Neutral Citation Number: [2022] UKIPTrib IPT_20_01_CH

No. **IPT/20/01/CH**

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 14/02/2022

Before:

MRS JUSTICE LIEVEN

CHARLES FLINT QC

B E T W E E N :

(1) LIBERTY
(2) PRIVACY INTERNATIONAL **Claimants**

- and -

(1) SECURITY SERVICE
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondents**

_____

C O U N S E L

MR T. DE LA MERE QC and MR B. JAFFEY QC (instructed by Bhatt Murphy and Liberty) on behalf of the Claimants.
SIR JAMES EADIE QC and MR. R. PALMER QC (instructed by Government Legal Department) on behalf of the Respondents.
MR J. GLASSON QC and MS S. HANNET QC (instructed by Government Legal Department) as Counsel to the Tribunal.

J U D G M E N T

Mrs Justice Lieven and Mr Flint QC:

1. This is an application by Liberty for permission to use materials disclosed, filed or served in the claim before the Investigatory Powers Tribunal ('IPT' / 'Tribunal') in its judicial review claim before the Divisional Court challenging the compatibility of the Investigatory Powers Act 2016 ('the IPA Claim') with articles 8 and 10 of the Human Rights Convention. Liberty wishes to use these materials to advance its application for permission to appeal the Divisional Court decision.

2. It is not necessary to set out the background save in very short form. In the IPA claim Liberty argued that it was necessary for the Court to consider the effectiveness in practice of the safeguards of a secret surveillance system and that there were material defects within the MI5 system. The Divisional Court rejected the argument, principally on the basis that it was not legally relevant to consider the practical effectiveness of the safeguards. However, the Court held, in the alternative, that the defects as disclosed did not establish that the safeguards were not effective in practice. It is this latter point which is relevant to the present application.

3. Liberty seeks permission to appeal ('PTA') both on the ground that the Court erred in principle in respect of legal relevance, but also that any finding that the safeguards were effective in practice was incorrect.

4. Liberty argue that the material sought goes directly to the issue of practical effectiveness. At [9] of its Application it sets out eight points from the material, which it argues demonstrates lack of effectiveness. It is not for us to judge the weight or otherwise of these points, save that they are all potentially relevant to effectiveness.

5. The applicable law on collateral use of material disclosed in the courts is codified in CPR r31.22. The most recent consideration of the principles is set out by Hildyard J in *ACL Netherlands BV v Lynch* [2019] EWHC 249 (Ch). Those principles can be summarised as:

a. It is for the applicant to demonstrate that collateral use is justified and to show that there are "special circumstances which constitute "cogent and persuasive reasons" for permitting collateral use" [30];

b. It must be shown that there is "some public interest in favour of, or even apparently mandating, such use which is stronger than the public interest and policy underlying the restrictions that the rules reflect": at [32], and see also [39];

c. A common public interest that tends in favour of permission a collateral use is "the public interest in the investigation and/or prosecution of serious fraud or criminal offences": at [34];

d. A factor tending against permitting the collateral use is any injustice that might thereby be caused to the disclosing party: at [47].

6. The earlier case of *Tchenguiz v Director of SFO* [2014] EWCA Civ 1409 emphasised the importance of protecting a litigant's right to privacy and confidentiality and the highly fact sensitive nature of these decisions.

7. The degree to which the documents may assist the Court is capable of being a relevant consideration. The Claimant relies upon *LIA v Société Générale* [2017] EWHC 2631 for the proposition that it is not appropriate for the Tribunal to decide the underlying issues which could arise on the application for leave to appeal in the Divisional Court. The judgment of Teare J at paragraph 35 does support the point that it is not necessary for a prima facie case to be established.

8. It is important to note the difference between the scope of the application made in this case and the cases cited by the parties as setting out the principles which should govern permission to make use of disclosed documents for a collateral purpose. In *ACL Netherlands NB v Lynch* [2019] EWHC 249 documents disclosed in the civil claim against Mr Lynch were sought to be made available to the FBI for investigation in potential criminal proceedings in the USA. In *Libyan Investments Authority v Société Générale* disclosure was sought to enable the claimant to investigate claims against other financial institutions which had not been parties to the proceedings in which disclosure had been given. In *Tchenguiz v Director of SFO* [2014] the collateral use was sought to investigate potential civil and criminal proceedings against

third parties who had not been involved in the proceedings in which the relevant disclosure had been given.

9. In this case the application does not raise any issue of potential injustice to a third party. The Secretary of State for the Home Department ('SSHD') is a party to both proceedings and it is accepted that the disclosure given in the judicial review proceedings did include documents concerning MI5 compliance issues (Respondents' submissions para 2). So the issues in the two sets of proceedings do overlap. There is a strong public interest in the lawfulness and operation of the safeguards in question. The Respondent does not, and could not, argue that there is any national security interest which would tell against collateral use in related proceedings.

10. In our view, the tests for collateral use of the material are met in this case. The material in question is potentially relevant to the Claimant's submission on Ground 6 in the IPA case. The matters set out at [9] of Liberty's application go to the practical effectiveness of MI5's systems and are, at least in principle, capable of being relevant to the matters the Divisional Court will need to consider. The consequences of the arguments as to practical effectiveness set out in the Respondent's submissions at [13] are a matter for the Divisional Court at PTA, or for the Court of Appeal, not for the IPT.

11. The primary argument of the Respondents' submissions is that the documents sought are irrelevant, and have been found to be such by the Divisional Court, see Respondent's submissions at [17 & 23]. However, Liberty's argument in Ground 6 is that the Divisional Court erred in finding practical effectiveness of the safeguards, and the material evidence now sought was not before the Divisional Court. That is a matter for the Divisional Court to decide.

12. The second line of argument is that the documents sought add nothing to the evidence which has already been disclosed in the judicial review proceedings [Respondents' submissions at paras 15, 17 & 21]. It will be relevant for the Divisional Court to consider whether the

evidence now available makes any material difference to the assessment of the adequacy of MI5's data handling arrangements, and if so whether that assessment provides a potential ground for appeal. But the argument for the Respondents that some relevant material has been disclosed in the judicial review proceedings does not provide any ground for seeking to exclude from consideration materials subsequently discovered which raise an arguable case.

13. Further, it is argued that this will entail a disproportionate use of Court time and may "derail" the proceedings, see Respondent's submissions at [4]. However, Liberty's submissions on PTA will necessarily have to be proportionate and appropriate.

14. The Respondent further submits that the material sought pre-dates the commencement of the IPA provisions and therefore does not go to the effectiveness of those provisions. Again, that is a matter primarily for the Divisional Court, but we accept that it is arguable that the alleged failure of the IPA regime to detect earlier breaches may be relevant to the IPA claim.

15. For these reasons we conclude that Liberty should have permission to use the OPEN disclosed materials referred to at paragraph 1 of Liberty's application.

16. In principle this decision could extend to CLOSED material, but we do not consider it necessary to make a direction that Counsel to the Tribunal should review the CLOSED material to assess whether any further documents require to be made available.

17. This application is urgent and to require the production of CLOSED material would risk causing substantial delay in the Divisional Court's consideration of the argument to be advanced under Ground 6.

18. Paragraph 9 of the application sets out the substance of the points which will be relied upon in support of the submissions as to the effectiveness of the MI5 controls and those points do not appear to be challenged as a matter of fact. It appears unlikely that any available CLOSED material would substantially affect the factual points advanced by Liberty in its submissions

at paragraph 9. The main thrust of the Respondent's argument is that those points are not relevant, not that they are factually wrong.

19. However, if Counsel to the Tribunal consider that there is CLOSED material directly relevant to the argument under Ground 6 which might throw a substantially different light on the factual basis of the arguments available to Liberty, then we would, if time permits, be prepared to consider an application to permit the use of CLOSED material.