Neutral Citation Number: [2019] EWHC 3165 (Admin)

Case No: CO/1064/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2019

Before:
LORD JUSTICE IRWIN
MRS JUSTICE MAY

- -

Between:

R (ON THE APPLICATION OF) TERRA SERVICES LIMITED	**Claimant**
- and -	
(1) THE NATIONAL CRIME AGENCY	**First Defendant**
(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Second Defendant**
(3) INNER LONDON CROWN COURT	**Third Defendant**

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Monica Carss-Frisk QC and Robin Barclay (instructed by **Macfarlanes LLP**) for the **Claimant**
Lisa Giovannetti QC and Guy Ladenburg (instructed by **the National Crime Agency**) for the **First Defendant**
Clair Dobbin (instructed by **The Government Legal Department**) for the **Second Defendant**
The Third Defendant did not attend and was not represented

Hearing date: 17 October 2019

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Approved Judgment

Lord Justice Irwin:

Introduction

1. In this case the Claimant seeks permission for judicial review in relation to a warrant issued by HHJ Kelleher at the Inner London Crown Court on 13 December 2018. The warrant was issued pursuant to Schedule 1 to the Police and Criminal Evidence Act 1984 ["PACE"]. It was applied for and executed by the National Crime Agency, the First Defendant. The application followed a request for mutual legal assistance from the United States Department of Justice ["DoJ"] to the Secretary of State for the Home Department, the Second Defendant.

2. HHJ Kelleher issued the warrant on 13 December 2018, following an *ex parte* hearing in the course of which he considered Public Interest Immunity ["PII"] material presented by the First Defendant in closed session. The warrant was executed on the same day at a commercial storage unit known as the Big Yellow Storage Company ["BYS"] in Kennington in London. Documents and data which were the property of the Claimant, and of associated individuals, was seized.

3. Subsequently the Claimant applied to the Crown Court pursuant to Criminal Procedure Rule 5.7(1) for disclosure of full copies of the material presented by the First Defendant to HHJ Kelleher. Redacted copies had been supplied to the Claimant. HHJ Kelleher heard further submissions from the Claimant and the First Defendant in OPEN session and further submissions from the First Defendant in CLOSED. He declined the application, giving his reasons in a CLOSED judgment.

4. It is not necessary for present purposes to itemise at any length all of the grounds upon which permission for judicial review is sought. In the course of these reasons I will consider some aspects of the claim in greater detail, but the following summary is sufficient to give the overall shape of the claim.

5. The first challenge is to the decision by the First Defendant to issue Requests For Information ["RFIs"] concerning the Claimant and associated individuals to BYS between 19 November and 13 December 2018. It is said that the First Defendant did not have the statutory power to issue the RFIs, alternatively that these RFIs exceeded the statutory powers. Secondly, it is said that the authorisation dated 26 November 2018, granted by the Deputy Director of the First Defendant, which permitted a covert search of the relevant premises was unlawful since it was said that the relevant statutory provisions (in Part III of the Police Act 1997) required approval of the authorisation by a judicial commissioner on the grounds that (1) the relevant premises constituted office premises and/or (2) the search and seizure was likely to result in acquisition of material subject to legal professional privilege.

6. The next challenge is to the direction given by the Second Defendant to the First Defendant to apply for the warrant to search the premises. This challenge is mounted on two grounds. The first is that the Letter of Request ["LoR"] from the DoJ in this case was excessively wide and insufficiently specific. As a consequence, it is said that the direction was unreasonable and unlawful. It is said, as a further consequence, that the application for the warrant was unlawful, being tainted by the unlawfulness of the requests for further information and/or the authorisation.

7. The next challenge is to the issue of the warrant which again is said to be tainted by the prior unlawfulness of the steps taken. In addition, it is said that the requirements of Schedule 1 to PACE were not met, in that there was no basis upon which HHJ Kelleher could properly be satisfied that the "access conditions" for the grant of a warrant were fulfilled. It is further said (Ground 3) that there was inaccurate and incomplete disclosure to the Crown Court at the time of the application and that the duty of candour borne by the First and/or Second Defendant was not met. Ground 4 alleges that the terms of the warrants issued were excessively wide and insufficiently specific. It is further said that the procedure and reasons followed by the Crown Court were inadequate and unlawful, since the judge did not apply the required "detailed, anxious and intense scrutiny".

8. In relation to two further aspects of the matter, termed "Decision 6: the NCA's decision to withhold the application materials" and "Decision 7: the Crown Court's refusal to order more disclosure of the application materials" it is said that there is procedural unfairness arising in the case since the First Defendant:

> "…has disclosed only heavily redacted versions of the application and supplementary form. In circumstances where there are clear signs that material information was not disclosed to HHJ Kelleher and that both the LoR and warrant were fishing expeditions on behalf of a foreign authority, it was procedurally unfair for the NCA to fail to disclose the Application Materials and the LoR and deny Terra the ability to test the legality of the warrant and the means by which it was issued … alternatively, it was procedurally unfair for the NCA not to provide even the gist of the application materials, since the safeguards on which the Supreme Court relied in *Haralambous* do not necessarily apply where a warrant is used to assist foreign investigations."

9. In a similar ground it is said that the decision on 11 March 2019 in the Crown Court to refuse the Claimant's application for disclosure of the Application Materials on the grounds of PII, following a CLOSED session in the absence of the Claimant, was procedurally unfair and substantively wrong.

10. The Defendants contest all the grounds upon which permission is sought.

Case Management

11. Following argument before the Divisional Court (Singh LJ and Mrs Justice Carr DBE) on 10 July 2019, it was ordered that:

> "PII & Confidentiality Hearing
>
> 1. A hearing of the application by the Claimant challenging the claim of the First Defendant to withhold information and documents placed before and relied upon by the Third Defendant at the hearings of 13 December 2018 and 11 March 2019 on the grounds of public interest immunity ("PII") shall be listed at the convenience of the parties with a time estimate of 1 day (the "PII & Confidentiality Hearing").

> 2. The claim of the Second Defendant to withhold the Letter of Request on the grounds of confidentiality shall be considered at the same hearing."

12. The hearing before us was to decide the issues identified in that Order. Hence, we must address the question of whether the First Defendant has made out a claim for PII, and secondly whether the Second Defendant is entitled to withhold disclosure of the Letter of Request on the ground of confidentiality.

Procedure Before Us

13. The First Defendant's claim in respect of public interest immunity is not a claim to exclude the material from consideration by the Court as is conventional. Rather, the First Defendant claims that public interest immunity should extend to withholding the material from consideration by the Claimant (and the public). It is envisaged that the Court at the judicial review hearing will consider the material, both OPEN and CLOSED, pursuant to the approach laid down by the Supreme Court in *R (Haralambous) v St Albans Crown Court* [2018] AC 236 [2018] AC 236 [2018] UKSC 1. The sole judgment in the case is that of Lord Mance DPSC, with whom the other justices agreed. As the Headnote makes clear, in the context of a challenge to the issue of a warrant:

> "It would be unsatisfactory and potentially productive of injustice and absurdity if the High Court in subsequent judicial review proceedings were bound to address the matter on a different basis from the magistrates' court or the crown court."

14. The statutory scheme entitles a magistrates' court, on an *ex parte* application for a search and seizure warrant under sections 8 and 15(3) of PACE, to rely on information which in the public interest cannot be disclosed to the subject of the warrant (judgment, paragraph 37). The Crown Court could not fulfil its role under Section 59 of the Criminal Justice and Police Act 2001 without adopting a similar procedure (judgment, paragraphs 38-43). Since recent amendments introducing section 31(2)(A) and 31(3C) of the Senior Courts Act 1981 "again postulate that the High Court will be considering the outcome on the same basis as the lower court or tribunal" (judgment, paragraph 58). Lord Mance concluded:

> "59. In the light of these statutory provisions and of an analysis of the alternative possibilities paralleling that undertaken in *Bank Mellat*, I consider that the only sensible conclusion is that judicial review can and must accommodate a closed material procedure, where that is the procedure which Parliament has authorised in the lower court or tribunal whose decision is under review. The Supreme Court, when it referred in passing to judicial review in the *Al Rawi* case [2012] 1 AC 531, was not directing its attention to this very special situation. If it had done so, it might also have seen a similarity between this situation and the two exceptions which it did identify, where inability to adopt a closed material procedure would render the whole object of the proceedings futile and where the interests of third parties (such as informers) are potentially engaged. Be that as it may be, I consider that the scheme authorised by

> Parliament for use in the magistrates' court and Crown Court, combined with Parliament's evident understanding and intention as to the basis on which judicial review should operate, lead to a conclusion that the High Court can conduct a closed material procedure on judicial review of a magistrate's order for a warrant under section 8 of PACE or a magistrate's order for disclosure, or a Crown Court judge's order under section 59 of the CJPA. I add, for completeness, that, even before judicial review was regulated by statutory underpinning, I would also have considered that parallel considerations pointed strongly to a conclusion that the present situation falls outside the scope of the principle in the *Al Rawi* case and that a closed material procedure would have been permissible on a purely common law judicial review."

15. Ms Carss-Frisk QC for the Claimant nevertheless submitted to us that we could reach a conclusion on the First Defendant's PII application (adverse to the claim of PII) on the basis of the OPEN material. This was principally founded on the submission that the OPEN material demonstrated no explicit "balancing exercise", calibrating the public interest in the issue of the warrant as against the negative impact on the interests of justice, when the decision to authorise the application for the warrant was made.

16. The principal evidence relied on by the First Defendant in relation to this decision is that of Stephen Smart, Director of Intelligence for the National Crime Agency. In his witness statement of 19 September, 2019 he sets out the arrangements between the United Kingdom and the United States from which this sequence of events arose. He describes the mutual legal assistance treaty between the two governments, and the close cooperation between the two states as strategic partners in law enforcement. He describes the USA as the United Kingdom's "most important strategic partner", working within –

> "…a relationship based upon respect and reciprocity. The NCA works closely with a number of agencies in the US and these reciprocal arrangements are of significant benefit to the NCA and the investigations that it conducts".

He describes these relationships as vital to the operations of the intelligence and law enforcement agencies of the two countries.

17. His witness statement continues:

> "6. The closeness and effectiveness of this relationship depends to a great extent on trust and reciprocity. The USA trusts the NCA with highly sensitive and confidential material that is capable of prejudicing on-going investigations in both jurisdictions were it to be disclosed. The NCA's undertaking not to disclose such material amounts to a vital obligation which underpins the strategic partnership. If the NCA is unable to maintain the confidentiality of US material, it will jeopardise the international relationship between the NCA and US law enforcement agencies, resulting in an adverse impact on the NCA's operational capabilities.

> 7. I have no doubt that if US law enforcement becomes concerned that the confidentiality of their material is at risk they will reconsider the extent to which they are prepared to engage with the NCA in future matters. Disclosure of such material would erode the trust upon which the relationship depends, undermine the effectiveness of the strategic partnership and significantly impede the NCA's capacity and expertise to investigate and prosecute serious crime."

18. Mr Smart's OPEN statement continues by emphasising that throughout the proceedings NCA officers have met the US authorities to discuss why the information contained in the warrant application materials cannot be disclosed. The motive for the non-disclosure is expressed to be "so as not to prejudice a substantial criminal investigation or compromise the strategic partnership between the agencies of the UK and the USA".

19. It is correct to say that the OPEN redacted statement from Mr Smart does not contain any explicit recital of the balance of public interest, weighing the reasons for non-disclosure against the difficulties arising for the Claimant in challenging the warrant (and in relation to the associated challenges). Ms Carss-Frisk submitted that the absence of reference to such a weighing exercise rendered Mr Smart's evidence inadequate to make out a credible case of PII.

20. In support of this submission, Ms Carss-Frisk took the Court to a range of authority. She made reference to the well-known statement of Lord Bingham in *R v H and Others* [2014] 2 AC 134, emphasising that a lack of disclosure could represent a "real risk of serious prejudice to an important public interest" (see paragraphs 18 and 36). That case, of course, concerned a trial rather than a challenge to a warrant. In a case dealing with a judicial review (although not connected with a criminal cause or matter) Ms Carss-Frisk emphasised the judgment of the Divisional Court in *R (Hoaraeu) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 3825 (Admin), where Singh LJ, giving the judgment of the Court, said:

> "17. The relevant legal principles are, as we understand it, uncontentious and we need only summarise them here. What is contentious is the application of those principles to the facts of this case. PII is a ground for refusing to disclose a document which is relevant and material to the determination of the issues. A successful claim for PII renders a document immune from disclosure, depriving both the court and the parties of relevant material, in contrast to the position under a closed material procedure (such as under the 2013 Act) when the evidence can be deployed by one of the parties but the other will then be excluded from that part of the hearing and its interests may have to be protected in another way, for example by the use of a special advocate. A claim to PII can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest and the fair administration of justice."

Ms Carss-Frisk lays emphasis on the three-stage process to which Singh LJ makes reference at paragraph 18 and in particular to the final requirement for the Minister to conduct a balancing exercise. It will be noted that that case concerned a PII application which would deprive both the court and the parties of relevant material. It

is also of note that at paragraph 19, Singh LJ observed that it was "the court which is the ultimate decision-maker".

21. In my judgment there is no need for further extensive quotation from authority. We were taken to the well-known case of *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 2100 (Admin), to the decision in *Air Canada v Secretary of State for Trade (No 2)* [1983] 1 All ER 161, and to the observations of the learned editors of *Matthews and Malek*, where at paragraph 12.18 the editors state that:

> "In each case, however, an official view will be put forward, usually by certificate or affidavit or witness statement, by the Minister or other appropriate official such as the head of the organisation concerned, as to why the documents concerned ought not to be disclosed or produced. In accordance with the three stage approach set out above, the official must consider whether disclosure would cause real damage or substantial harm. If he is satisfied that the damage test is met he should consider (so far as he can judge it) the strength of the public interest in disclosing the document and carry out the balancing exercise. There is no obligation to claim public interest immunity, if the decision maker is satisfied that the public interest is in favour of disclosure. This view as expressed is not conclusive; it is for the court to decide."

22. Although we were not taken to it, it is notable that the editors/authors go on to say:

> "12.20 Where a document is potentially covered by public interest immunity, but also the document itself is of questionable relevance or it is arguable that production is in any event not necessary, the court will usually consider relevance first and, only once it is decided that prima facie the document should be disclosed, will it then go on to consider public interest immunity."

23. Ms Carss-Frisk's propositions derived from this material were as follows: (1) the balancing exercise is part of the relevant test for a claim of public interest immunity and the public authority cannot legitimately make such a claim unless they have conducted the balancing exercise; (2) the litigant with an interest who seeks disclosure is entitled to assume that the public authority has properly weighed matters in the balance; (3) there is no logical distinction between the obligations on a minister or another relevant public decision-maker in this regard; (4) there is no case law distinguishing the position of minister or official in central government from any other public authority; (5) the authorities relied on are consistent with a requirement for an explicit consideration and a balancing exercise between the competing public interests; (6) in this case there is no basis in the evidence showing there was a balancing exercise, despite the fact that in this case there is said to be a particularly strong interest in disclosure; (7) it makes "no sense" for the court to step into the shoes of the relevant public official and become the primary decision-maker; and (8) in the event that the relevant official did not conduct a proper exercise, the court should not be troubled to replicate or check the balance.

24. The Claimant also took the court to CPR 31.19(6), the relevant parts of which read:

> "**31.19 - Claim to withhold inspection or disclosure of a document**
>
> (1) A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest.
>
> …
>
> (3) A person who wishes to claim that he has a right or a duty to withhold inspect of a document, or part of a document, must state in writing –
>
> (a) that he has such a right or duty; and
>
> (b) the grounds on which he claims that right or duty.
>
> (4) The statement referred to in paragraph (3) must be made –
>
> (a) in the list in which the document is disclosed; or
>
> (b) if there is no list, to the person wishing to inspect the document.
>
> (5) A party may apply to the court to decide whether a claim made under paragraph (3) should be upheld.
>
> (6) For the purpose of deciding an application under paragraph (1) (application to withhold disclosure) or paragraph (3) (claim to withhold inspection) the court may –
>
> (a) require the person seeking to withhold disclosure or inspection of a document to produce that document to the court; and
>
> (b) invite any person, whether or not a party, to make representations."

25. Ms Carss-Frisk rejected the suggestion that the demand for direct explicit evidence of a balancing exercise by the relevant public official might be regarded as formulaic. She emphasised that, in her submission, the implication of the ruling in July leading to the hearing before us was that there should be evidence of the balancing exercise.

26. The proper response to Ms Carss-Frisk's proposition appears to me as follows. The claim for PII must indeed be made with a mind to the balance between the public interest in non-disclosure and the countervailing public interest in the fair administration of justice, and the person affected is entitled to assume that the balancing exercise has been performed. However, it is inevitable that those with such responsibilities will be highly conscious of the need for immunity. They may be less well positioned to judge the impact on justice. There would be little or nothing gained by a ritual incantation of the balance of interests recorded in the relevant decision or direction. Such an official should, of course, consider the balance in the particular case, and have in mind the degree of public interest in withholding disclosure, as well

as (so far as the official can determine it) an eye to the impact on the individuals concerned. In considering the latter, the relevant official or minister may properly also hold in mind the role of the courts in safeguarding those interests and conducting the balancing exercise. The official or minister must hold very clearly in mind the duty of candour to the court. That is of paramount importance, since it is only through scrupulous adherence to that obligation that the court is enabled to fulfil its function. I reject the proposition that the court "should not be troubled" if the relevant official "did not conduct a proper exercise". It is quite impossible for that to be known, without the court "being troubled".

27. I express no conclusion as to whether any of these obligations differ, depending on whether the relevant decision was taken by an official or a minister. It is not necessary to do so here, and the matter has not been fully argued.

28. Ms Carss-Frisk went on to advance several further arguments, which in my judgment are more relevant to the substantive question of permission than the adjectival question as to how the permission hearing may be conducted. She drew the Court's attention to the decision in *NCA v Abacha* [2016] 1 WLR 4375, where the Court ordered the disclosure of a Letter of Request to the National Crime Agency originating from the United States. That had not led to a drying up of cooperation. I note in passing that in that case all of the relevant information in the Letter of Request was already known. She made reference to the judgment of Marcus Smith J in *The Competition and Markets Authority v Concordia International RX (UK) Ltd* [2018] EWHC 3448 (CH) at paragraphs 23-29, where the judge considered the adverse impact of a lack of disclosure on the party affected. With respect to Ms Carss-Frisk, it seems to me that those points do not bite on the adjectival question of how the Court proceeds.

29. In reply, Ms Giovannetti QC for the First Defendant emphasises that questions of PII can arise in different ways and that the response of the courts has been a flexible one, intended to maximise the justice of proceedings as different problems arise. She emphasises observations to that effect in *R v H* and in the judgment of Lord Bingham (see paragraph 15). Authorities relating to PII in criminal cases required a careful eye to their context. Without undermining the significance of withholding information in challenges to warrants, such a withholding of evidence was of markedly less significance than it might be in the context of a full criminal trial.

30. Ms Giovannetti submitted that she was not aware of any case in which a court considering a PII application had ordered disclosure without looking at the documents in respect of which public interest immunity was claimed. It would be wrong to do so, since that would mean that the court declined to be the final arbiter of the public interest, and since it would itself conduct no balancing exercise. No such authority was referred to us by either side.

31. In my view, it is not necessary to recite more of the argument advanced by the First Defendant. As we indicated in the course of the hearing we were of the clear view that it would be entirely wrong for us to decline to consider the documents, in their unredacted form and in a CLOSED hearing, before deciding the issue of public interest immunity. Therefore, after the second argument in OPEN, concerning confidentiality and the Letter of Request, we proceeded to do so.

32. Having seen the documents and considered them fully in CLOSED, I am of the clear view that they should not be placed into OPEN. I have no doubt that disclosure would be likely to damage or inhibit future cooperation between the two countries, and affect their mutual capacity for law enforcement. I am minded to order that there should be a public interest immunity order, following the procedure indicated in *Haralambous*, so that the court deciding permission (or a "rolled-up" hearing or substantive hearing if that is ordered separately) can consider the material in CLOSED conditions.

33. In the course of argument, Ms Carss-Frisk indicated that if we reached such a provisional conclusion, the Claimant would wish the opportunity to amplify submissions made in short form to us to the effect that a confidentiality ring involving counsel only might found a sufficient safeguard. In theory, at least, other particular measures might be considered. I do not wish to raise unrealistic expectations. Such submissions will necessarily be made without knowledge of the material which would be revealed within such a confidentiality ring, and thus without a detailed understanding of the difficulties which would arise.

34. For those reasons, I would be prepared to consider further written submissions on such points provided they are made swiftly.

Confidentiality of the Letter of Request

35. The evidence supporting the Second Defendant's confidentiality claim is contained in the written statement of Philip Newman, a solicitor and caseworker in the United Kingdom Central Authority, part of the International Criminality Unit of the Home Office. His statement too emphasises the system of mutual legal assistance between the United Kingdom and other countries. Mr Newman emphasises that "the confidentiality of LoR is therefore considered a critical feature of UK's ability to provide, and also by reciprocal arrangements to receive, effective MLA".

36. A number of cases were cited to us on this issue. They include *R (Abacha) v SSHD* [2001] EWHC 787 (Admin); *R (Evans) v Director of the SFO* [2003] 1 WLR 299; *R (Energy Financing) v Bow Street Court* [2006] 1 WLR 1316; *R (BSG Resources Ltd) v Director of the SFO* [2015] EWHC 1813 (Admin); *National Crime Agency v Abacha (Supra) and R (River East Supplies Ltd) v Crown Court at Nottingham (Chief Constable of Nottinghamshire Police and Secretary of State for the Home Department)* [2017] 2 CR APPR 27.

37. Mr Newman emphasises that the United States take a particular position on this as was recorded in *NCA v Abacha* [2016]:

> "The [US Department of Justice] does not see disclosure of the letter, or any part of the document, as an issue to be decided solely on a case-specific basis, but as requiring consideration of, firstly, the need to safeguard the mechanism of mutual legal assistance generally as it exists around the world and, secondly, the need to protect executive state-to-state communications to the greatest extent possible." (Paragraph 44)

Mr Newman's view is that the United States might seek to reconsider its cooperation if the confidentiality of such requests is breached.

38. The Claimant's central propositions here are that there is no fixed rule of law that confidentiality in a LoR must prevent disclosure and that in the present case, the LoR "forms a crucial part of the background to the grant of the warrant and provides the basis on which the Direction to apply for the warrant was issued". Thus the "challenge to the Direction self-evidently cannot be properly addressed without access to the Letter of Request".

39. I cannot accede to the Claimant's application. The inherent and established confidentiality in a LoR can of course be over-ridden in specific circumstances, as for example arose in *Abacha (No 2)*. But it is obvious that there would be a profound negative impact on the mutual cooperation of states if this were thought to be a general or default position, rather than the exception, arising only on particular facts. There are, in my judgment, the strongest reasons for maintaining the confidentiality of such LoRs.

40. Moreover, the premise advanced by the Claimant is fallacious. The impact on the Claimant flows from the grant of the warrant, not the request. It will only be in unusual circumstances that the issue of the warrant cannot be challenged without sight of the LoR.

41. For these reasons, I would reject the Claimant's claim that the confidentiality in the LoR should be set aside.

Mrs Justice May:

42. I agree.