

IN THE INVESTIGATORY POWERS TRIBUNAL

(The President and the Vice-President)

9 December 2004

IN THE MATTER OF APPLICATION No IPT/01/62

RULINGS OF THE TRIBUNAL ON PRELIMINARY ISSUES OF LAW

REPRESENTATION

Counsel for the Complainant: Mr Richard Clayton QC and Mr Gordon Nardell instructed by Mona Arshi, Liberty.

Counsel for the Respondents: Mr Philip Sales and Mr Ben Hooper instructed by the Treasury Solicitor.

I. INTRODUCTION.

1. On 6 July 2001 the Complainant made (a) a complaint to the Tribunal under the Regulation of Investigatory Powers Act (RIPA, s65(4)) and (b) a claim under the Human Rights Act 1998 (HRA, s7(1)(a) and within the jurisdiction of the Tribunal under s65(2)(a) RIPA in respect of alleged ongoing interception by one or more of the respondent agencies (the Security Service, GCHQ and the Commissioner of Police for the Metropolis) over a period dating back to June 1996. In 1998 he had made a similar complaint under the Interception of Communications Act 1985 (the 1985 Act), which was replaced by RIPA with effect from 2 October 2000.
2. The Complainant also alleges harassment, intrusive surveillance, interference with property, removal of documents, interference with a web site and e-mails and interception of privileged communications by the respondent agencies.
3. The Complainant seeks a final order prohibiting the agencies from intercepting any communication by him in the course of its transmission by means of a telecommunications system or retaining or otherwise processing the product of any such interception except on the grounds and subject to the procedure provided by RIPA Part I.
4. He also seeks an order requiring the destruction of any product of such interception held by each respondent, whether or not obtained pursuant to any warrant or authorisation; and an award of compensation under s 67(7) RIPA and/or damages

sustained by the Complainant in consequence of the matters complained of.

5. Following written submissions from each side in 2003 the Tribunal made an order on 24 March 2004 for an oral hearing in public to hear legal argument from each side on specific issues of legal principle relevant to the determination of the RIPA complaint and the HRA claim. It was ordered that the hearing should be held together with the hearing of legal issues arising in Application No TPT/01/77.
6. No oral evidence was given on either side in public or in private at the hearing on 28 July 2004. The Tribunal does not consider it necessary to hear any oral evidence from the Complainant in order to make a determination. Very full written details have been supplied by him.
7. The Tribunal is able to rule on the issues, of legal principle without reference in the determination to any of the facts or evidence. The legal principles were argued by reference to the statutory provisions and the authorities concerning interception of communications.
8. The points raised concern the specific legal principles and propositions governing the determination of the complaint and the claim: the relationship between RIPA, the European Convention on Human Rights and the common law protection of privacy of communications: whether there is a common law right of privacy in public law and, if so, whether it is a fundamental or basic right attracting the application of the principle

of legality to the interpretation of RIPA; the principle of proportionality with regard to interference with the right; the application of RIPA to complaints and claims in respect of acts committed before 2 October 2000 (the date on which RIPA and the HRA came into force); and whether an extension of time should be granted under s67(5) RIPA and s7(5) of the HRA.

9. Legal points were raised in the written submissions concerning the Data Protection Act 1998 and alleged breaches of it, but they were not pursued at the hearing and will not be dealt with in this determination.

II. COMMON GROUND.

10. The exchange of written submissions ordered by the Tribunal narrowed the area of dispute between the parties, as they revealed the following measure of agreement on the relevant propositions and principles governing the determination of the complaint and the claim.

(1) Under s2 of the 1985 Act the Secretary of State had power to issue interception warrants if he considered that the warrant was necessary in the interests of national security, or for the purpose of preventing or detecting serious crime or for the purpose of safeguarding the economic well-being of the United Kingdom. In considering whether a warrant was necessary the Secretary of State had to consider whether the information which it was considered necessary to acquire could reasonably be acquired

by other means.

(2) The equivalent provisions in s5 RIPA provide that the Secretary of State shall not issue an interception warrant unless he believes that the warrant is necessary on similar specified grounds and that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.

(3) Claims under the HRA (s7(1)(a)) relying on a Convention right, such as the right to private life in Article 8, can only be brought in respect of conduct taking place on or after 2 October 2000.

(4) The Tribunal shall not consider or determine any complaint if it is more than 1 year after the taking place of the conduct to which it relates, unless the Tribunal is satisfied, having regard to all the circumstances, that it is equitable to do so: s67(5) RIPA. Similarly proceedings under the HRA (which are assigned to the Tribunal) must be brought before the end of 1 year from the date on which the act complained of took place, subject to extension for such longer period as the Tribunal considers equitable having regard to all the circumstances: s7(5) HRA.

(5) The Tribunal shall apply to the determination of a complaint and of a claim in relation to particular conduct the same principles which the

Administrative Court would apply to the conduct in question on an application for judicial review: s67(2) and (3)(c) RIP A.

(6) Illegality is a head of judicial review. Illegality is established where the particular conduct is unlawful pursuant to s6(1) of the HRA by virtue of being incompatible with one or more of his Convention rights and the respondents cannot rely on s6(2) of the HRA.

(7) Illegality, as a head of judicial review, is established if the conduct in question violates any common law right to privacy of communications that the Complainant enjoys, so far as those rights are recognised and protected by public law.

(8) If the Complainant succeeds in establishing that any conduct to which he was subjected by or on behalf of the respondent agencies was not a proportionate interference with his rights under article 8 of the Convention, and the respondent agencies fail to bring any such conduct within s6(2) of the HRA, then the Complainant is entitled to succeed to that extent in his HRA claim and in his complaint, subject to questions of (a) the jurisdiction of the Tribunal over conduct before 2 October 2000 and (b) the grant of an extension of time where there has been noncompliance with time limits.

(9) If the Complainant establishes that any of the conduct complained of after 2 October 2000 resulted in a breach of his article 8 right, then he is entitled to have that complaint and claim upheld in relation to that conduct under s67(2) and s67(4) RIP A.

III. PRINCIPLE OF LEGALITY AND COMMON LAW PRIVACY RIGHTS IN PUBLIC LAW.

11. The determination of the Tribunal on this point is that the Complainant has failed to establish that there is in public law a fundamental or basic common law right of privacy of communications. On this basis it follows that the principle of legality is not available to the Complainant for the interpretation of the 1985 Act in support of the complaint of interception with communications pre-2 October 2000.

12. The principal area of contention concerns the existence of a common law right of privacy in public law. The Complainant submitted that there is such a right, which is entitled to protection on the same basis as other fundamental rights analogous to and informed by the Convention rights. He invokes for its protection the principle of legality, as expounded by Lord Hoffmann in **R v. Secretary of State for the Home Department, ex parte Simms and O'Brien** [2002] 2 AC 115 at 131E-G (**Simms**). That was a case on freedom of expression between convicted prisoners and journalists and examination of prisoners' privileged communications. The principle of legality affects the interpretation of legislation in the context of fundamental or basic

constitutional rights, such as freedom of speech, the right of access to the courts and, it is asserted, the right to private life:

"....the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts must presume that even the most general words were intended to be subject to the basic rights of the individual."

13. It is submitted on behalf of the Complainant that, applying the principle of legality, s3(1) of the 1985 Act should be read as limiting a warrant granted under it to conduct which interferes with the common law privacy right only so far as it is proportionate.
14. It was made clear that the Complainant did not accept that the agencies had the necessary authorisation of a warrant under the 1985 Act when interfering, if they did, with his right of privacy. It was submitted that, if investigation revealed that there was such interference and that there was no warrant under the 1985 Act, the Complainant was entitled to succeed by reason of breach of the claimed right of privacy of communications and that reliance on the application of the principle of legality for the interpretation of legislation was unnecessary.
15. The issue whether there was at common law a relevant fundamental or basic right to privacy available in public law against public authorities is specially relevant to complaints of conduct pre-2 October 2000, which it is agreed cannot be challenged on Convention and HRA grounds.

16. Common law rights are not co-extensive with Convention rights, which are supplemental to common law rights and do not retrospectively apply to the conduct of the respondent agencies.

17. The Complainant cited authorities for the proposition that a general public law right to privacy or the right to private life as a fundamental right or basic common law right which engages the principle of legality in public law. the cases cited were: *Simms; R(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, a case on freedom of expression, as regards which right the English courts have held that there is no difference between the common law position and the right in article 10 of the Convention; and *R v. Chief Constable of North Wales Police ex parte Thorpe* [1999] QB 396 and *R v. A Local Authority in the Midlands ex parte LM*[[2000] 1 FLR 612, both cases concerning challenges on Wednesbury grounds to the official disclosure of information (e.g. by the police or by a local authority), of convictions in the one case and of unproven allegations in the other, about the sexual abuse of children, in which article 8 was referred to, but no mention was made in either case of a fundamental or basic right of privacy in public law or of engagement with the principle of legality.

18. Indeed, there is authority against a general common law right to complain of interception of communications: see **Malone v. Metropolitan Police Commissioner** [1979] 1 Ch 344, in which it was held that statutory authority was not required to carry out telephone tapping. This led to the regime of statutory regulation established by the 1985 Act, after the ruling of the Strasbourg Court in *Malone*, and continued by RIPA. The correctness of **Malone** was not doubted by the House of Lords in their recent decision in **Wainwright v. Home Office** [2004] 2 AC 406 at paras 26-31, in which it was confirmed that there is no general common law right to privacy in private law. This is in contrast to the right to free speech

at common law, which has been held to reflect the Convention right to freedom of expression in article 10.

19. It was held in **Malone** that it was not unlawful at common law to conduct telephone interception. The requirement for authorisation was introduced by the 1985 Act, as there was no pre-existing right at common law to complain of unauthorised interception.

III. PROPORTIONALITY AND THE COMMON LAW.

20. The determination of the Tribunal on this point is that the principle of proportionality does not apply to the review of the legality of interception of communications before 2 October 2000. The appropriate ground of judicial review of such conduct is that of illegality or irrationality.

21. It is common ground that, if a common law privacy right exists as a fundamental or basic right so that the principle of legality applies, for example, to the Secretary of State's power to issue interception warrants under s2 of the 1985 Act, interference with the right must be necessary and the power to issue an interception warrant would not have extended to the issue of a warrant which sanctioned a disproportionate interference with the right.

22. The principle of proportionality does not, however, apply to the pre-2 October 2000 conduct of the respondent agencies. For the reasons already given the principle of legality is not engaged, as the relevant right did not exist as a fundamental or basic right. Proportionality review is not available for pre-2 October 2000 conduct, which is reviewable on **Wednesbury** grounds only.

23. After 2 October 2000 proportionality can be applied to the issue and construction of warrants by virtue of the terms of s5 RIPA itself and by reference to Article 8(2) without the need to consider the common law position.

IV. CONDUCT PRE-2 OCTOBER 2000.

24. The determination of the Tribunal on this point is that, subject to the question of non-compliance with time limits discussed below, the Tribunal has jurisdiction to investigate a complaint in respect of interception of communications before 2 October 2000, if it was a complaint that could have been made under the 1985 Act to the Interception of Communications Tribunal, to which jurisdiction the Tribunal succeeded under RIPA, but it has no jurisdiction to adjudicate on a claim under the HRA (s7(1)(a)) in respect of such conduct.

25. It is common ground that in the case of conduct on or after 2 October 2000 the Complainant can rely on the Convention right if the conduct amounts to an interference with the right, which is not a proportionate means of serving a legitimate aim. The issue is whether the Tribunal has jurisdiction to determine complaints and claims relating to conduct occurring before RIPA came into force (2 October 2000). A distinction should

be drawn between (a) common law rights and Convention rights and between (b) complaints under RIPA and claims under the HRA assigned by RIPA to the Tribunal.

26. As already noted, it is agreed that the Convention right to privacy cannot be invoked in respect of pre-HRA conduct, so as to make something that was lawful when it was done pre-HRA retrospectively unlawful.

27. The tribunal has jurisdiction to consider complaints under s65(4) relating to pre-RIPA and pre-HRA conduct, subject to the question of extension of time, if the conduct can be characterised as unlawful at common law, that is the illegality ground of judicial review. The dispute is, as seen above, whether on arguments based on the principle of legality, the right to privacy of communications was protected by public law and whether the principle of proportionality applies.

28. No claim can be made in respect of pre-HRA conduct under s7(1)(a), which is not retrospective. Such a claim can only be dealt with under the ordinary rules of domestic public law, such as the head of irrationality

V. OUT OF TIME COMPLAINTS AND CLAIMS AND EXTENSIONS OF TIME.

29. The determination of the Tribunal on this point is that, in respect of conduct occurring more than 12 months before the complaint and claim were made, they are out of time, but that an extension of time should be granted under s67(5) RIPA and s7(5) of the HRA.

30. The complaints of pre-RIPA conduct date back to June 1996 and are clearly out of time. In exercising the discretion to grant an extension of time it is relevant to have regard to the length of the period of delay, the reasons given for the delay and the balance of prejudice. The respondent agencies made no submissions on the point, other than to state that they were content to leave the question whether to extend time to the discretion of the Tribunal.

31. It was submitted on behalf of the Complainant that there has been an alleged continuous course of conduct by the respondent agencies; that he had not been inactive, as he complained of the substance of the conduct through a variety of forums prior to commencing these proceedings; that the conduct pre-dating 6 July 2000 did not differ fundamentally from that falling within the 1 year period; that the respondent agencies would not be prejudiced by the investigation into the conduct at the earlier period.

32. In the circumstances summarised in paragraph 31 the Tribunal considers that it is equitable to extend the time limit for the complaint and the claim.

VI. RESULT.

33. Accordingly the determination of the Tribunal is that, in relation to the complaints and the claims in this case-

(1) It should apply the principles set out in Section II above;

(2) There is in public law no fundamental or basic common law right of privacy

of communications attracting the principle of legality;

(3) The principle of proportionality does not apply to the review of the legality of interception of communications taking place before 2 October 2000 and that the appropriate ground of such review is illegality or irrationality;

(4) The Tribunal has jurisdiction to investigate a complaint in respect of interception of communications before 2 October 2000, if the complaint could have been made under the 1985 Act to the predecessor tribunal, but it has no jurisdiction to adjudicate on a claim under the HRA in respect of such conduct pre-2 October 2000;

(5) The Tribunal exercises its discretion to extend time in respect of the complaints and claims of the Complainant falling within its jurisdiction, but which are out of time.

(6) Determination of the substantive complaints and claims will be notified separately and in due course in accordance with s68(4) RIP A.

