Neutral Citation Number: [2021] EWHC 584 (Admin)

Case No: CO/3186/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2021

Before:

MR JUSTICE SWIFT

- -

Between

THE QUEEN

on the application of

AIG **Claimant**

- and –

(1) HM COURTS & TRIBUNAL SERVICE
(2) COMMISSIONER OF POLICE OF THE METROPOLIS **Defendants**

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Aaron Watkins (instructed by **Kingsley Napley LLP**) for the **Claimant**
Neil Sheldon QC (instructed by **Metropolitan Police Legal Department**) for the **Second Defendant**
The First Defendant did not appear and was not represented

Hearing date: 26 January 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be 10:00 am 12 March 2021.

MR JUSTICE SWIFT:

A. Introduction

1. This is my decision on an application made by the Commissioner of Police of the Metropolis for the court's permission to withhold disclosure of certain documents in these proceedings on the grounds of public interest immunity ("PII"). The application is made in the context of judicial review proceedings brought by the Claimant which challenge a decision made on 5 June 2020 to issue a search warrant in respect of the Claimant's home. As an adjunct to that claim, the Claimant requested disclosure of the material shown by the Commissioner to the judge for the purposes of that search warrant application. Some of the documents relied on when the application for the search warrant was made have been disclosed. However, a document referred to in the disclosed version of the warrant application as a "form of words" has not been disclosed. This document set out further information relied on by the Commissioner when the application for the search warrant was made. The judge saw this information and took it into account when deciding to issue the warrant. The PII application is made by way of response to the Claimant's application for disclosure of the "form of words" document.

2. Ordinarily, the consequence of a successful PII application is that the material in issue ceases to be disclosable in the proceedings, and for all practical purposes falls out of the proceedings which are then determined without reference to it. However, following the decision of the Supreme Court in *R(Haralambous) v St Albans Crown Court* [2018] 2 AC 236, that will not be the consequence in this case. In *Haralambous* the Supreme Court decided that in a search warrant case such as this case, the court could when determining the substantive merits of the judicial review challenge to the decision to issue the warrant, have regard to all information put before the judge when the application for the search warrant was made even though for reasons of public interest that material cannot be disclosed to the claimant.

B. Decision

3. The approach I should take when deciding this application is not controversial. First, I considered the parties' submissions on issues of legal principle and on the circumstances of this case so far as they are relevant to the PII application. This part of the hearing took place in public. The hearing then continued in private in "closed" conditions – i.e. in the absence of the Claimant and his lawyers. In this part of the hearing Neil Sheldon QC leading counsel for the Commissioner made submissions addressing the substance of the material over which PII is claimed, and I considered that material itself. The final part of the hearing then took place in public.

4. Save on one point, the parties were agreed as to the approach to the substantive questions whether the claim to PII should be upheld, namely the approach described in the speech of Lord Templeman in *R v Chief Constable of West Midlands Police ex parte Wiley* [1995] 1 AC 274 (pages 280H to 281H)

> "… the first question is whether a document is sufficiently relevant and material to require disclosure in the interest of justice … if a document is relevant and material then it must be disclosed unless it is confidential and unless a breach of

> confidentiality will cause harm to the public interest which outweighs the harm to the interests of justice caused by non-disclosure … when a document is known to be relevant and material, the holder of the document should voluntarily disclose it unless he is satisfied that disclosure will cause substantial harm … if the holder decides that a document should not be disclosed then that decision can be upheld or set aside by the judge. A rubber stamp approach to public interest immunity by the holder of a document is neither necessary nor appropriate … as a general rule the harm to the public interest of the whole or part of a document dealing with defence or national security or diplomatic secrets will be self-evident and will preclude disclosure …"

5. As to the first of these matters, relevance, there is no doubt that the document that is the subject of the Commissioner's application contains information relevant to the Claimant's substantive claim that the decision to grant the warrant application was unlawful. That information comprises the so-called "form of words" provided to the judge when the warrant application was made in June 2020. The Claimant has been provided with a copy of the warrant application that contains part of the information relied on when the decision to grant the warrant was made, but it is beyond argument that for the purposes of assessing the legality of that decision in the judicial review proceedings all the material put before the judge is relevant.

6. In his submissions Aaron Watkins, counsel for the Claimant emphasised that although the Commissioner's application relied on the assertion that the "form of words" information is sensitive on grounds of national security I should be careful to scrutinise that claim and not just accept the Commissioner's say so. That submission is correct. I must be satisfied, taking account of the nature of the information and any explanation given to its meaning and significance, that the risk to national security in the event of disclosure is both real and substantial. In making this assessment I will pay close attention to the experience and expertise of witnesses who depose to the national security case, and also to any basis they put forward to explain any significance, in terms of the interests of national security, of the "form of words" information.

7. Mr Watkins also submitted that in this case, any claim that information contained in the "form of words" was sensitive must be evaluated taking account of the Claimant's background and also the nature of his work and the information he would see in the course of that work, day to day. The Claimant is a foreign national. To the extent that the "form of words" information relies on connections arising from his background it may not be sensitive information at all. The Claimant worked as an analyst. Thus if, for example, information in the "form of words" was to the effect that he had accessed websites controlled by "hostile sources" such actions might well be entirely consistent with the proper performance of his job duties. I accept these submissions; they were not matters that Mr Sheldon actively sought to dispute. Any issue as to whether and to what extent disclosure of information might cause harm to the public interest has to be measured in specifics, taking account of circumstances relevant to the case at hand. In this case the Claimant's background, his job and the work that required him to do might all be relevant.

8. One matter on which there was an element of disagreement between the parties concerned an observation of Marcus Smith J in *Competition Markets Authority v Concordia International RX (UK) Ltd* [2018] EWHC 3448 (Ch). Having referred to the effect of *Haralambous* (i.e. that in some instances material not disclosed on PII grounds remains within the proceedings rather than falling out of them) he said this

> "27. But it must be noted that the adverse effect on the public interest in the administration of justice is materially greater under the present dispensation than previously. Previously, the worst that could happen was that relevant material was withheld generally. Now, the position is that relevant material is deployed before the court in the absence of an interested party. Inevitably, the court loses the benefit of the scrutiny and submissions of that interested party.
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> 28. It follows that the adverse effect on the due administration of justice is significantly greater in a case where PII material is being deployed without sight to one party than where it is simply being withheld from everyone. That is because one party (here, the CMA) can refer to and deploy in argument material that is unavailable to the other party to the dispute (here, Concordia).
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> 29. That must mean that the cogency of the PII arguments made by the party asserting PII must be stronger than in a case where the PII material is simply being withheld. In short, the balancing exercise in a case such as this is different to the balancing exercise contemplated in previous cases in that there is this additional factor to take into account."

9. Mr Watkins relied on this for the proposition that in this case any public interest argument must be particularly strong if disclosure is to be withheld. Mr Sheldon relied on comments to the opposite effect made by Chamberlain J in *R(Jordan) v the Chief Constable of Merseyside Police* [2020] EWHC 2274 (Admin) at paragraph 17(c) - (e)

> "17. In my judgment, the applicable principles are as follows:
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> …
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> (c) At the third stage (the *Wiley* balance), it is necessary to weigh, on the one hand, the damage to the public interest that would be caused by disclosure and, on the other, the damage to the administration of justice caused by non-disclosure. This involves two calibrated assessments, both fact-specific.
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> (d) When considering the damage to the public interest caused by disclosure, it will sometimes be obvious that there is a serious risk of grave damage. That be the case where, for

example, disclosure would substantially increase the risk that the identity of a covert informer would be revealed. The disclosure of the identity of a covert informer is generally liable to cause grave damage to the public interest because it may lead to his or her suffering physical harm and/or because it may deter others from providing information. In other cases, the party asserting PII may succeed in establishing that disclosure would give rise to a risk of damage to the public interest, but the extent to which disclosure increases the risk, though material, is low; or, although the risk of damage eventuating is substantial, the damage feared would not be grave. It is important for the court to reach its own, level-headed assessment of the *extent* of any damage to the public interest caused by disclosure.

(e) Against this must be weighed the extent of the damage caused by non-disclosure to the public interest in the administration of justice. Any assessment of that damage requires a close focus on the issues in the case (both those pleaded and any others to which the undisclosed material gives rise) and the nature of the closed material. I would certainly not assume that, because the court can now consider that material in a CMP, there is no such damage: any proceeding where the opportunity for adversarial scrutiny is lacking represents a fundamental derogation from the standards of fairness which the common law ordinarily demands. But nor, for my part, would I assume that availability of a CMP means that the adverse effect on the public interest in the administration of justice is materially greater than it would have been previously, when material attracting PII was categorically inadmissible. One of the reasons why the Supreme Court in *Haralambous* was prepared to countenance a CMP in claims of this kind was that, without one, the absence of admissible evidence as to the basis on which the warrant was granted might well have favoured the defendant. Prior to *Haralambous*, the court might have had to apply the presumption of regularity, as in *R v Inland Revenue Commissioners ex parte Rossminster Ltd* [1980] AC 952 and *R(AHK) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) or might have struck the claim out as untriable, as in *Carnduff v Rock* [2001] 1 WLR 1786. These outcomes would not have served the public interest in the administration of justice. The possibility that a court might apply the opposite presumption, quashing a warrant because it was not possible to consider the material on which it was based, would have been equally unacceptable. The Supreme Court regarded the CMP as preferable to any of these outcomes from the standpoint of the administration of justice: see generally *Haralambous*, at [44]-[59]. It follows that I respectfully disagree with Marcus Smith J insofar as he held that a higher standard of cogency is required of the arguments

> advanced by a party asserting PII in a case such as this where, post-*Haralambous*, material attracting PII may be considered by the court in a CMP."

10. Let me first be clear that I do not consider that any matter arising from this debate is determinative of the PII issue in this case. On its facts this case is not a situation in which the difference in assessment of the public interest in the administration of justice apparent from the extracts set out above is decisive of the outcome of the *Wiley* balance.

11. With that point clearly made I will add that it does not seem to me to be particularly profitable to attempt to calculate degrees of unfairness depending on whether or not the rule in *Haralambous* will apply to the substantive decision in the case in hand. The starting point must be that any derogation from the principle that relevant material is disclosable material will always cause harm to the interests of justice. In all cases it is that harm that must be balanced against harm to the public interest that will arise if disclosure takes place in the usual way. The damage to the interests of justice will not necessarily be greater or less depending on whether the proceedings are ones to which the rule in *Haralambous* will apply. In *Haralambous* the Supreme Court was faced with a choice between two hard outcomes consequent on a successful PII application. The first, if the information concerned were excluded from the proceedings, was that it could be impossible for the court to determine the substantive merits of the decision under challenge; see the reference at paragraph 51 of Lord Mance's judgment to the decision of the Court of Appeal in *Carnduff v Rock* [2001] 1 WLR 1786. The second option was that if the information remained in the proceedings but undisclosed to the claimant, the substantive issue would be decided without submissions or evidence from the claimant in response to the material. The Supreme Court chose the latter option over the former, Lord Mance saying this at paragraph 57

> "… In *Bank Mellat*, a determination by the Supreme Court on a basis different from that required and adopted in the courts below would have been self-evidently unsatisfactory, risk injustice and in some cases be absurd. So too in the present context it would be self-evidently unsatisfactory, and productive potentially of injustice and absurdity, if the High Court on judicial review were bound to address the matter on a different basis from the magistrate or Crown Court, and, if it quashed the order, to remit the matter for determination by the lower court on a basis different from that which the lower court had quite rightly adopted and been required to adopt when first considering the matter."

12. Contrary to the conclusion reached by Marcus Smith J at paragraph 28 of his judgment in *Concordia*, I consider it impossible to say that the harm to the public interest in the administration of justice will always be greater in a case where the rule in *Haralambous* applies than in a case where it does not. Each option is a mis-match

with the ordinary conditions for the administration of justice, as explained at paragraph 17(e) of Chamberlain J's judgment in *Jordan*. It cannot be said that the harm to the public interest flowing from one option will, generically, be greater than the harm to the public interest caused by the other. There is no extra harm to the public interest that can be reliably measured and weighed in the balance in all cases where the rule in *Haralambous* applies. I agree with the way the matter is put by Chamberlain J at paragraph 17(c) of his judgment in *Jordan*: the damage to the public interest caused by the disclosure and the damage to the administration of justice caused by non-disclosure must be evaluated and weighed against each other, case by case. That is the approach I have taken when deciding this application.

13. In this case I have carefully considered the substance of the material that is the subject of the Commissioner's PII application. On one matter the Commissioner has now accepted that applying the *Wiley* balance some further disclosure can be made. That disclosure is contained in a letter from the Commissioner to the Claimant's solicitors dated 3 February 2021. I am satisfied so far as concerns the remainder of the information contained in the "form of words", that disclosure would cause harm to the public interest.

14. Mr Watkins made a number of submissions by reference to what has happened since the execution of the search warrant. He points out that some of the items seized has been returned, and that no restriction was placed that prevented the Claimant from leaving the United Kingdom. These matters, he submitted, indicated either that there was no significant case against the Claimant, or that there was no national security-based concern of any substance, or both, and that in such circumstances it was unlikely that disclosure of the information in the "form of words" document would cause substantial harm to the public interest. I do not accept the logic of this submission: what has happened since the execution of the search warrant does not give rise to any inevitable inference as to the extent of the harm to the public interest that would arise from disclosure. In this case, these submissions have not caused me to doubt the extent of the harm that disclosure would cause to the public interest.

15. I have considered the possibility of "gisting" – i.e. some form of summary or reformulation that would convey any point of substance without causing harm to the public interest. However, I can see no options for disclosure of any gist that would not cause damage to the public interest as would arise from disclosure of the "form of words" itself.

16. I am also satisfied that the damage to public interest resulting from disclosure would clearly outweigh the damage to the administration of justice caused by non-disclosure of the material to the Claimant. I accept that the outcome of the substantive claim is very significant for the Claimant. In this case what is at stake for the Claimant is not limited to the interference with his privacy and rights to property that arises whenever a search warrant is executed. The outcome of the substantive proceedings will more likely than not, go directly to his ability to continue in the type of work he has been engaged in for the last 5 years. Thus, for the Claimant the significance of the proceedings may have a longer-lasting effect than might usually be the case where the challenge is to a decision to grant a search warrant. However, all of this notwithstanding, the harm to the public interest resulting from disclosure outweighs the harm to the interests of justice. I have set out my reasons for this in a little more

detail in a closed Annex to this judgment. That Annex will not be provided to the claimant or be made public unless and until the court so directs.

17. For these reasons, and save to the extent of the information now disclosed in the Commissioner's letter dated 3 February 2021, the Commissioner's application to withhold disclosure of the information contained in the "form of words" document on public interest grounds is granted.