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

No. CO/760/2023

Neutral Citation Number: [2023] EWHC 3606 (Admin)

Royal Courts of Justice

Thursday, 27 July 2023

Before:

LORD JUSTICE LEWIS

MR JUSTICE JAY

B E T W E E N :

THE KING
ON THE APPLICATION OF
MIKHAIL FRIDMAN — Claimant

- and -

NATIONAL CRIME AGENCY & ANOR — Defendants

Hugo Keith KC, Nicholas Yeo and Rachel Scott (instructed by **Gherson Solicitors LLP**) for the **Claimant**
Cathryn McGahey KC and Andrew Deakin (instructed by **Government Legal Department**) for the **Defendant**
The Second Defendant did not appear and was not represented.
Hearing date: 27th July 2023

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J U D G M E N T

LORD JUSTICE LEWIS:

1 This hearing concerns a claim for judicial review of, first, the decision of HHJ Perrins, sitting at Southwark Crown Court on 16 November 2022, to issue a search warrant under para.12 of Schedule 1 to the Police and Criminal Evidence Act 1984 and, second, the execution of that warrant by the first defendant, the National Crime Agency, on 1 December 2022.

2 By way of preliminary observation, a claim for judicial review has essentially two stages. First, the claimant must obtain permission to apply for judicial review. If that is granted, there is then a period for the defendant to filed detailed grounds of defence and evidence. Secondly, there is then a full hearing considering the legal arguments of the parties and/or the evidence.

3 The claim, in this case, is at the first stage, namely, the question of whether the claimant should be granted permission to bring the claim for judicial review.

4 By an order made in April 2023, Lavendar J ordered that the application for permission to apply for judicial review be adjourned and considered at a hearing in court with a time estimate of one day. This is the hearing to consider the application for permission to apply for judicial review.

5 I will set out the factual background very briefly. The claimant is Mr Mikhail Fridman. He lives at an address in North London. He has dual Russian and Israeli citizenship, but his home has been in the United Kingdom for a number of years. He has many business

interests, but the focus of the present application has been the activities of the Alpha(?) Group, a consortium of independent businesses established in 1989.

6 On 15 March 2022, the claimant was designated by the Foreign, Commonwealth and Development Off under the Russia (Sanctions) (EU Exit) Regulations 2019 as an individual subject to sanctions. His assets were frozen and a travel ban was imposed. Restricted measures against him have also been imposed by the European Union. Those designations are currently under challenge.

7 The National Crime Agency was investigating four offences. In order to further investigation, on 16 November 2022 an application for a search warrant was made to HHJ Perrins, sitting at Southwark Crown Court. After a hearing, the judge granted the application and the warrant was executed at the claimant's home address on 1 December 2022.

8 The claim form sets out 12 grounds upon which it is said that the decision to grant the warrant or the execution of the warrant was unlawful. The remedies that the claimant seeks are:

1) an order quashing the warrant;

2) an order declaring the warrant, the entry, search of the property and the seizure of property was unlawful;

3) an order that property seized at the address and not yet returned be returned to the claimant;

4) damages for trespass to land and to goods and for breach of the claimant's rights under the Convention of the Protection of Human Rights and Fundamental Freedoms.

9 Mr Keith KC, for the claimant, submitted that we should grant permission on all 12 grounds and we should determine all of the 12 grounds and the question of the appropriate remedy or remedies today at this hearing.

10 The first defendant, the National Crime Agency, provided an acknowledgement of service. In that document, the National Crime Agency accepted that six of the twelve grounds of challenge were made out, or partially made out. It has not sought to persuade the court that the remaining grounds are unarguable. Initially, the National Crime Agency's position was that permission to apply for judicial review should be granted on the six uncontested grounds, but otherwise refused and the warrant should be quashed on those six grounds; the issue of the assessment of damages for trespass should be transferred to the county court; the question of whether any or all of the seized material still in the hands of the National Crime Agency (NCA") should be dealt with by the Crown Court on an application by the NCA under s.59 of the Criminal Justice and Police Act 2001 ("the 2001 Act").

11 In the course of today's hearing, the NCA changed its position. It accepts now that permission should be granted on all 12 grounds but, Miss McGahey KC for the NCA submitted that the normal timetable for judicial review proceedings should be followed and the 12 grounds and the appropriate remedy should not be determined today.

12 The question for this court, therefore, is should all the substantive grounds be decided now together with the appropriate remedies on this permission application or should permission be granted so that that issue can be considered at a full hearing following the NCA putting in its detailed grounds and evidence?

13 Before dealing with that question, it is appropriate to refer briefly to the legal framework. Section 59 of the 2001 Act permits an application to be made to the Crown Court by a

public authority in the position of the NCA in circumstances where, as here, a warrant is acknowledged to be unlawful or has been quashed. Under s.59(6) the Crown Court may authorise the retention of property seized but only (see subsection 7) if the property were returned it would immediately become appropriate:

> "(a) to issue, on the application of the person who is in possession of the property at the time of the application under this section, a warrant in pursuance of which, or in the exercise of which, it would be lawful to seize the property…"

Thus, under this subsection, the Crown Court examined whether a notional application for a fresh warrant both would succeed in the light of the circumstances.

14 The High Court hearing a claim for judicial review also has jurisdiction to consider whether to make an order that seized material should be returned. If the High Court makes such an order that would, in practice, prevent the NCA from using the material when making any application under s.59. The jurisdiction of the High Court has been discussed in a number of cases to which Mr Keith took us this morning. For present purposes, it is only necessary to refer to two decisions of the Divisional Court:*, R (on the application of Chatwani) v The National Crime Agency* [2015] EWHC 1283 (Admin) and *R (on the application of HS & Ors) v South Cheshire Magistrates' Court* [2015] EWHC 3415 (Admin), [2016] 4 WLR 74.

15 In *Chatwani*, Hickinbottom J said this about the jurisdiction at para.139 of his judgment:

> "Unsurprisingly, these cases illustrate that, in terms of appropriate relief, each case will be fact-dependent."

However, he said that four propositions could be made in relation to the jurisdiction. The fourth of the propositions was expressed in the following terms:

> "iv) However, there may be circumstances in which it is appropriate to deny the agency of all benefit of the illegal search,

> irrespective of the nature and content of the documents seized. Those circumstances are likely to focus on the agency's own conduct. If it has acted in bad faith, that is likely to be a compelling reason for not allowing it to retain any benefit from the exercise. However, bad faith is not a prerequisite: the agency's conduct in obtaining and/or executing the warrant (or their subsequent conduct, as in *Kouyoumjian*) may drive this court to give the subjects of the warrants relief to deny the agency of all benefit of the unlawful search. I stress that the circumstances in which the court is likely to make such a finding will be rare."

16 Hickinbottom J decided that the conduct of the NCA in that case was such that it should not have the opportunity to apply to the Crown Court to retain the material. Rather, it should be deprived of the benefit of the unlawful searches. Lord Justice Davis agreed. He found there had been no bad faith on the part of the NCA but, as he said at para.151 of his judgment:

> "That said, in my view in the present case the conduct of the NCA both in the manner of obtaining and in the manner of executing the warrants was sufficiently egregious, albeit falling short of bad faith, as to justify depriving it of any advantage or benefit whatsoever derived from such warrants. Justice so requires."

17 That, therefore, is a case where the High Court considered the question of the appropriate remedy at the substantive hearing of the claim and decided to order the NCA to return material.

18 The relationship between the remedy available on judicial review on the jurisdiction of the Crown Court under s.59 was further considered in the case of *HS*. The facts are complex but, for present purposes, the key facts can be summarised as follows. In one of the four cases before the Divisional Court, Case 254, search warrants were issued on 27 November 2014 authorising the search of particular properties. On 2 December 2014, the warrants were executed and the properties searched. Following correspondence, the police force indicated on 12 January 2015 that it would not contest a claim for judicial review that the warrants were unlawful and should be quashed On 20 January 2015, a claim for judicial

review was issued seeking a declaration that the entry search procedures were unlawful, an order quashing the warrants and a mandatory order for the return of all of these items. On 13 April 2015, a deputy High Court judge granted permission to apply for judicial review. She noted on the order that:

> "The sole issue remaining for determination in the substantive hearing is whether the court is granting a mandatory order for the return of all seized items and any copies made thereof (all other relief sought being agreed)."

19 On 29 July 2015, there was an application in the Divisional Court for the hearing of the claim to be expedited and to be consolidated with another claim. The Divisional Court was partly concerned about delay in determining the issue and partly about the impact on the criminal trial that was due to start in the autumn. The Divisional Court decided that the s.59 power could be exercised by the Crown Court before a final decision had been reached in the judicial review. Accordingly, it made an order that until final determination of the question of remedy or further order of the Crown Court the material could only be used for the purposes of making a s.59 application and that application had to be made within 48 hours. An application under s.59 was made to the Crown Court. It was considered by HHJ Peel QC. He allowed the police to retain the material. A further claim for judicial review was brought in Case 4133 challenging the decision, but permission to apply for judicial review was refused.

20 The Divisional Court in *HS* subsequently held a hearing dealing with, amongst other things, the hearing of the claim in Case 254 and a renewed application for permission in Case 4133. Simon LJ, with whom Stewart J agreed, identified a number of common themes in the interaction of claims for judicial review and the operation of s.59, which he set out at para.63 of his judgment but which it is not necessary to set out in detail in this judgemnt. At para.68 to para.74 Simon LJ applied those principles to the facts of the cases before him. He accepted that a claimant cannot insist on a case remaining in the Administrative Court

until each issue is conceded or resolved by a decision. Whether that was to happen involved a fact-sensitive inquiry in the context of the interrelated jurisdictions. Here, the Divisional Court had already permitted the police force to make an application under s.59. Simon LJ considered that it had been entitled to do that but, in any event, it was not open to the Divisional Court now to review the earlier decision. The decision of the Crown Court granting a s.59 application was lawful, but permission to apply for judicial review of that decision was refused. In those circumstances, the Divisional Court, in Case 254 quashed the warrant but did not make an order requiring the seized material to be delivered up as that had already been dealt with by the Crown Court.

21 I turn, then, to the present case. As I have indicated, this is an application for permission. Mr Keith, for the claimant, submitted that this court should, in fact, treat the hearing as both a hearing of the permission application and a substantive hearing of the claim if permission was granted. He submitted that at this hearing the court should quash the warrant and make an order requiring any retained seized material to be handed back to the claimant because of the alleged conduct of the NCA. Miss McGahey KC, for the National Crime Agency, submitted that this court should not take that course of action for essentially two reasons. First, this hearing was ordered to be a hearing of the permission application, not a substantive hearing about the grounds of challenge and the remedy. Secondly, and more significantly, the defendant had not yet put in its detailed grounds and all of the evidence on which it might seek to rely. It was not required to do that until after permission had been granted. It would be unfair, therefore, Miss McGahey submitted, for this court to proceed as if this was the substantive hearing of the claim rather than the hearing of the application for permission.

22 First, I would l not treat this hearing as a full hearing of the claim for judicial review. That is not what Part 54 of the Civil Procedure Rules provides for. That envisages there will be a

permission stage. Then, if permission is granted, there will be the opportunity for the defendant to put in detailed grounds in evidence. Lavendar J ordered that there be on oral hearing of the permission application. A judge can make an order that the permission application and the substantive hearing be heard at the same time. That, however, is not what was ordered in this case. In those circumstances, it would not be consistent with the rules of procedure, the order of Lavendar J or basic principles of procedural fairness to treat this hearing as the hearing of the claim and to deal with all the grounds of challenge and all the remedies to be granted. I would not, therefore, accept Mr Keith's submissions that it is appropriate to proceed in that way today.

23 Secondly, however, the position is this. First, there is jurisdiction to grant an order that seized material be returned. Secondly, that issue is a fact-sensitive issue. The court does not, at this stage, have detailed grounds of defence from the NCA setting out the basis for saying that the other grounds of challenge would not be established. Nor, importantly, have we had full evidence from the NCA. Three short witness statements on discrete issues have recently been filed. I would not, however, think it appropriate at the permission stage in this case to reach a concluded view as to whether all the grounds or which grounds are made out or whether there are any real material factual issues that need to be resolved.

24 I will do what is required at the permission stage and consider whether or not the grounds of claim are arguable. The NCA have accepted that six of the grounds are arguable in whole or in part. It has not sought to submit that the other grounds are unarguable. I have considered each of the 12 grounds. I am satisfied that they each raise arguable grounds for challenge which merit full investigation with all the relevant evidence at an oral hearing. I will, therefore, grant permission on all 12 grounds.

25 This court will hear further submissions on the appropriate timetable, bearing in mind the rules of the Civil Procedure Rules and the Practice Direction. We can also consider any applications for ancillary orders or a timetable for dealing with ancillary orders.

MR JUSTICE JAY:

26 I agree.

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CERTIFICATE

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