IN THE HIGH COURT OF JUSTICE
INVESTIGATORY POWERS TRIBUNAL

No. IPT/20/01/CH

Royal Courts of Justice

Tuesday, 27 July 2021

Before:

LORD JUSTICE SINGH
(PRESIDENT OF THE INVESTIGATORY POWERS TRIBUNAL)

LORD JUSTICE EDIS

MRS JUSTICE LIEVEN

B E T W E E N :

PRIVACY INTERNATIONAL — Claimant/Applicant

- and -

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(3) GOVERNMENT COMMUNICATION HEADQUARTERS
(4) SECURITY SERVICE
(5) SECRET INTELLIGENCE SERVICE — Respondents

A N D B E T W E E N:

(1) LIBERTY
(2) PRIVACY INTERNATIONAL — Claimants

- and -

(1) SECURITY SERVICE
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT — Respondents

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J U D G M E N T

A P P E A R A N C E S

MR J. GLASSON QC and MS S. HANNET QC (instructed by Government Legal Department) appeared on behalf of the Tribunal.

MR T. DE LA MARE QC and MR B. JAFFEY QC appeared on behalf of the Claimants.

SIR JAMES EADIE QC and MR. R. PALMER QC appeared on behalf of the Respondents.

LORD JUSTICE SINGH:

Legal professional privilege

1 This application relates to the legal paper on compliance risk dated January 2016. This document was disclosed in these proceedings by the respondents on 11 December 2020, but only showing those sentences which had already been quoted as unredacted in the first inspection report by the Investigatory Powers Commissioner (or IPC) in 2019. The document itself was not disclosed in the Divisional Court proceedings brought by Liberty in 2019, but the first inspection report in which it was quoted was disclosed in those proceedings pursuant to the continuing duty of candour and cooperation with the court which the respondents properly recognised. The respondents accept that there was a partial waiver of legal professional privilege (or LPP), but submit that they are not required to disclose any more of the paper. The claimants submit that the respondents' position does not reflect the correct approach to waiver of privilege as set out by the Court of Appeal in *The Queen on the Application of Jet2.com Ltd v Civil Aviation Authority* [2020] QB 1027. They seek a direction that the respondents (1) disclose the legal paper on compliance risk or parts thereof over which privilege has been waived; (2) confirm the extent to which other material relevant to the "transaction" has been redacted or not disclosed; and (3) provide disclosure of that material. There is an issue about what is the relevant transaction. The respondents submit that it is not in any event, as the claimants assert, "the compliance (or otherwise) of the TE with the statutory safeguards", rather it is the description of the TE as an "ungoverned space".

2 We have been referred to relevant authorities, in particular *Great Atlantic Insurance Company v Home Insurance Company* [1981] 1 WLR 529; *General Accident Fire and Life Assurance Corporation v Tanter (the "Zephyr")* [1984] 1 WLR 100; *Paragon Finance Plc v Freshfields* [1999] 1 WLR 1183 and *Jet2.com Ltd*. The claimants also rely upon a passage

in **Hollander, Documentary Evidence, 13th Edition 2018** at p.356, para.23-13 where it is said:

> "There is a distinction to be drawn between a reference to the fact of legal advice and to reliance on its contents. Because the fact that legal advice has been taken is not of itself privileged. Merely referring to the fact that legal advice has been taken will not normally give rise to a waiver of privilege. As the cherry picking doctrine only comes into play where a party has sought to rely on a privileged document, mere reference to the existence of a privileged document will not be sufficient. There must be reference to, or reliance on, its contents. Thus to state that before serving a witness statement A had taken legal advice is not a waiver of privilege, but to say that A omitted certain facts from his witness statement because his solicitor advised him to do so does rely on the contents of the legal advice. Here the point of the reliance on the privileged advice is to provide an explanation or justification for the omission. What is important here is not whether legal advice was taken but what was the content".

3 It is unnecessary for us to resolve the issue about what is the relevant "transaction", because the claimants advance their case on the basis that whether the original waiver extended beyond the passage quoted in the first IPC inspection report or not, the respondents had subsequently extended it by reliance upon the paper more broadly in their pleaded case in these proceedings, in particular in the response to the request for further information at paras. 84 to 87, in particular para.87. In our view, on its correct interpretation, para.87 of that response does place positive reliance on the paper in January 2016 in order to support the assertion of fact that the management board's knowledge in February 2016 was "limited". For that reason, we have concluded that that does constitute a waiver of privilege in that document. It does not follow, nor do the claimants contend, that the entirety of the document must be disclosed. If there was legal advice given about a completely separate matter, the Tribunal would not be entitled to see that, because privilege in that separate matter would not have been waived. If, however, redactions have been made to the document for reasons other than LPP in principle the Tribunal is entitled to see those passages. We have been able to do so in closed. It does not follow from any of this that the document must be opened up any further to the claimants, as they accept. The first issue is

whether privilege has been waived so that the document can be seen by the Tribunal itself. If it can, there may be an issue which arises later as to whether any further parts of it can properly be made open.

Cross-examination

4 The claimants make an application for the cross-examination of Witness A who has given evidence on behalf of MI5 in these proceedings. There are two parts to this issue. First, should the Tribunal order that Witness A be made available for cross-examination at all? Secondly, if so, should it direct that that cross-examination should at least in part take place in open? The jurisdiction of the Tribunal is set out in s.65(2) of the Regulation of Investigatory Powers Act 2000 (or RIPA):

> "The jurisdiction of the Tribunal shall be –
>
> (a) to be the only appropriate Tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;
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> (b) to consider and determine any complaints made to them which, in accordance with subsection (4), are complaints for which the Tribunal is the appropriate forum".

Proceedings which fall within subsection (3) include: "(a) … proceedings against any of the intelligence services". It will be apparent, therefore, that one of the jurisdictions of the Tribunal is to consider the sort of claim under s.7 of the HRA which could otherwise be brought in an ordinary court as a Part 7 claim under the Civil Procedure Rules. A claim under s.7 of the HRA need not be brought as a claim for judicial review. It must be brought as a claim for judicial review if one of the remedies sought is only available using that procedure, typically a quashing order. Other remedies (for example, damages) can properly be sought by bringing an ordinary Part 7 claim. The usual time limit for a claim under s.7 of

the HRA is one year, although this is subject to a shorter time limit (for example, the usual time limit of three months in the context of a claim for judicial review).

5 Section 67(1) of RIPA provides:

> "Subject to subsections (4) and (5), it shall be the duty of the Tribunal-
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> (a) to hear and determine any proceedings brought before them by virtue of section 65(2)(a) …; and
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> (b) to consider and determine any complaint … made to them by virtue of section 65(2)(b)".

Subsection (2) provides:

> "Where the Tribunal hear any proceedings by virtue of section 65(2)(a), they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review".

Subsection (3), however, is more broadly phrased. It provides:

> "Where the Tribunal consider a complaint made to them by virtue of section 65(2)(b), it shall be the duty of the Tribunal-
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> (a) to investigate whether the persons against whom any allegations are made in the complaint have engaged in … any conduct falling within section 65(5)" in relation to the complainant etc.

As para.(c) goes on to provide:

> "In relation to the Tribunal's findings from their investigations [it is then the duty of the Tribunal] to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review".

6 It follows, therefore, that in relation to complaints, as distinct from claims under the HRA, the jurisdiction of this Tribunal is broader than the ordinary courts and is, in part, an investigatory one. Furthermore, we take the view that the reference in the legislation to the principles which would be applicable on a claim for judicial review is a reference to the substantive principles of public law which would be applicable in such a claim. It does not

follow from those references that Parliament intended that this Tribunal should be confined in its procedures to adopt the same procedure that might be applied by the Administrative Court considering a claim for judicial review. In that context, as is common ground, it is exceptional for there to be cross-examination of witnesses, but this is principally due to the nature of the issues which arise in claims for judicial review. They are rarely issues of fact. That said, our attention has been drawn to a number of authorities in the Divisional Court where, because there were live issues of fact, there had to be cross-examination (see e.g. *The Queen on the Application of Al-Sweady v Secretary of State for Defence* [2010] HRLR 2).

7 On behalf of the claimants, Mr de la Mare, Queen's Counsel, points out that in the present case the Tribunal has before it both a claim and a complaint. Furthermore he points out that even in relation to the claim under s.7 of the HRA there is a claim for damages. It is not contended on behalf of the claimants that they are entitled to have cross-examination in this case, as might be the case if this were a Part 7 claim brought in an ordinary court. What is submitted is that there is no test of exceptionality which needs to be applied as the respondents contend. We agree with the claimants on this point. Section 68(1) of RIPA provides:

> "Subject to any rules made under section 69, the Tribunal shall be entitled to determine their own procedure in relation to any proceedings, complaint … brought before or made to them".

The Secretary of State has made rules governing the procedure of this Tribunal (see the Investigatory Power Tribunal Rules 2018 (SI 2018 No. 1334)). Rule 4(a) provides that the rules apply to all s.7 proceedings and complaints before the Tribunal. Rule 10(1) provides:

> "The Tribunal is under no duty to hold a hearing, but they may do so by holding, at any stage of their consideration-
>
> (a) a hearing at which the complainant and the respondent may make representations, give evidence and call witnesses; …

> (c) a hearing in the absence of the complainant at which the respondent may make representations, give evidence and call witnesses".

Paragraph 2 provides that a hearing may be held wholly or partly in private. Paragraph 4 provides:

> "In exercising their discretion to hold a hearing under paragraph (1) the Tribunal must endeavour, so far as is consistent with the general duty imposed on the Tribunal by rule 7(1), to conduct proceedings, including any hearing, in public and in the presence of the complainant".

8 It is important, first, to note that that is not an absolute duty. It is in terms a duty of "endeavour". Secondly, the duty is subject to the general duty imposed on the Tribunal by Rule 7(1) which provides:

> "The Tribunal must carry out their functions in such a way as to secure that information is not disclosed to an extent. or in a manner, that is contrary to the public interest or prejudicial to national security … or the continued discharge of the functions of any of the intelligence services".

In the circumstances of this case we have reached the conclusion that (1) the Tribunal does need to hear from Witness A giving live evidence so that members of the Tribunal and counsel to the Tribunal can ask that witness questions; (2) However, that exercise cannot be conducted in open. It must be conducted in closed so as to comply with our duty in Rule 7(1). Counsel for the claimants will have the opportunity to suggest topics for possible cross-examination to be put by counsel to the Tribunal in CLOSED. Further reasons are given in the ruling we gave in CLOSED.

Inadvertent disclosure by the respondents

9 This issue relates to what use, if any, can be made by the open representatives of the claimants in a situation where there has been inadvertent disclosure of material by the respondents. The issue has arisen in the past, both in the Special Immigration Appeals Commission (or SIAC) and in this Tribunal. In SIAC the issue arose in *XX v Secretary of State for the Home Department* Appeal No SC/61/2007, judgment of 10 September 2010.

As Mitting J said at para.6: "An *ad hoc* solution had to be found to deal with the problem" which had arisen. SIAC rejected the submission that the documents should be treated as fully open.

> "That left two alternatives: to require the open advocates to hand back the documents to the Secretary of State and to make no reference to them in questions or submissions in the open session; or, as [had happened in a previous case] with the consent of all parties … to deal with the Secretary of State's case on the issue of safety on return and with the submissions of the open advocates … on that issue in a private session from which the public and XX were excluded".

SIAC were satisfied that this was the right course to take in exercise of its power to conduct part of the hearing in private. This would achieve "the least bad solution to the problems created by the error".

> "It would not have been fair to [counsel or his client] to require him, at short notice, to put out of mind everything he had learnt from the inadvertently disclosed documents. Fairness required that [counsel] should be able to deploy, in questions and submissions, all of the information helpful to [his client's] case which he had properly acquired. Conducting part of the hearing in private permitted him to do this. It also permitted SIAC to fulfil its duty to secure that information was not further disclosed contrary to the interests of the international relations of the United Kingdom provided that appropriate undertakings from the open advocates and those who instructed them were given, which they were".

SIAC acknowledged:

> "The price to be paid was the exclusion of the public … from parts of what would otherwise have been open sessions … That is regrettable, but it is a price which has to be paid to permit XX to have as fair a hearing as possible. …. The exclusion of XX [himself] from the private session had no effect upon him, because he has shown no interest in attending any part of the hearing".

10 This Tribunal applied that approach in *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* [2017] UKIP Trib IPT/15/110/CH 2, judgment of 18 December 2017, at paras. 6 to 7. In that case counsel for the respondent accepted that where there has been inadvertent disclosure the claimant could not be prevented from using or deploying in submissions any material information which had been

disclosed. On the facts there was no need for the claimants to use that knowledge, because the material did not raise anything relevant to the issues which the Tribunal had to decide. This Tribunal then went on to consider at para.8 the principle of open justice. It held that that principle is not absolute, but is subject to statutory exceptions, including what is now Rule 7(1) of the 2018 rules. Sir Michael Burton, President, said:

> "In principle it would be contrary to the interests of national security to disclose the identity of any person to whom a s.94 direction has been given, and that rule must apply to any such information, including information inadvertently disclosed to one party".

11 These decisions offer some valuable guidance, although the way in which such issues are dealt with is inevitably fact specific. We must then consider how to apply those principles to the facts of the present case. In order to do so we have heard submissions, including by the open advocates in private. The Tribunal has given a ruling in CLOSED upholding the respondent's submissions in relation to the inadvertently disclosed sensitive material in the IPCO confidential annexe. The question now arises as to the procedure to be followed. As we understand it, the only people on the claimants' side who have seen the document are all counsel, but not de la Mare, QC, the lead solicitor at Liberty, a programme director at Privacy International and a legal trainee on secondment at Liberty until early September. The question that arises is who should be included in the confidentiality ring as matters proceed. The mechanics of the confidentiality ring can no doubt be settled by discussions between the parties and counsel to the Tribunal, but, as indicated by Sir James Eadie, QC, and as past experience suggests, they will include appropriate undertakings and practical arrangements, such as a safe for storage.

12 The issue to be decided is who should be in the ring. Mr Cashman on behalf of the claimants did not press that the trainee should be included and we rule accordingly that the trainee should not be part of the confidentiality ring. The same applies to the programme director at Privacy International. In the unusual circumstances of this case we accept Mr

Cashman's submission that it would be impossible for the counsel team to have sensible conversations if Mr de la Mare was excluded. We, therefore, direct that Mr de la Mare should be included in the confidentiality ring and be able to see the document that he has not seen so far. As regards the lead solicitor at Liberty, she should also be in the confidentiality ring. She has seen the document and is a solicitor with professional duties. That entails not least a duty owed to the court and Tribunal and will be subject to the undertakings as well as to the applicable regulatory standards.

The Investigatory Powers Commissioner

13 This issue arises from the suggestion which has been made by counsel to the Tribunal (or CTT) and which is supported by the claimants that the Tribunal should consider exercising its powers to request statutory assistance from the Investigatory Powers Commissioner (IPC) or IPCO. Section 68 of RIPA provides in subsection (2):

> "The Tribunal shall have power-
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> (a) in connection with the investigation of any matter, or
>
> (b) otherwise for the purposes of the Tribunal's consideration or determination of any matter,
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> to require a relevant Commissioner appearing to the Tribunal to have functions in relation to the matter in question to provide the Tribunal with all such assistance … as the Tribunal think fit.
>
> (3) Where the Tribunal hear or consider any proceedings, complaint … relating to any matter, they shall secure that every relevant Commissioner appearing to them to have functions in relation to that matter-
>
> (a) is aware that the matter is the subject of proceedings, a complaint … brought before or made to the Tribunal; and
>
> (b) is kept informed of any determination, award, order or other decision made by the Tribunal with respect to that matter".

14 Section 232(1) of the Investigatory Powers Act 2016 provides:

> "A Judicial Commissioner" (which includes the IPC) "must give the Investigatory Powers Tribunal all such documents, information and other assistance … as the Tribunal may require-
>
> (a) in connection with the investigation …
>
> (b) … consideration or determination of any matter".

In making this suggestion, CTT note that in these proceedings to date there have been relevant documents generated by IPCO or documents sent by MI5 to IPCO which were not disclosed to the Tribunal until CTT had made specific requests for them. Accordingly, they submit that the Tribunal should make a request so as to ensure that it has complete confidence that the case has been thoroughly investigated and that it has available all relevant material. Should the Tribunal be minded to seek assistance from IPCO, CTT suggests that IPCO should be asked to provide any relevant documentation which it holds concerning the TE and TE2 areas 1 and 2 to the Tribunal and CTT in closed. CTT suggest that IPCO should be provided with the pleadings in the case and a list of the documents that have already been disclosed. This could be achieved by, for example, providing the index to the open bundles highlighted to indicate documents created by IPCO or documents that MI5 has provided to IPCO.

15 The Tribunal must also bear in mind that it must not do anything indirectly in this case which would cut across some live issues which still remain to be resolved in relation to how it should exercise its functions under s.68(2) and s.232. Those matters are to be the subject of a hearing listed for 5 October 2021 in the context of other proceedings brought by Privacy International and others, known as the IPCO issue in the Third Direction case. That said, it appeared at the hearing before us that a request could be made to IPCO framed in a suitable way so as not to prejudge any decision which this Tribunal will make after the hearing on 5 October.

16 This is an entirely OPEN issue. Having heard the submissions of the parties and CTT in OPEN, we have reached the conclusion that in the circumstances of this case it would be

appropriate to exercise the Tribunal's discretion to write to the IPC as suggested by CTT. In view of the history of this case, it is possible that IPCO will have relevant documents which the Tribunal has not been shown so far, but even if that is not the case, having that confirmation will help to assure the Tribunal that there is nothing relevant which it has not seen and so will help to reinforce public confidence in the process. We think that the letter to be sent to the IPC should in essence be in the terms originally drafted by CTT. We do not consider that it is appropriate to include the amendments proposed by the claimants which will add unnecessary complexity to the task which IPCO will have to perform. Nor do we think it necessary to include the additional wording proposed by the respondents. The process envisaged by the draft letter envisages that no documents would be disclosed by IPCO, only a list would be compiled and given to the Tribunal. There will be no question, therefore, of material that is subject to LPP being wrongly disclosed.

17 At the hearing this morning, Sir James Eadie for the respondents indicated that he was still in the process of receiving instructions on other aspects of the drafting of the letter. In the circumstances and bearing in mind the time of year, we will give the parties until Friday, 13 July at 10 a.m. to make any further written representations, if they wish to, before the President finalises the letter and sends it to the IPC. [In the event, no such representations were made.]

CERTIFICATE

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