Neutral Citation Number: [2020] EWHC 130 (Admin)

Case No: CO/1064/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2020

Before:

LORD JUSTICE IRWIN
MRS JUSTICE MAY DBE

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R (ON THE APPLICATION OF) TERRA SERVICES LIMITED	**Claimant**
- and -	
(1) THE NATIONAL CRIME AGENCY	**First Defendant**
(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Second Defendant**
(3) INNER LONDON CROWN COURT	**Third Defendant**

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Monica Carss-Frisk QC and Robin Barclay (instructed by **Macfarlanes LLP**) for the **Claimant**
Lisa Giovannetti QC and Guy Ladenburg (instructed by **the National Crime Agency**) for the **First Defendant**
Clair Dobbin (instructed by **The Government Legal Department**) for the **Second Defendant**
The Third Defendant did not attend and was not represented

Hearing date: 22 January 2020

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Approved Judgment

Lord Justice Irwin:

1. On 22 January 2020 we refused the application of the Claimant for the appointment of a Special Advocate (SA) to appear in the Closed Material Proceedings (CMP) in the case. We now give our reasons for that decision. Both of us have contributed to this judgment.

2. The facts of the case are familiar and require no detailed recitation. They were set out in paragraphs 1 to 10 of the judgment of 21 November 2019.

3. As indicated in paragraph 33 of that judgment, the Claimant wished to make submissions as to the approach to a hearing in CLOSED conditions. The initial suggestion was that a confidentiality ring was appropriate. However, the Claimant subsequently withdrew that suggestion as being impractical. A rolled-up hearing was ordered on 13 December 2019. We gave other directions, including a direction that oral submissions on the appointment of a SA should be heard as soon as possible in January 2020. The rolled-up hearing has been fixed for 18 and 19 March 2020.

The Claimant's Submissions

4. Monica Carss-Frisk QC, for the Claimant, at the outset of her oral submissions emphasised the inherent unfairness of a closed procedure, describing it as contrary to common law principles of fairness and as giving rise to a significant inequality of arms. She submitted as a general proposition that it was right, in circumstances where a CMP is to be adopted, that anything which could be done to mitigate any unfairness, or to redress such inequality, should be done. Here that meant appointing a SA; it was what justice required.

5. Ms Carss-Frisk observed that many of the reported cases on the appointment of a SA concern issues of disclosure, rather than substantive issues affecting a claimant's rights. The test of "exceptionality" discussed by Lord Bingham in *R v H* [2004] 2 AC 134 was expressed in the context of disclosure for the purposes of a criminal trial. She pointed out that this and other such cases pre-dated the decision of the Supreme Court in *R (Haralambous) v Crown Court at St Albans and another* [2018] AC 236, approving the use of a CMP in judicial review proceedings where statute provides for closed procedures in the court below. In judicial review proceedings, which she says raises issues bearing directly upon a claimant's substantive rights, other considerations come into play. Ms Carss Frisk identified these as follows:

   i) Proportionality: one of the access conditions for the issue of a warrant is whether it is in the public interest for the material to be obtained. She directed us to the decision of Sir Anthony Clarke MR in *R (AHK) v Secretary of State for the Home Department* [2009] 1 WLR 2049 where issues of proportionality were identified as a factor which might make it appropriate to appoint a special advocate.

   ii) The complexity of the exercise in this case: she pointed out that the Claimant is seeking to examine not just the issue of the warrant itself but, more broadly, matters occurring prior to its issue.

iii) The scale of the infringement of the claimant's property rights, where over 24,000 hard copy and/or digital documents have been seized. Ms Carss Frisk submitted that although there is no criminal prosecution, nevertheless the interference with her client's privacy and property rights was extreme and the judicial review hearing would finally determine her client's substantive rights in this context.

iv) The requirement for full and frank disclosure to the court issuing the warrant: in this case the Claimant will wish to raise points on disclosure to the judge at the time the warrant was sought, for instance whether he was told of a prior covert search at the premises, or that large amounts of the material would attract legal professional privilege.

v) The prospect of a SA furthering the Claimant's interests not only by testing arguments put forward by the Defendants but also, potentially, by identifying other arguments arising out of the closed material, something that it would be inappropriate for the court itself to do.

6. Ms Carss-Frisk drew our attention to these and other factors identified in *The Competition and Markets Authority v Concordia International RX (UK) Ltd* [2018] EWHC 3158, a decision examining the propriety of a warrant issued in a different context. The overarching consideration, she suggested, was one of fairness. She submitted that the correct question for a judge in a given case was whether it was just to appoint a SA, having regard to the need for proceedings to be fair to both sides, referring us to the very recent decision of Supperstone J in *R (Privacy International) v Investigatory Powers Tribunal* [2019] 10 WLUK 111.

7. Finally, Ms Carss-Frisk indicated that insofar as the cost of appointing a SA may be a concern, the Claimant was prepared to meet such costs, whilst reserving the right to reclaim them in the event of success in the judicial review.

The Respondent's Submissions

8. Lisa Giovanetti QC, for the Secretary of State, submitted the need for a SA in this case had not been made out. She argued that the issues arising on the challenge to the warrant were straightforward and could easily be grasped. There would be relatively few documents to be considered by the court in closed session.

9. Ms Giovanetti pointed out that a criminal trial, or indeed a citizenship application, involves qualitatively different rights to those engaged by the issue of a search and seizure warrant, issued in the context of an ongoing investigation. Evidence obtained as a result of a warrant remains subject to ordinary safeguards before it can be used at any criminal trial. Furthermore, she reminded us, the procedure for obtaining a warrant was designed as a speedy, ex parte process, as emphasised by the Supreme Court in *Haralambous,* at [27].

10. As to proportionality, Ms Giovanetti submitted that in examining whether the present warrant was properly issued, the court will not be examining proportionality at large, it will be looking at that question in the relatively narrow context of the statutory test.

11. Ms Giovanetti pointed out that the court will have before it all the material that was before the judge. The Claimant will be able to raise all its arguments, for instance its points on full and frank disclosure, in open session. The court will be able to cross-check submissions made in open session against all the material before it, the bulk of which will be open material in any event.

12. Ms Giovanetti argued that to the extent that there are any complex issues raised on this application, they are matters of law capable of being raised and fully argued in open session: for instance whether any previous covert search of the premises would, in the event of any irregularity, taint the subsequent issuing of the warrant. The time taken at the judicial review hearing would be mainly occupied in open session discussing such issues. The time on the closed material would by contrast be very short. There was no particular feature of this case that required a SA.

13. Lastly as to cost, Ms Giovanetti submitted that if justice required a SA to be appointed (which she maintained it did not) then the cost was immaterial.

Analysis

14. It is essential to begin from the facts and to focus on the context of this case. The capacity of the High Court to hold a CMP is derived from the statutory power of the Court below to conduct an application for a warrant on an *ex parte* basis; see the judgment of Lord Mance DPSC in *Haralambous* at [25]-[27], and see sections 8, 9 and 15 and Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE). The statutory procedure under section 8 of PACE is itself subject to a number of safeguards, expressed in the current Criminal Procedure Rules, and summarised in *Haralambous* at [3], [4] and [25]. Similar safeguards apply to applications under section 9. It is the statutory scheme, including those safeguards, which necessitates and justifies the capacity of the High Court, in the course of judicial review, to have regard to evidence which is not disclosed to the subject of the warrant: see *Haralambous* at [59].

15. In considering the other adjectival issues which they addressed, Lord Mance in *Haralambous* emphasised the need (as identified by Eveleigh LJ in *R v Inland Revenue Commissioners, ex parte Rossminster Ltd* [1980] AC 952, and approved by the House of Lords in that case) for a "more focused approach". At the time of obtaining a search warrant there:

> "…is a current and continuing public interest in withholding information relied on for the issue of the warrant…" (*Haralambous* at [31])

16. In addressing the fifth specific issue identified by Lord Mance in *Haralambous*, namely the question of any obligation to provide a gist or summary of the evidence relied on in CLOSED, he made a clear distinction between the issue of a warrant for search and seizure on the one hand, and any ensuing criminal proceedings on the other. In our judgment that distinction is relevant to a consideration of other safeguards in CLOSED proceedings, such as the appointment of a SA. Lord Mance said this:

> "65. In my judgment, it cannot be axiomatic in this context that even the gist of the relevant information must be supplied to any person (such as the occupier or some other person claiming some

> proprietary, possessory or other interest in the documents) claiming to be affected by, and wishing to object to, the warrant or the search and seizure. Every case must of course be considered in the light of its particular circumstances. But, as a general proposition, I answer issue (v) in the negative."

17. Standing back from authority directly concerned with search warrants, it is possible, subject to the facts and circumstances of individual cases, to discuss a broad hierarchy of requirements for approach to CLOSED hearings. As the House of Lords made clear in *SSHD v AF (No 3)* [2010] AC 269, where the liberty of the subject is in question, a minimum level of information must be provided to the subject, even in cases involving national security.

18. In cases such as those commonly dealt with by the Special Immigration Appeals Commission ("SIAC") addressing the immigration status or the asylum claims of those whose cases involve sensitive material requiring to be heard in CLOSED, the European Court of Human Rights approved the SIAC regime, laying emphasis on the highly organised processes in the SIAC Rules and on the provision of SAs, see *IR and GT v United Kingdom* [2014] ECHR 340. But no stipulation is made as to a necessary minimum level of information provided.

19. In *SSHD v SIAC* [2015] EWHC 681 (Admin), a Divisional Court led by the President of the Queen's Bench Division, Sir Brian Leveson, considered the necessary level of CLOSED disclosure obligations in another category of SIAC proceedings, where the individual seeks a statutory review, akin to judicial review, of a refusal to permit naturalisation on public interest grounds. The Court concluded that the necessary level of disclosure was limited to "such material as was used by the author of any relevant assessment … or if [the assessment] is subsequently re-analysed, disclosure should be of such material as is considered sufficient to justify [the] facts and conclusions and which was in existence at the date of decision" [38].

20. As Lord Mance summarised in *Haralambous* at [62], the Supreme Court in *Tariq v Home Office* [2012] 1 AC 452 ruled, in an employment case, that there was "no invariable rule that gisting must always occur. It depended on balancing the nature and weight of the circumstances on each side…"

21. In our view, as a category, challenges to the issue of search warrants fall towards the lower end of any such hierarchy, essentially for the reasons given by Lord Mance in the passages from *Haralambous* quoted above. The application is directed to premises and not people. There is no question of loss of liberty, or indeed any direct loss of rights, or even adjudication of rights, as a consequence of the warrant. Whilst of course search and seizure warrants are often for the explicit purpose of criminal process, any such process is accompanied by established procedures and safeguards, once that secondary or consequential process begins.

22. It is noteworthy that even within a criminal prosecution, exclusion of evidence by means of a Public Interest Immunity (PII) application will only exceptionally lead to the appointment of special independent counsel, see *Regina v H and Others* [2004] 2 AC 134. The potential impact of a successful PII application, in removing from consideration by the jury material which is potentially exonerating, is evidently more

important an intrusion on the rights and interests of a defendant facing criminal proceedings than are the current circumstances in relation to the Claimant.

23. We did not find the argument persuasive that this case engages a "substantive issue" affecting the Claimant's rights. We do not seek to diminish the importance or potential intrusiveness of the execution of a search warrant. However, it is in our view clearly of lesser impact than a substantive decision about a claimant's case, whether criminal or civil.

24. We should not be understood to mean that such a general hierarchy or declension of case and thus of safeguards is definitive or in any way finally determinative of the necessity of safeguards such as the provision of SAs. Its utility is as an overall approach. But in our judgment it will be a rare case where a challenge to the issue of a search and seizure warrant will justify the appointment of a SA.

25. The court will of course look to the facts of each case, but as a process which is most obviously part of a criminal investigation, preparatory to and not part of a criminal prosecution, and where the scope of investigation is limited by the statutory scheme itself, the circumstances would in our view need to be exceptional to call for the appointment of a SA.

26. The decision of Supperstone J in *R (Privacy International) v Investigatory Powers Tribunal* is an example from a different field of the Court responding appropriately by making such an appointment. The Court was there dealing with an attempted judicial review of a Statutory Tribunal which does not publish reasons for its decision, save in highly exceptional circumstances. Supperstone J acceded to the application for the appointment of a SA, but in most unusual circumstances. The relevant decision of the IPT was by a majority of three judges to two. All that the losing claimant could know was that two out of five specialist tribunal judges considered the majority decision to be wrong. The claimant could not even begin to formulate an application for permission to apply for judicial review. Yet that application was the only potential route of challenge to the decision. It is important to stress those exceptional facts when considering that decision.

27. Here there is little or nothing specific to show there is a real need for the appointment of a SA. The Claimant must be taken to know what is contained in the body of documents subject to the warrant. Of course, in a sense that material is not central to the case: it is the material which founded the application which is critical. The fact that there are challenges to steps taken before the application for the warrant does not import the need for a SA. That the documents to be seized might include a body of documents subject to legal professional privilege is not uncommon in such cases, and requires no elaboration in CLOSED. The relevant legal arguments can and will be fully explored in OPEN. In our view, the Claimant has made no effective point to show that this case requires the appointment of a SA.

28. We have of course been able to consider the CLOSED material here, which led to the grant of the application for the warrant. In our view, there is nothing in that material which will provide any difficulty of analysis or interpretation. We can confirm the submission of the First Defendant that there are relatively few documents to be considered in CLOSED.