Approved Judgment

Neutral Citation Number: [2016] UKIPTrib 14_176-H

Case No: IPT/14/176/H

IN THE INVESTIGATORY POWERS TRIBUNAL

P.O. Box 33220
London
SW1H 9ZQ

Date 4 February 2016

Before :

MR JUSTICE BURTON
(President)
MRS JUSTICE CARR
MR FLINT QC
MS O'BRIEN QC
PROFESSOR ZELLICK CBE QC

Between :

(1) News Group Newspapers Limited **(2) Tom Newton Dunn** **(3) Anthony France** **(4) Craig Woodhouse**	**Complainants**
- and -	
The Commissioner of Police of the Metropolis	**Respondent**

Gavin Millar QC and Aaron Watkins (instructed by **Simons Muirhead & Burton**) for the **Complainants**

Jeremy Johnson QC and Jonathan Dixey (instructed by **Directorate of Legal Services**) for the **Respondent**

JUDGMENT

MR JUSTICE BURTON (President):

1. This is the Judgment of the Tribunal.

2. By our Judgment dated 17 December 2015, which should be read together with this Judgment, we made findings of fact and determinations as to liability. Consequential upon those findings, we concluded that:

    i) The Respondent did not act unlawfully in making the First, Second and Fourth Authorisations under s.22 of the Regulation of Investigatory Powers Act 2000 ("RIPA"), in respect of (respectively) the Second, Third and First Complainants, such that by virtue of s.6(2)(b) of the Human Rights Act 1998 ("the HRA") the Tribunal had no power to grant any remedy under s.8(1) of the HRA in favour of those Complainants.

    ii) The Third Authorisation was by reference to s.22 of RIPA neither necessary nor proportionate to the legitimate aim which it pursued, such that there was an infringement of the Convention rights of the Fourth Complainant, Mr Woodhouse. The interference with his Article 10 rights was therefore not in accordance with the law (paragraph 128 of the Judgment). S.6(2)(b) of the HRA thus did not apply, and we invited written submissions as to remedy, which we have been grateful to receive.

    We have now considered those written submissions, and we have concluded that no further oral hearing is necessary.

3. These conclusions were based upon our findings, after full consideration of the facts, that the decisions by the Respondent to make applications for authorisations in relation to the communications data of the First, Second and Third Complainants pursuant to ss.21-22 of RIPA were proportionate and necessary, and hence complied with that statutory scheme, whereas we were not so satisfied in respect of the application for authorisation in respect of Mr Woodhouse. However we concluded that applications by the RIPA route, rather than by the route of seeking judicial pre-authorisation pursuant to s.9 of the Police and Criminal Evidence Act 1994 ("PACE"), paid insufficient regard to the protection of journalist sources, and was thus an infringement of those journalists' Article 8/10 rights. For the future there is now in place a new 2015 Code, not in existence at the time, which prescribes the taking of such latter course, save in exceptional circumstances. The Tribunal was however satisfied that the Respondent, in following the course it did at that time in relation to the First, Second and Third Complainants, was acting lawfully, and was entitled to the protection of s.6(2)(b) of the HRA, which we set out at paragraph 113 of our Judgment. For the reasons we gave, the Respondent did not have that protection in respect of its application relating to Mr Woodhouse.

4. With regard to the First, Second and Third Complainants:

    i) Mr Millar QC and Mr Watkins in their written submissions nevertheless submit that the Tribunal's determination as to the application of HRA s.6(2)(b) to their complaints does not preclude the exercise of the Tribunal's power to

award compensation under s.67(7) in their favour, because the Tribunal had determined that their Article 10 rights to protect their sources have been violated.

ii) Mr Johnson QC and Mr Dixey however submit that we were correct to conclude (at paragraph 126 of our Judgment) that in respect of the First, Second and Third Complainants, the Tribunal has "*no power to grant any remedy under s.8(1) of the HRA*", and indeed that the Claimants are impermissibly inviting the Tribunal to rescind or reverse that finding, and in any event without justification. They submit that the Respondent did not act unlawfully, as the Tribunal found at paragraph 130 of our Judgment, so that the condition precedent for granting a remedy (i.e. a finding that the Respondent has acted unlawfully under s.6(1) HRA) is not satisfied. The Claimants' submission that the Tribunal's finding of infringement of the Convention gave it some freestanding power to award compensation cannot be supported. The Tribunal's jurisdiction is derived from statute, and the statutory power to award compensation in s.8(1) makes it clear that such power is limited to findings of illegality under s.6(1) of the HRA.

5. By s.67(2) of RIPA, where the Tribunal is hearing any proceedings by virtue of s.65(2)(a) (such as the present proceedings) "*they shall apply the same principles for making their determination in those proceedings that would be applied by a court on an application for judicial review*". S.6(1) of the HRA provides that "*it is unlawful for a public authority to act in a way which is incompatible with a Convention right*": but this sub-section has no effect if s.6(2)(b) applies, as we have found in this case. S.8 of the HRA provides for "*Judicial remedies*" as follows:

> "*(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*
>
> *(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.*
>
> . . .
>
> *(6) In this section —*
>
> *'court" includes a tribunal;*
>
> *'damages' means damages for an unlawful act of a public authority; and*
>
> *'unlawful' means unlawful under section 6(1).*"

It is entirely clear that the Respondent is correct that this Tribunal, like a court, has no power to order damages or compensation against a public authority in respect of breaches of the Convention otherwise than by reference to ss.6 and 8 of the HRA, and, having found that the Respondent's acts were not unlawful in respect of the First,

Second and Third Complainants, has no jurisdiction to award damages or compensation in their favour.

6. The same would appear to apply in respect of any "*relief or remedy*" where the act complained of has been found not to be *unlawful*, but by paragraph 17 of the Respondent's submissions the Respondent recorded its agreement that "*the Commissioner . . . will, in any event (and notwithstanding the absence of jurisdiction to grant a remedy) destroy all the data obtained as a result of the Authorisations and all consequential schedules compiled on the basis of the data in respect of the First to Third Complainants*". We accept this agreement which will, as proffered in the Respondent's draft order, be recorded as a recital in the Order we make.

7. We turn to the claim by Mr Woodhouse, which we have upheld, and in respect of which there is no dispute as to the Tribunal's jurisdiction to award a remedy. Mr Woodhouse seeks an award of £10,000, to include elements for injury to feeling, distress and vindication of his right, aggravated by the large quantity of data obtained over 9 days, and what Counsel described in their written submissions as the "*covert nature of the obtaining and the conduct of the Respondent in contesting the case*". It should be said immediately that the *covert nature* is no better and no worse than the applications for authorisations themselves (which we have found lawful in the case of the other three Complainants), and we see nothing in the conduct of the Respondent in contesting the case which would in any way merit criticism.

8. It is common ground that the Tribunal has the power to order compensation (s.67(7) of RIPA) and that in addition to the provision of s.67(2) of RIPA set out in paragraph 5 above there are the following relevant provisions in s.8 of the HRA:

> "*(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including —*
>
> *(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and*
>
> *(b) the consequences of any decision (of that or any other court) in respect of that act,*
>
> *the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.*
>
> *(4) In determining—*
>
> *(a) whether to award damages, or*
>
> *(b) the amount of an award,*
>
> *the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.*"

9. Our attention was drawn by the Respondent to a number of our own previous decisions directed to the question of when it is appropriate or *necessary* to award compensation. Counsel for the Respondent set out the following in their submissions:

> *"26. The relevant legal principles are very well known to the IPT. In both **Mr and Mrs B v Department for Social Development** IPT/09/11/C and **Chatwani and others v National Crime Agency** [2015] UKIPTrib 15_84_88-CH the IPT followed the jurisprudence of the European Court of Human Rights and the domestic courts' decisions in **Anufrijeva v Southwark LBC** [2004] QB 1124 and **R (Greenfield) v Secretary of State for the Home Department** [2005] 1 WLR 673 and declined to make any award of damages. The Respondent submits that a similar approach should be taken in the instant case.*
>
> *27. In **Chatwani** the IPT said (at [46]-[47]):*
>
> > *'46. The Complainants claim compensation or damages in the event of the quashing of the authorisation. No doubt mindful of the jurisprudence of this Tribunal, which emphasises the reliance we place upon the Strasbourg jurisprudence in relation to the quantification of compensation and the likelihood that declaratory relief will be sufficient, Mr Jones trod lightly in this regard. Mr Bird drew our attention to that jurisprudence, and to the fact that the interference was relatively short lived and was not at domestic premises, that no medical evidence or evidence of distress or inconvenience has been produced by the Complainants, and no special damage pleaded. He referred to **B v Department for Social Development** IPT/09/11/C in which this Tribunal considered the Strasbourg authorities and held that no compensation/damages should be awarded even where there was an order for destruction of the product. At paragraph 10 of the Judgment the Tribunal followed the guidance from the House of Lords in **R (Greenfield) v SSHD** [2005] 1 WLR 673 to the effect that damages for breach of Convention Rights were typically modest because the primary consideration is "just satisfaction" by other means. In considering the Strasbourg cases the Tribunal observed at paragraph 13 that: "No award was made for non-pecuniary loss in respect of a violation of Article 8 in the cases of **Niemietz v Germany** [1993] 16 EHRR 97 (11/2 hours search and removal of documents, including privilege documents), **Cremieux v France** [1993] 16 EHRR 357 (a lengthy search and seizure at the claimant's house), **Hewitson v UK** [2007] 44 EHRR 30 (covert bugging in the applicant's garage over five months) and **Heglas v Czech Republic** [2009] 48 EHRR 44 (sustained surveillance of the claimant's mobile phone)."*
> >
> > *47. The Tribunal considers that in this case too the finding in favour of the Complainants which we have made, fortified by our Order in respect of the retention of this material, is just satisfaction, and it is not appropriate to award any compensation.'"*

10. The Tribunal's decisions indicate the reliance placed by the Tribunal on the decisions of the European Court of Human Rights (ECtHR) in accordance with s.8(4) of the HRA. We note that the Tribunal also considered this question in its Judgment in

Belhadj & Ors v Security Service & Ors [2015] UKIP Trib 13_132-H (29 April 2015) at paragraph 23, where we stated:

> "*We have carefully considered all the authorities that have been put before us, as indeed the Tribunal did in* ***B v Department for Social Development*** *[2010] IPT09/11, and we have noted paragraph 77 of* ***Liberty v United Kingdom****, and the Practice Direction 'Just Satisfaction Claims' issued by the President of the ECtHR on 28 March 2007. In particular it is plain, from paragraph 9 of that Practice Direction, that two of the matters raised by Mr Jaffey* [similarly to the present case]*, even if we had otherwise been persuaded by them, namely the asserted culpability of the Respondents' conduct and the manner of the Respondents' handling of the proceedings, would not have been appropriate considerations in any event. We have concluded . . . that this is a case in which no compensation is called for, and that there is just satisfaction by virtue of the finding in favour of the Third Claimant.*"

11. The Claimants' Counsel in their written submissions referred the Tribunal to the ECtHR judgments in **Tillack v Belgium** [2012] 25 EHRR 25, where the ECtHR awarded the applicant €10,000 by way of non-pecuniary damages and **Fatullayev v Azerbaijan** (Application no. 40984/07 Judgment 22 April 2010). In both of these cases the facts and the interferences were strikingly different, in the latter case involving long sentences of imprisonment. They also referred to **Gulati & Ors v MGN Limited** [2015] EWCA Civ 1291, although, as the Respondent pointed out, the claims in that case were not made pursuant to the HRA, and the facts again were very different in terms of interference by way of persistent voicemail interception. Mr Millar pointed out that Arden LJ in her judgment in that case (at paragraph 43) referred to an ECtHR decision in **Halford v UK** (1997) 24 EHRR 523, in which £10,000 compensation was awarded for interception of telephone calls, but this case appears to stand alone and was considered and distinguished by the Court of Appeal in **Anufrijeva** referred to above.

12. Mr Millar drew specific attention in his submissions to the evidence of Mr Woodhouse in his witness statement, particularly to the fact that he was "*horrified about how much information* [the Respondent] *now has about my confidential sources and my whereabouts during that 9 day period*", and he described the harm done to him in both his personal and professional life as a result of the accessing of his phone data by the police and that fact being known to his friends, family and potential sources. Mr Johnson urged the Tribunal to proceed with caution before accepting such assertions as to his professional life, not least by virtue of the fact that Mr Woodhouse was recently promoted to Chief Political Correspondent at The Sun. We are not satisfied that this is a case in which the harm caused to Mr Woodhouse is such as to justify compensation, any more than in the cases referred to in paragraphs 8 and 9 above. Mr Millar refers to guidance by Mann J at first instance in **Gulati** [2015] EWHC 1472 (Ch), in respect of aggravated damages, i.e. where there is conduct

which aggravates, by causing "*greater hurt",* but we are in any event not satisfied that there was any such *greater hurt*.

13. Mr Johnson referred to a number of signal cases (referred to in our Judgment) reinforcing the significance of the infringement of Article 10 rights, in which either no award of compensation was granted or none was sought (**Goodwin v UK** [1996] 22 EHRR 123, **Voskuil v Netherlands** [2008] EMLR 14 465, **Sanoma Uitgevers v Netherlands** [2011] EMLR 4, **Media Nederland Landelijke Media BV v Netherlands** (2012) 34 BHRC 193).

14. Mr Millar submits that by making an order for compensation, and vindicating Mr Woodhouse's rights, the Tribunal will be "*sending a message to the Executive and the world at large about the fact and importance of the source protection right and the need to respect it*". Mr Johnson responds that no such message is necessary, because the legal regime has changed since the events, the subject matter of this claim, not least by reference to the 2015 Code and "*therefore in so far as there is any residual need to 'send a message' . . . that message has . . . been sent, received, heard, understood and acted upon already*".

15. The Tribunal drew the attention of Counsel to the words of Laws LJ in the Divisional Court in **R (Miranda) v Secretary of State for the Home Department** [2014] 1 WLR 3140 at paragraph 46 (not affected by the recent Court of Appeal judgment [2016] EWCA Civ 6), whereby Laws LJ emphasised the public rather than private nature of the Article 10 right:

> "*The contrast is not between private right and public interest. The journalist enjoys no heightened protection for his own sake, but only for the sake of his readers or his audience.*"

16. Mr Millar's response is that "*this does not mean that a journalist whose ECHR Art 10 right has been violated is not entitled to compensation assessed by reference to the harm done to his or her personal interests in the usual way*". That is plainly right, but the question is whether in a given case that harm is established.

17. We are entirely satisfied that this is a case in which "*just satisfaction*" is achieved by the Judgment which we have given and the declaration which we are making by our order that "*the obtaining of the Fourth Complainant's communications data was unlawful, it being contrary to s.6 of the Human Rights Act 1998 as read with Article 10 of the European Convention on Human Rights*", a declaration which the Respondent accepts the Tribunal should make and has incorporated in its draft order.

18. Although Mr Woodhouse has described in his witness statement his distress at discovering that his billing data over a period of 9 days had been accessed and considered, this case is very far indeed from the facts of either **Tillack** or **Fatullayev** (or for that matter **Gulati**) such as to fall within Mr Millar's description of "*harm done to his or her personal interests*".

19. Applying the principles of ECtHR jurisprudence and our own, we are satisfied that within the terms of s.8(4) of the HRA an award of damages or compensation is not "*necessary to afford just satisfaction to the person in whose favour it is made*". We agree with the Respondent that just satisfaction is provided by the declaration as to the

infringement of Mr Woodhouse's rights, and the destruction in the same terms as that agreed by the Respondent in respect of the other Complainants, as set out in paragraph 6 above. We do not see the need to make an order to that effect, because of the Respondent's agreement, which will be recorded in our Order.

20. We accordingly refuse the Complainants' applications for compensation and approve the draft order submitted by the Respondent.