IN THE INVESTIGATORY POWERS TRIBUNAL — Case No. IPT19/08/CH

Neutral Citation Number: [2022] UKIP Trib 4

Date: 2 November 2022

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
(5) GOVERNMENT COMMUNICATIONS HEADQUARTERS

Respondents

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, Third and Fifth 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

JUDGMENT

The parties

1. The claimant is known in these proceedings as Z3 following the making of an anonymity order by the Tribunal.

2. The respondents are, first, the Secretary of State for the Home Department; second, the Security Service; (third) HM Prison and Probation Service; and fifth the Government Communications Headquarters (GCHQ). For ease of reference these are referred to as the Government respondents. The fourth respondent is the Chief Constable of West Yorkshire Police, who has responsibility for the North East Counter Terrorism Unit (NECTU). NECTU is now known Counter Terrorism Policing North East (CTP NE).

3. We should record that in the course of the hearing It was agreed that the fifth respondents (GCHQ) had no involvement in any of these matters and we dismissed the complaint and claim insofar as directed against them.

Summary

4. Z3 was a naturalised British citizen who was convicted of an offence under the Terrorism Act 2016, and subsequently a breach of a Terrorism Prevention and Investigation Measure (TPIM). On 14 August 2018 he was served with a notice of deprivation of nationality and a decision to deport him. He was detained in HMP Belmarsh. He challenged the decision to deprive him of nationality to the Special Immigration Appeal Commission (SIAC). On 1 November he applied for bail. The hearing before SIAC was set for 29 November 2018.

5. The Home Office opposed the application and, through the Government Legal Department (GLD), instructed counsel to appear at the hearing. In the course of

preparation the Home Office official dealing with the case became aware of certain information concerning the claimant's attitude to remaining in the UK which she considered might be relevant to the Home Office case at the hearing. The information had been obtained from the monitoring of the claimant's calls from prison. The issue in this case arises out of the subsequent provision to a GLD lawyer and counsel of material from these calls which arguably attracted legal professional privilege (LPP).

6. On 22 February 2019 the claimant made both a human rights claim (form T1) and a complaint (form T2) to the Tribunal. He alleged that the respondents had misused his legally privileged material by intercepting, disseminating and using privileged and sensitive material recording legal advice given to him by solicitors in the ongoing litigation before SIAC. The conduct he alleged was (a) in breach of articles 6 and 8 ECHR and (b) unlawful as a matter of domestic law. In addition, Z3 complained that further similar or related conduct was likely to have occurred. Further particulars clarified that there were two elements to the claim. The first is in relation to the overt interception of prison telephone calls by the prison. The second is to the effect that during the course of covert surveillance on him legally privileged material was obtained and misused in the course of various court proceedings in which the claimant was a party.

7. The respondents contend that insofar as the complaints arise out of the interception of calls made by the claimant from prison the Tribunal does not have jurisdiction. The Government respondents further contend that there is no valid basis within the complaints for the Tribunal to further investigate conduct by or on behalf of the Security Service.

8. The Tribunal held a preliminary hearing on jurisdiction. It was in three parts. There was an OPEN hearing at which all parties were present. The second was an IN CAMERA hearing. In the course of the criminal trial the claimant had disclosed to him material

which had not been shared with the fourth respondents. The IN CAMERA hearing dealt with submissions arising out of that material and for that reason the fourth respondent and their counsel and solicitors were excluded from this part of the hearing. Finally, there was a CLOSED hearing from which the claimant and his counsel was excluded. The Tribunal was assisted by Counsel to the Tribunal.

9. While this was a preliminary hearing on jurisdiction extensive reference was made by all parties to the factual issues in the case in all three parts of the hearing. In some instances these went far beyond what was required to resolve the jurisdiction point.

The facts

10. The claimant was detained and inducted into HMP Belmarsh on 16 August 2018 as a high risk Category A prisoner in the High Security Unit. He was informed that telephone calls would be recorded and monitored. His induction pack included a compact to sign regarding telephone use. He signed the forms, including the telephone compact which made it clear that the use of the telephone (other than to named legal representatives) would be monitored. He received an induction booklet which said;

> "TELEPHONE CALLS ARE RECORDED AND WILL BE MONITORED WITH THE EXCEPTION OF LEGAL CALLS"

11. The booklet stated that TACT prisoners, which included all those remanded or convicted of offences under the terrorism legislation, would be subject to 100% monitoring of mail and telephone calls. There was a sign placed next to the telephone which stated that by using the phone the prisoner agreed to the conversation being recorded and listened to by prison staff. The staff monitoring the calls were visible from the telephones.

12. The relevant calls took place between the claimant and his wife between 20 August 2018 and 14 November 2018. On 29 August 2018 West Yorkshire Police applied to the

prison for access to recordings of calls made by the claimant. Access to the digital recordings of the monitored calls was granted on 6 September 2018.

13. A GOLD meeting was held on 13 November 2018 to discuss the application for bail and the management of the claimant in the event of his release on bail. (The term GOLD meeting simply connotes a meeting chaired by a GOLD commander as part of an operational command structure). Among those present at the meeting was a Home Office representative, Ms Banks, and a detective constable from NECTU. In the course of the meeting reference was made to the claimant's state of mind and his desire to leave the UK. This information came from the transcripts of the claimant's telephone calls. Ms Banks asked for the information to be emailed to her as it might be relevant to the Home Office's opposition to bail. This information was incorporated into a document referred to as 'Document 1' which was sent to Ms Banks. She was given permission by the fourth respondent to allude to the information contained in the document in a witness statement she was preparing for the hearing. She was also informed that the claimant knew that his calls were being monitored.

14. Ms Banks forwarded Document 1 to the lawyer at GLD dealing with the case before SIAC, Ms Hall. Ms Hall started reading the document and noted that it contained reference to advice that that the claimant had received as to the prospects of success in his bail application. She was concerned that this might be subject to LPP. She forwarded Document 1 to Rory Dunlop, counsel who was instructed for the Secretary of State in the bail proceedings and asked for his advice. Mr Dunlop read part of the document, but because of his own concerns he stopped reading when he read the reference to prospects of success. He sent an email to the special advocate, copied to senior counsel for the claimant, outlining his own involvement with the document.

15. Subsequently Ms Banks asked HMP Belmarsh to provide a redacted version of Document 1, where only the potential LPP material was visible so that it could be disclosed to the OPEN representatives before SIAC. This was to assist them if they wished to pursue the matter before SIAC. This document, 'Document 2', was provided to the Home Office on 28 November 2018, the day before the hearing. It was not at that stage provided to those representing the Home Office before SIAC, nor to the claimant's legal representatives. Counsel for the claimant had agreed, on the basis of what he understood was the extent of reference to the allegedly LPP material, that the claimant would not raise the issue before SIAC and that the hearing should go ahead. No reference was made to Document 1 at the hearing. The application for bail was refused.

16. On 4 December 2018 the Home Office sent Document 2 to GLD. It was not at that stage checked by Home Office. When the GLD lawyer opened the document it immediately became clear that it was not the document that she had asked for. She closed it immediately and double deleted it from the system. Document 2 contained further material, obtained as a result of the monitoring of the claimant's calls in prison, which arguably attracted LPP material. Those representing the claimant were subsequently informed of what had occurred. They were shown Document 2. Meanwhile a third document, 'Document 3' had been created, which contained the potential LPP material from Document 1. That was also shown to the claimant's representatives.

Submissions for Claimant

17. There were two elements to the claim. The first was in relation to the overt interception of prison telephone calls by the prison. The second was in relation to the covert use of other investigatory powers against the claimant. While a response had been filed by the Government respondents it dealt only with the first part of the claim and did not address the second element. It was highly likely that the claimant had been the target

of a range of investigatory powers. Such powers are used covertly. A claimant in the Tribunal is not required to prove that he has been the subject of such powers to bring a claim. All he need show is that he was potentially at risk of such measures; *Human Rights Watch* [2016] UKIPTrib 15_165-CH at [19]. The claimant's position was similar to the case of *Belhadj* [2015] UKIPTrib 13_132-H, in which it transpired that the claimant's privileged material had been mishandled by GCHQ.

18. The human rights claim (form T1) and complaint (form T2) were significantly different jurisdictions. Section 65(2)(a) of the Regulation of the Investigatory Powers Act 2000 (RIPA) provides that it is the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 (HRA) for proceedings that fall within section 65(3) RIPA. The claimant was a victim in terms of section 7 HRA. The Tribunal had jurisdiction if the conduct complained of was against the intelligence services or against any other person in respect of conduct carried out on behalf of these services; section 65(3)(a) and (b) and took place in challengeable circumstances; sections 65(7) and (8). This included conduct for or in connection with the interception of communications; section 65(5)(b).

19. In this case there had been a catalogue of errors by the fourth respondent, whose officers did not have an adequate understanding of LPP. There was every prospect that further errors may have been made in relation to LPP obtained by covert means. It was apparent that Home Office, GLD and the Security Service had received the summaries of calls. The LPP material had been mishandled contrary to Convention rights. When this was realised it was too late. There were no adequate steps taken to deal with it. They made an error that the material did not attract LPP. There was an interference with the claimant's private rights.

20. The material was obtained by the Prison Service and West Yorkshire Police. The issue of whether this conduct was within the exclusive jurisdiction of the Tribunal depended

on whether it was conduct on behalf of the Security Service. That depended on whether it was at the request and instigation of the Security Service. The claimant did not know for sure. It was clear that the Tribunal had a Human Rights Act jurisdiction once the material had been received by the Security Service.

21. It was accepted that if the police did it off their own bat then the Tribunal did not have jurisdiction. That might depend on what was available to the Tribunal in CLOSED. If the only way of dealing with it was by applying NCND then the jurisdiction issue should be kept open for a substantive hearing.

22. The other route to jurisdiction was on form T2 under sections 65(2)(b), (4) and (5). Unlike the first route it was not an exclusive jurisdiction. The Tribunal could consider and determine any complaints made to them in accordance with subsection (4). All that was necessary for the claimant under this route is that he is able to plead that the conduct complained of was carried out by or on behalf of one of the intelligence services. The claimant had done so in this case.

23. After the CLOSED hearing the Tribunal invited parties, if they so wished, to make any submission on the meaning of the words "on behalf of" in section 65 RIPA. The Claimant submitted a short written note. The phrase "on behalf of" should be given its ordinary meaning. The Claimant's research had identified only one potentially relevant authority; *Gaspet v Elliss (Inspector of Taxes)* [1987] 1 WLR 769. The Court of Appeal had considered the meaning of a tax relief for scientific research "directly undertaken... on... behalf" of a taxpayer. The Court held that the words "directly undertaken" together with the concept of acting on behalf of the taxpayer connoted a close link to agency, though not necessarily contract. The language of RIPA does not include any equivalent language but some express or implied request will be needed.

Submissions for Government Respondents

24. Mr Palmer KC for the Government respondents submitted that the Tribunal did not have jurisdiction to consider complaints arising out of the interception of calls made by the claimant from prison. These were overt lawful interceptions of telephone calls made by the prison service in accordance with sections 4 and 6 of the Investigatory Powers Act 2016, the Prison Act 1952, section 47 and the Prison Rules 1999, in particular rules 34(1) and (2), 35A and 35C. As a high security prisoner and as a TACT prisoner his calls were subject to monitoring throughout his detention; see Prison Service Instruction (PSI) 04/26, paras 2.95 and 4.15. The claimant had been required to sign a copy of the telecommunications compact; para 2.11. He had done so. He knew his calls would be monitored. They were calls made to his wife, not to his legal advisers. Such calls were not monitored.

25. The claimant contended that the Tribunal had jurisdiction, including under section 65(2)(a) and (b). In terms of section 65(2)(a) the Tribunal would have jurisdiction in terms of a claim under section 7 of the Human Rights Act if they were proceedings against any of the intelligence services or were proceedings against any other person in respect of conduct by or behalf of any of the intelligence services; section 65(3)(a) and (b). It was clear from the facts that the only specific allegations related to overt and routine call monitoring and recording by the prison, the passing of summaries of calls to West Yorkshire Police, and then on to the Home Office and then to GLD. On the facts nothing was done by the Security Service with the material which allegedly attracted LPP. So far as the complaint on T1 was concerned nothing had been pleaded in the particulars of claim which would suggest that further enquiry was warranted. It was not sufficient to assert a belief without any basis or pleading.

26. So far as covert material was concerned the claimant did not complain that he was of interest to the intelligence services; plainly he was. The complaint was about LPP. As such it was not analogous to a human rights claim. The test for jurisdiction is whether the claimant, as a result of is situation was potentially at risk of being subjected to such measures; *R (NCCL) v Home Secretary* [2020] 1 WLR 243 at [109] per Singh LJ, approving the formulation of the test by the Tribunal in *Human Rights Watch.* It was not enough to come along with a mere assertion. In this case the claimant had been given a full explanation but he still asserts a belief that LPP was deliberately collected and misused.

Submission for the Fourth Respondent

27. Mr Skelt KC submitted that the police did not intercept the telephone calls; it was done by the Prison Service. In making the application for access to the digital recordings they did not act on behalf of or at the behest of the Security Service. The reasons for the police interest were clear. There was a real possibility that if the claimant was released on bail he would be located within their operational area, where he had been living previously.

Decision

Interception of telephone calls at HMP Belmarsh

28. It is common ground that in respect of the interception of the claimant's telephone calls the Tribunal only has jurisdiction under section 65(2)(a) and (3), or (4) if it was carried out by or on behalf of the intelligence services, in this case the Security Service. We accept that the words should be given their ordinary meaning. We consider that the Claimant is right to submit that it requires some express or implied request.

29. It is an offence to intercept communications in the course of transmission by a telecommunications system, whether public or private, without lawful authority; s3 Investigatory Powers Act 2016 (IPA). A person has lawful authority if inter alia the

interception is authorised by any of sections 44 to 52 IPA; s6(1)(b). Section 49 provides that interception in prisons is authorised if it is conduct in exercise of any power conferred by or under prison rules. So far as England and Wales are concerned the applicable rules are the Prison Rules 1999, made under the Prison Act 1952. Rule 35A(2) provides that, subject to any directions given by the Secretary of State the governor may make arrangements for any communication by a prisoner or class of prisoners to be intercepted by a prison officer or an employee of the prison authorised for that purpose on any of the grounds specified in 35A(4). These include (a) the interests of national security and (b) the prevention, detection, investigation or prosecution of crime. As a high security prisoner and as a TACT prisoner his calls were subject to monitoring throughout his detention; Prison Service Instruction (PSI) 04/26, paras 2.95 and 4.15. No such interception may be made of calls to the prisoner's legal adviser; rule 35A(2A)(a).

30. It cannot therefore be said that the interception of the claimant's telephone calls was carried out on behalf of the Security Service. The interception occurred because of the obligation on the prison, through the Prison Rules and the Prison Service Instruction, because of the claimant's status in the prison. As such it was a matter of routine. It was entirely overt. The claimant knew that his calls were being routinely monitored. He had signed a compact acknowledging as much. There were signs next to the telephones reminding prisoners that calls may be monitored.

31. Nor can it be said that the request for the transcripts on 29 August 2019 by the police was done on behalf of the Security Service. In the first place the application was made by a police officer. The police had an obvious interest in whether the Claimant might pose a threat of engaging in criminal activity, specifically acts of terrorism, were he to be released.

32. There is no evidence to suggest that the Security Service asked for or instigated the interception, far less for the purposes alleged by the Claimant, the misuse of legally privileged material. The fact that the Security Service saw copies of the summaries of the calls made by the claimant does not imply that they requested them for that purpose.

33. It was argued for the claimant that another route to the Tribunal's jurisdiction was through s65(4). That would apply in this case if the following requirements were met.

34. First, it was conduct falling within subsection (4). This condition is met; it is conduct for or in connection with the interception of telecommunications. Section 65 (5) (a) relates to conduct by or on behalf of any of the intelligence services. However, this does not apply for the reasons given above.

35. Secondly, the conduct took place in relation to communications sent and received by the claimant; section 65(4)(a). That condition is met.

36. Thirdly, whether it took place in challengeable circumstances; s.65(4(b). 'Challengeable circumstances' is defined in subsection (7). The relevant part of that subsection is whether the conduct took place with the authority or purported authority of anything falling within subsection (8). This test is not met. In particular, section (8)(a) does not apply because although the interception took place under the authority of Part 2 of the IPA a warrant was not required.

37. For these reasons we conclude that the Tribunal does not have jurisdiction in respect of the interception of telephone calls made by the claimant from HMP Belmarsh.

Misuse of LPP material by the Security Service in the course of covert surveillance

38. The Tribunal is the only appropriate tribunal for the purposes of section 7 HRA in respect of proceedings against the intelligence services. The claimant alleges breaches of articles 6 and 8 ECHR in connection with the handling of LPP material by the Security Service during covert surveillance. He asserts a belief that similar breaches may have happened on other occasions in respect of LPP material. He says that he is a victim for the purposes of HRA.

39. The respondents submit that the claimant is not a victim because he has no proper basis on which to found his belief. Secondly, and in any event having made a full disclosure there is nothing further to investigate and the claim should be dismissed.

40. In *Human Rights Watch* the Tribunal consisting of five members, including the then President and Vice President, considered the appropriate test to be applied in respect of an asserted belief that any conduct falling within s 68(5) RIPA has been carried out by or on behalf of the intelligence services, Adopting the approach taken by the ECtHR in *Zhakarov v Russia* 4/12/2015 Application no 47143/06 (para 171) the Tribunal held that the appropriate test was whether the *"individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or legislation permitting secret measures only if he is able to show that due to his personal situation, he is potentially at risk of being subjected to such measures"*; *Human Rights Watch* at [46]. The Tribunal described this as the low hurdle for a claimant that the Tribunal has traditionally operated. This test was endorsed by Singh LJ in *R (on the application of Liberty) v Secretary of State for the Home Department* [2019] EWHC 2057 (Admin) at [99 – 112].

41. The Claimant is a convicted terrorist who has been the subject of a TPIM. It would be surprising if he had not, at some point, been the subject of covert surveillance measures. His personal situation puts him at risk of such measures being used against

him. At the very least article 8 would be engaged. We do not consider we need go any further. *Prima facie* the victim test is met.

42. The respondents submit however that having been given a full explanation of all the measures that have been taken against him the claimant cannot properly say that he has a well-founded belief that he has been a victim of a violation of his Convention rights. As we understand the submission it amounts to a recognition that (a) he was a person potentially at risk of such measures and (b) that he was in fact subjected to such measures. But while he may fulfil the criteria for victim status, having been given a full explanation the victim status in effect flies off. Another way of characterising the submission is that while the claimant may have the right to bring the claim before the Tribunal on the basis of his victim status, he is not entitled to pursue it any further because, having been given the explanation, he no longer has victim status. Taken to its logical conclusion it means that while, initially the Tribunal had jurisdiction it no longer has jurisdiction because the claimant is no longer a victim. No authority was cited for these propositions which we reject.

43. In the first place the claimant has not accepted the explanation. He is entitled not to do so. He has brought his claim to the Tribunal and is entitled to a determination. Secondly, the respondents are, in effect, asking the Tribunal to make a ruling on the substance of a claim at a preliminary stage. We see no advantage in doing so. Indeed we do not consider that we have the power to in effect determine the claim on such a basis.

44. The jurisdiction of the Tribunal is set out in s 65 RIPA. The exercise of that jurisdiction is set out in s 67. The duties of the Tribunal vary depending on whether it is a human rights claim under s65(2) or a complaint; s 65(2)(b) or (c). In both cases the duty of the Tribunal is to make a determination; s 67(1)(b) and (3)(c). The determination is either in favour of the claimant, or not in his favour; s. 68(4). The Tribunal cannot decide not to do so.

Conclusion

45. The Tribunal does not have jurisdiction in respect of the interception of telephone calls made by the Claimant during his detention in HMP Belmarsh. The Tribunal does have jurisdiction in respect of his claim arising out of his belief that having been the subject of covert surveillance legally privileged material was obtained by the Security Service which was then misused in the course of court proceedings to which the claimant was a party.

Further procedure

46. The Government respondents have made extensive disclosure. Having seen the material in CLOSED and IN CAMERA as well as in OPEN we do not consider that we need to make any further investigation or to have a further hearing. We will invite parties to make written submissions in relation to the determination by the Tribunal of the claim in respect of which we have jurisdiction. The Claimant's submissions will be OPEN and should be lodged within 28 days of the handing down of this judgment. The Respondents, submissions should be lodged within 28 days thereafter, and, if they rely on any CLOSED material may be both OPEN and CLOSED. Counsel to the Tribunal is invited to respond within 28 days therafter. The Tribunal will consider these submissions without a hearing and will determine the claim on the papers.

47. The issues raised in CLOSED and IN CAMERA relate to the merits of the claim and not the jurisdiction issue. We do not propose therefore to give any judgment in relation to those matters, which we will take into account when determining the claim. The parties may, if they choose, simply refer to their earlier submissions when filing submissions in accordance with the direction above, and do not need to repeat everything which they have said on these questions.