Neutral Citation Number: [2024] UKIPTrib 9

Case No: IPT/15/542-550/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 20 December 2024

Before:

LORD JUSTICE SINGH (PRESIDENT)
and
MR JUSTICE CHAMBERLAIN

- -

Between :

AXY and others

Complainants

- and -

COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondent

- -
- -

Charlotte Kilroy KC and Bart Casella (instructed by **Banks Kelly Solicitors**) appeared on behalf of the **Complainants**
James Fletcher (instructed by **HMRC Solicitor**) appeared on behalf of the **Respondent**

Hearing date: 8 November 2024

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PUBLIC VERSION OF JUDGMENT

This is a public version of a judgment handed down in private. It has been modified to maintain the anonymity of the Complainants.

Lord Justice Singh and Mr Justice Chamberlain:

Introduction

1. The background to the present dispute appears from paragraphs 1-6 of our ruling of 10 June 2024 ("the Ruling"). We set out those paragraphs, so that the context for what we say here can be properly understood:

> "1. In [a recent case], the Divisional Court quashed six search warrants issued and executed by the National Crime Agency ('NCA') against the complainants' business premises and home. On [date], the Tribunal (Burton J (President), HH Geoffrey Rivlin QC and Sir Richard McLaughlin) issued a decision quashing NCA authorisations for covert listening devices and an approval for property interference under the Regulation of Investigatory Powers Act 2000 ('RIPA'). These judgments were handed down in public.
>
> 2. However, in subsequent proceedings in the Tribunal against the NCA, with HM Revenue and Customs ('HMRC') as an interested party, the hearing was conducted in private at the complainants' request. Those proceedings resulted in a decision of 25 September 2019, which was handed down in private.
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> 3. The complainants brought proceedings before this Tribunal against HMRC, resulting in Orders dated 25 July 2015, 9 February 2016, 8 May 2018 and 21 September 2019. The Tribunal gave written decisions on 25 September 2019 and 9 December 2019 (by a panel comprising Sir Richard McLaughlin and Mr Christopher Symons QC).
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> 4. Some of the complainants brought separate proceedings in the Administrative Court. By a letter to the Tribunal dated 10 March 2023, HMRC applied for the Tribunal's permission to adduce and rely on the Tribunal's decision of 25 September 2019 in the Administrative Court proceedings. The complainants did not object, provided that the decision was subject to appropriate protections for confidentiality in the Administrative Court but contended that HMRC should apply for permission for the parties to adduce and rely on all documents disclosed in the context of the Tribunal proceedings.
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> 5. In a Ruling dated 18 April 2023, the President required the submission of a list of the documents the complainants sought to rely on. The list was provided, and the Tribunal granted the parties permission to rely on and cite both the decision of 25 September 2019 and (subject to appropriate protection for confidentiality) the documents listed by the complainants.
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> 6. Up until that point, the Administrative Court proceedings had been heard in private. However, Swift J wished to reconsider whether some or all of the case could be heard in public. Accordingly, on 23 November 2023, he made an order requiring the parties to write to the Tribunal posing the following questions:

> A. Is it the opinion of the Investigatory Powers Tribunal ("the IPT") that neither the existence or content of:
>
> a. the decision of the IPT dated 25 September 2019
>
> b. the decision of the IPT dated 9 December 2019
>
> c. orders made by the IPT on 24 July 2015, 9 February 2016, 8 May 2018 and 21 September 2019
>
> may be referred to in a public hearing in the judicial review proceedings or in any publicly available judgment made in those proceedings, notwithstanding that the judgment of the IPT dated [date] and its order dated [date] are publicly available, and that the following information is already in the public domain by reason of (a) the IPT's judgment dated [date]; and (b) the earlier decision of the Divisional Court […]
>
> (i) that authorisations to plant surveillance (listening) devices were applied for and given;
>
> (ii) the reasons relied on in support of the application for the authorisations, and the reasons given for the decision granting the authorisations that surveillance devices were in place and in use between 28 January 2015 and 5 February 2015; and
>
> (iii) that the IPT required the NCA either to return or destroy the product of the devices used?
>
> B. Does the IPT consider that neither the existence nor the content of any of the documents referred to in the 2 lists provided with the Claimants' letter to the IPT dated 3 April 2023 may be referred to in open court in the Administrative Court proceedings or in any publicly available judgment of the Administrative Court in those proceedings, by reason of their use in the course of the IPT proceedings?
>
> C. If the answer to 2 above is that no general prohibition applies, which documents or parts of documents referred to in the 2 lists provided with the 3 April 2023 letter (if any) should not, by reason of their use in the IPT proceedings, be referred to in open court in the judicial review proceedings or in any publicly available judgment given in the judicial review proceedings."

2. There was a dispute about whether the Tribunal has jurisdiction to answer the questions posed by Swift J. For the reasons set out at paragraphs 10-15 of the Ruling, we concluded that it does. We also concluded, however, that fairness required us to give the Complainants the opportunity to make further oral submissions before deciding what answers we should give. Part of our reason was that it is "difficult properly to distinguish questions about the effect of the Tribunal's existing orders from questions about whether those orders should be modified or discharged" (see paragraph 16).

3. In the event, the Respondent did not invite us to modify or discharge any existing order; and the Complainants did not invite us to impose any additional protections. The argument was therefore focussed on the effect of the existing orders and on whether we should modify or discharge them of our own motion. It is right to add, however, that the Complainants reserved their position as to the correctness of our conclusion that the Tribunal has jurisdiction to answer Swift J's questions.

The Complainants' submissions

4. Charlotte Kilroy KC for the Complainants submitted that, even where there is jurisdiction to revisit orders which have not been appealed, the courts have repeatedly emphasised that there is a high threshold for doing so: *Tibbles v SIG Plc* [2012] 1 WLR 2591, at paragraph 39; *Thevarajah v Riordan* [2016] 1 WLR 76, at paragraphs 14-19; *Vodafone Group plc and others v IPCom GmbH & Co KG* [2023] EWCA Civ 113, at paragraph 54. A power to vary an order should be exercised only where there is a material change of circumstances. The position is no different where the principle of open justice is engaged: see for example *Venables v News Group Papers Ltd* [2019] EWHC 94, at paragraph 52; and *AB/X v Ministry of Justice* [2023] EWHC 1920 (KB), at paragraphs 36-38. The threshold cannot be lower in proceedings under the Regulation of Investigatory Powers Act 2000 ("RIPA"). Recourse to the Tribunal for wrongful surveillance is one of the ways in which the State balances privacy rights against the public interest (see *Kennedy v United Kingdom* (2011) 52 EHRR 4, at paragraphs 152-154 and 167-169) and the value of that recourse would be undermined if the right to invoke the Tribunal's jurisdiction exposed citizens' private lives to even greater scrutiny.

5. Ms Kilroy emphasised that neither the Complainants nor the Respondent had asked the Tribunal to modify or discharge any previous order. Swift J's questions appeared to

proceed on the misunderstanding that the Tribunal had taken no active decision to impose protections in the first place. In fact, however, a decision to impose such protections had been taken, on 25 September 2019. In the absence of any material change of circumstances, there was no proper basis for the Tribunal to exercise any jurisdiction to modify or discharge any existing order.

6. Finally, Ms Kilroy relied upon evidence in the form of a second witness statement of [the first Complainant] dated 24 October 2024 showing that the considerations which underlay the Tribunal's decision to impose privacy protections continue to be pertinent. The Divisional Court's judgment in [month, year] and the Tribunal's decision in [month, year] revealed that there had been searches of the Complainants' property and arrests. Although these were unlawful, the effect was that banks and other third parties stopped dealing with the Complainants. There were adverse effects on the Complainants' businesses and on the willingness of professional advisers to act for them. As a result, the Complainants sought from the Tribunal, and were granted, privacy in respect of the Tribunal's ruling of September 2019. Going behind that decision now would be likely to trigger just the kind of adverse consequences which the privacy protections were designed to avoid.

7. The answers to Swift J's questions should be that judgments and rulings of the Tribunal delivered in private may not be referred to in public, nor may any documents (including witness statements) prepared for those proceedings. Documents not produced for the purposes of those proceedings may be adduced in the Administrative Court, subject to any applications that may be made by either party in respect of those documents.

The Respondent's submissions

8. James Fletcher for the Respondent noted that the judicial review proceedings before Swift J challenge HMRC's decision to commence tax enquiries against the Complainants on the basis, the Complainants contend, of information unlawfully obtained through surveillance by the National Crime Agency ("NCA"). It is the Complainants who chose to refer to the earlier proceedings before the Tribunal. In that context, the Respondent sought to refer to the Tribunal's decision of 25 September 2019, which found that the Respondent had conducted a proper and compliant exercise to trace and quarantine any produce of unlawful NCA authorisations.

9. Mr Fletcher drew attention to the principle of open justice, enunciated by Lord Shaw in the House of Lords in *Scott v Scott* [1913] AC 417, at 477 and by Lady Hale in the Supreme Court in *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38, [2020] AC 629, at paragraphs 1 and 34-40.

10. As to Swift J's question A, mere reference to the existence of a judgment or decision cannot pose any risk to the privacy of the Complainants, particularly given that both the Tribunal's [year] decision and the Divisional Court's [year] judgment are public. As to the content of the Tribunal's decisions and rulings, the Tribunal should consider the content of the document, its role in the Tribunal proceedings, whether the document was exclusively created for the Tribunal proceedings and whether the Tribunal proceedings would be undermined if the evidence were referred to. Any cases of doubt should be left to the Administrative Court to determine.

11. As to Swift J's question B, there is no general prohibition on the use before the Administrative Court of documents used during in Tribunal proceedings. Nor does the fact that the documents were used in private proceedings before the Tribunal determine

whether they may be referred to in public in the Administrative Court. Whether they may be is a matter for that court, bearing in mind the open justice principle and the need to balance that against other interests, such as right to privacy and the confidentiality of documents.

12. As to Swift J's question C, the mere fact that documents were referred to in private before the Tribunal, and in the Tribunal's private judgment, does not determine whether they may be referred to in public in the Administrative Court. The Tribunal should consider in relation to each document the content of the document, its role or status in the Tribunal proceedings, whether the document was exclusively created for the Tribunal proceedings and whether the document would undermine the Tribunal proceedings if referred to in public. Cases of doubt should be left to the Administrative Court to determine.

Discussion

13. Before turning to the questions posed by Swift J, it is necessary to emphasise three contextual matters.

14. First, the names of the Complainants and the fact of the unlawful surveillance, searches and arrests are already in the public domain as a result of the [year] public judgment of the Divisional Court and the [year] public decision of this Tribunal.

15. Secondly, although Ms Kilroy referred throughout her written submissions in this case to the "privacy protections" imposed by the Tribunal, she accepted that these protections were all to be found in an order recorded in the last sentence of paragraph 47 of the Tribunal's ruling of 25 September 2019:

> "In keeping with the representations in this regard made on behalf of the Complainants, we agreed that the instant hearing should take place in private; that was also agreed by HMRC."

There does not seem to have been a formal order to that effect, but this does not matter. The Tribunal was there acceding to an application made by the Complainants' solicitors by email on 30 August 2019 at 15:48 in which they invited the Tribunal to "hold the hearing in private under Rule 10(2) of [the Investigatory Powers Tribunal Rules 2018 (SI 2018/1334)]". Having held the hearing in private, the judgment was also given in private. Hence, in its email of 26 September 2019 at 11:32 attaching the ruling, the Tribunal made clear that the ruling "should not be published" and would not be published on the Tribunal's website.

16. Thirdly, we have not been asked to modify or vary any existing order of this Tribunal and, in circumstances where both sides are represented by experienced counsel and solicitors, we do not consider it appropriate to do so of our own motion. Therefore, the first issue for us to determine is the effect of the Tribunal's decision to hold the hearing which led to the ruling of 25 September 2019, and give that ruling, in private.

17. As the Tribunal said in *E and Ors v Security Service* [2022] UKIP Trib 3, [2023] 2 All ER 949 ("the Vetting cases") at paragraphs 70-71, open justice is a foundational common law principle; and legislative derogations from it must be stated expressly or by necessary implication and must be strictly construed. This applies as much to the Tribunal as it does to the ordinary courts: see ibid, paragraph 72. See also *Lee v Security Service (No 2)* [2023] UKIP Trib 10, [2024] 4 All ER 510, at paragraph 23.

18. One facet of the principle of open justice is that courts and tribunals sit in public unless there is a compelling reason not to do so. When a court or tribunal sits in public, anything said at the hearing can be reported unless a reporting restriction is imposed under a statutory power or pursuant to an implied or inherent jurisdiction. Reporting restrictions operate in the same way as injunctions *contra mundum*. Anyone who breaches them may

be liable for contempt of court. That being so, it is important that any reporting restriction specify in clear terms the information covered by the prohibition on reporting. If material whose disclosure is subject to a restriction imposed by one court or tribunal is deployed before another, the latter will generally conduct its own proceedings in a way which gives effect to, and does not undermine, the restriction imposed.

19. An order or direction that a court or tribunal will sit in private governs who may attend a hearing. In general, it has the effect of excluding members of the press and public. Obviously, the press cannot report information to which they have no access, but an order or direction that a court or tribunal will sit in private does not itself prohibit reporting of the matters discussed in the hearing. A separate reporting restriction is required to do that: see *A F Noonan Ltd v Bournemouth and Boscombe ACFC Ltd* [2007] 1 WLR 2614. A member of the press who comes into possession of information is not prohibited from reporting it solely because it was considered at a private hearing. There may be an express or perhaps implied duty of confidentiality, which could be enforced by one of the parties through the equitable doctrine of breach of confidence, but that would not lead to the prospect of punishment (in contrast to the contempt jurisdiction).

20. In this case, the Tribunal decided that there was a compelling reason to hold the hearing which led to the ruling of 25 September 2019 in private. But this decision did not impose any prohibition on reporting of the fact that there had been a hearing before the Tribunal, nor the fact that the Tribunal had given a ruling. The Tribunal's decision that its ruling should not be published would no doubt be undermined if the Administrative Court were to decide to publish that ruling (for example as an annex to its judgment), but no-one appears to have suggested publication in that form. Subject to that, no order or direction of the Tribunal prevents the disclosure of the content of the ruling.

21. That is not to say that the considerations which persuaded the Tribunal to hold the hearing and give its ruling in private are irrelevant to the question of which parts of the proceedings in the Administrative Court should be heard in public or referred to in a public judgment. The Administrative Court may consider what is said in the Second Witness Statement of [the first complainant] relevant to that issue. In our judgment, however, that is a matter for the Administrative Court to determine, evaluating and balancing the damage which it is said that disclosure would bring against the public interest in open justice in the particular context of the judicial review proceedings which the Complainants have decided to bring.

22. It follows that we consider that question A should be answered as follows. In the view of the Tribunal, it is for the Administrative Court to determine whether and to what extent the existence and/or content of the rulings referred to in question A can be referred to in a public hearing or public judgment.

23. As to question B, we note that, in the Tribunal's ruling of 18 April 2023, the President gave the Respondent permission to rely on and cite its private ruling of 25 September 2019 and gave the Complainants permission to cite other documents disclosed in the Tribunal proceedings. The Tribunal did so on the agreed footing that the proceedings before the Administrative Court were "currently being held in private" (see paragraph 1). The President took the view that the Administrative Court should have access to all the documents concerned and, at paragraph 8, added this:

> "If, and insofar as, the Administrative Court takes the view that reference to those documents is not necessary for it to dispose fairly of the proceedings before it, that would be a matter for that Court. That Court would be better placed to make that assessment in the context of the proceedings before it. I have no doubt that the Administrative Court will ensure that appropriate arrangements are made for the preservation of confidentiality where that is required."

24. This is consistent with the approach we have taken to answering question A. The imposition of confidentiality protections in respect of the documents the subject of the President's ruling is a matter for the Administrative Court. The President noted that the proceedings before that Court were, at the time of his ruling, "currently" being held in private. This reflected what the Tribunal had been told by those representing both the Respondent and the Complainants: see the letter from the HMRC Solicitor dated 10 March 2023 and the letter from Banks Kelly Solicitors dated 21 March 2023. There was no express or implied assumption that the proceedings in the Administrative Court would always remain private. Furthermore, the letter from Banks Kelly Solicitors dated 3 April 2023, at paragraph 6, requested the Tribunal to grant permission to the parties to rely upon and cite "with appropriate protection for confidentiality where appropriate" the listed documents "in the course of the current private Judicial Review proceedings." The wording of that request is precisely reflected in the President's ruling of 18 April 2023.

25. The Administrative Court is, in our view, better placed than we are to weigh up the matters relied upon in support of the claim to confidentiality against the public interest in open justice in the judicial review proceedings, not least because it will have a better understanding of the issues in those proceedings, the extent to which the Complainants have put the contents of the documents in issue by bringing the claim and the extent to which any relevant parts of the documents are already substantially in the public domain as a result of other proceedings.

26. The answer to questions B and C is therefore that it is a matter for the Administrative Court to determine whether and if so to what extent the documents or their contents can be referred to in a public hearing or public judgment.