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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

Duffy's (Colin) Application (Judicial Review) [2016] NIQB 77

AN APPLICATION BY COLIN DUFFY FOR JUDICIAL REVIEW

Gillen LJ, Weatherup LJ and Weir LJ

WEATHERUP LJ (delivering the judgment of the court)

[1] The applicant applies for Judicial Review of a decision of the Home Office to refuse to provide the applicant with an assurance that his legal consultations will not be subject to covert surveillance. Ms Doherty QC and Ms Rooney appeared for the applicant and Mr McLaughlin for the respondent.

[2] The applicant was arrested on 15 December 2013 and two days later was charged with offences arising out of an incident on 5 December 2013 in which shots were fired at members of the Police Service of Northern Ireland. The applicant sought assurances from various agencies such as the Home Office, the Northern Ireland Courts and Tribunal Service, the Northern Ireland Prison Service, the Secretary of State and the National Crime Agency that his legal consultations were not the subject of surveillance. The applicant received satisfactory assurances from other agencies but did not receive a satisfactory assurance from the Home Office. The applicant then applied for leave to apply for Judicial Review of the decision of the Home Office and sought an order quashing the failure to provide the

applicant with the assurance, a declaration that the failure was incompatible with the applicant's rights under Article 8 of the European Convention on Human Rights and a declaration that, insofar as it fails to provide for prior approval of intrusive surveillance authorisations by an independent judicial officer or a person of similar standing, Part II of the Regulation of Investigatory Powers Act 2000 is incompatible with Article 8.

The application for Judicial Review.

[3] The applicant's grounds for Judicial Review are stated as follows:

(i) The applicant wishes to consult in private with his lawyers.

(ii) The possibility that the applicant's legal consultations could be subject to covert surveillance is an interference with his right to privacy and incompatible with Article 8(1) of the ECHR.

(iii) The said interference cannot be justified because it is not in accordance with the law and does not pass the quality of law test for the following reasons:

(a) the lack of prior independent judicial control of authorisations for intrusive surveillance made by the Secretary of State; and

(b) the law in relation to the handling of material obtained by covert surveillance of legal consultations authorised by the Secretary of State is not sufficiently foreseeable and insufficient safeguards exist for the protection of such material due to the fact that no publicly available document or policy exists which provides details of how such material will be examined, used or stored, the precautions to be taken when communicating the material to other parties and the circumstances in which recordings may or must be erased or the material destroyed.

[4] The applicant's challenge resolves to two matters. The first is described as the 'independence issue' which seeks to establish that authorisations for surveillance should be approved by an independent judicial officer or a person of similar standing. The second is described as the 'handling arrangements issue' which seeks the introduction of published guidelines in relation to the appropriate handling of surveillance material.

[5] The applicant was granted leave to apply for Judicial Review. The respondent contends that the Divisional Court does not have jurisdiction to hear the applicant's claim and that the Investigatory Powers Tribunal has exclusive jurisdiction. The preliminary issue for determination is whether the Divisional Court has jurisdiction.

The Regulation of Investigatory Powers Act 2000

[6] The Regulation of Investigatory Powers Act 2000 ("RIPA") Part II deals with surveillance and covert human intelligence sources. Section 26 refers to three types of conduct, namely directed surveillance, intrusive surveillance and the conduct and use of covert human intelligence sources. Directed surveillance is covert but not intrusive and is undertaken for the purposes of a specific investigation or operation in a manner likely to result in the obtaining of private information otherwise than by way of an immediate response where it would not be reasonably practicable to seek authorisation. Intrusive surveillance is covert surveillance in relation to any residential premises or private vehicle involving the presence of an individual on the premises or in the vehicle or carried out by means of a surveillance device.

[7] Surveillance of legal consultations at places of detention or police stations or courts or legal offices is treated as intrusive surveillance under Article 3 of the Regulation of Investigatory Powers (Extension of Authorisation Provisions – Legal Consultations) Order 2010.

[8] Section 32 of RIPA provides for the authorisation of intrusive surveillance by the Secretary of State or by a senior authorising officer. An initial authorisation by a senior authorising officer becomes effective on approval by a Surveillance Commissioner. Section 41 provides for the authorisation of intrusive surveillance by the Secretary of State. The grant by the Secretary of State of an authorisation on the application of the intelligence services must be made by the issue of a warrant. The approval of a Surveillance Commissioner is not required for the Secretary of State's authorisation of intrusive surveillance. Applications for the Secretary of State's authorisation may be made by a member of the intelligence services, an official of the Ministry of Defence, a member of Her Majesty's Forces or an official of a designated authority.

RIPA in the European Court of Human Rights

[9] Kennedy v United Kingdom [2010] 29 BHRC 341 examined the operation of Part I of RIPA and the Interception of Communications Code of Practice. The applicant suspected interception of his communications. As it could not be excluded that secret surveillance measures were applied to the applicant or that he was at the material time potentially at risk of being subjected to such measures, the applicant was entitled to complain of interference with his right to privacy under Article 8 of the Convention. It was therefore necessary to justify the potential interference. The interference had to be in accordance with law as having a basis in domestic law compatible with the rule of law, accessible to the person concerned and with foreseeable consequences. The ECtHR was satisfied that the relevant provisions of RIPA and the Code were sufficiently clear to permit the applicant to foresee the

consequences of the domestic law and that the provisions on processing and communication of intercepted material provided adequate safeguards for the protection of the data obtained.

[10] The position of the Investigatory Powers Tribunal was also considered in Kennedy. The ECtHR was satisfied that the Interception of Communications Commissioner was independent of the executive and the legislature and was a person who held or had held high judicial office and had access to all relevant documents and had oversight of the scheme; that the Tribunal had extensive jurisdiction to examine any complaint of unlawful interception; that it was an independent and impartial body whose members held or had held high judicial office or were experienced lawyers and had the power to order disclosure by those involved in the authorisation and execution of a warrant of all documents it considered relevant.

[11] Accordingly, the ECtHR was satisfied that there was justification under Article 8(2) and therefore no violation of Article 8. In addition, the Tribunal's rules of procedure complied with the requirements of Article 6(1) in relation to fair trial rights and there was no violation of Article 6.

The independence issue

[12] In relation to the requirement for independent supervision of the process, the ECtHR stated in Szabo and Vissy v Hungary [12 January 2016]:

> "75. A central issue common to both the stage of authorisation of surveillance measures and of their application is the absence of judicial supervision. The measures are authorised by the Minister in charge of Justice upon a proposal from the executives of the relevant security services …
>
> …
>
> 77. As regards the authority competent to authorise the surveillance, authorising of telephone tapping by a non-judicial authority may be compatible with the Convention … provided that that authority is sufficiently independent of the executive …
> The Court recalls that in *Dumitru Popescu* …. it expressed the view that either the body issuing authorisations for interception should be independent or there should be control by a judge or an independent body over the issuing body's activity. Accordingly, in this field, control

> by independent body, normally a judge with special expertise, should be the rule and substitute solutions the exception, warranting close scrutiny."

[13] The applicant's complaint is that there is no such independent scrutiny of authorisations for intrusive surveillance as the scheme provides for executive authority exercised by the Secretary of State rather than judicial authority.

The handling arrangements issue

[14] In relation to the requirements for the handling of surveillance material, the ECtHR stated in RE v United Kingdom [27 October 2015] concerning RIPA, the 2010 Order, the Code of Practice and the PSNI Service Procedure –

> "139. These provisions, although containing some significant safeguards to protect the interests of persons affected by the surveillance of legal consultations, are to be contrasted with the more detailed provisions in Part I of RIPA and the Interception of Communications Code of Practice, which the court approved in *Kennedy*. In particular, in relation to intercepted material there are provisions in Part I and the Code of Practice limiting the number of persons to whom the material is made available and restricting the extent to which it is disclosed and copied; imposing a broad duty on those involved in interception to keep everything in the intercepted material secret; prohibiting disclosure to persons who do not hold the necessary security clearance and to persons who do not "need to know" about the material; criminalising the disclosure of intercepted material with an offence punishable by up to 5 years' imprisonment; requiring intercepted material to be stored securely; and requiring that intercepted material be securely destroyed as soon as it is no longer required for any of the authorised purposes.
>
> 140. Paragraph 9.3 of the revised Code does provide that each public authority must ensure that arrangements are in place for the secure handling, storage and destruction of material obtained through directed or intrusive surveillance. In the present case the relevant arrangements are contained in the PSNI Service Procedure on covert surveillance of legal consultations and the handling of legally privileged material. The administrative court accepted that taking together the 2010 Order, the revised Code and the PSNI Service and

> Procedure Implementing Code, the arrangements in place for the use, retention and destruction of retained material in the context of legal consultation was compliant with Article 8 rights of persons in custody. However, the service procedure was only implemented on 22 June 2010. It was therefore not in force during the applicant's detention in May 2010.
>
> 141. …. in the absence of the "arrangements" anticipated by the covert surveillance regime, the court …. is not satisfied that the provisions of Part II of RIPA and the revised code concerning the examination, use and storage of the material obtained, the precautions to be taken when communicating the material to other parties and the circumstances in which recordings may or must be erased or the material destroyed, provides sufficient safeguards for the protection of the material obtained by covert surveillance.
>
> 142. Consequently, the court considers that to this extent during the relevant period of the applicant's detention (4-6 May 2010) the impugned surveillance measures insofar as they may have been applied to him did not meet the requirements of Article 8(2) of the Convention as elucidated in the court's case law."

[15] The applicant's complaint is that there is no publicly accessible document for covert surveillance of legal consultations relating to the Home Office. Accordingly, the approach of the ECtHR in RE v United Kingdom applies equally to the present position of the Home Office.

The role of the Investigatory Powers Tribunal.

[16] Before considering the respondent's contention that jurisdiction to hear the applicant's complaints rests with the Tribunal, it is necessary to consider the applicant's objection that the Tribunal does not have appropriate powers to deal with the applicant's complaints. Section 67 provides in relation to the exercise of the Tribunal's jurisdiction as follows –

> "(2) Where the Tribunal hear any proceedings by virtue of section 65(2)(a), they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review.

> (7) Subject to any provision made by rules under section 69, the Tribunal on determining any proceedings, complaint or reference shall have power to make any such award of compensation or other order as they think fit; and, without prejudice to the power to make rules under section 69(2)(h), the other orders that may be made by the Tribunal include–
>
> (a) an order quashing or cancelling any warrant or authorisation; and
>
> (b) an order requiring the destruction of any records of information which–
>
> (i) has been obtained in exercise of any power conferred by a warrant or authorisation; or
>
> (ii) is held by any public authority in relation to any person."

[17] The scope of the Tribunal's jurisdiction was considered by the Supreme Court in A v B (Investigatory Powers Tribunal: Jurisdiction) [2009] UKSC 12. The applicant was a former member of the security services who sought the consent of the security services to publish a book about his work. In that instance the proceedings were clearly against the intelligence services. It was held that section 65(2)(a) of RIPA conferred exclusive jurisdiction upon the Tribunal. The Supreme Court found that the Act and the Tribunal rules were designed to ensure that disputes, even in the most sensitive of intelligence cases, could be properly determined and that the requirement for Tribunal jurisdiction did not oust judicial scrutiny of the acts of the intelligence services and the Tribunal rules allowed it to adapt its procedures to provide information to a complainant, consistently with national security interests.

[18] We are satisfied that, if the Tribunal has jurisdiction to hear the applicant's complaints, the Tribunal has the necessary procedures and powers to address the applicant's complaints. The applicant refers to the limits of the Tribunal rules in relation to disclosure, oral hearings and public hearings, to the absence of legal aid and a right of appeal and to the inability of the Tribunal to issue a Declaration of Incompatibility. In light of these limitations the applicant contends that the Court should interpret strictly the provisions concerning the jurisdiction of the Tribunal. We accept that contention.

The jurisdiction of the Investigatory Powers Tribunal

[19] The respondent refers to section 7(1)(a) of the Human Rights Act 1998 which provides as follows:

> “(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –
>
> > (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> >
> > (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.
>
> (2) In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.”

[20] The respondent contends that the appropriate court or tribunal for the purposes of section 7(1)(a) is the Investigatory Powers Tribunal established by section 65(1) of RIPA.

[21] Section 65 provides, in relation to the Tribunal, as follows *(with italics added)* -

> “(2) The jurisdiction of the Tribunal shall be–
>
> (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;
>
> *(3) Proceedings fall within this subsection if–*
>
> *(a) they are proceedings against any of the intelligence services;*
>
> *(b) they are proceedings against any other person in respect of any conduct, or proposed conduct, by or on behalf of any of those services;*
>
> *(c) ……….*
>
> *(d) they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5).”*

[22] The issue is whether these proceedings fall within any of the three categories in section 65(3) of the Act set out above so as to grant exclusive jurisdiction to the Tribunal.

Section 65(3)(a).

[23] The first category concerns whether these are proceedings against any of 'the intelligence services'. The intelligence services are the Security Service, the Secret Intelligence Service and GCHQ.

[24] The respondent refers to section 1 of the Security Services Act 1989 which provides that the Security Service shall be under the authority of the Secretary of State and the equivalent provision in section 1 of the Intelligence Services Act 1994 relating to the Secret Intelligence Service and section 3 of the Intelligence Services Act 1994 relating to GCHQ.

[25] The applicant contends that the proceedings are against the Secretary of State and not against any of the intelligence services.

[26] The respondent in these proceedings is the Secretary of State. She was made respondent as representative of the intelligence services. However, the applicant contends that it is necessary to consider the character of the claims made in the proceedings to determine whether the proceedings are "against" the intelligence services. We are not satisfied that this is indeed necessary as the issue concerns the identity and status of the party targeted by the proceedings, in this instance the Secretary of State as representative of the intelligence services. Nevertheless we look to the character of the claims.

[27] The applicant's independence claim relates to the authorisation for surveillance. For present purposes any authorisation would be given by the Secretary of State and the applicant contends that authorisation should instead be given by an independent judicial authority. Thus the proceedings in relation to the independence issue are said by the applicant not to be against the intelligence services or their representative but rather against the legislative arrangements and the power to authorise the actions of the intelligence services. However, the reality of the independence claim is that the proceedings involve a challenge to any authorisation on the basis that it is not compliant with Convention rights in the absence of judicial approval. The challenge is to the nature of any authorisation that would be given in the circumstances of the present case on the basis that it could not justify the interference with respect for private life and would be contrary to Article 8. We are satisfied that the proceedings taken to advance the independence issue are proceedings against the Secretary of State as representative of the intelligence services in conducting surveillance on the basis of an authority which the applicant contends would be unlawful.

[28] The handling arrangements claim is concerned with the manner in which the intelligence services manage the surveillance material. The claim is directed at the information about the handling of the surveillance material. The challenge is to the absence of information about the management of intelligence material on the basis that the present arrangements are not such as would justify the interference with respect for private life and would be contrary to Article 8. We are satisfied that the proceedings taken to advance the handling arrangements issue are proceedings against the Secretary of State as representative of the intelligence services in acting on the basis of handling arrangements which the applicant contends would be unlawful.

[29] These are proceedings against the Secretary of State as representative of the intelligence services and fall within section 65(3)(a).

Section 65(3)(b)

[30] The second category concerns proceedings against any other person in respect of any conduct or proposed conduct by or on behalf of any of the intelligence services. The first matter concerns "any other person", the second, the nature of "conduct", the third, whether the conduct is "by or on behalf of" the intelligence services and the fourth, whether the proceedings are "in respect of" the conduct.

[31] The "other person" for these purposes is anyone other than the intelligence services. Insofar as the proceedings are not against the intelligence services for the purposes of section 65(3)(a), they are proceedings against an 'other person', namely the Secretary of State.

[32] The applicant contends that for the purposes of section 65(3)(b) the "conduct" referred to is the surveillance carried out by the intelligence services. The proceedings involving the independence claim and the handling arrangements claim are, according to the applicant, not matters of surveillance and therefore not "conduct" covered by the subsection. The applicant calls in aid section 26 of the Act which provides that Part II applies to "conduct" described as directed surveillance, intrusive surveillance and the conduct and use of covert human intelligence sources. Thus the Act distinguishes on the one hand between "conduct" which is surveillance and on the other hand, authorisation and handling. Further, the applicant refers to sections 27 and 28 of the Act which indicate expressly that the surveillance "conduct" is distinct from the authorisation for the carrying out of such surveillance.

[33] Part II of RIPA deals with "conduct" defined as directed surveillance, intrusive surveillance and the conduct and use of covert human intelligence sources. Part II also deals with the authorisation for such conduct. The authorisation is distinct from the "conduct". Section 65(5) also distinguishes between "conduct by or on behalf of the intelligence services" and "other conduct" to which Part II applies.

This would also suggest that the authorisation is distinct from conduct by or on behalf of the intelligence services.

[34] What is the "conduct" in respect of which the proceedings are concerned? We are satisfied that, in relation to the independence claim, the "conduct" is the intelligence gathering as distinct from the authorisation. However we are not satisfied that this distinction can be applied to the handling arrangements claim, where the "conduct" remains the intelligence gathering but where the management of the intelligence material appears to be a part of that conduct.

[35] The surveillance and the management of the surveillance material are undertaken "by or on behalf of" the intelligence services.

[36] The proceedings must be "in respect of" the conduct. The Oxford Dictionary and Thesaurus refers to "in respect of" as "concerning, regarding, in/with regard to, with reference to, respecting, re, about, apropos, on the subject of, in connection with, vis a vis". If the conduct in question is the authorisation and the handling of the material, the proceedings are clearly "in respect of" that conduct. If, as the applicant contends, the conduct is the surveillance, it is equally clear that the proceedings on the independence claim and the handling management claim are proceedings concerning, regarding, with reference to, respecting, in connection with, the conduct, namely, the surveillance by or on behalf of the intelligence services.

[37] These are proceedings in respect of conduct by or on behalf of the intelligence services and (in so far as they are not proceedings against the intelligence services) fall with section 65(3)(b).

__Section 65(3)(d)__

[38] The third category concerns proceedings relating to the taking place in any challengeable circumstances of any conduct falling within sub-section (5).

[39] It is necessary to identify, first of all, what conduct falls within sub section (5), secondly, what amounts to challengeable circumstances and, thirdly, what is meant by the proceedings 'relating to' the conduct in such circumstances.

[40] First, conduct falls within subsection (5) if (whenever it occurred) it is–

> "(a) conduct by or on behalf of any of the intelligence services;
>
> (d) other conduct to which Part II applies
>
> (if it is conduct by or on behalf of a person in the intelligence services, HM forces, the police, the Serious Crime Agencies and the Commissioners of HMRC)."

[41] Paragraph (a) applies to conduct (whenever it occurred) by or on behalf of any of the intelligence services. The "conduct" is the surveillance and includes the management of intelligence material, which is conduct by or on behalf of the intelligence services. As referred to above, the gathering and management of intelligence material is distinct from the authorisation, which is not "conduct" by or on behalf of the intelligence services.

[42] Paragraph (d) applies to conduct to which Part II of the Act applies – which includes section 41 of the Act dealing with Secretary of State authorisations. However, while section 41 authorisations are within Part II they are not within the description of conduct relating to surveillance.

[43] The surveillance and the management of intelligence material fall within section 65(5).

[44] Second, as provided by section 65(7), conduct takes place in "challengeable circumstances" if –

> "(7)(a) it takes place with the authority, or purported authority, of anything falling within subsection (8); or
>
> (b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought;
>
> but conduct does not take place in challengeable circumstances to the extent that it is authorised by, or takes place with the permission of, a judicial authority.
>
> (8) The following fall within this subsection–
>
> (c) an authorisation under Part II of this Act …."

[45] Paragraph (a) applies if the conduct takes places with the authority or purported authority of anything falling within sub-section (8). Sub-section (8) includes an authority under Part II of the Act, which includes section 41 dealing with Secretary of State authorisations.

[46] Paragraph (b) applies if the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought. It would not be appropriate, in circumstances such as the present case, for surveillance to take place or surveillance material to be gathered and retained without authority.

[47] Any such surveillance and the gathering and management of intelligence material would take place in challengeable circumstances for the purposes of section 65(3)(d).

[48] Third, the proceedings must "relate to" the conduct. The Oxford Dictionary and Thesaurus defines "relate to" as "have reference to or concern". The conduct is the surveillance and the management of the intelligence material. The proceedings advance an independence claim and a handling claim, both of which "relate to" the conduct in that they have reference to or concern that conduct.

[49] These are proceedings relating to the taking place in challengeable circumstances of conduct by or on behalf of the intelligence services and fall within section 65(3)(d).

[50] Accordingly, the present proceedings are proceedings under section 65(3) of the Act and fall within the jurisdiction of the Tribunal by virtue of section 65(2)(a) of the Act.

[51] In relation to the preliminary issue we are satisfied that the Divisional Court does not have jurisdiction to hear this application for Judicial Review and that exclusive jurisdiction lies with the Investigatory Powers Tribunal.