



[2021] UKIPTrib IPT_20_89_CH

Case No: IPT/20/89/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 16 June 2021

Before :

LORD JUSTICE SINGH (PRESIDENT)
and
LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)

Between:

CLS

Complainant
/Claimant

- v -

**COMMISSIONER OF POLICE FOR THE
METROPOLIS**

Respondent
/Defendant

Mr Christopher Houssemayne du Boulay (instructed by **Hickman & Rose**) for the
Complainant/Claimant
Ms Victoria Ailes (instructed by the **Directorate of Legal Services, Metropolitan Police**) for
the **Respondent/Defendant**
Mr Ben Watson QC (instructed by **Government Legal Department**) as **Counsel to the**
Tribunal

After written submissions only

Lord Justice Singh and Lord Boyd of Duncansby:

Introduction

1. This judgment concerns only the question whether the Tribunal has the jurisdiction to consider this complaint/claim. Although there is both a complaint and a claim before the Tribunal, we will refer for convenience to “the complaint” and “the Complainant”. The Respondent concedes that the Tribunal does have jurisdiction but, since jurisdiction cannot be conferred by the consent of the parties and the issue is a novel one on which there appears to be no previous authority, we have been assisted by detailed submissions in writing not only from the parties but also from Counsel to the Tribunal (“CTT”), Mr Ben Watson. We are grateful to all those who have made written submissions, including CTT, who has ensured that the Tribunal has all relevant submissions before it despite the fact that the parties do not dispute jurisdiction.

Factual background

2. On 19 October 2020 the Tribunal received a complaint and a claim under the Human Rights Act 1998 (“HRA”) from solicitors acting for CLS against the making of a notice under section 49 of the Regulation of Investigatory Powers Act 2000 (“RIPA”), requiring him to supply the PIN number to his Apple iPhone.
3. A response was received from the Metropolitan Police Service (“MPS”) on 6 December 2020.
4. CLS is/was contracted as a consultant for a legal practice. He is an accredited police station representative, but is not otherwise legally qualified. On 7 March

2019 he attended Wandsworth police station to advise and assist two clients, Client 1 and Client 2, who had been arrested for murder. Both put forward prepared statements in interview, apparently denying the charges. Subsequently, according to the MPS, one of the two defendants served a defence statement in which he claimed that the statement he gave at interview was false, as CLS well knew. It was an account that CLS had suggested that he use.

5. Evidence also emerged of telephone calls on a mobile phone between one of the defendants in prison (the phone had been illegally supplied to him by a third party) and a number assigned to CLS. An Apple iPhone was seized during the search of CLS's house. On around 15 October 2020 he was served with a notice under section 49 of RIPA, requiring him to supply the PIN number. Permission for service of the notice had been given by HHJ Greene at Snaresbrook Crown Court on 21 September 2020.
6. CLS was charged with two counts under section 44(1) of the Serious Crime Act 2007 (encouraging the transmission of electronic communications from inside a prison).
7. The grounds of complaint to this Tribunal can be summarised as follows:
 - a. Permission for the notice to be given was needed from an officer of the rank of Superintendent;
 - b. Certain procedural steps required by sections 51(1) and 51(2)(a) of RIPA were not complied with; and
 - c. The notice is said to be, in a number of respects, unnecessary, unreasonable and disproportionate.

Material legislation

8. The Tribunal’s jurisdiction is governed by section 65 of RIPA, as amended. The jurisdiction to consider a claim under section 7 of the HRA is couched in different terms from the jurisdiction to consider other complaints but that difference is not material to the present issue.

9. Section 65(3), which deals with claims under the HRA, provides that proceedings fall within that subsection if “(d) they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5)”.

10. Section 65(4) provides that the Tribunal is the appropriate forum for any complaint if it is “a complaint by a person who is aggrieved by any conduct falling within subsection (5) which he believes –
 - (a) to have taken place in relation to him, to any of his property, to any communications sent by or to him, or intended for him, or to his use of any postal service, telecommunications service or telecommunication system; and
 - (b) to have taken place in challengeable circumstances ...”

11. Section 65(5) sets out a list of relevant “conduct” and includes this:

“Subject to subsection (6), conduct falls within this subsection if (whenever it occurred) it is –

...

(e) the giving of a notice under section 49 of any disclosure or use of a key to protected information;”

12. The proviso in subsection (6) is immaterial for present purposes, since it applies only to paragraphs (d) and (f) of subsection (5).
13. In the present case there is no dispute that the conduct complained of is the giving of a notice under section 49 and therefore falls within section 65(5).
14. The concept of “challengeable circumstances” is defined in three provisions. One of those provisions is immaterial because it concerns conduct carried out as part of a foreign surveillance operation pursuant to section 76A: see section 65(7A). The other two provisions are section 65(7) and section 65(7ZB).
15. Section 65(7) provides:

“For the purpose of this section conduct takes place in challengeable circumstances if it is conduct of a public authority and –

(a) it takes place with the authority, or purported authority, of anything falling within subsection (8); or

(b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought;

but, subject to subsection (7ZA), conduct does not take place in challengeable circumstances to the extent that it is authorised by, or takes place with the permission of, a judicial authority.”

16. The phrase “a judicial authority” is defined in section 65(11) and includes: “(a) any judge ... of the Crown Court or any Circuit Judge;” and “(e) any person holding any such judicial office as entitles him to exercise the jurisdiction of a judge of the Crown Court or of a justice of the peace”.

17. Section 65(7A), which was first introduced by the Protection of Freedoms Act 2012 and was subsequently amended by the Investigatory Powers Act 2016 (“the IPA”), provides as follows:

“The exception in subsection (7) so far as conduct is authorised by, or takes place with the permission of, a judicial authority does not include conduct authorised by an approval given by a Judicial Commissioner or under section 32A of this Act or section 75 of the Investigatory Powers Act 2016.”

18. Section 65(7ZB), which was introduced by the IPA, provides:

“For the purpose of this section conduct also takes place in challengeable circumstances if it is, or purports to be, conduct falling within subsection (5)(bb) [and some other specific provisions] ... or (so far as the conduct is, or purports to be, the giving of a notice under section 49) subsection (5)(e).”

19. The things which fall within subsection 65(8) include:

“(d) a permission for the purposes of Schedule 2 to this Act; and
(e) a notice under section 49 of this Act”.

20. Schedule 2 sets out three different kinds of permission that may be relevant. Under paragraph 1, there may be permission granted by a Judge. Under paragraph 4, there may be permission in relation to data obtained under statutory powers without a warrant. Under paragraph 6, there may be permission granted by a superintendent to a constable of a lower rank. This permission is required in addition to a permission under paragraphs 1 or 4.

21. Section 49(2) of RIPA provides:

“If any person with the appropriate permission under Schedule 2 believes, on reasonable grounds –

- (a) that a key to the protected information is in the possession of any person,
- (b) that the imposition of a disclosure requirement in respect of the protected information is –
 - (i) necessary on grounds falling within subsection (3), or
 - (ii) necessary for the purpose of securing the effective exercise or proper performance by any public authority of any statutory power or statutory duty,
- (c) that the imposition of such a requirement is proportionate to what is sought to be achieved by its imposition, and
- (d) that it is not reasonably practicable for the person with the appropriate permission to obtain possession of the protected information in an intelligible form without the giving of a notice under this section,

the person with that permission may, by notice to the person whom he believes to have possession of the key, impose a disclosure requirement in respect of the protected information.”

Submissions for the Complainant

- 22. On behalf of the Complainant it is submitted that the conduct complained of in this case took place in “challengeable circumstances” both because it falls within section 65(7) and because it falls within section 65(7ZB).
- 23. So far as the latter is concerned, it is submitted that the words used by Parliament should be given their natural meaning and effect. In particular, it is submitted that the rider at the end of subsection (7) relating to “a judicial authority” does not appear in subsection (7ZB) and could easily have been inserted there by Parliament if that had been its wish.

Submissions for the Respondent

24. On behalf of the Respondent Ms Victoria Ailes concedes that there is jurisdiction but only under section 65(7ZB) and not under section 65(7). She accepts in essence the submissions for the Claimant that this case falls within the natural meaning of subsection (7ZB).

Submissions by Counsel to the Tribunal

25. In order to assist the Tribunal Mr Ben Watson, acting as CTT, has made helpful submissions setting out the contrary argument that could be made against the joint view of the parties on section 65(7ZB). The argument is that the rider which appears at the end of section 65(7) excludes the Tribunal's jurisdiction where a judicial authority has been granted and nothing in section 65(7ZB) either limits the operation of that exclusion or provides an alternative basis for conferring jurisdiction. He has helpfully traced the legislative history of section 65. The relevant amendments to section 65 of the RIPA were introduced by section 243 of the IPA, which included subsection (7ZB) and deliberately retained the exclusion in section 65(7).

Analysis

26. In our view, the words of section 65 of RIPA are plain and should be given their natural meaning. The rider relating to "a judicial authority" appears only in subsection (7) and acts as a qualification or exception only to that subsection. It could easily have been made general or inserted into subsection (7ZB), when that was introduced by the IPA, if that had been the intention of Parliament. We do not regard that rider as amounting to a general "exclusion" for the purposes

of RIPA but rather as a specific exception which applies to subsection (7) and no more.

27. We note that this is how Parliament itself described the rider when it introduced subsection (7A) in 2012. That provision refers to “the exception in subsection (7)”. It does not refer to the rider as an “exclusion”, still less that it is a general exclusion for the purposes of section 65.
28. It is also significant, in our view, that subsection (7ZB) was inserted in 2016 so as to *extend* the Tribunal’s jurisdiction: this is why it uses the words “*also* takes place in challengeable circumstances” (emphasis added). It is therefore possible, and not surprising, for conduct to fall outside the scope of subsection (7), because it comes within the exception relating to “a judicial authority”, but then to fall within the scope of subsection (7ZB).
29. For present purposes the conduct which falls within subsection (7ZB) is “the giving of a notice under section 49”. We accept the submission made on behalf of the Complainant that the effect of the construction proposed by CTT would be that there could never be a case of the giving of a notice under section 49 which falls outside subsection (7) but within subsection (7ZB), because that conduct always requires permission by a judge. We also accept the submission for the Complainant that Parliament should not be taken to legislate in vain: if possible each and every provision enacted by Parliament should be given some effect.
30. Nor do we consider, as submitted by CTT, that there is a conflict between subsections (7) and (7ZB) on the construction of both the Complainant and the Respondent. There is only such a conflict if one assumes that Parliament

intended, in enacting the rider to subsection (7), to create a general exclusion from jurisdiction in all circumstances where there has been a judicial authority granted. We do not consider that Parliament had such an intention. Rather than there being a conflict, section 65(7) and (7ZB) create two different ways in which a case may fall within this Tribunal's jurisdiction. Although they may overlap, if a case falls within one it does not matter if it falls outside the other.

31. Finally, we do not detect any general policy in the scheme enacted by Parliament that this Tribunal should always lack jurisdiction whenever conduct is the subject of a judicial authority. There can be circumstances, for example warrants which are approved by Judicial Commissioners, which can be the subject of complaint in this Tribunal. We note the submission made by CTT, that the phrase "a judicial authority" in section 65 expressly excludes Judicial Commissioners but the fact that the Tribunal does have jurisdiction over their decisions is of some relevance. Judicial Commissioners have to be serving or retired judges and are sometimes of a very senior rank indeed; yet Parliament saw no reason of policy to exclude their decisions from the jurisdiction of this Tribunal.

32. We also note CTT's submission that the treatment of subsection (7ZA) is instructive. He submits that the amendments to subsection (7ZA) retained a "limited exception" to the judicial authority/permission "exclusion" within subsection (7): i.e. where the "judicial authority" is either a Judicial Commissioner or a justice of the peace giving an approval under section 32A of RIPA (see section 32A(2) and (7)) or section 75 of the IPA (now repealed). What is significant, in our view, about this is that Parliament contemplated that

a justice of the peace, who would otherwise naturally be regarded as “a judicial authority” falls outside the definition of that phrase and so their decisions can fall within the jurisdiction of the Tribunal.

33. CTT also submits that that exception to the “exclusion” is also reflected in the powers of the Tribunal to quash an order of a “judicial authority” made under those same provisions: see section 67(7)(aa) of RIPA. Subsection (7ZA) was not amended to include any broader range of judicial authorities within the exception to the subsection (7) exclusion; nor was subsection (7) amended to be “subject to subsection (7ZB)” as well as subsection (7ZA). In our view, there was no need for any express provision of that sort because the rider in subsection (7), on its natural reading, only applies to that subsection. As we have said above, it is not to be regarded as a general “exclusion”, as CTT submits.

Conclusion

34. For the reasons we have given, we have reached the conclusion that the present case does fall within this Tribunal’s jurisdiction within section 65(7ZB). It is therefore unnecessary to address the Complainant’s alternative submission that the case also falls within subsection (7).
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