



Neutral Citation Number: [2020] UKIPTrib IPT 17 86 CH

IN THE INVESTIGATORY POWERS TRIBUNAL

IPT/17/86/CH & IPT/17/87/CH

Royal Courts of Justice
Strand
London
WC2A 2LL

Monday, 27 July 2020

Before:

LORD JUSTICE SINGH

(President)

LORD BOYD OF DUNCANSBY

(Vice-President)

And

MR CHARLES FLINT QC

B E T W E E N :

(1) PRIVACY INTERNATIONAL

(2) REPRIEVE

(3) COMMITTEE ON THE ADMINISTRATION OF JUSTICE

(4) PAT FINUCANE CENTRE

Claimants

- and -

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS

(4) SECURITY SERVICE

(5) SECRET INTELLIGENCE SERVICE

Respondents

MR B. JAFFEY QC and MS C. ROONEY appeared on behalf of the Claimants.

SIR JAMES EADIE QC and MR W. HAYS appeared on behalf of the Respondents.

MR J. GLASSON QC appeared as Counsel to the Tribunal

J U D G M E N T

THE PRESIDENT:

1 This is the unanimous judgment of the tribunal.

Introduction

2 This is an application for disclosure and other information by the claimants made on 30 April 2020. The respondents replied to that application on 12 May 2020. There was also a response by the claimants dated 18 May 2020. We have also received helpful notes in preparation for this hearing from the respondents dated 20 July 2020, counsel to the tribunal dated 24 July 2020, and the claimants dated 24 July 2020. This has helped to bring the tribunal up to date and also clarify the issues which need to be determined at this hearing.

3 We should also record our thanks to Mr Jaffey QC, who has appeared for the claimants, and to Sir James Eadie QC, who has appeared for the respondents, for their oral submissions at this hearing. We also express our gratitude to Mr Jonathan Glasson QC, who has appeared at this hearing but in the end did not need to make any oral submissions.

Background

4 The present applications arise from the “Third Direction” case in which this tribunal gave its judgments on 20 December 2019. That decision is under appeal to the Court of Appeal of England and Wales. In the meantime, there are some outstanding issues for this tribunal to determine. One of those is the “IPCO issue”. That is in relation to the mechanisms that the tribunal should use when it seeks statutory

assistance from the Investigatory Powers Commissioner under section 232(1) of the Investigatory Powers Act 2016. The factual background and nature of that issue are set out in a summary agreed between counsel to the tribunal and counsel for the respondents dated 2 August 2019.

- 5 In accordance with directions made by the tribunal, the parties made open submissions in relation to the IPCO issue with a view to a hearing which we hope will still take place later this year. In the submission on the IPCO issue by counsel to the tribunal dated 24 April 2020, the following was said at paragraph 19:

“... the tribunal must be able to carry out its functions including making requests for assistance from the IPC without interference by the parties. In this case, there appears to have been such an instance which CTT sought to have included in the note as follows:

‘On 5 March 2019, two members of the respondents’ staff contacted the tribunal secretary to state that the documents should not have been provided to the tribunal. On 7 March 2019, the tribunal secretary wrote to the respondents at the request of the President and stated that it was inappropriate to seek to intervene in the way that they had sought to do. On 12 March 2019, the respondents wrote to the tribunal secretary apologising for any misunderstanding’”.

- 6 That prompted the claimants’ solicitors to write to the Government Legal Department (“GLD”) on 27 April 2020. The GLD replied in a letter dated 29 April 2020. As we have mentioned, that then led to the claimants’ applications dated 30 April 2020 which are now the subject of this hearing.

- 7 The underlying documents are the following. On 7 March 2019, the tribunal secretary wrote to the Secret Intelligence Service (“SIS” or MI6) in material terms as follows:

“I am writing to you further to telephone conversations I had with two of your staff... and... on Tuesday, 5 March 2019, in which it was asserted that various inspection reports that had been provided to the tribunal by the Investigatory Powers Commissioner Office (IPCO) should not be provided to the President and the tribunal members considering the complaint above. It is also asserted that material should not be provided to counsel to tribunal.

During the telephone conversations I explained that the material in question had been provided to the tribunal by IPCO pursuant to a statutory request for assistance that the tribunal made pursuant to section 232 of the Investigatory Powers Act 2016. That request was made in the course of the tribunal’s consideration of the complaint made by Privacy International and others in relation to the ‘Third Direction’ in which the Secret Intelligence Service is a named respondent.

The request had been made for disclosure only to the tribunal and its counsel. Although I noted your agency’s concerns in relation to the material, I emphasised that any concerns that you may have should be directed through your lawyers, the Government Legal Department, who can raise them with the tribunal, if appropriate. It was inappropriate for your staff to seek to intervene in ongoing legal proceedings in the way that they sought to do. The tribunal is an independent judicial body and it is of the utmost importance that the exercise of its statutory functions, in this instance a request for assistance from IPCO, is not the subject of inappropriate interference by any public authority...”

8 The tribunal secretary ended the letter by explaining that she had discussed the issues with me, the President of the Tribunal, and that I had approved her letter. She also said that she was sending a copy of her letter to the Investigatory Powers Commissioner.

9 The reply to that from SIS was dated 12 March 2019 and, so far as material, contains the following:

“... I would like to assure you that the sole purpose of those telephone calls was to seek to understand better the nature of SIS information apparently referenced in the attachments to your 27 February email to the Government Legal Department... in the course of the conversations with my staff, you helpfully explained to them that the material in question had been provided to the tribunal by the Investigatory Powers Commission Office (IPCO). IPCO had provided this material in response to a statutory request for assistance that the tribunal had made pursuant to section 232... you made clear that you would be unable to

provide any further details.

We recognise, of course, that the only appropriate channel to raise any continuing concerns we may have in relation to this issue would be through the Government Legal Department. Please accept my apologies for any misunderstanding that may have arisen as a result of the approach made to the tribunal on this issue. I would be grateful if you would draw this letter to the attention of the President of the Tribunal. I am also copying this letter to... at the Investigatory Powers Commission Office for the attention of Sir Adrian Fulford [the then IPC]...”

- 10 Finally, in that series of correspondence in March 2019, I should go to an email dated 26 March 2019 sent by the tribunal secretary which reads as follows:

“The President has now had the opportunity to read your letter dated 12 March 2019 and has asked me to reply on his behalf to say that he is grateful for your response. He considers it helpful that it has been clarified that the only appropriate channel to raise concerns in relation to this case would be through the Government Legal Department”.

- 11 On 13 May 2020, the claimants were provided with letters dated 7 and 12 March 2019 with appropriate redactions. On 16 June 2020, the claimants were provided with an email of 26 March 2019. Before leaving this correspondence, we should make the following clear. In our view, the tribunal secretary acted entirely appropriately in responding as she did in the conversation recorded by her in her letter of 7 March 2019 and also by drawing these matters to my attention.

The Parties' Submissions

- 12 The first issue is whether the requested information and disclosure are relevant. The respondents deny that they are relevant to the IPCO issue or to any other issue that remains to be determined in this case by the tribunal. The claimants submit that they are relevant to the IPCO issue. In any event, they submit, there needs to be adequate

investigation into whether an improper and unfair attempt was made to subvert the fairness of the procedure before the tribunal. The claimants submit that the tribunal has a general power over its own procedures: see section 68(1) of the Regulation of Investigatory Powers Act 2000. We did not understand that to be disputed by the respondents. Indeed, Sir James Eadie accepted at the hearing before us that the tribunal has the relevant jurisdiction, but questioned whether it would be appropriate and proportionate to exercise it in the circumstances which have arisen in this case.

13 The claimants submit that investigating whether a party has made an inappropriate attempt to intervene in proceedings is an essential element of the judicial role. This is all the more so, they submit, where the conduct takes place in secret and is likely to have an effect on public confidence and the confidence of the claimants in the fairness of the proceedings.

14 On behalf of the claimant, Mr Jaffey submits that there are a number of reasons for concern. In particular, he submits that there has been no explanation for the conflict of evidence as to what was said in March 2019. He also submits that there has been no recognition of wrong-doing or any proper apology. He acknowledges that the two individuals at SIS are no longer involved in these proceedings for unrelated reasons, but he submits that it is still not known whether they acted on instructions from others and whether those others are still involved in this litigation. The parties have also made detailed submissions in writing in relation to each of the specific requests if the tribunal holds that the information on disclosure is relevant in principle.

Our Decision

- 15 We agree with Sir James on the issue of relevance. We are not persuaded that it is necessary to grant the applications in order to adjudicate fairly on the IPCO issue. That is an issue of legal principle to be determined for the future. Even if these events had never occurred, the tribunal would have been in a position fairly to determine that issue of principle.
- 16 It is common ground that even then the tribunal has the jurisdiction to undertake an investigation into these events, but that it has a discretion whether to do so. We have come to the conclusion that it would not be a proportionate exercise of that discretion in the circumstances of this case.
- 17 First, there is no application to commit anyone for a contempt of court. In principle, it would be open to others to call for an investigation that might lead to an application for committal, if so advised, but that is not what is before us in these applications.
- 18 Secondly, the tribunal has such facts as it needs already before it. We doubt very much if anything more fruitful would be produced by way of witness statements. If the claimants are right that there is a conflict of evidence in the correspondence of March 2019, it is likely that there will simply be the same conflict of evidence set out in witness statements.
- 19 Thirdly, the tribunal must have regard to its own finite resources and those of the parties and keep a sense of proportion. This would be satellite litigation which we consider to be unnecessary and disproportionate in the circumstances of this case.
- 20 Before we conclude, we wish to reiterate certain fundamental principles so that no one is in any doubt, whether that is the claimants, the respondents or the general public, about these matters. First, this tribunal is, in substance, a court which is

completely independent of the government, the intelligence agencies and everyone else. Its President is a judge of the Court of Appeal of England and Wales; its Vice-president is a Senator of the College of Justice in Scotland (he is a judge of the Outer House of the Court of Session); and its other members are either serving or retired judges or are Queen's Counsel. We all act in a judicial capacity when we sit as members of this tribunal.

21 Secondly, the tribunal secretary is also independent. This was demonstrated by the facts of this very case.

22 Thirdly, we have the benefit of the assistance of independent counsel to the tribunal whose functions are set out in rule 12 of the Investigatory Powers Tribunal Rules 2018. Counsel to the tribunal can see, for example, documents which are closed and can make submissions that they should be disclosed to the claimants. That is indeed what has happened in this case.

23 Fourthly, the respondents are subject to their acknowledged duty of candour and co-operation with the tribunal on a continuing basis. They are represented by both solicitors and barristers who are subject to their own professional duties and, we have no doubt, would discharge them.

24 Fifthly, in March 2019, it was recognised that the direct communication which took place with the tribunal was inappropriate. An apology was given and it was clearly recognised that nothing like this should happen in the future. At the hearing before us, Sir James Eadie acknowledged that everyone had recognised that something serious had gone wrong.

25 In conclusion, therefore, we are confident that this tribunal can continue to discharge its functions fairly, both in this case and more generally, without the need for the sort of investigation which the claimants have sought.

26 For the reasons we have given, these applications are refused.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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