

SUMMARY

In the matter of **IPT/01/62 and IPT/01/77**

22 January 2003

RULINGS OF THE TRIBUNAL ON PRELIMINARY ISSUES OF LAW

Before Lord Justice Mummery and Mr Justice Burton

INTRODUCTION

Publication of Rulings

This is the first occasion on which the Tribunal has sat in public.

The Tribunal decided that the Rules do not (subject to the general duty imposed by Rule 6(1)), prevent the Tribunal from notifying and publishing its rulings of law on a complaint. That procedure runs no risk of disclosure of any information to any extent, or in any manner, that is contrary to or prejudicial to the matters referred to in section 69(6)(b) of RIPA and rule 6(1) or to the NCND policy.

General Background

The challenge to the Tribunal Rules made this the most significant case to come before the Tribunal.

For the time being, this Ruling is the procedural foundation for the Tribunal's application of the Rules to these and other claims and complaints under RIPA.

THE CASES

This Ruling dealt with a preliminary issue of law in relation to a number of complainants. In one case the Complainant was an individual. In the other case the Complainants were organisations. In each case allegations were made against agencies using RIPA powers.

The grounds of the claims and the complaints in each case are that there was alleged unlawful interception of telephone communications between the Complainants and third parties.

RIPA.

The main purpose of RIPA is to ensure that the relevant investigatory powers (interception of communications, intrusive covert surveillance and the use of covert human intelligence sources) are used lawfully and compatibly with Convention rights.

THE TRIBUNAL

Jurisdiction and Powers

The Tribunal has jurisdiction over two matters – Human Rights Act claims (using a form T1) and complaints (using a form T2).

Procedure

The Tribunal's procedure is contained partly in RIPA and partly in the Rules.

National Security, NCND (“Neither Confirm nor Deny”) Policy and Public Interest Context

If allegations of interception or surveillance are made, but not denied, then, in the absence of the NCND policy, it is likely to be inferred by a complainant that such acts are taking place. This is especially likely if other complainants are being told that they have no cause for complaint, because no such acts are, or have been, taking place in relation to them. If criminals and terrorists became aware, or could infer the possibility of covert activities, they are likely to adapt their behaviour accordingly. The likely outcome of this is that the all-important secrecy would be lost and with it the chance of obtaining valuable information needed in the public interest or in the interests of national security.

PRELIMINARY ISSUES

The preliminary issues concern:

(a) the applicability of Article 6 to the procedure of the Tribunal and to the rule-making power of the Secretary of State in the light of section 3 (1) of the Human Rights Act 1998;

(b) the interpretation of RIPA and the Rules relating to particular topics, principally:

- i. the restrictions on the disclosure of information and documents,
- ii. the holding of hearings in private,
- iii. the departures from the adversarial procedure in having separate hearings without the attendance of the other party,
- iv. the absence of cross examination and the power to compel witnesses,
- v. the restrictions on the content of the determinations notified to the parties; and

(c) the ambit and exercise of the discretion of the Tribunal to determine its own procedure.

GNL APPLICATIONS

In addition to the preliminary issues summarised above the Tribunal had to rule on related issues arising from the late appearance of Guardian Newspapers Ltd (GNL), who made applications to the Tribunal on the first day of the hearing. It was specifically requested that named GNL journalists should be allowed to attend the hearing.

The Tribunal declined to make any of the directions sought at that stage, pointing out that the requirement that the proceedings of the Tribunal should

be conducted in private was one of the preliminary issues formulated by the parties and that, unless and until that issue was decided in favour of the Complainants, the Tribunal was bound by rule 9(6) to conduct the oral hearing and the rest of the proceedings in private.

It was, however, agreed by the parties and the Tribunal that a transcript of the hearing would be made so that they could be issued if permitted following this ruling.

Following legal argument the Tribunal agreed with the Complainants and with GNL that the hearing of the preliminary issues need not have been held in private. The Tribunal concluded that rule 9(6) does not prevent public access to, and reporting of, a Tribunal hearing solely concerned with purely legal argument on issues of a procedural nature. As no risk of prejudice to the NCND policy or to any other aspect of national security or the public interest is present, the Tribunal have decided to exercise their discretion under section 68(1) of RIPA to allow the hearing to be made public by means of the transcripts and also to make public the reasons for their rulings on the legal issues argued at the hearing.

ISSUE 1: CONVENTION RIGHTS AND COMMON LAW

Article 6

Article 6 guarantees the right to a fair trial.

The conclusion of the Tribunal is that Article 6 applies to a person's claims under section 65(2)(a) (form T1) and to his complaints under section 65(2)(b) (form T2) of RIPA, as each of them involves "the determination of his civil rights" by the Tribunal within the meaning of Article 6(1).

Complainants bringing Human Rights Act claims have no choice of forum for their determination. Section 65(2)(a) provides that the Tribunal is the **only** appropriate forum for their adjudication.

For all practical purposes the Tribunal is also the only forum for the effective investigation and determination of complaints and for granting redress for them where appropriate.

No one in this proceeding suggested that the Tribunal is not an "independent and impartial tribunal established by law" within Article 6. Membership of the Tribunal is confined by RIPA to members and former members of the senior judiciary and senior members of the legal profession. All those who qualify for appointment as members of the Tribunal should be well suited by experience and by training to determine contested "civil rights." They are not administrative officials responsible for taking discretionary executive decisions.

Article 8

Article 8 guarantees the right to respect for private life.

The Tribunal concluded that the Rules do not contain procedural requirements which, in the context of the interception of communications and secret surveillance and the need to maintain the NCND policy, are incompatible with Article 8.

Article 10

Article 10 protects freedom of expression.

The Tribunal concluded that the Rules preventing complainants from gaining access, either directly or indirectly via proceedings in the Tribunal, to sensitive information, documents or evidence in the hands of the security and intelligence services are compatible with Article 10.

The Rules protecting such information from being disclosed in Tribunal proceedings are necessary in the interests of national security and, in particular, for the maintenance of the NCND policy and they are a proportionate interference under Article 10(2).

Common Law

There are no common law principles or presumptions of wider ambit or greater force than the Convention rights applicable to the procedure of the Tribunal.

ISSUE 2: VIRES AND CONSTRUCTION

Construction of s.69 of RIPA

RIPA s69 allows for the Secretary of State to make Rules regarding the exercise of the Tribunal's jurisdiction and hearings or consideration of complaints.

Construction and validity of the Rules

In the light of s69 and Convention rights the Tribunal concludes that, with the exception of rule 9(6), the Rules, properly interpreted, are valid and binding on the Tribunal.

General

The Complainants asked if any of the Rules are to any extent ultra vires the enabling power in s.69 of RIPA. The Complainants referred in particular to rule 6(2) to (5) (disclosure); rules 9 and 6(2)(a) (hearings in private); (adversarial procedure); rule 11(3) (compelling evidence); rule 13 (statement of findings and reasons in case of unsuccessful complainant).

In the light of submissions the tribunal said that it was necessary to consider the interpretation and validity of the particular provisions in the Rules challenged by the Complainants.

Oral Hearings

Oral hearings are at the discretion of the Tribunal. They do not have to hold them, but they may, if they so wish, do so in accordance with rule 9.

The Tribunal reached the conclusion that the absence from the Rules of an absolute right to either an inter partes oral hearing, or, failing that, to a separate oral hearing in every case is within the rule-making power in section 69(1). It is also compatible with the Convention rights under Article 6, 8 and 10.

Hearings in Private

The language of rule 9(6) is clear and unqualified: "The Tribunal's proceedings, including any oral hearings, shall be conducted in private." The Tribunal are given no discretion in the matter.

The Tribunal concluded that the public, as well as the parties to the complaint, has a right to know that there is a dispute about the interpretation and validity of the law.

The Tribunal has therefore decided that, subject to the general duty imposed by Rule 6(1) to prevent the disclosure of sensitive information, the Tribunal can exercise discretion and hold open *inter partes* hearings.

The Tribunal recognises the potential conflict between, on the one hand, the interests of the Complainants in securing maximum information and openness and, on the other hand, the interests of national security and other public interests. A proper balance must be struck between them.

The Tribunal concluded that rule 9(6) is ultra vires section 69. It does not bind the Tribunal.

The Secretary of State may exercise his discretion under section 69(1) to make fresh rules on the point, but, unless and until he does, the Tribunal may exercise their discretion under section 68(1) to hear the legal arguments in public under rule 9(3), subject to their general and specific duties, such as rule 6(1) in the Rules and in RIPA.

The transcripts of the hearing were therefore made available for public consumption.

Departures from Adversarial Procedure

The Complainants submitted that the Tribunal's departure from normal adversarial procedures results in an inequality of arms incompatible with Convention rights. The Tribunal receives information and documents from the Respondents without the Complainants having any right to see the material or to cross examine on it.

The Tribunal conclude that these departures from the adversarial model are within the power conferred on the Secretary of State by section 69(1), as limited by section 69(6). They are also compatible with Convention rights in Articles 8 and 10, taking account of the exceptions for the public interest and national security in Articles 8(2) and 10(2), in particular the effective operation of the legitimate policy of NCND in relation to the use of investigatory powers.

Reasoned and Public Determination

Rule 13(2) was also challenged by the Complainants for limiting the right to a reasoned determination of a claim or a complaint. This provision was criticised by the Complainants as incompatible with the Convention right to a fair trial, which includes the right to a reasoned judgment given in public.

The Tribunal concluded that there can be publication of the reasons for legal rulings on preliminary issues, but, so far as determinations are concerned, the Tribunal is satisfied that section 68(4) and rule 13 are valid and binding and that the distinction between information given to the successful complainants and that given to unsuccessful complainants (where the NCND policy must be preserved) is necessary and justifiable.

ISSUE 3: AMBIT OF DISCRETION

Section 68(1) RIPA

The Complainants contended that the Tribunal is entitled and bound to exercise its procedural power under section 68(1) so as to achieve compatibility with the Convention rights, as the relevant rules are ultra vires and there are no provisions in RIPA, which, properly interpreted, require them to do otherwise.

The Tribunal concluded that it has discretion under section 68(1) in respect of only three relevant areas of procedure:

- whether to hold an oral hearing with all parties present;
- whether to hold the hearing in public; and
- whether to publish detailed reasons for their rulings on pure questions of law concerning procedure and practice.

Section 6(1) Human Rights Act

section 6 (1) of the 1990 Act that states that:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

The Tribunal concluded that if a rule is, on its proper interpretation, a valid rule (rule 6 and rule 9, save for rule 9(6)), then the discretion of the Tribunal under section 68(1) is subject to those rules. There is no discretion to act differently under section 6(1).

ISSUE 4: EXERCISE OF DISCRETION

The contention of the Complainants was that the Tribunal's discretion should be exercised to conduct the proceedings before them in accordance with the principles of fair trial and open justice.

The conclusion of the Tribunal is that, in respect of the three relevant areas of discretion, the Tribunal exercise it:

- first, by holding an oral hearing of the preliminary issues in the presence of all the parties;
- secondly, by directing that the oral hearing of the legal argument on the preliminary issues should be treated as having been held in public; and,

- thirdly, by directing that the reasons for the rulings on the preliminary issues should be given in public.

That procedure runs no risk of disclosure of any information to any extent, or in any manner, that is contrary to or prejudicial to the matters referred to in section 69(6)(b) of RIP A and rule 6(1) or to the NCND policy. It is also compatible with Convention rights.

CONCLUSION

The Tribunal determined to deal with the claims and complaints of the Complainants in accordance with the normal procedure.

Note

This summary is provided to assist in understanding the Tribunal's ruling. It does not form part of the reasons for the decision. The full Ruling is the only authoritative document and is available at www.ipt-uk.com.

European Court of Human Rights 18 May 2010

The Tribunal did not disclose the identity of the complainants. However, one of the complainants took his complaint to the European Court of Human Rights in the case of Kennedy v The United Kingdom (Application No 26839/05) (IPT/01/62/CH).

The applicant maintained that he had an "arguable claim" under Articles 6 § 1 and 8, and that the proceedings before the IPT did not afford him a remedy as required by Article 13 of the Convention as it did not comply with the requirements of Article 6 § 1.

The Court ruled that the IPT offered to the applicant an effective remedy insofar as his complaint was directed towards the alleged interception of his communications.

The Tribunal procedures have been accepted by the European Courts of Human Rights