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IN THE INVESTIGATORY POWERS TRIBUNAL

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 2 October 2018

Before:

LORD JUSTICE SINGH / PRESIDENT

MR CHRISTOPHER GARDNER QC

PROF. GRAHAM ZELICK QC

B E T W E E N :

WILSON

Claimant

- and -

COMMISSIONER OF POLICE FOR THE METROPOLIS
NATIONAL POLICE CHIEF'S COUNCIL

Defendants

MS. C. KILROY appeared on behalf of the Claimant.

MR. D. PERRY QC (instructed by the Legal Department) appeared on behalf of the Defendants.

MS. S. HANNETT appeared as Counsel the Tribunal.

JUDGMENT

LORD JUSTICE SINGH:

Introduction

- 1 This is an application by the defendants to discharge orders for disclosure which were previously made by the Tribunal.

- 2 Initially, an order was made after a hearing which took place on 4 December 2017 before a panel chaired by the then President of this Tribunal, Sir Michael Burton. That order, insofar as material, provided at para.1 that the defendants were to inform the Tribunal and the claimant whether they intended to rely on closed witness statements in defence of the claim and/or make disclosure of relevant documents enclosed. Paragraph 2 provided that in the event that the defendant stated that they did intend to rely on such closed evidence and/or make closed disclosure, the Tribunal would appoint counsel to the Tribunal. That was done in due course and the Tribunal is grateful to Ms. Sarah Hannett who continues to act as counsel to the Tribunal. Paragraph 3 of the order provided that by a certain date, 5 February 2018, the defendant should file and serve on the counsel for the Tribunal the closed evidence on which they intended to rely.

- 3 Most importantly, for present purposes, para.8 of the order provided that by 19 February, the defendants were to file with the Tribunal and serve on the claimant and counsel for the Tribunal –
 - (a) the open evidence on which they intended to rely and
 - (b) "Make disclosure of all remaining material relevant to the claim in open."

- 4 Subsequently, those precise deadlines were not in fact complied with. In the meantime, what happened was that the defendants themselves made an application to which the claimant did not object, that the order of the Tribunal of 4 December 2017 should be amended. The terms of that order are set out in detail over some thirteen paragraphs and a schedule which is dated 1 February 2018. As we have indicated, it was made by consent in the sense that it was without objection from the claimant.
- 5 It is unnecessary for present purposes to set out specific provisions of that order in full which are familiar to the parties. The important point for present purposes is that, as will become apparent, the defendants in fact voluntarily embarked upon an exercise of disclosure which arguably went beyond what the original order of the Tribunal had contemplated in para.8(b) and also arguably is similar to the kind of disclosure of documents which would take place in an ordinary civil action rather than in for example, judicial review proceedings or claims brought before this Tribunal.
- 6 The defendants submit in outline that the time and cost which will be associated with the disclosure exercise which has been embarked upon has now proved to be disproportionate and should be discontinued. The defendants also propose a way forward for what they submit would be an expeditious, proportionate and fair disposal of this claim.

Factual background

- 7 The background to this claim arises from the actions of an undercover police officer, Mark Kennedy who used the pseudonym "Mark Stone" and who formed an intimate relationship with the claimant. On 20 October 2011, the claimant commenced proceedings against the defendants in the High Court in which she claimed that the actions of Mr. Kennedy had violated her rights under various Convention rights as set out in Sch.1 to

the Human Rights Act, 1998 or "HRA". In addition, the claimant relied upon causes of action at common law.

8 The High Court declined jurisdiction to hear her complaints under the HRA on the basis that they should have been brought before this Tribunal. But that decision was affirmed on appeal by the Court of Appeal. However, the common law causes of action were permitted to proceed. In due course, although there is some dispute about this, on 15 January 2016, judgment was entered for the claimant in respect of the common law causes of action leaving damages to be assessed by reference to the facts and allegations made in her Particulars of Claim.

9 On 31 January 2017, the High Court claim was settled. On 13 March 2017, the claimant received an apology on behalf of the Commissioner of the Police for the Metropolis. She also accepted a significant sum by way of settlement of both claims for damages of common law.

10 In the meantime, the proceedings before this Tribunal had been stayed. In July 2016 the stay was extended while damages were assessed by the High Court. On 16 January 2017, the Tribunal set a deadline of 24 February 2017 for service of fully pleaded particulars. The claimant did not, in fact, serve full particulars by that date but was granted an extension until 10 April 2017 when they were served.

11 As we have mentioned on 4 December 2017, a directions hearing took place before this Tribunal chaired by Sir Michael Burton. An order was made by the Tribunal of which we have cited the relevant parts. The defendants observe that the order did not in terms set out the scope of the disclosure exercise which was ordered or envisaged but rather concerned

what they describe as the mechanics of the disclosure exercise (in other words what documents would be in closed and what would be in open).

- 12 However, as the defendants have said, they interpreted the order as requiring a process akin to standard disclosure of documents. As we have mentioned, revised directions were then made with the agreement of the parties on 1 February 2018 with the dates for compliance of various steps changed.
- 13 In the ensuing months, there were communications between counsel to the Tribunal, Ms. Hannett and counsel acting for the parties. There were discussions in those communications about revised disclosure principles relating to the approach to be taken to redaction of documents. The defendants submit that this has had the effect of increasing the time and cost which will be associated with the disclosure exercise, although they emphasise that this is not a criticism of counsel to the Tribunal.

Relevant legal principles

- 14 The defendants point to the principle of proportionality which they submit now occupies a central place in the administration of civil justice. They emphasise the overriding objective in CPR 1.1. They also emphasise the provisions of CPR 31.1(2) and the notes in *The White Book* which accompany CPR 31; see in particular para.31.01 where it is said that:

"The case management powers of the court give the court the responsibility and the means for ensuring that disclosure is limited to what is really necessary in individual cases. Accordingly, the procedure for the 'automatic' discovery of non-specific documents without order is abolished. Ultimate responsibility for the regulation of

the disclosure process in accordance with the rules in Part 31 and in a manner consistent with furtherance of the overriding objective rests with the court."

- 15 Further, the defendants submit that the jurisdiction of this Tribunal is confined to the principles which would be applicable on a claim for judicial review: see s.67(4) of the Regulation of Investigatory Powers Act, 2000 ("RIPA"). They note in that context that the ordinary rules for standard disclosure have never applied to judicial review proceedings in the Administrative Court. They acknowledge, importantly, that there is a different duty of candour and cooperation with the Court in judicial review proceedings.
- 16 The defendants remind the Tribunal of the decision of the House of Lords in *Tweed v Parades Commission* [2007] 1 AC 560. See also the recent decision of the Court of Appeal in *The Queen (on the application of Citizens UK) v Secretary of State for the Home Department* [2018] 4 W.L.R. 123 in particular, in my judgment, at paras.105-106 in which I sought to summarise the relevant principles and cited the earlier judgment which I gave in the Divisional Court in *The Queen (on the application of Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 150 at paras.8-24.

The defendants' submissions

- 17 On behalf of the defendants, Mr. David Perry, QC who has appeared before us with Mr. John Paul Wyatt submits that the time and costs which would be associated with the disclosure exercise now would be disproportionate in light of the following four main features of this case:

(1) The core factual and legal allegations have been admitted by the defendants including a breach of Art.3. As Mr. Perry reminds us, in the experience of both counsel and of members of this Tribunal, such an admission is unprecedented.

(2) In the light of the significant amount of damages which have already been paid as a result of the settlement of the High Court proceedings, the claim can only have limited financial value. In the alternative, he submits the result of any disclosure exercise is unlikely to have material impact on the nature of any remedy due to the limited nature of the factual which remains between the parties.

(3) The jurisdiction of this Tribunal is to operate as if it were hearing a claim for judicial review.

(4) A full public inquiry (chaired by Sir John Mitting, a retired High Court Judge) is underway at which the claimant is a core participant. That inquiry, he submits, will investigate any wider issues of law, practice and policy which arise from the conduct of undercover policing at the relevant time.

18 In the light of those submissions, the defendants propose that from hereon, first, the Tribunal should determine the question of remedy on the basis of a schedule of admitted facts derived from the claimant's grounds of challenge. They submit that this is similar to the approach which this Tribunal adopted in *Moran & Others v Police Scotland* [2016] UKIPTrib 15_602-Ch. Secondly, in the limited number of areas which are the subject of denial or admission –

(a) the Tribunal should decline to adjudicate upon para.103 of the Particulars of Claim, in the alternative, it should proceed on the assumption that para.103 is true without informal admission being made to that effect and treated as a factor which aggravates the Art.8 breach which has already been admitted by the defendants.

(b) the Tribunal should decline to investigate the alleged inadequacy of the statutory regime created by both because that is not within the jurisdiction of this Tribunal since it was a matter for Parliament rather than the defendants and because it is unnecessary to do so.

19 Finally, the defendants indicate that they would consent to liberty being granted to the claimant to apply in respect of any remedy which the Tribunal orders in these proceedings in the light of the eventual outcome of the undercover policing inquiry by Sir John Mitting. In the alternative, they would consent to any order which this Tribunal makes as to remedies being treated as an interim order only pending publication of the report of the inquiry by Sir John Mitting.

20 In his oral submissions this morning, Mr. Perry maintained those submissions which he had advanced in more detail in writing but described them as his "primary case". In oral submissions he also advanced an alternative case in the event that the Tribunal did not accept his primary case. He submits that the full disclosure and redaction exercise which has been started cannot continue in its present form. This is because he submits it is too costly and disproportionate. However, he appeared to acknowledge at this stage of his submissions that the defendants might well have to file witness evidence setting out what the defendant say were the relevant facts of this case in order to assist the Tribunal in compliance with their duty of candour and cooperation.

The claimant's submissions

21 On behalf of the claimant, Ms. Charlotte Kilroy resists each of the two main parts of the defendants' application. She submits that the suggestion that the claim should not be adjudicated upon in full or that it should be dealt with on the basis of admitted or assumed facts is misconceived. In particular, Ms. Kilroy submits that parts of the claim have not

been admitted or, indeed, even pleaded to in the defendants' amended Defence, for example, the Art.14 issue. She also submits that the claimant's pleaded case, for example at paras.90-91 of the Particulars of Claim raises important issues as to whether there was, what she describes as, "systemic illegality" in the way in which undercover police officers such as Mark Kennedy were deployed by the Metropolitan Police and how high up in the chain of command there was knowledge of the fact that Mr. Kennedy was having a sexual relationship with the claimant and to what extent this was part of a deliberate and coordinated plan.

- 22 Ms. Kilroy accepts that the principle of proportionality is relevant to this Tribunal's functions in the context of disclosure of documents, even if the exact terms of the CPR are not applicable to this Tribunal. However, she submits that this is a case in which extensive disclosure of the underlying documents may well be necessary, at least in due course perhaps at the remedial stage if not at this stage. She makes that submission, not only because this individual claimant is entitled to have a proper adjudication of all aspects of her claim and not just parts of it, but also because of the wider public interest raised by this case.

The Tribunal's decision

- 23 We do not accept Mr. Perry's primary case. In our view, the Tribunal can and should proceed to determine the claim on its merits. It cannot stop the claim in its tracks at this stage. We should emphasise that this does not mean that it will necessarily adjudicate on all aspects of the claim in due course after a substantive hearing. As Ms. Kilroy accepts, the European Court of Human Rights does not always do so itself. For example, it sometimes declines to adjudicate on a complaint under Art.14 separately if it does not need to in the light of what it has already said in finding a violation of another Convention right such as Art.8. See, for example, *Smith & Grady v United Kingdom* [2000] 29 EHRR 493. But, as

Ms. Kilroy reminded this Tribunal, that was after the court had all relevant material before it, not at the preliminary stage. Nor in our view should the Tribunal decide issues which are still in dispute on the basis of admissions or assumed facts.

24 It is true that the Tribunal has, on occasion, determined cases on the basis of assumed facts. However, that has been where issues of law arose and they could be determined on the basis of assumed facts. That procedure has proved to be of real value, especially in cases in which it would not otherwise have been possible to conduct a hearing in open with a claimant's representatives present. The present case is very different. There are main issues of fact which are in dispute. It would not be appropriate for the Tribunal to make findings of fact in those circumstances without considering the merits of the arguments by reference to it. Further, we regard the decision of this Tribunal in *Moran* as having been decided on its own facts although it was doubtless correct in the circumstances of that case.

25 We are not persuaded by Mr. Perry's other arguments in support of his primary case either. We do not consider that the fact that there may be some overlap with what may be covered by the undercover policing inquiry should prevent this claimant from having her claim adjudicated on by this Tribunal, which is the judicial body to whose jurisdiction such cases have been entrusted by Parliament. We also note without any criticism that it is publicly known that that inquiry is not likely to report for many years.

26 Finally in this context we address briefly Mr. Perry's submission that certain legal matters should not be adjudicated upon by this Tribunal, in particular as to whether the legal regime created by RIPA in this context conforms with the Convention requirement that any interference with convention rights should be in accordance with the law. We do not accept his argument that the Tribunal should not consider that ground of complaint on its merits in

due course. As Mr. Perry fairly acknowledged, that can be done without the need for any disclosure, it is a pure question of law. What the answer will be in due course, this Tribunal cannot pre-empt. It will have to hear the arguments and will adjudicate on the merits.

27 However, that all said, we do consider that the Tribunal needs to bring this case back on track. This will be in the interest of all concerned as well as the public interest. The Tribunal has a wide and flexible jurisdiction in relation to its own procedures. For example, it is unlike the ordinary civil courts, because its function is an inquisitorial one not an adversarial one. Accordingly, we propose to proceed as follows in a sequential way: -

1. There needs to be a fully pleaded defence to all aspects of the claimant's Particulars of Claim. We will give the defendants a reasonable time in which to file and serve a re-amended Defence.

2. Although we anticipate this may be done at the same time as that further Defence, the defendants must file and serve witness statements which comply with their duty of candour and cooperation. That evidence must assist the Tribunal in its task of adjudicating on the factual issues which remain in dispute.

28 Mr. Perry has asked the Tribunal for a period of three months to do this exercise. Ms. Kilroy did not specifically demur from that. We grant that period of time. The defendants witness statements should exhibit such documents as are necessary in order to understand the evidence and so as to comply with their duty of candour and cooperation. We envisage that it will be at that stage that counsel for the Tribunal, Ms. Hannett, will be asked by this Tribunal to review what has been filed by the defendants by reference to the underlying documents in order to advise the Tribunal on whether more may be required and

in particular, whether any documents can properly be disclosed to the claimant and her representatives with or without redactions.

- 29 It may well be that the Tribunal will have questions of its own which it asks the defendants to answer at that stage pursuant to its inquisitorial role depending on the circumstances.

CERTIFICATE

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This transcript has been approved by the Judge