Neutral Citation Number: [2023] UKIPTrib 9

Case No: IPT/19/197/C

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 27 October 2023

Before :

LORD JUSTICE SINGH (PRESIDENT)
LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)
ANNABEL DARLOW KC

- -

Between :

ABD AL-RAHIM AL NASHIRI	**Complainant**
- v -	
(1) SECURITY SERVICE **(2) SECRET INTELLIGENCE SERVICE** **(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS** **(4) MINISTRY OF DEFENCE**	**Respondents**

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Hugh Southey KC and Robbie Stern (instructed by **Sternberg-Reed Solicitors**) for the **Complainant**
David Blundell KC, Charlotte Ventham and Richard O'Brien (instructed by the **Treasury Solicitor**) for the **Respondents**

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DECISION

Lord Justice Singh :

Introduction

1. This is the decision of the Tribunal.

2. On 21 June 2023 we gave judgment on a preliminary issue (whether the Complainant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the European Convention on Human Rights or "ECHR"). Having decided that he did not, we noted that that was not necessarily the end of the matter, because the Complainant wishes to argue that, even if his "claim" under section 7(1) of the Human Rights Act 1998 ("HRA")/section 65(2)(a) of the Regulation of Investigatory Powers Act 2000 ("RIPA") fails, he has a "complaint" which should be investigated by the Tribunal under section 65(2)(b) of RIPA. We indicated that, in our view, that would require permission from the Tribunal to amend the pleading and made procedural directions as to the next steps that should be taken by the parties.

3. We have now had written submissions from the parties as to whether the application for permission to amend should be granted, in particular having regard to the lapse of time since the events complained of in this case. We now proceed to give our decision on these issues, having considered the papers. We do not think it necessary to hold a hearing before reaching our decision on these issues. It was not suggested to us that a hearing was necessary.

Chronology

4. The alleged conduct which is the subject of this complaint took place between October 2002 and September 2006. The Complainant alleges that he was subjected to torture and inhuman and degrading treatment while detained pursuant to a secret detention and interrogation programme of the United States Central Intelligence Agency ("CIA") and that the Respondents, through their co-operation and liaison with the US authorities, were complicit in that conduct.

5. The Complainant filed a Form T2 dated 18 October 2019. This was the appropriate form for a "complaint", although such a document often also includes a claim for breach of Convention rights under section 65(2)(a) of RIPA as well as a complaint in the strict sense under section 65(2)(b). Nevertheless, as we have held in our judgment of 21 June 2023, in substance the only matter in fact complained about was an alleged breach of Article 3 of the ECHR, a claim which we have now rejected on jurisdictional grounds.

6. On 4 August 2020 the Tribunal emailed the First, Second and Third Respondents to invite them to provide written submissions on the time limit issue. The Tribunal also informed the Complainant on the same date that it had done so. The Respondents replied to the Tribunal informing it that they did not wish to make any submissions: the three Respondents did so respectively on 25 August 2020, 26 August 2020 and 28 August 2020.

7. On 7 September 2020 the Tribunal sent an email to the Complainant's solicitor, stating that "the Tribunal is content to exercise discretion and extend time as requested in para. 8.1 of your submissions."

8. On the same day the Complainant's solicitor (Mr Kenneth Carr) sent an email saying that this appeared to have been sent to him in error because he acted for the Complainant and had not asked for an extension of time. A further email was sent by the Tribunal Secretary on 8 September 2020, which explained that the Respondents had been invited to make submissions on the time limit issue and the Tribunal now confirmed that it was equitable to extend time.

Evidence on behalf of the Complainant

9. For the purpose of the present application, the Complainant has filed a witness statement by Mr Carr dated 9 October 2023. Mr Carr explains that his principal area of practice is criminal law and he is a consultant at Sternberg-Reed Solicitors, a high street practice with a significant emphasis on publicly funded work.

10. Mr Carr states that he was aware of the Intelligence and Security Committee ("ISC") Report in June 2018 as he had read about it in the press but at that time he was not acting for this Complainant. He did not link the ISC Report to the Complainant, who is not named in it. He has been made aware by his colleagues that at the time of the ISC Report the Complainant was not represented in the UK.

11. On 2 April 2019 Mr Carr received an email from one of the Complainant's American lawyers about the ISC Report and the possibility that the Complainant might be able to pursue a case in the UK.

12. He agreed to act on a *pro bono* basis. He had to research the factual and legal issues and put together a team who would also be willing to act *pro bono*. He confirms that this case has involved "the most complex factual matrix" that he has ever had to deal with, coupled with an area of law with which he was unfamiliar: see para. 14 of his statement. He explains that a period of six months between first instructions and lodging the complaint was only possible because of the unpaid efforts of the lawyers in this case. They wanted to ensure that the Complainant's case was presented in the best possible light and that they had done everything to assist the Tribunal to understand fully the factual and legal basis for the claim.

The Respondents' submissions

13. The Respondents submit that the Tribunal should refuse to consider the complaint on the basis that it is out of time. Their submissions can be summarised as follows:

(1) The decision taken on 7 September 2020 is properly construed as an interim procedural decision. If it was a substantive decision, then it would have included a specification of the relevant appellate court under section 68(4C) of RIPA.

(2) The Tribunal has the power to revoke or vary interim decisions. It has a wide discretion to do so, including where there has been a material change of circumstances or where the facts on which the original decision was made were misstated, innocently or otherwise. The Tribunal has to have regard to all the circumstances and

must be able to revisit the decision if circumstances change or are differently understood.

(3) The original decision related to an HRA claim and does not apply to the complaint now brought. Accordingly, there is good reason to vary or revoke the decision or alternatively to consider the application *de novo* and refuse it.

(4) While no *ex post facto* explanation for refusing to object on time grounds in August/September 2020 is advanced, the Tribunal should take into consideration the fact that the claim/complaint as then formulated permitted the recovery of damages and was subject to a compelling jurisdictional objection the effect of which was to strike out the claim/complaint in its entirety.

(5) The delay in this case is quite exceptional. The reasons for the delay are not sufficient for it to be equitable to extend time. In particular there has been no explanation for the delay of 16 months between the publication of the ISC report and the filing of the claim or the period of over three years between the lodging of the claim and the application to amend the pleading so as to introduce a complaint engaging judicial review principles.

(6) Allowing the complaint to proceed would cause significant prejudice to the Respondents.

The Complainant's submissions

14. The Complainant's submissions can be summarised as follows:

(1) The decision to extend time has already been made, on 7 September 2020. The Complainant's pleading included (at para. 8.1) a request that the Tribunal exercise its

discretion under section 67(5) of RIPA. The Respondents had an opportunity to object at the time but chose not to take it.

(2) Limitation is typically regarded as a substantive rather than a procedural issue. The absence of notice under section 68(4C) does not affect that conclusion.

(3) Accordingly, the decision of 7 September 2020 should be regarded as final.

(4) A discretion to revoke or vary a decision must be subject to common law considerations of fairness. The decision was in effect an unequivocal assurance and the Complainant has proceeded on the basis of that assurance.

(5) Even if the complaint was not sufficiently particularised, it was evident that the claim was not solely based on ECHR grounds. The form said that it "included" that claim, not that it was restricted to it.

(6) Reserving the Respondents' objection until after the jurisdictional "knock out" point was unfair to the Complainant and an inappropriate use of court time and resources.

(7) In any event it is equitable now to extend time. The Complainant points to the length of time he has been held incommunicado and denied access to lawyers. The Complainant could not have known about the involvement of the Respondents until after publication of the ISC report on 28 July 2018. That is the relevant date for the start of the time by analogy with section 11(4) of the Limitation Act 1980.

(8) As for the Respondents' claim that there has been no adequate explanation for the delay since then: at the time the Complainant was unrepresented in the UK. He was not named in the ISC report, although he had been mentioned in the judgments of the European Court of Human Rights. US lawyers contacted the Complainant's solicitors in April 2019. They are acting *pro bono*. The delay is therefore less than six months. In the circumstances that was reasonable. The same principles applied by the

Tribunal in *Al-Hawsawi v Security Service and Others* [2023] UKIPTrib 5 should apply here.

(9) No particulars are given as to why the Respondents would be significantly prejudiced. In any event that should not alone be sufficient to deny the complaint from being heard. The Respondents had deliberately concealed their involvement in the High Value Detainee programme over a period of years. The matter is of the utmost importance to the Complainant.

The time limit issue

15. In our opinion the first issue is: what is the nature of the decision taken by the Tribunal on 7 September 2020?

16. Section 67(5) of RIPA is in the following terms:

> "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."

17. The Tribunal has exercised its power under this provision and has proceeded to consider the complaint. The Respondents characterise the decision as an interim procedural one. We do not agree. A decision by the Tribunal not to exercise its discretion to admit a claim out of time is a substantive decision rejecting the complaint, albeit one that is not amenable to an appeal under section 67A of RIPA (although it would in principle be amenable to judicial review). The Respondents have not argued that the words "or determine" import an ability at a later stage to decide not to determine the complaint even though the Tribunal has exercised its

discretion to "consider" it. We think the better argument is that the words "consider or determine" are to be read together. The Tribunal has no power to consider a complaint unless it exercises its discretion to extend time to do so. That implies that the discretion is to be exercised once at the admission stage and cannot be revisited at a later stage.

18. We can, however, see an argument that the provision allows the Tribunal to reserve the question of whether to exercise its discretion to a point where it has more information. In that case it may admit the complaint and investigate it under reservation. But that did not happen here. The provision might also allow the Tribunal to revisit its decision if it was misled or there is some other substantial reason to revisit it.

19. The second issue is: what exactly did the decision relate to? Was it only a claim under the HRA or did it, at least arguably, include a complaint under section 65(2)(b) of RIPA?

20. We do not think that it only related to the human rights claim for the following reasons. First, the claim was made on a T2 form (the prescribed form for a "complaint") and that was what was being dealt with at the time the original decision was made. The clarification that it was in fact a human rights claim came in the course of preliminary proceedings. Secondly, the Complainant maintains that the claim/complaint always included a complaint under section 65(2)(b). Thirdly, as noted above, the Tribunal exercised its power to extend time under section 67(5) of RIPA.

21. We do not think we should go back and reconsider the decision the Tribunal took in September 2020. First, the decision was taken after giving the Respondents an opportunity to make submissions objecting to an extension of time. They did not do so. They knew the factual basis of the claim. They knew it was made on a T2 form and was on the face of it a complaint. They knew that it sought an exercise of the Tribunal's discretion under section 67(5) of RIPA to extend time to admit it.

22. That conclusion does not necessarily lead to the conclusion that the Tribunal should grant the Complainant's application for permission to amend his pleading. We now turn to that application.

Discretion to permit amendment

23. Although the Civil Procedure Rules 1998 do not apply to this Tribunal, some helpful assistance can be derived by analogy from what is said at CPR 17.4, which applies where a party seeks to amend the Statement of Case after a period of limitation has expired. Para. (2) provides that:

> "The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

24. This reflects the provisions of section 35 of the Limitation Act 1980. Section 35(3) provides that, unless an exception applies, the court shall not allow a new claim to be made in the course of any action after the expiry of any time limit under that Act

which would affect a new action to enforce that claim. One exception is where the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which the claimant has already claimed a remedy in the proceedings.

Exercise of our discretion

25. We refer to the judgment of this Tribunal in *Al-Hawsawi v Security Service and Others*, at paras. 61-72, on the approach which this Tribunal should take to the time limit issue. We do not repeat what we said there. We note that the Tribunal has a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case and that it will often be appropriate to take into account factors of the type listed in section 33(3) of the Limitation Act. 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.

26. In the exercise of our discretion, we consider that substantially the same factors bear on the question whether we should permit the amendment to be made to the pleading as would apply if we were considering the time limit issue afresh. For that reason, irrespective of whether the Respondents are correct on their first submission, that the decision of 7 September 2020 can be revisited by this Tribunal now, we would in any event reach the same conclusion. We bear in mind in particular the following features of the case in the exercise of our discretion.

27. First, the length of the delay is very considerable. The events complained of took place in the period from 2002 to 2006. The complaint was not filed until October 2019.

28. Secondly, at all material times the Complainant has been in detention and has been subject to very stringent restrictions on his ability to communicate with others, including his lawyers.

29. Thirdly, the ISC Report was not published until 28 June 2018 and, even then, it was not obvious that it related to this Complainant. Having considered Mr Carr's witness statement, we are satisfied that the Complainant's representatives acted with reasonable speed and diligence in making the complaint to this Tribunal in October 2019.

30. Although it is submitted in this case, as it was not in *Al-Hawsawi*, that there will be prejudice to the Respondents if time is extended, we consider that such prejudice can be mitigated because documents will have had to be retained and must be available because they would have been considered by the ISC. As in *Al-Hawsawi*, where it is necessary to do so, this Tribunal will look at that evidence in CLOSED, with the assistance of Counsel to the Tribunal. At least some of the evidence, we anticipate, is going to be common to both cases. A reasonable member of the public might consider that there would be a serious risk of unfairness if the two cases were treated differently and this Complainant were not permitted to pursue his complaint.

31. Finally, as in *Al-Hawsawi*, we consider that the underlying issues are of the gravest possible kind. We conclude that it would be in the public interest for these issues to be considered by this Tribunal as they are going to be considered in *Al-Hawsawi*.

32. What has given us some pause for thought is whether the Complainant's representatives could reasonably have been expected to apply for permission to amend the pleading at an earlier stage, before this year. Nevertheless, we have concluded that it would not be right to refuse the application for permission to amend on that ground alone. The complaint may be formulated in different terms but we consider that the underlying facts are substantially the same as were relied upon to found the initial claim under the HRA. To refuse the application for permission to amend would be to give priority to form over substance.

33. In the circumstances which have arisen, the Respondents submit that the Tribunal should grant the Complainant permission to amend his pleading with the modifications suggested in the Annex to their submissions dated 18 September 2023. The Complainant's submissions do not object to that suggestion: see the submissions dated 6 October 2023, at para. 51. We endorse that approach.

Conclusion

34. For the above reasons we grant the Complainant's application for permission to amend his pleading so as to include a complaint under section 65(2)(b) of RIPA with the modifications set out in the Annex to the Respondents' submissions dated 18 September 2023.