Neutral Citation Number: [2016] UKIPTrib 15_134_C

Case No: IPT/15/134/C

INVESTIGATORY POWERS TRIBUNAL

P.O. Box 33220
London
SW1H 9ZQ

Date: 28 January 2016

Before :

MR JUSTICE MITTING (VICE-PRESIDENT)
SIR RICHARD McLAUGHLIN
PROFESSOR GRAHAM ZELLICK QC

- -

Between :

PHILIP MICHAEL KERR	**Claimant**
- and -	
THE SECURITY SERVICE	**Respondent**

- -
- -

TIM LAWSON-CRUTTENDEN
(instructed by **DG LAW**) for the **Claimant**
MISS LISA GIOVANNETTI QC AND MISS VICTORIA AILES
(instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **Respondent**

Hearing dates: 20 January 2016

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Approved Judgment

JUDGMENT ON PRELIMINARY ISSUES

1. Philip Michael Kerr (the complainant) alleges that since 2003 he has been the subject of a campaign of harassment by members of the Security Service, acting in their official capacity. He states that he believes that the harassment began because the Security Service wished to persuade him to provide information to them about his criminal acquaintances. He says that he refused to do so, whereupon the purpose of the campaign became to punish him for his refusal. He has kept a log of incidents of harassment which contains 148 separate incidents, from the first on 12 April 2003 to the last on 8 September 2014.

2. By a claim form sealed on 2 October 2014 issued in the Queen's Bench Division of the High Court against the Attorney General on behalf of the Security Service, he claimed an injunction under Sections 3 and 3A Protection from Harassment Act 1997 restraining the Security Service from pursuing a course of conduct amounting to harassment of him. He did not claim damages and did not bring an alternative claim under Section 6 Human Rights Act 1998, for unlawful interference with his right to respect for his private and family life under Article 8 of the European Convention on Human Rights, even though his factual claims, if true, would give rise to such a claim. His purposes in so limiting his claim appear to have been or to have included the following: to take advantage of the longer limitation period in a statutory claim under Section 3 of the 1997 Act than would be available under Section 7(5)(a) of the 1998 Act and to avoid the compulsory jurisdiction of the Investigatory Powers Tribunal over such a claim under Section 65(2)(a) Regulation of Investigatory Powers Act 2000.

3. The Attorney General applied to strike out the High Court claim. The application was not based, as it might have been, upon the proposition of law that the 1997 Act did not bind the Crown, and so the Security Service or its officers, purporting to act in the course of their official duty. If ever the High Court claim is revived, this may be an issue which will have to be resolved by that Court. The grounds of the application appear to have been (our copy is incomplete) that the complainant's case disclosed no reasonable ground for bringing the claim and/or that it could and should have been made to this Tribunal. The application was heard by the Senior Master, who declined to strike out the claim, but stayed it to permit the complainant to apply to this Tribunal. She decided that conventional litigation was inappropriate, given the availability of a more suitable, alternative remedy – a complaint to this Tribunal. Accordingly, she made an order refusing to strike out the claim, but stayed all further proceedings in the High Court. She gave the complainant permission to apply for the stay to be lifted in the event that this Tribunal made a determination in favour of the complainant and that he had reasonable grounds for asserting that the Security Service had failed to comply with that determination.

4. The Claimant sought permission to appeal to a High Court judge. His application was refused by Cooke J and certified as totally without merit. The reasons given by Cooke J included the following:

> "…The Investigatory Powers Tribunal has jurisdiction under Section 65(3) (but not exclusive jurisdiction) to determine the truth of the complaints.

> 4. The Master was entitled to, and right to, find that the Investigatory Powers Tribunal was the most appropriate forum to hear the issues as the Defendant/Respondent would abide by any determination made."

5. Thus, on the case presented by the complainant, the High Court has declined to hear it on the premise that this Tribunal is the appropriate forum to determine whether or not there is substance in the complainant's claims. This is an important factor in the decision which we have reached, as we explain below.

6. By form T2 (in respect of alleged conduct which does not breach ECHR rights) filed on 14 July 2015, the complainant reiterated the claim which he had made in the High Court as a complaint to this Tribunal. He did not at the same time file a T1 claim form (in respect of alleged breaches of ECHR rights) and expressly disclaimed any intention to do so. The complainant's purpose in adopting this stance at this stage is not clear to us. The complainant has now indicated, at our invitation, that he intends to file a T1 claim form, so that his complaint/claim can now be considered under Section 6 of the 1998 Act. Miss Giovannetti QC, for the Security Service, has rightly conceded that the belated filing of a T1 claim form will have no impact upon the decision which we must make under Section 67(5) of the 2000 Act about how far back in time this Tribunal should go when considering the complaints.

7. That concession removes the need for us to determine, at this preliminary stage or at all, whether the 1997 Act binds the Crown. As Miss Giovannetti again rightly concedes, if the complaints made by the complainant are substantially true, so that he has been subjected to a campaign of harassment by the Security Service, his complaint that his right to respect for his private and family life under Article 8 ECHR would be made out; and he could rely on the saving in paragraph 3(iii) of the Order of Master Fontaine of 1 April 2015 to apply to lift the stay on the High Court proceedings on the basis of our findings of fact and determination.

8. The only remaining issue which we have to determine is limitation: whether or not it is equitable, having regard to all circumstances, to determine the complaint in respect of conduct which occurred more that one year before the filing of the complainant's T2 form on 14 July 2015. The complainant contends that we should make findings about all matters that have arisen since 2 October 2008, the cut off date for his statutory claim before the High Court under the 1997 Act. Miss Giovannetti, in response to our question and on instructions, said that the Security Service are able and willing to submit to and co-operate with any investigation by this Tribunal of the conduct alleged by the complainant since 2 October 2008. That helpful stance permits us to give effect to what may well have been the understanding of the Senior Master and of Cooke J that this Tribunal would investigate all of the complaints which were the subject of the High Court claim.

9. But for both of those factors, we would not have been satisfied that it was equitable to disapply the ordinary time limit in Section 67(5), for the following reasons. The complainant asserts that for many years he has believed that the Security Service have been subjecting him to a campaign of harassment. By a letter of 26 June 2012 (of which a copy has been provided to us since the hearing) his then solicitors asserted that he has since 2003 been the subject of monitoring and surveillance by the Security Service. The letter threatened legal action. In their reply dated 6 July 2012, the

Security Service pointed out his right to complain to the Investigatory Powers Tribunal. On 28 December 2013 the complainant was arrested by Merseyside Police officers for an offence under Section 6 Road Traffic Act 1988 (failing to provide a specimen of breath). He was summoned to appear before Liverpool Magistrates' Court for a trial fixed for 9/10 October 2014. In his defence case statement, he asserted that he had a reasonable excuse for his refusal to provide a specimen of breath namely that he held a genuine and longstanding belief that he had been persistently harassed by the Security Service for about 12 years. He said that his solicitors had sent a letter of complaint to this Tribunal in November 2012. The Tribunal have no record of any complaint or claim form having been filed then or at any time before 14 July 2015; and would have such a record if one had been. All but one of the complaints of conduct since 4 May 2014 (72 in all) are about the text and timing of apparently innocuous spam emails from a variety of commercial sources.

10. Two conclusions would ordinarily have followed from those facts: first, there is no good reason for requiring a complaint to be investigated about conduct alleged to have occurred between just over one and just over six years before the normal cut off date in circumstances in which the Claimant was well aware of his right to complain to the Tribunal but decided not to do so. Secondly, it is likely that the two members to whom the complaint would initially have been referred would have concluded that the apparently innocuous emails did not give rise to a complaint which had any prospect of success and so would have declined to hear, consider or determine the complaints under Section 67(4) on the basis that the making of them was frivolous. It is only for the reasons explained in the previous paragraph that we have not adopted this course.

11. For the reasons explained, we order that,

    i) the complainant must file a T1 claim form within 7 days. The form need do no more than refer to his existing grounds of complaint.

    ii) within 56 days, the complainant must file any further material, including witness statements, upon which he wishes to rely to support his complaint and claim.

    iii) the Tribunal is satisfied that in the circumstances it is equitable to investigate alleged conduct on the part of the Security Service since 2 October 2008; and will do so.