



**Neutral Citation Number: [2023] UKIPTrib 7**

**Case No. IPT19/08/CH**

**IN THE INVESTIGATORY POWERS TRIBUNAL**

**Date: 18 July 2023**

**Before:**

**LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)  
LORD JUSTICE EDIS  
MR CHARLES FLINT KC**

**BETWEEN:**

**Z3**

**Claimants**

**- and -**

**(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT  
(2) SECURITY SERVICE  
(3) HM PRISON AND PROBATION SERVICE  
(4) CHIEF CONSTABLE OF WEST YORKSHIRE POLICE**

**Respondents**

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**MR B. JAFFEY KC and MR TIM BULEY KC (instructed by Birnberg Peirce) appeared on behalf of the Claimant**

**MR ROBERT PALMER KC, and MS EMILY WILSDON (instructed by Government Legal Department) appeared on behalf of the First, Second and Third Respondents.**

**MR IAN SKELT KC (instructed by West Yorkshire Police Directorate of Legal Services) appeared for the Fourth Respondent)**

**MR J. GLASSON KC** appeared as Counsel to the Tribunal

Hearing dates: 15 October 2020 and 9 December 2021

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## JUDGMENT

### **Introduction**

1. On 2 November 2022 the Tribunal issued its judgment on the preliminary issue of jurisdiction; [2022] UKIPTrib 4. The Tribunal found that it did not have jurisdiction in respect of the interception of telephone calls made by the claimant during his detention in HMP Belmarsh. The Tribunal concluded, however, that it did have jurisdiction in respect of the claimant's belief that having been the subject of covert surveillance, legally privileged material (LPP) was obtained which was then misused in the course of court proceedings to which the claimant was a party.
2. The Tribunal noted that the respondents had made extensive disclosure in the course of the proceedings and reference was made by the parties to the factual issues in the case going far beyond what was required to resolve the question of jurisdiction. Against that background the Tribunal considered that it did not require to have a further hearing. We invited parties to make written representations on the merits of the claim within the Tribunal's jurisdiction. None of the parties have made any further submissions and counsel to the Tribunal has confirmed that he has no further submissions to make. Accordingly, we have determined the claim on the basis of the written and oral submissions made at the hearing and on the material disclosed by the respondents.
3. As we explained in our judgment [8] the hearing was in three parts; OPEN, CLOSED and IN CAMERA. Briefly that was because some material had been disclosed to the claimant in the course of the criminal proceedings which had not

been made available more widely, including to the fourth respondent. The material relevant to this issue were in all three and we heard submissions in all three sessions. This OPEN judgment is to be read along with the IN CAMERA and CLOSED judgments.

4. The essence of the claim that is now left for the Tribunal's determination is that having become aware of the misuse of LPP by the respondents following on the interception of his telephone calls from HMP Belmarsh he now believed that LPP material may have been obtained and misused in the course of other proceedings to which he was a party. That belief was reinforced by material which was disclosed to him in the course of trial proceedings and which is dealt with IN CAMERA.

#### **The applicable law**

5. Mr Jaffey KC submitted that legal professional privilege was a fundamental right and an aspect of the rule of law; *R v Derby JJ, ex parte B* [1996] AC at 507 per Lord Taylor of Gosforth CJ. It could only be invaded in exceptional circumstances; *R (Morgan Grenfell) v Special Commissioners* [2003] 1 AC 563 per Lord Hoffman. It was of overriding importance to the proper administration of justice that a client should have complete confidence that what he tells his lawyer will remain secret; *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 per Lord Millett at 236. An invasion of LPP by an opposing party in litigation is a serious interference with the process of justice; *CAAT v BAE Systems Plc* [2007] EWHC 330 (QB) per Underhill LJ and King J [41] and [86]; *Ablitt v Mills & Reeve* per Blackburne J (24 October 1995). These principles applied *a fortiori* in cases involving covert surveillance and intercept. In *Turner v R* [2013] EWCA Civ 642 Lord Judge CJ said "*arrangements for covert surveillance must focus*

*attention on a need to preserve legal privilege” [22], [24]. (See also Laws LJ in R v Grant [2006] QB 60 at [52].)*

6. Mr Palmer KC submitted that LPP described the special protection that the law gave to communications between a lawyer and his client; *McE v Prison Service of Northern Ireland and another (Northern Ireland Human Rights Commission and others intervening)* [2009] 1 AC 908 per Lord Phillips at [3]. It is not based upon the maintenance of confidentiality; *Three Rivers District Council and others v Governor and Company of the Bank of England (no 6)* [2005] 1 AC 610 per Lord Carswell at [86]. While confidentiality was not sufficient for a claim of privilege it is a necessary precondition; *Three Rivers 6* per Lord Scott [24], *BBGP Managing General Partner Limited v Babcock & Brown Global Partners* [2011] 2 WLR 496 at [45 – 50]. LPP applied to communications between solicitor and client with sub-heads of legal advice privilege and litigation privilege. Litigation privilege applied only where litigation was either in progress or in contemplation, where material was for the sole or dominant purpose of conducting that litigation and the litigation must be adversarial, not investigative or inquisitorial; *Three Rivers 6* [95], Lord Carswell at [102], [105]. Legal advice privilege applied to communications between clients and their lawyers for the purpose of obtaining legal advice. Legal advice privilege applied to

*“all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client;” Three Rivers 6 per Baroness Hale at [61].*

7. There is no real dispute on the law applying to LPP. We accept Mr Jaffey's submissions that LPP is a fundamental right of importance to the rule of law. It is a right that can only be invaded in exceptional circumstances which will require full justification. The right applies to communications between a lawyer and his client. It does not matter that the communication does not contain advice on matters of law, provided that it is directly related to the performance of the lawyer's professional duties to his client; *Three Rivers 6* per Baroness Hale [61]. All such communications are presumed to be privileged, though that privilege may be lost in certain cases, none of which apply here.

### **Discussion**

8. The submissions for the claimant have, as their starting point, the alleged misuse of LPP material obtained through the interception of telephone calls made by the claimant from HMP Belmarsh. We have ruled that this is outwith our jurisdiction and it is not necessary or appropriate for us to determine the issue. Nevertheless, even assuming that the claimant is correct that the material obtained by the prison authority as a result the monitoring of his calls contained LPP material we have reached the following conclusions.
9. First, the monitoring of the claimant's calls was not done for the purpose of obtaining LPP. It was carried out because he was both a high risk category A and a TACT prisoner; Z3 at [10] and [29].
10. Second, the sharing of the transcript with the police, and the Security Service, was not done with the intention of obtaining LPP material; it was because of his conviction for terrorism offences and other intelligence. The application for

access to the transcripts dated 6 September 2018 (see Z3 [12]) states, “*there is no intention of acquiring any confidential material, legal privilege*”.

11. Third, the request made by the Home Office representative Ms Banks at the GOLD meeting on 13 November 2018 arose out of the disclosure made at the meeting about the claimant’s state of mind and desire to leave the UK. It was thought that this might be of significance in responding to the claimant’s application for bail. There was no request for access to material to which LPP might apply (Z3 [13]).
12. Fourth it is clear that the lawyers, GLD and counsel, who saw the documents provided by the fourth respondent recognised that they might contain material which arguably attracted LPP, sought advice and advised both the claimant’s representative and the special advocate as to what had occurred (Z3 [14] – [16]). Whether these steps were sufficient or whether it might have been handled differently is of no moment. There was no intention to gather or misuse communications to which LPP might apply.

## **Decision**

13. For these reasons, and for the reasons given in the CLOSED and IN CAMERA judgments, we make no determination in favour of the claimant.
  14. The relevant appellate court for the purposes of an appeal under section 67A is the Court of Appeal of England and Wales.
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