IPT/390/16/CH

IPT/29/17/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

Charles Flint QC

Professor Graham Zellick CBE QC

19 July 2017

B E T W E E N:

(1) KIRSTY ANDREW
(2) MICHAEL ANDREW

Complainants

-and-

COMMISSIONER OF POLICE OF THE METROPOLIS

Respondent

Aaron Watkins (instructed by Penningtons Manches) for the Complainants
Jason Beer QC (instructed by Directorate of Legal Services) for the Respondent

Hearing date: 11 July 2017

JUDGMENT

1. This is a judgment on remedy only, following an admission by the respondent that two authorisations granted under section 22 (3) of the Regulation of Investigatory Powers Act 2000 (**RIPA**) were unlawfully made and ought to be quashed.

2. The first complainant is a Chief Inspector serving with the Metropolitan Police Service (**MPS**). Her husband, the second complainant, is a former detective constable with the MPS who resigned in August 2016.

3. On 22 May 2015 information was received by the MPS alleging misconduct by the first complainant in making false claims as to the periods for which she was on duty and thus claiming pay. The complaint was treated by the investigating officer as alleging an offence of false accounting under section 17 of the Theft Act 1968 and misconduct in a public office. On that basis an authorisation was granted on 27 May, on the grounds set out section 22 (2) (b) of RIPA, namely for the purpose of detecting crime, for the obtaining of communications data relating to two mobile phones used by the first complainant for the period 1 November 2014 to 27 May 2015, including in and out call data and location data. The purpose of including location data was to check where the first complainant was located when, according to her time records on the management system, she was shown as being on duty. The authorisation was granted on the basis that the allegation was made against a senior officer and the ramifications of such an officer committing the criminal offence under investigation were serious.

4. On 24 June 2015 the first complainant was served with a written notice that she was under investigation both for an offence under section 17 of the Theft Act and in respect of gross misconduct.

5. On 10 August 2015 a further authorisation was granted under section 23 of RIPA. That authorisation covered not only the mobile phones used by the first complainant, which duplicated the authorisation already granted, but also covered a mobile phone used by the second complainant for the period from 14 February 2015 to 31 March 2015. The basis of granting an authorisation for communications data, including location data, in respect of the second complainant was that he was also under investigation for an offence under section 17 of the Theft Act.

6. On 5 November 2015 the first complainant was interviewed under caution. During that interview she was informed that communications data had been obtained using RIPA powers, a point confirmed in writing on 15 November. On 11 November the first complainant provided a statement under caution.

7. The investigation team then interviewed the line managers to whom the first complainant had reported. Following those interviews it was concluded that the first complainant had

no case to answer for misconduct. On 22 December 2015 the first complainant was informed that she had no case to answer.

8. On 23 May 2016 the first complainant commenced proceedings before the Tribunal by making a claim under the Human Rights Act 1998 (**HRA**), asserting an infringement of her right to private life, and a complaint in respect of the authorisation for the obtaining of communications data relating to her use of mobile phones.

9. By letter dated 2 February 2017 the respondent accepted that the authorisations had been unlawfully granted, on the basis that the allegations made against the first complainant should not have been considered a criminal matter and that it had been disproportionate for the MPS to have obtained communications data under section 22 of RIPA.

10. On 10 February 2017 the MPS disclosed documents, as directed by the Tribunal, which revealed that the second complainant had also been the subject of the second authorisation. On 13 February the second complainant made a claim under the HRA and a complaint in respect of the authorisation for the obtaining of communications data relating to the use of his mobile phone. By an email sent on 1 April the respondent conceded that it was disproportionate to have obtained communications data relating to the second complainant under section 22 of RIPA. By letter to the Tribunal dated 2 December 2016 the MPS had stated that the communications data obtained in respect of the second complainant had not been used in the investigation and had been destroyed.

Issues

11. The letter from the respondent dated 2 February 2017, and the email sent on 1 April, conceded that there should be a declaration that the authorisations were unlawfully obtained and should be quashed, and that, subject to consent of the Tribunal, all of the data obtained as a result of the authorisations should be deleted. The complainants request that, if required for any further proceedings or investigation, one set of such data should be retained by the respondent's legal advisers.

12. The remaining issue to be determined is whether the Tribunal should exercise its power under section 67 (7) of RIPA to make an award of compensation.

13. Under section 8 of the HRA the Tribunal has power, in respect of any act of a public authority which it finds to be unlawful, to grant such remedy as it considers just and appropriate. Under subsections 8 (3) and (4) it is provided:

> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including- (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
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> (4) In determining-
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> (a) whether to award damages, or
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> (b) the amount of an award,
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> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention…

14. The general principles to be applied in considering the award of compensation under section 8 of the HRA are well established, but in the course of argument it became apparent that the parties differed over (a) whether the general rule is that damages are not necessary to provide just satisfaction, save in exceptional cases and (b) whether it is necessary in order to establish a claim for damages for distress or psychological injury for a claimant to prove that the injury was directly caused by the infringement of rights in issue.

15. The complainants submitted:
    (a) the conduct of the respondent was an intrusion on both professional and private life and in respect of a very substantial quantity of communications data, which conduct had a substantial impact, in particular on the first complainant, which justifies a substantial sum in respect of the significant and prolonged injury to feelings and distress caused;

(b) damages should reflect the use of the power under section 22 of RIPA for conduct which should not have been considered a criminal matter and the consequent prolonging of the investigation for seven months, and the conduct of the respondent in failing to apologise or offer workplace support, and the delay in providing disclosure, in particular the authorisation in relation to second complainant;

(c) an additional award to reflect special damages is appropriate, covering the estimated cost of medical treatment for the first complainant amounting to £2400.

16. The respondent submitted:

(a) No award of compensation should be made because, in line with the authorities, no such award is shown to be necessary;

(b) The complainants' rights are fully vindicated by the agreed order making a declaration that the authorisations were unlawful, quashing the authorisations, and ordering the deletion of data so obtained;

(c) The first complainant cannot show that the stress-related conditions from which she has suffered were caused by the use of RIPA powers to obtain communications data, as opposed to being caused by the commencement and conduct of the investigation.

17. The arguments are clearly set out in the written argument on each side and were helpfully developed in oral argument. We have taken into account the written witness statements of the first and second complainants, and the report of Dr. Bristow, a consultant psychiatrist, jointly retained by the parties.

18. It was not argued for the complainants that the authorisations were applied for or granted in bad faith. There is no evidence on which the Tribunal could rely to make any such finding. We therefore proceed on the basis that the authorisations were granted in aid of an investigation which was reasonably believed to be necessary.

Principles

19. The Tribunal has set out the general principles to be applied in *B v Department for Social Development* IPT/09/11/C and *Chatwani and others v National Crime Agency* [2015] UKIPTrib 15_84_88-CH. Those cases followed the guidance from the speech of Lord Bingham in *R (Greenfield) v SSHD* [2005] 1 WLR 673 at paragraph 19 to the effect that the HRA is not a tort statute, the power to award damages is directed towards vindication of the right asserted and, following the principles applied by the European Court of Human Rights, any award of damages necessary to achieve just satisfaction should be equitable and fair in the circumstances of the case. In the judgment of Lord Woolf CJ in *Anufrijeva v Southwark LBC* [2004] QB 1124 at paragraph 66 it was stated:

> "The critical message is that the remedy has to be "just and appropriate" and "necessary" to afford "just satisfaction". The approach is an equitable one. The "equitable basis" has been cited by the Court of Human Rights both as a reason for awarding damages and as a basis on which to calculate them."

20. Mr. Watkins for the complainants submitted that the power to award compensation, as applied by the Court of Human Rights, is a wide discretionary power which should be exercised when necessary, not only in exceptional cases, that damages may include compensation for distress and that in assessing the impact of the infringement a flexible approach is taken to causation. Those submissions are not inconsistent with the approach adopted by the Tribunal in *David Moran & others v Police Scotland* [2016] UK IPTrib15_602 at paragraph 33. The point on causation is supported by the judgment of Lord Bingham in *R (Greenfield) v SSHD,* in an Article 6 context, at paragraph 15 where it was stated:

> "In the absence of a clear causal connection the court's standard response has been to treat the findings of violation without more as just satisfaction … But it has softened this response where it was persuaded that justice required it to do so. … Wisely, in my opinion, the court has not sought to lay down hard and fast rules in a field which pre-eminently calls for a case by case judgment, and the court's language may be taken to reflect its assessment of the differing levels of probability held to attach to the causal connection found in individual cases."

21. The principles argued for by Mr. Watkins are supported by the case of *Halford v United Kingdom* (1997) 24 EHRR 523 at paragraphs 74-76. That was an interception of communications case which the court treated as a serious infringement and awarded compensation of £10,000, notwithstanding that there was no evidence to suggest that the stress suffered was directly attributable to the interception of the claimant's communications data. In *Copland v United Kingdom* (2007) 45 EHRR 37 at paragraphs 53 to 55 there was an award of compensation of £3,000 in a case which involved monitoring of communications, not interception. The medical evidence was that the claimant had suffered stress in her work environment, but did not prove that such stress was directly caused by the infringement in issue. The court specifically referred to *Halford* in making its award.

22. In answer Mr. Beer QC for the respondent argued that the Tribunal had developed its own approach, in *B v Department for Social Development, Chatwani v National Crime Agency* and *News Group v Commissioner of Police of the Metropolis* [2016] UK IPTrib 14_176, so that reference to the cases of *Anufrijeva v Southwark* and *R (Greenfield) v SSHD* was unnecessary. Mr. Beer QC particularly relied on the statement in paragraph 11 of the *News Group* decision in referring to *Halford* as a standalone decision which had been distinguished in *Anufrijeva*. However each of the cases decided by the Tribunal is dealing with a different set of facts in the context of a jurisdiction of wide discretion, and the general principles to be applied must be those authoritatively established in the judgment of Lord Bingham in *R (Greenfield) v SSHD*. We do not consider that, in a different factual and legal context, the Tribunal in *News Group* was indicating that the decision of the Court of Human Rights in *Halford* should not be taken into account, and, as pointed out above, that decision was taken into account by the Court in *Copland*. At paragraph 68 of the judgment in *Anufriejeva* Lord Woolf stated that the seriousness of the violation committed could be taken into account, and at paragraph 69 the case of *Halford* was cited as such a case.

23. For those reasons we accept the submissions made for the complainants. The general test is that summarised by Lord Woolf in *Anufrijeva v Southwark LBC* at paragraph 66. It is not necessary to demonstrate that a case is exceptional for compensation to be awarded. The seriousness of the infringement and its impact on the claimant may be taken into account. In assessing the effect on the complainant it is not essential that distress or

psychological injury be proved to have been directly caused by the infringement, provided there is some causal relation between the infringement and the distress or injury.

Effect on the First Complainant

24. The factual issue which we have to resolve is whether the grant of the two authorisations to obtain communications data relating to the first complainant was a cause of, or had a causal relation with, the stress related disorder which is diagnosed by Dr. Bristow at paragraphs 10.1 to 10.4 of his report.

25. Dr. Bristow was asked to report, inter alia, whether the condition from which the first complainant suffered was caused or exacerbated by the unlawful authorisations. His answer at paragraph 10.7 is that from what the first complainant had described the principal cause of her stress disorder was the investigation. By the investigation he means all the events occurring in the course of that investigation, including disclosure that RIPA powers had been exercised. His report at paragraphs 4.6 to 4.11 sets out how the First Complainant described her reaction to those events from June 2015 to January 2016. It is clear from that narrative that the information in June 2015 that an investigation had been commenced had caused the first complainant considerable stress, and in conjunction with a period of post-operative recovery, led to her taking sick leave for over 2 months, to 8 October 2015. She stated that her stress worsened when in November 2015 she found out about "the RIPA surveillance", by which she must have meant the obtaining of communications data, which appreciably worsened her symptoms of stress.

26. The first complainant's witness statement does not seek to attribute the cause of her stress-related condition entirely to the conduct of the respondent in obtaining communications data under RIPA. For a senior officer, with an unblemished record of 22 years' service, to be subjected to an investigation for a criminal offence would have been deeply troubling and undoubtedly triggered her stress condition. Her evidence is that when she was informed on 5 November 2015 that she had been the subject of a RIPA authorisation that did cause her significant stress, as she appreciated that RIPA powers would only be used for the most serious of cases. She attributes the flashbacks from which she is suffering specifically to the issue of the RIPA authorisations. To the extent that she attributes the cause of her stress disorder specifically to the misuse of

RIPA powers her evidence must be approached with some caution, but there are no grounds for not accepting her evidence that the disclosure that RIPA powers had been used materially exacerbated the stress that she was under.

27. The first complainant was not suspended during the investigation, but was moved to other duties. She has since moved to another department with the same rank of Chief Inspector. Since November 2015 she has not required to take sick leave on account of her stress disorder.

28. We find that, although the primary cause of the stress condition which has been diagnosed was the investigation conducted by the MPS, the disclosure that RIPA powers had been used in the investigation would have had a material detrimental effect. The investigation and her interview under caution on 5 November 2015 relied almost entirely on the location data obtained under authorisations which are accepted to have been unlawful. There is in this case a sufficient causal connection between the infringement of rights and the stress condition diagnosed to justify an award of compensation, if such an award is necessary.

Just Satisfaction

29. Mr. Beer QC submits that no award of compensation is necessary as the grant of a declaration and the quashing of the authorisations would be a sufficient vindication for the complainants, the authorisations were granted in good faith, and there was no interception of the content of any communications. The main factors advanced by Mr. Watkins for the complainants to justify an award of damages are the seriousness of the intrusion into their private life, the substantial impact which that intrusion had on the first complainant, and the subsequent conduct of MPS in failing to remedy the wrong which had been committed. He accepted that aggravated damages are not recoverable as such (see *Wainwright v United Kingdom* (2007) 44 EHRR 40 at paragraph 60) but argued that similar factors could be taken into account in assessing the seriousness of the infringement.

30. In the case of the second complainant we do not consider that any award of compensation is necessary. He was unaware that his communications data had been

obtained until after he resigned from the MPS in August 2016. His communications data was not used in the investigation, but was deleted. His witness statement, made in support of his wife's claim, does not suggest that he suffered any stress or damage as a result of the authorisation made in respect of his communications data.

31. In the case of the first complainant although the contents of her communications were not intercepted this was a serious infringement of her rights, covering a substantial period of time. The investigation, substantially based on the communications data unlawfully obtained, has caused her diagnosed stress disorder. However she has been able to continue in work and the resolution of this case may assist her recovery. An award of compensation is necessary to vindicate her rights.

32. It is common ground that any compensation should be assessed on a basis which is moderate (*Anufrijeva* at paragraph 77) or modest (*Chatwani* at paragraph 46). The decided cases do not establish any tariff of awards and each case must be decided on its own facts. In this case, taking account of all the circumstances, we consider that an award of £5,000 to the first complainant is just and appropriate.

Order

33. For the reasons set out above we make the following order:

(1) A declaration that the obtaining of the complainants' communications data under authorisations granted on 27 May and 10 August 2015 under section 23 of the Regulation of Investigatory Powers Act 2000, was unlawful, as being contrary to section 6 of the Human Rights Act 1998 as read with Article 8 of the European Convention on Human Rights;

(2) The authorisations are quashed, and the communications data obtained under such authorisations shall be deleted by the Metropolitan Police Service (save that one set of such data will be retained by the respondent's legal advisers in case of further proceedings brought by either complainant and any related investigations);

(3) The respondent shall pay compensation of £5,000 to the first complainant within 28 days.

34. Pursuant to section 68(3) of the Regulation of Investigatory Powers Act 2000 a copy of this judgment shall be sent to the Interception of Communications Commissioner.