C:2020:559) at §108 the CJEU held that "It follows from those provisions that the supervisory authorities' primary responsibility is to monitor the application of the GDPR and to ensure its enforcement." Authorities such as the Commissioner must, for example, handle complaints with "all due diligence": §109. At §112, the CJEU emphasised that the margin of appreciation to be afforded to the supervisory authority is limited:

“Although the supervisory authority must determine which action is appropriate and necessary and take into consideration all the circumstances of the transfer of personal data in question in that determination, the supervisory authority is nevertheless required to execute its responsibility for ensuring that the GDPR is fully enforced with all due diligence.”

14. In this respect, the requirements of EU law – all of which are relevantly retained under the European Union (Withdrawal) Act 2018 – reflect well-established common law principles that the rule of law requires that breaches of the law be investigated by the person or body with the applicable functions and that the law be enforced, and a refusal to enforce the law may be the subject of a mandatory order: see, e.g., *R v Commissioner of Police of the Metropolis, ex p Blackburn* [1968] 2 QB 118.

15. The UK GDPR contains specific recognition of the need for special protection for the personal data of children. Recital (38) provides that:

“Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child.”

16. See too: recitals (58), (65), (71), (75) and Articles 6(1)(f), 8, 12(1) and 40(2)(g).

17. We do not set out here the substantive provisions of the UK GDPR, with which you will be very familiar. We address the unlawful processing of the personal data of children by pornographic websites below.

18. The territorial scope of the UK GDPR is very wide. Article 3(2)(a) in particular provides that the UK GDPR applies to processing of personal data of data subjects in the United Kingdom by a controller (or a processor) who is not in the United Kingdom where “the processing activities are related to...the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the United Kingdom”. This provision plainly catches, as it was intended to catch (per recital (23)), a website which offers pornographic material – whether for payment or for free – to individuals in the United Kingdom, wherever the person responsible for the website is located. See too: section 207 DPA 2018.

19. Nothing in the DPA 2018 precludes the Commissioner from taking regulatory action against a controller which is located in another jurisdiction, provided that the processing is within the scope of the UK GDPR. Indeed, the Commissioner’s first Enforcement Notice issued under section 149 DPA 2018 was against a Canadian company, Aggregate IQ, on the basis of Article 3(2)(b) GDPR.

20. In accordance with section 160 DPA 2018, the Commissioner has published her ‘Regulatory Action Policy’ (“the RAP”). Objective 1 is given as being “To respond swiftly and effectively to breaches of legislation which fall within the ICO’s remit, focussing on (i) those involving highly sensitive information, (ii) those adversely affecting large groups of individuals, and/or (iii) those impacting vulnerable individuals”. It is then explained that “we will be selective when exercising this discretion, looking at the features and context of each case, as well as applying our resources more broadly to the areas of greatest risk and potential or actual harm to the community”. The RAP also commits the Commissioner to exercising her regulatory powers so as to meet her obligations under the Children Act 2004.

21. For the avoidance of doubt, our clients are aware of the terms of section 123 DPA 2018 and the Commissioner's (belated) publication of an 'Age-appropriate Design Code' under that section. Our clients take no issue with that Code in this proposed claim. But it does not address the present issue: section 123 is concerned with information society services which are likely to be accessed by children and although the Code itself emphasises that this does not mean it applies only to services specifically aimed at children, it also makes clear that the Code is not intended to apply to services such as pornography websites:

"If your service is the kind of service that you would not want children to use in any case, then your focus should be on how you prevent access (in which case this code does not apply), rather than on making it child-friendly. For example, if it is an adult only, restricted, or otherwise child-inappropriate service. This code should not lead to the perverse outcome of providers of restricted services having to make their services child-friendly."

The factual context

22. The harmful impacts of the ability of children to access pornographic material is well-recognised and indisputable. For example, the Women and Equalities Committee of Parliament issued a report in 2016 on 'Sexual Harassment and Sexual Violence in Schools', chapter 6 of which dealt in detail with the effect of access to pornography on sexualisation of children. The Committee explained at §192 that there "is extensive evidence that children's perceptions of sex, consent, gender roles and relationships are changing as a result of the pornography they are seeing" and concluded at §204 that:

"Widespread access to pornography appears to be having a negative impact on children and young people's perceptions of sex, relationships and consent. There is evidence of a correlation between children's regular viewing of pornography and harmful behaviours. The type of pornography many children are exposed to is often more extreme than adults realise."

23. In February 2020, the Government Equalities Office published 'The Relationship between Pornography Use and Harmful Sexual Behaviours' and concluded (p.6) that:

"Across all of the methodologies reviewed, there is substantial evidence of an association between the use of pornography and harmful sexual attitudes and behaviours towards women. The nature and strength of this relationship varies across the literature, and there are many potential moderating (potentially even mediating) variables that require further investigation. However, it is clear that a relationship does exist and this is especially true for the use of violent pornography."

24. More recently, the 'Everyone's Invited' campaign has brought to light deeply disturbing levels of sexual harassment and assault in schools.

25. According to research carried out by Ofcom and the Commissioner, published in 2019, nearly 50% of adults have concerns about children accessing pornography and sexual content online: 'Internet users' concerns about and experience of potential online harms'. The Government's Impact Assessment for the Online Pornography (Commercial Basis) Regulations 2019 explained that in May 2015, 1.4 million unique visitors under the age of 18 had visited online sites containing pornographic material. Approximately half of these were aged between 6 and 14; one in ten children between 6 and 14 had visited a pornographic website in May 2015. It records that a survey by the NSPCC found that around 1 in 5 young people had seen pornographic material online that had shocked or upset them.

26. The number of pornographic websites is incalculable, but in 2020, two such websites (Xvideos and Pornhub) appeared in the top ten most visited websites, having received more monthly visitors than Amazon and Netflix. In 2019, four pornographic websites appeared in the top twenty websites visited and used by UK users: Pornhub (8th), Xvideos (15th), Xnxx (16th) and Xhamster (17th). Other similar lists give yet other pornographic sites.

27. There can be no serious dispute that pornographic websites such as these process the personal data of the users of the site. They collect and store data concerning the user (and the user's device) to enable the provision of targeted advertising and, depending on the website, particularised pornographic content based on previous viewings.

28. The processing of the data of a child visitor to such a pornographic website occurs in precisely the same way. Despite the obvious and significant differences between a child user and an adult user, the controllers responsible for the websites do not treat such users differently to reflect their different positions, the different levels of harm which may be caused and legal requirements concerning pornographic content. This failure of differentiation is fundamentally contrary to the terms of the UK GDPR.

29. First, it is not fair processing within the meaning of Article 5(1)(a) for a pornographic website to process a child's personal data as though they were any other user of the website, store that data and use it to target advertising and other content to the child. Fair processing would require the controller to put in place measures to verify the age of the user, to exclude them from the website and to delete any data collected from them.

30. Secondly, it is not lawful processing within the meaning of Article 5(1)(a) because no legal basis within Article 6 can possibly be identified to justify such processing. Read with Article 8, Article 6(1)(a) cannot be interpreted as meaning that a child can consent to the processing of his personal data in order to receive any pornographic content which is stumbled across. Article 6(1)(f) requires there to be a balancing exercise carried out between the commercial interests of the pornographic website and the harm caused to the child user; the outcome of the balance is self-evident, even were there not specific language in Article 6(1)(f) underlining the need to protect children.

31. A detailed investigation would doubtless find a variety of other UK GDPR breaches, particularly concerning data protection impact assessment, privacy by design and default, transparency information and the organisational and technical measures in place to prevent data loss.

32. The Commissioner has conducted investigations into sectors before: she has carried out investigations into the AdTech industry, the credit reference agency companies and a variety of controllers linked to political campaigns. She has failed to conduct one into pornographic websites accessible from the UK by children.

33. On 27 October 2020, the Commissioner wrote to the Director General at the Department for Digital, Culture, Media and Sport, following correspondence she and Steve Wood, her Deputy Commissioner, had had with John Carr OBE, Secretary of the Children Charities Coalition for Internet Safety.

34. The Commissioner's letter relevantly sets out the following:

"You will know from our previous conversations my view that data protection is an important component of a national online harms strategy. I have always said that it is personal data that serves to facilitate the delivery of online content to individuals; as such data protection is engaged.

...

We have now entered the transition period for the ICO's age appropriate design code (AADC) and whilst we await detailed plans for bringing forward legislation on online harms, we are beginning to see evidence of the General Data Protection Regulation (GDPR), and therefore the ICO, being called upon to address questions that are also matters of online policy and for Government to answer.

This has particularly been the case in relation to children's access to pornographic content online. Such an important issue has attracted the attention of some reputable children's advocates, including the receipt of a letter from John Carr OBE in which he has asked us to take enforcement action against pornographic sites.

The limited scope of the AADC has been recognised (it only covers online services likely to be accessed by children). But children's advocates maintain there is a pressing case for the ICO to take action against pornographic content providers for processing children's personal data in an unlawful manner. This unlawful processing could immediately arise by virtue of an underage user accessing a website patently designed for and targeted at an adult audience. They maintain that this action could be taken under GDPR, setting aside the AADC.

Whilst recognising the serious concerns raised, my response so far has highlighted that the harm identified is not primarily related to data misuse; rather it is an issue of content access. Without being overly technical, while there are potentially issues with whether pornographic content providers are processing the data of underage users, tackling this effectively is likely to require mandating pornographic providers to engage in age verification. We know age verification for content access is an area currently being considered by government in the context of online harms and we do not think the ICO should act ahead of legislation being enacted. We also recognise the practical reasons that lay behind the decision to halt the introduction [sic] of the Digital Economy Act provisions.

Similarly, there are concerns that ICO action might not be effective in practice. We have identified a number of legal barriers to the ICO taking action, such as overseas jurisdiction. I have therefore concluded that the ICO should not pursue action at the current time but I am writing to ensure DCMS are properly sighted of the ongoing risks and the position the ICO might face if challenged on its inaction. ...

The risks to children from using these services are well documented; these are shared by the ICO and the Government. My concern is that the expectation for the ICO to act might build ever stronger, even if the ICO is not best placed to act, in the absence of a clear roadmap. I would therefore welcome a further briefing for my staff on next steps and further discussions on we can work together on this issue, including public statements."

35. The proposed Claimant understands from this letter that the Commissioner agrees that:

- (1) There are established risks to children from accessing pornographic websites;
- (2) The 'Age-appropriate design code' does not apply to pornographic websites;
- (3) The accessing of pornographic websites by children engages data protection law (and now the UK GDPR); and that
- (4) There are "serious concerns" about whether pornographic websites are lawfully processing the personal data of children contrary to data protection law; but that
- (5) The Commissioner has nonetheless concluded (on an unknown date) not to pursue action.

36. If any of these matters are now disputed, please explain why and on what basis.

Grounds of claim

37. The Commissioner's ongoing failure to take enforcement action against pornographic websites in relation to their processing of the personal data of children, or even investigate the compliance of that processing with the UK GDPR, is unlawful. It constitutes a failure to comply with the duties imposed upon the Commissioner to monitor and enforce the UK GDPR, set out in Articles 51 and 57(1)(a), and to act with all due diligence.

38. In short, the Commissioner is failing to enforce the law when it is her duty, and it is a core aspect of her regulatory functions, to do so. As the Commissioner correctly contemplated in her letter to the Department, her "inaction" is unlawful and the expectation on her to act has grown "ever stronger".

39. The apparent reasons given by the Commissioner for her inaction are legally flawed and irrational.

40. First, it is irrational for the Commissioner to refuse to investigate breaches of, and enforce, the existing law on the basis that it is possible that in the future some other law may be passed to impose different enforcement functions on a different body. The refusal of the Commissioner to "act ahead of legislation" is a frustration of the statutory duties placed upon her by the UK GDPR, with a particular emphasis (see recital (38)) on the protection of children.

41. Moreover, the continued failure of the Commissioner to act is even more irrational in circumstances where her own reasoning recognises that the need for the Commissioner to enforce the existing law will be all the stronger in the absence of a clear timeline for any relevant legal change. Part 3 of the Digital Economy Act 2017 has never been brought into force, and the Online Safety Bill – announced in the Queen's Speech of 11 May 2021 – has not yet been placed before Parliament, let alone enacted. The UK GDPR is the only legal regime which is in place and can protect children. It is incumbent on the Commissioner to enforce the law as it stands, not the law as she wishes it were or the law as it might in the future be.

42. Secondly, it is a legally irrelevant consideration that the Commissioner does not have power to regulate the content of pornographic websites. There is no dispute that she does not (at least by reference to the user data subject). But that does not alter the fact, evidently accepted in the letter quoted above, that the Commissioner does have relevant regulatory functions concerning how pornographic websites process the personal data of children visiting their site. That she does not have greater powers is irrelevant, especially when taken with the fact that no other regulator has such greater powers.

43. Thirdly, it is legally wrong to conclude that pornographic website based outside the UK are not subject to the UK GDPR: see Article 3(2) UK GDPR. Relatedly, it is legally wrong to conclude that the Commissioner's enforcement powers do not apply to such websites: there is no such bar, as the Aggregate IQ Enforcement Notice underlines.

44. Fourthly, it is also irrational for the Commissioner to have reached this decision without making any reference to the terms of her own RAP, set out above, and giving appropriate weight to the need to protect the interests of vulnerable children, protecting against material harm caused to those in real need.

45. Fifthly, there is no indication that the Commissioner has had any regard to the well-established legal principle that Article 8 does not merely protect individuals from interferences with their private and family life by the State, but imposes a positive obligation on the State (including the Commissioner as an emanation of the State) to ensure sufficient protection from the acts of other individuals: e.g. *X and Y v Netherlands* (1986) 8 EHRR 235. The Commissioner's failure to act means that she has failed to fulfil her positive obligation under Article 8 to protect

the private lives of children, in particular by taking sufficient steps to protect them from the harmful effects of pornography on their sexuality, sexual development and sexual relationships.

Action requested

46.The Commissioner is requested to confirm in her response to this pre-action letter that she will commence an investigation into the pornographic website industry's processing of the personal data of children and its compliance with the UK GDPR.

47.If the Commissioner fails or declines to provide this confirmation, the claim for judicial review will invite the Court to issue a mandatory order requiring the Commissioner to commence such an investigation, or alternatively, declaratory relief.

Timing

48.Our client is of the view that this proposed challenge has been raised promptly, and in any event within three months of them becoming aware of the Commissioner's position as set out in her letter of 27 October 2020. That letter was not to our clients, who only became aware of it on or about 28 April 2021. In any event, the Commissioner's failure is an ongoing course of conduct.

Alternative dispute resolution

49.CEASE are willing to consider any reasonable proposals for ADR, including an opportunity to meet the Commissioner or her officials to explain their concerns and seek a constructive solution.

Details of other interested parties

50.The Claimant does not presently consider that there are any interested parties.

Request for information and documents

51.The Commissioner is reminded of her obligations under the pre-action protocol and the duty of candour to disclose documents relevant to the proposed claim at the earliest opportunity. In particular, the proposed Claimants request the disclosure of any internal decision-making document considering whether to commence an investigation into the processing of childrens' data by pornographic websites.

Address for reply and service of court documents

52.Sinclairslaw. 32 Candler Mews, Amyand Park Road, Twickenham, Borough of Richmond, TW1 3JF
DX: 200007 Twickenham
Ref PC/CEASE

Please confirm by 4pm 25th June 2021 that the Commissioner will commence an investigation as requested within 1 month of the date of this letter (11th July 2021).

Yours faithfully
Sinclairslaw

