**Neutral Citation Number: [2023] UKIPTrib 12**

**Case No: IPT/23/152/CH**

**IN THE INVESTIGATORY POWERS TRIBUNAL**

Date: 30 November 2023

**Before:**

**LADY CARMICHAEL**
**MR JUSTICE JOHNSON**
**MR STEPHEN SHAW KC**

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**BETWEEN:**

**Claimant**

**ES**

**-and-**

**Respondent**

**THE NATIONAL CRIME AGENCY**

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**JUDGMENT**

**Mr Stephen Shaw KC:**

## Background

1. This is the unanimous judgment of the Tribunal. We have anonymised the complainant and others to prevent prejudice to any potential criminal proceedings.

2. On 30 May 2023, ES, the complainant, lodged a complaint and section 7 proceedings against the National Crime Agency. Along with the prescribed forms he filed a document dated 22 May 2023, entitled *Grounds of Complaint/Claim* (hereafter "Grounds") which elaborated his case against the authorities.

3. In his Grounds, the complainant explains that on 2 May 2023 he was convicted of conspiracy to murder a Mr RL. The case advanced by the Crown was that the complainant introduced an assassin (CP) to PO, whom the latter hired to shoot one RL. It is alleged the complainant also arranged vehicles and weapons for the attack. On 29 May 2020 RL was shot and injured in Birmingham. PO and CP have made applications to the Tribunal, as explained below.

4. It appears the case against the complainant is grounded in the successful breach in 2020 of a secure and encrypted communication network that went by the name of EncroChat. As the Grounds explain,

> "*Until early 2020 it had been assumed that the handsets used by EncroChat customers were impenetrable by law enforcement unless they had been able to acquire specific passwords*." Grounds §7.

5. However, thanks to an international operation by law enforcement agencies, the Encrochat system was disrupted in 2020. The Grounds recite at §31 that Encrochat published on 12 June 2020 a 'security notice' advising users to power off and physically dispose of devices immediately since Encrochat "*can no longer guarantee the security of your device*".

6. Consequent upon the penetration of the Encrochat system by law enforcement agencies, they harvested information that led to multiple prosecutions in the United Kingdom, and elsewhere. The complainant is among those who are concerned that the breach of the EncroChat network was unlawful.

7. Issues arising from the disruption of the EncroChat network have been determined in a number of criminal proceedings. This Tribunal has dealt with claims and complaints about a number of such issues. On 11 May 2023 the Tribunal gave its Judgment in a set of eleven lead cases, leaving some issues still at large: *SF and others and NCA* [2023] UKIPTrib3. One of the remaining issues is one raised by the complainant CP as to whether messages were unlawfully obtained from Dubai.

8. Like PO, the complainant now brings a claim and complaint. In common with PO, he faces the challenge that he brought proceedings nearly three years after the material events. The Respondent contends he is out of time and that no extension should be granted.

9. Having considered all material issues we have concluded the proceedings are out of time and that we should not extend time. In accordance with Rule 15(5) of the Investigatory Powers Tribunal Rules 2018 (the Rules) the Tribunal is required to inform the complainant of any reasoning for this decision that they consider appropriate.

**Time Limits at the Tribunal**

10. The Tribunal's limitation regime is well-known; there is a 12-month limitation period for both the complaint and Human Rights claims, subject to our discretion to extend when appropriate.

11. The legislation provides: -

**Regarding complaints**

*Except where the Tribunal, having regard to all the circumstances, are satisfied that it is equitable to do so, they shall not consider or determine any complaint*

*made by virtue of section 65(2)(b) if it is made more than one year after the taking place of the conduct to which it relates.*

Section 67(5) of the Regulation of Investigatory Powers Act 2000.

**Human Rights claims**

*Proceedings under subsection (1)(a) must be brought before the end of—*
*(a) the period of one year beginning with the date on which the act complained of took place; or*
*(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances, but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.*

Section 7(5) of the Human Rights Act 1998.

12. A recent ruling by the President and Vice President sitting with Ms Darlow KC explained the Tribunal's approach to extending time: *Al-Hawsawi v Security Service etc* [2023] UKIPTrib5. At paragraphs 62-63 the Tribunal said:

> 62. *The first point to note is that section 67(5) is closely modelled on section 7(5)(b) of the HRA. RIPA was brought into force on the same date as the HRA (2 October 2000) since they are properly to be regarded as part of a package which was designed to secure compatibility with the Convention rights in the context of the activities governed by RIPA: see R (A) v Director of Establishments of the Security Service [2009] EWCA Civ 24; [2010] 2 AC 1, at paras. 46-47 (Dyson LJ). It is therefore appropriate to have regard to the principles which apply when a court is considering the power to extend time in section 7(5)(b) of the HRA.*
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> *63. When considering that provision the courts have held that it confers "a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case": see Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72, at para. 75 (Lord Dyson JSC). As Lord Dyson also said in the same paragraph, it will often be appropriate to take into account factors of the type listed in section 33(3) of the Limitation Act 1980 as being relevant when deciding whether to extend time for a domestic law action in respect of personal injury or death. These may include (1) the length of the delay; (2) the reasons for the delay; (3) the extent to which, having regard to the delay, the evidence in the case is or is likely to be less cogent than it would have been; and (4) the conduct of the public authority after the right of claim arose.*

13. Although the claims were filed in May 2023 about conduct that ran until June 2020, in his Grounds the complainant offered no reasons to warrant the use of our discretion to extend time. Unsurprisingly, in its submissions on limitation dated 23 June 2023, the NCA highlighted the lack of material before us contending there is no proper basis for us to exercise the discretion. The respondent observed the complainant does not state: when he first became aware of the relevant conduct nor when he first became aware of the Tribunal's ruling of 8 March 2022 on limitation. Moreover, they stressed, he is silent as to why he failed to issue his claim promptly; and/or why his failure to issue his claim promptly was reasonable in the circumstances.

14. The NCA submission on limitation also recorded that in the course of his criminal proceedings on 22 March 2022 the complainant referred to the fact that EncroChat proceedings were afoot in the Tribunal.

15. Although alive to NCA criticism that he failed to lay a basis to extend time, the complainant's written submissions on limitation dated 3 August 2023 did not address the lack of explanatory material nor seek to make it good. Instead, the complainant relies on a reading of a ruling by this Tribunal dated 8 March 2022.

**The 8 March 2022 Ruling [**2022] UKIPTrib IPT 21 56 CH

16. The Tribunal was confronted by several claims arising out of the operation which disrupted Encrochat where claims were issued more than 12 months after the system ceased to function (June 2020). The Tribunal said in §2.

> *The cases in which this ruling is given are all cases which were issued in the Tribunal more than 12 months after the Encrochat system ceased to function and the JIT operation became overt. That occurred in June 2020.*

17. The ruling went on to say in §7-8.

> *7. We have today directed that the next substantive hearing of the test claims will be heard in the week of 19 September 2022. That hearing may or may not*

> *be a final determination of the claims depending on what decisions the Tribunal makes.*
>
> *8. We have decided that we should allow all claims issued **prior to the decision of the Tribunal** at the next hearing to proceed, in that they will be accepted and not barred on time grounds. They will then be stayed pending that decision and further directions in the light of it.*
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> Underlining and bold added.

18. In the event, with the funeral of Queen Elizabeth II on 19 September 2022, the Hearing opened on 20 September and ran for several days that month and resumed in December with Judgment delivered on 11 May 2023: *SF and others and NCA* [2023] UKIPTrib3.

19. The complainant argues the March 2022 ruling leaves the door ajar to claimants provided they issue proceedings before the Tribunal "*has given judgment on the points raised in the claim or complaint*": see §2 of the Grounds. The interpretation is parsed by the complainant in this way in his Grounds at §18 *"the ruling makes clear that claims will be allowed, and not barred on time grounds, if issued: **prior to the decision of the Tribunal**…."*

    The phrase highlighted in bold was italicised for emphasis by the complainant in the Grounds.

20. Since the Tribunal has not yet decided the Dubai point, for example, under the complainant's reading it would be permissible to file at any time before judgment is delivered on that issue. Accordingly, the complainant's stance is that his claim *was* filed within the time set by the March 2022 ruling.

21. We consider his stance is not only of doubtful practicality, but it also misreads the March 2022 ruling. It rests on extracting and isolating a phrase (that we have placed in bold above) that fails to respect the sentence, paragraph, and context of the ruling. In short, the passages underlined in §17 above are ignored by the complainant who fastens to the phrase in bold. However, we find the plain purpose of the ruling was to leave the door open to those claims started before the Tribunal issued a decision after the hearing which commenced on 19 September, whether or not that decision finally

determined all the claims. If initiated by then, they would be stayed until the substantive decision (which arrived on 11 May 2023) and then open to further directions in light of it. However, these proceedings were held back by the complainant until 30 May 2023, for reasons that remain unexplained.

22. We have had regard to all relevant circumstances before us. Having considered his papers with care, we discern no fresh factual context beyond what is already before us in the outstanding claims concerning CP. The issues mooted in the Grounds already arise in the case of CP and we are satisfied the interests of justice would not be infringed if we were to exclude these proceedings.

23. Consequently, the Tribunal has determined that section 7 proceedings and the complaint are out of time as provided for the legislation set out above. After considering all relevant circumstances before us we are not satisfied that it would be equitable to consider or determine the proceedings.

24. There is no right of appeal from this decision which is therefore final.