



No. IPT/11/167/H

IN THE INVESTIGATORY POWERS TRIBUNAL

[2019] UKIPTrib IPT 11 167 H

P.O. Box 33220
London
SW1H 9ZQ

Thursday, 16 May 2019

Before:

LORD JUSTICE SINGH

(President)

MR CHRISTOPHER GARDNER QC

PROFESSOR GRAHAM ZELICK CBE QC

B E T W E E N :

KATE WILSON

Claimant/Applicant

- and -

(1) COMMISSIONER OF POLICE OF THE METROPOLIS

(2) NATIONAL POLICE CHIEFS' COUNCIL

Respondents/Defendants

IN OPEN

MS C KILROY QC (instructed by **Birnberg Peirce Ltd.**) appeared on behalf of the
Claimant/Applicant.

MR J-P WAITE (instructed by the **Metropolitan Police Legal Services**) appeared as Counsel for
the First and Second Respondents/Defendants.

MS S. HANNETT (instructed by **Government Legal Department**) appeared as Counsel to the
Tribunal.

J U D G M E N T

LORD JUSTICE SINGH:

- 1 The background is sufficiently set out in the judgment of this Tribunal on 3 October 2018. Since that time what has happened for present purposes is that the defendants have filed and served a witness statement by Sir Stephen House which seeks to comply with the defendants' duty of candour and cooperation with the Tribunal. That witness statement was prepared, as we understand it from the defendants' skeleton argument, by a team of lawyers, including two members of the independent Bar. For reasons that are explained in the statement, it is clear that Sir Stephen does not have any personal or direct knowledge of the facts of this case.
- 2 It is a lengthy witness statement and seeks to assist the Tribunal in addressing some 16 issues which have been identified and are set out at para.5 of the defendants' skeleton argument. However, unusually it does not exhibit any of the underlying documents. What it does seek to do is, where relevant, to quote from documents which are referred to and otherwise to summarise. To some extent the statement consists of inferences which Sir Stephen draws from the evidence and which no doubt in due course the defendants will, as a matter of submission, invite the Tribunal to draw as well.
- 3 The defendants submit that that is an adequate discharge of their duties and sufficient to enable the Tribunal to adjudicate fairly and proportionately with the issues which it has to determine in this case. The defendants, accordingly, subject to some procedural directions which may be necessary in the meantime, invite the Tribunal to order that the case should now proceed to a substantive hearing, in other words a trial.
- 4 On the other side on behalf of the claimant it is submitted that there has been a completely inadequate approach taken to date; complaints are made about a failure to discharge the defendants' duty of candour and cooperation. The claimant submits through Ms Kilroy QC that this Tribunal should make a number of directions which would enable the Tribunal in due course more properly and fairly to adjudicate on the issues of underlying fact which she submits it will have to do in due course. In particular, in suggested draft directions, although we should stress that these had to be compiled at somewhat short notice and were produced really for the purpose of discussion, two particular directions are sought.
- 5 The first is that the defendants should provide the underlying documents in full, at least to counsel to the Tribunal, so that a view can be taken as to which documents can be disclosed to the claimant and her representatives, if necessary, with appropriate redactions.
- 6 A second major limb of the directions sought on behalf of the claimant is that further inquiries should be made by the defendants along the lines of what was suggested by the claimant's solicitor in a letter of 14 February 2019 (Appendices 1 and 2).
- 7 Finally, we should observe that we have had the assistance of Ms Hannett, who has appeared as counsel to the Tribunal. She suggests that there may be what might be described as a middle way between the two positions advanced on behalf of the claimant and the defendants.
- 8 We remind ourselves, first, of the salient legal principles. They were sufficiently set out for present purposes in the decision of the House of Lords in *Tweed v Parades Commission* [2007] 1 AC 650. We bear in mind, of course, that these are not strictly speaking judicial review proceedings. We also bear in mind, as Ms Kilroy has reminded us, that this Tribunal to some extent has an inquisitorial element to its procedure and is not like an ordinary civil court strictly bound by adversarial process. Nevertheless, all parties, as we understood it,

were agreed that helpful guidance at least can be found in the speeches of the House of Lords in *Tweed*.

- 9 As Mr Waite reminded us, the ultimate test for the disclosure of documents in cases even involving the Human Rights Act is as set out in para.3 in the speech of Lord Bingham where he said:

“The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.”

- 10 However, Mr Waite reminds the Tribunal also that Lord Bingham went on to say at para.4 that there may be issues arising, for example, from confidentiality or the volume of material in question, why a document should or need not be exhibited.

- 11 For her part, Ms Kilroy fairly acknowledges that proportionality is relevant to the exercise which the Tribunal has to perform. She accepts, as we understand it, that proportionality is relevant not only in the sense of the resources and time which may be required on the part of a defendant but also the resources which may be required of the Tribunal which, of course, has other litigants to whom it must also deliver justice. Correspondingly, all sides are agreed that there is a very important interest which the claimant herself has in seeking to pursue this claim now as expeditiously as it can be while doing justice to all concerned. Further delay is, on any view, undesirable.

- 12 We also remind ourselves that earlier in para.4 in *Tweed* Lord Bingham said that:

“Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence.”

He continued:

“Any summary, however, conscientiously and skilfully made, may distort. But where the authority’s deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says ...”

That is, as we have already indicated, subject to other considerations which may arise, such as confidentiality and proportionality.

There are similar passages in the speeches of Lord Carswell and Lord Brown.

- 13 Bearing those principles in mind, we also remind ourselves of particular features of the present case which were set out in more detail in our judgment last October.

- 14 First, this is a case in which to a large extent, although not entirely, liability is admitted by the defendants, that includes liability for breach of Art.3 of the ECHR, which in our experience is almost, if not entirely, unprecedented.

- 15 Secondly, however, we remind ourselves that an important feature of the claimant’s pleaded case is that she wishes to know not just the fact that there was a breach of her rights, but also the extent and gravity of such breaches if we find them to be such. In particular, she (and she submits the wider public) have an interest in identifying the extent to which there may have

been a tacit acceptance of a practice of police officers having the sort of sexual relationships which Mark Kennedy had in this case. That includes, on her submission, a relevant investigation having to be made into the extent to which other more senior police officers either were aware of what was going on or ought to have been aware.

- 16 Thirdly, we bear in mind that some of the issues in this case, as Ms Kilroy has reminded us, will have to be determined in any event by the undercover police inquiry being conducted by Sir John Mitting. However, that point, it seems to us, cuts both ways. She is entitled to submit that if the matters are going to have to be gone into anyway there is no reason why they should not be gone into by this Tribunal in this case. However, if the matters are going to have to be gone into anyway, that may be a pointer as to why these things should be left to the inquiry. This Tribunal on any view is not a public inquiry; it does not have the ability on a standing basis to conduct the sort of investigation that an inquiry can do.
- 17 In the circumstances of this case, the conclusion to which we have come is that the submissions for each of the parties cannot be accepted in full. We do not accept Ms Kilroy's submission that further inquiries should be ordered on the part of the defendants. The evidence is as it is. The defendants have made the inquiries which they have. We will make no comment at this stage on the adequacy of those. That will no doubt be the subject of submission between the parties and it may well be, as Ms Kilroy has already adumbrated for us today, that submissions will be made on behalf of the claimant in due course as to the alleged inadequacy of inquiries. In due course we have no doubt, given what Ms Kilroy has submitted, that the Tribunal will be invited to draw appropriate inferences. But we do not think that in the circumstances of this case it would be proportionate now to require further inquiries to be conducted.
- 18 That then leaves the question of what should happen in relation to the documents which already do exist. We do not think that something approaching a full disclosure exercise is either necessary or proportionate in the circumstances of this case. On the other hand, we do not consider that what the defendants have done to date is adequate either. We have no way, for example, of testing whether the inferences or summaries in the witness statement of Sir Stephen House are accurate. As Lord Bingham said in *Tweed*, the author of a witness statement can in perfect good faith say things which do not necessarily accurately or completely convey the meaning of a document. We consider, therefore, that in relation to key categories of documents the Tribunal, with the assistance of its own counsel, does need to have more.
- 19 There is a separate although related question which will arise in due course of to what extent such documents can and should be disclosed to the claimant and her representatives with appropriate redactions. But the prior question is what should be done in relation to analysis in the first instance by counsel to the Tribunal of relevant categories of documents. In that respect we accept in principle the submission made to us by Ms Hannett, in particular at para.11 of her skeleton argument, where she suggested that some five categories of documents may be considered by the Tribunal to be significant. First, the RIPA applications and authorisations relating to Mark Kennedy, including any reviews and renewals. We would add to that cancellations. Secondly, decision logs, cover officer logs, concerning Mark Kennedy and undercover officer report books made by him. Thirdly, the SOCA review. Fourthly, documents relating to Mark Kennedy's principal cover officer known as EN31; and, finally, the guidance documents to undercover officers referred to at paras.47 to 57 of the witness statement of Sir Stephen House.
- 20 In our judgment, that approach will strike a fair balance between having no opportunity to test the accuracy and completeness of the witness statement of Sir Stephen House and what would

be, we consider, an unacceptably broad, open-ended, time consuming and disproportionate disclosure exercise.

- 21 We consider that this is what is required in order to dispose of the issues which arise in this case fairly.
- 22 We heard oral submissions at the Open hearing before us as to the precise manner in which this procedure might be implemented in practice. We have had some helpful suggestions in the way of draft proposed directions by all counsel but, in particular, by Ms Hannett, whose submissions, as we have said, we essentially accept. We intend, therefore, to invite Ms Hannett to follow the approach which is reflected in her draft proposed directions. This is subject to discussion which may need to take place as to any further directions that need to be ordered specifically by this Tribunal and also the question of timetabling.
