Neutral Citation No. [2024] EWHC 875 (Admin)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

AC-2023-LON-000601

Royal Courts of Justice

Tuesday, 12 March 2024

Before:

LORD JUSTICE DINGEMANS
MR JUSTICE HENSHAW

B E T W E E N :

THE KING ON THE APPLICATION OF
DIOGO SANTOS-COELHO — Claimant

- and -

(1) CARLISLE MAGISTRATES COURT
(2) NATIONAL CRIME AGENCY — Defendants

THE CLAIMANT did not appear and was not represented.

THE FIRST DEFENDANT was not represented.

MR A BIRD KC appeared on behalf of the Second Defendant.

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction and issues

1 This is the judgment of the Court. This is the hearing of an application for judicial review in relation to a search warrant that was executed on 9 November 2022. There are three issues to be determined at the hearing: (1) whether the application today should be adjourned; (2) whether this court should permit the National Crime Agency to make use of material that was seized under the search warrant; and (3) whether the National Crime Agency should be entitled to make an application to the Crown Court under section 59 of the Criminal Justice and Police Act 2001 (CJPA 2001).

Background

2 The claimant is a Portuguese national who lives in the United Kingdom. His extradition has been sought by the United States, and ordered by the Westminster Magistrates' Court, and the claimant has appealed against that order. His extradition has also been sought by Portugal, and the claimant has consented to that extradition. Both extraditions were sought for offences of fraud. The allegation is that the claimant operated a website called Raid Forum, which was used for the purposes of criminal activity.

3 The first defendant is Carlisle Magistrates' Court, which has taken no part in the proceedings and which issued the search warrant which is the subject of this claim. The second defendant is the Director of the National Crime Agency. The National Crime Agency is the body which sought the search warrant which gave rise to the proceedings.

4 In circumstances which are explained in a witness statement from Ms Cherry Martin, dated 11 February 2023, the application for the warrant was made under section 8 of the Police and Criminal Evidence Act 1984 (PACE) and section 16 of the Crime (International Co-

operation) Act 2003 (CICA 2003). The search warrant related to 58 Harleyford Road, London SE11 5AY and a laptop and mobile phone. We were told that the laptop and mobile phone had been taken from the claimant when he arrived at Gatwick Airport, but then returned to him because there was, at that stage, no basis on which it could be retained. It was in those circumstances that US prosecuting authorities had sought the assistance of the National Crime Agency to obtain the search warrant. The application for the search warrant was made in Carlisle Magistrates Court because it seems it was the first available court to consider the application. It appears that the application was made by telephone.

5 On 9 November 2022 the warrant was executed and the laptop and mobile phone were seized pursuant to section 8(2) of PACE.

6 The claimant instructed solicitors Hodge Jones Allen (HJA), who requested a copy of the search warrant from the National Crime Agency. The National Crime Agency refused to provide the warrant on 30 November 2022. We can see no good reason for the refusal to provide the search warrant, and it should have been provided at that stage.

7 A pre-action protocol letter was sent to the defendants by HJA contending that the search was unlawful. The search warrant was then provided to HJA on 23 January 2023. This was at a time after the second defendant had taken the opportunity, we infer, to obtain proper legal advice. A response to the pre-action protocol letter was provided on 26 January 2023. The claim was resisted.

The proceedings

8 A claim form was issued, contending that the warrant was unlawful because, among other matters, it could not satisfy the relevant criteria set out in section 8(1) of PACE. Section 8 deals with the powers of a Magistrate to authorise the entry and search of premises. One of the statutory criteria is that "(1) … the Justice of the Peace is satisfied that there are reasonable grounds for believing … (d) that it does not consist of or include items subject to

legal privilege …". It is apparent from Ms Martin's helpful witness statement, and indeed from the materials that were submitted to Carlisle Magistrates Court, that in fact there were grounds to believe that the material, being the laptop and mobile phone, had items subject to legal privilege.

9 After the claim form had been issued, the National Crime Agency put in an acknowledgment of service and also a document which was titled "Summary Grounds of concession on Merits and Resistance to Relief Sought", dated 27 February 2023. In that document, it was accepted that the search warrant was unlawful because no exception had been made for the material subject to legal privilege. This meant that the warrant could not have been lawfully issued pursuant to section 8(1) of the Police and Criminal Evidence Act. It was also common ground that the search warrant should be quashed and that a declaration made that the entry, search and seizures made by the second defendant on 9 November 2022 were unlawful. It was suggested that any claim for damages should be transferred to the Central London County Court for determination of liability and assessment of quantum.

10 The Director of the National Crime Agency however resisted the relief that was sought by the claimant. This included the return of the laptop and the mobile phone. In fact, by the time that the proceedings had been issued it seems an image had been taken of the digital material contained on the laptop. The second defendant had, having recognised the unlawful action in seeking the search warrant on the basis as it did, undertook to the court not to make any investigation of the phone, laptop or image of the laptop. We are told that remains the position as at today's hearing.

11 Farbey J granted permission to apply for judicial review in an order dated 24 November 2023. This was on the basis that it was common ground that the search warrant needed to be quashed and therefore permission to apply ought to be granted. Other directions were made.

It seems that the claimant had difficulties in obtaining legal aid. It is not apparent that any thought was given to the fact that the claimant would be entitled to his costs up to the date of the admissions made by the second defendant in any event.

The applications to adjourn

12 That led to the next substantive application which came before Mr Justice Cavanagh on the papers on 1 March 2024. The claimant applied for an order that the hearing fixed for today (which is 12 March 2024) be adjourned. Cavanagh J made orders to the effect: that the substantive application remain listed for 12 March, and if and when the claimant obtains legal aid for representation, his legal advisers must notify the interested party and the court forthwith. If, after obtaining legal aid, the claimant seeks an adjournment of 12 March, he should make an application in writing with reasons as soon as possible, serving it on the defendants. If an adjournment application is made, the defendants should write to the court within 48 hours saying whether or not it is opposed. Cavanagh J gave reasons noting that the claimant had been unable to comply with directions because of difficulties in obtaining legal aid. Cavanagh J noted:

> "The issues have narrowed considerably in the light of concessions made by the interested party. The only live issue before the court will be whether the claimant should be granted mandatory relief in the form of an order of the return of two items and whether the interested party should be permitted to retain them pending an application to the Crown Court to retain them under section 39 of the Criminal Justice and Police Act. As the issue is a narrow one, there is a realistic chance that the hearing on 12 March might be effective if the claimant obtains legal aid in the next few days. For the time being, therefore, the listing remains."

13 The claimant's solicitors then emailed the court asking for the matter to be adjourned, repeating that there were funding difficulties. The second defendant sought further information and asked whether legal aid had been granted. In response to that inquiry HJA disclosed that legal aid had been granted on 12 February 2023, albeit with a costs limitation of £2,250 and that legal aid was limited to an application for permission to apply for judicial

review on the papers and if permission is granted, limited to the filing of defendants' evidence and thereafter obtaining counsel's opinion on the merits. It seems from the further correspondence from HJA that they have incurred costs so that the costs limitation has been exceeded. The Legal Aid body has not extended the authority and counsel has not been instructed.

14 Another emailed application was made. The papers were put before me last week, because I had by then been identified as sitting on this claim. The second defendant maintained its objection to an adjournment. I directed that the matter remain listed and the application for the adjournment should be the first matter dealt with by the court, and if the matter was adjourned the hearing would go off; and if not, it would continue.

15 A further written application was sent in by Ms Abbey Hart, a trainee solicitor for HJA on Monday, saying:

> "Due to the ongoing funding issues we are unable to attend the hearing tomorrow. We have chased Legal Aid extensively in order to extend the representation order to cover counsel's work. The Legal Aid Agency has been unable to confirm it will extend the representation. Furthermore, due to the change in extradition proceedings as of last Wednesday, when our client consented to extradition to Portugal, we will require additional time to prepare different submissions, for which more time and instructions are necessary. Our client was released on bail from custody late Friday evening, having been remanded on Wednesday afternoon from Westminster Magistrates Court. Given these circumstances, we request an adjournment of the hearing."

No adjournment (issue one)

16 That remained the position at the start of the hearing. There was no appearance from the claimant or representation on his behalf. Mr Bird KC appeared on behalf of the second defendant. Mr Bird was supported by members of the National Crime Agency's legal team. It was apparent that there had been attempts at contact between Mr Bird and Mr Bowers KC. Mr Bowers had drafted the claim form for the claimant. We were told that Mr Bowers was without instructions.

17 We heard submissions from Mr Bird about why this hearing should not be adjourned. Having heard those submissions we directed that his instructing solicitor, to whom we are grateful for making further enquiries, should contact HJA and to explain the situation that: the court was sitting; it seemed from the materials before the court that there was certainly a costs order due to the claimant in relation to the application for permission to apply for judicial review, on the basis that the claimant had succeeded in the claim; and whether that might assist in obtaining representation for the claimant. We were told that there were further discussions and emails, and HJA had indicated that the claimant did not know what its costs were, and we were given no information to suggest that even if we were to adjourn today the situation would change either with the Legal Aid Agency or in relation to private funding.

18 In those circumstances, and notwithstanding the extra time given, we reluctantly decided that we would not adjourn the matter and would therefore continue to hear it.

No permission for National Crime Agency to look at the material in order to make an application under section 59 of CJPA 2001 (issue two)

19 The next issue that arose was Mr Bird's application for this court to refuse the relief sought by the claimant, namely an order for return of the material, and for an order that the National Crime Agency should be permitted to look at the seized materials for the purposes of making an application to retain them under section 59 of the CJPA 2001.

20 Mr Bird, in answer to the question as to why no application had yet been made, had made the point that the claimant was still seeking return of the material from this court and therefore it would have been inappropriate to make the application under section 59 of the CJPA 2001 until this court had determined the claimant's application. Mr Bird also submitted that in order to make a proper application under section 59 of the CJPA 2001 the

National Crime Agency ought to be permitted to look at the materials, and he relied on a case where that had occurred. Mr Bird referred to *R(Van der Pijl) v National Crime Agency* [2013] EWHC 3040 (Admin) (*Van der Pijl (No.2))*, *HM Revenue and Customs and Cheema* [2013] 12 WLUK 349 (Nottingham Crown Court 11 December 2013) *(Cheema)* and *Chatwani v National Crime Agency* [2015] EWHC 1283 (Admin) (*Chatwani*).

21 Section 59 of the Criminal Justice and Police Act provides:

> "Application to the appropriate judicial authority.
>
> (1) This section applies where anything has been seized in exercise, or purported exercise, of a relevant power of seizure.
>
> ...
>
> (5) The appropriate judicial authority –
>
> (a) on an application under subsection (2),
>
> (b) on an application made by the person for the time being having possession of anything in consequences of its seizure under a relevant power of seizure...
>
> "may give such directions as the authority thinks fit as to the examination, retention, separation or return of the whole or any part of the seized property.
>
> "(6) On any application under this section, the appropriate judicial authority may authorise the retention of any property which –
>
> (a) has been seized in exercise, or purported exercise, of a relevant power of seizure, and
>
> (b) would otherwise fall to be returned,
>
> "if that authority is satisfied that the retention of the property is justified on grounds falling within subsection (7).
>
> "(7) Those grounds are that (if the property were returned) it would immediately become appropriate –
>
> (a) to issue, on the application of the person who is in possession of the property at the time of the application under this section, a warrant in pursuance of which, or of the exercise of which, it would be lawful to seize the property; or

(b) to make an order under –

(i) paragraph 4 of Schedule 1 to the 1984 Act ...

"under which the property would fall to be delivered up or produced to the person mention in paragraph (a)."

22 Subsection (10) gives the relevant powers of seizure.

23 The purpose of section 59 of the CJPA 2001 has been explained in *Chatwani* at paragraph 139. Parliament has provided a second chance to law enforcement agencies who have seized material pursuant to unlawful search warrants. The Crown Court has a discretion to authorise the retention of the material seized, despite the unlawfulness of the search, if were the material to be returned, it would be immediately appropriate to issue a warrant under which it would be lawful to seize the property. In this sense section 59 permits a law enforcement agency to take advantage of its own wrong in unlawfully seizing the materials, by having a second go for the equivalent of a search warrant while retaining the unlawfully seized materials. The Crown Court then has to consider whether it would grant a (notional) application for a warrant. It is right to say that in *Chatwani* itself, that the normal course was not taken because of egregious failures on the part of the National Crime Agency.

24 The fact that the discretion is vested in the Crown Court, has been said to be a powerful reason for the High Court to exercise restraint when considering whether to order the return of the unlawfully seized materials to the claimant before the making of the application under section 59 of the CJPA 2001. However, as Mr Bird properly accepts, on finding that documents were seized by an agency as the result of an unlawful search the decision to grant relief is a matter for the court's discretion. Therefore, despite an application under section 59 being the norm, there may be circumstances in which it is appropriate for this court to deny an agency any benefit from its wrongdoing by ordering the return or destruction of such material.

25 Mr Bird has, however, gone further and submitted that the National Crime Agency should not only be permitted to retain the material which was seized pending the making of the section 59 CJPA 2001 application, but should be able to examine the material on the laptop and mobile phone in order to make the application to the Crown Court. Mr Bird relied in particular on the decisions of in *Van der Pijl (No.2)* and *Cheema*.

26 *Van der Pijl (No.2)* was a case where a search warrant had been executed but it was unlawful because the names of the suspects was omitted (that was decided in *R(Van der Pijl) (No.1) v Crown Court at Kingston* [2012] EWHC 3745 (Admin); [2013] 1 WLR 2706). The court then allowed the National Crime Agency to retain the papers to make an application under section 59(7) of the CJPA 2001. An application was made to the Crown Court. Very substantial quantities of papers had been seized. The papers were sought by Dutch authorities in relation to an alleged tax fraud. The papers related, among other matters, to Mr Van der Pijl, but also his wife who by the time of the section 59 CJPA 2001 application was no longer being pursued by the Dutch authorities. The application under section 59(7) of the CJPA 2001 was made to Kingston Crown Court. The judge in Kingston Crown Court made an order permitting the Dutch prosecutor to go through the papers in order to make submissions about relevance, given that there was an imminent trial coming up in the Netherlands. Mr Van der Pijl challenged that order.

27 Mr Justice Ouseley held that the order made by the Crown Court judge was lawful, because it had been agreed in that case that the prosecutor should make a document by document case for relevance of the unlawfully seized material in order to obtain it. In our judgment *Van der Pijl (No.2)* was a case which was decided on very particular facts, which included: the unlawfully seized materials had already been seen by the National Crime Agency; there had already been inspection of the material with a lawyer for the purposes of protecting legal and professional privilege, and the lawyer had made comments about the relevance of

some of the material which the officer could recall, but not in detail; and it was agreed by the parties that on the application under section 59(7) there would be a document by document review of relevance.

28 In *Cheema* a search warrant had been obtained which was quashed, on the basis of admitted irregularities, by the High Court. The High Court then sat as a Crown Court to consider the application under section 59 CJPA 2001. There was a difficulty in that application because the items had not been identified in any meaningful way and the court accepted that the law enforcement agency had to examine what had been seized in order to make the application. That exemption did not apply to electronic devices which had been described.

29 We agree that, as has been pointed out in other authorities, "criminal litigation is not, however, a game", and that Parliament has countenanced the retention of documents seized as the result of an unlawful search, and this is an important factor to be taken into account by this court in refusing to order the return of the seized material to the claimant before an application has been made under section 59 of the CJPA. This prevents any loss of the material after their return and before a new application for a search warrant is made. However that is very different from allowing the law enforcement agency to examine the material when it has not already done so, for the purpose of making the section 59 application. In our judgement it would be unusual to expect a law enforcement agency to profit from its own wrong by inspecting unlawfully seized material which it has not yet inspected, in order to make an application under section 59 of the CJPA 2021. That is because a court is unlikely to reward a party for its wrongful act. In this case there is no principled reason for us to exercise our discretion to order that the National Crime Agency should look at the material which it had wrongfully seized for the purposes of making a section 59 application. This is because the National Crime Agency is able to identify in the

section 59 application what it seeks as the object of the notional search warrant with particularity.

Retention of the material pending an application under section 59 of the CJPA 2001 (issue three)

30 That then brings us to the last and main issue, which is whether or not we should permit the National Crime Agency to retain the laptop and the mobile phone and the image of the laptop that has already been taken (but not examined) for the purposes of making a section 59 application.

31 In this particular case, we have considered the circumstances under which the application for the unlawful search warrant came to be made. It is, in our judgment, plain on the materials before us that there was no issue of bad faith. In fact the relevant officer, Cherry Martin, had sent the wrong form in, having had the benefit of advice in the production of the warrant. There was no attempt to gain any procedural advantage, and the National Crime Agency has been frank with the claimant and the court in the judicial review proceedings. The National Crime Agency had voluntarily undertaken not to look at the materials from the laptop and phone. The situation in relation to relief for the purposes of making an application under section 59 may have been different if the National Crime Agency, recognising its own unlawful act, had then attempted to take advantage of that and look at the material. Further, once the error was appreciated, it was properly admitted.

32 In these circumstances, in our judgment, it is appropriate to permit a section 59 application to be made. That is because: it is the normal course, as appears from *Chatwani*; there is no bad faith; and the National Crime Agency has properly and frankly reported its unlawful behaviour to the court.

Conclusion

33 That disposes, therefore, of the three issues that were before the Court. The adjournment is refused. The National Crime Agency is not permitted to take advantage of its own wrongdoing before this court by carrying out any imaging or investigation for the purposes of making the section 59 application, but it will be permitted to retain the iPhone, laptop and image of the laptop for the purposes of making the application under sections 59(5) (6) and (7) to the Crown Court. Any further examination, retention or use of the iPhone, laptop or image of the laptop will be determined by the Crown Court.

34 In those circumstances, we propose to make an order which refuses the adjournment of the application; quashes the search warrant; declares the entry search and seizures made by the second defendant on 9 November to be unlawful; transfers the claimant's claim before damages to the Central London County Court for determination of any issues of liability and assessment of quantum; and permits the second defendant to retain the iPhone, laptop and image of the laptop for the purposes of the application, thereafter to be determined by the Crown Court.

35 That leaves one final further issue, which is the issue of costs. It is perfectly apparent that the claimant's solicitors acted appropriately by seeking a copy of the search warrant by writing a pre-action protocol letter and then by commencing this action. It is right to say that the National Crime Agency then did admit their wrongdoing on 27 February. In these circumstances, we will order the defendant to pay the claimant's costs to be the subject of a detailed assessment on the standard basis, if not agreed, up to 31 March 2023, which would have given the claimant sufficient time to consider and examine the concessions made by the defendant.

36 We will also order there be a Legal Aid assessment of the claimant's costs pursuant to the civil Legal Aid certificate dated 12 December 2023, to which I have already referred.

37 I should conclude these remarks by thanking Mr Bird, and those who instruct him, for all their assistance to this court.

[After a short delay]

Further materials relating to the adjournment (issue one revisited)

38 During the course of delivering this ex tempore judgment, we have been forwarded an application notice sealed on 7 March 2023. The application was incorrectly issued pursuant to the Extradition Act 2003, which may explain the delay in getting to us, but it was issued in the correct court. The application is to adjourn the hearing for this application for judicial review currently listed for today. It provides:

> "We represent the claimant. We attach an application to adjourn. Our client's case is funded by way of Legal Aid. Whilst funding has been granted, we have been working to resolve issues regarding the funding. Until these issues are resolved, we are unable to proceed with the hearing.
>
> We have been in regular communications with the Legal Aid Agency to resolve the issues so that the hearing on 12 March could remain effective. We sincerely apologise we have been unable to resolve these issues ahead of the hearing.
>
> Furthermore, Portugal have now issued an arrest warrant for our client pertaining to the same matters contained in the American warrant. Our client attended Westminster Magistrates' Court yesterday (6 March) and consented to the extradition. We anticipate this will substantially impact the arguments made by both parties in relation to this case as it materially impacts the legal issues involved. At present, given the very recent developments, the respondent's skeleton argument does not address this.
>
> We refer to the order of HHJ Cavanagh, as attached, which orders that we should notify the court as soon as possible of our intention to seek an adjournment. In the light of the above, we respectfully request that the court adjourn the hearing on 12 March 2024."

39 It can be seen that this application mirrors many of the points made in the materials from HJA referred to earlier in this judgment. We do not alter our conclusion that the adjournment should be refused. We take no point on the fact that this was issued under the

Extradition Act 2003. It was issued in the right court and it was plainly seeking an adjournment of this hearing. Further nothing turns on the fact that there is a reference to "HHJ Cavanagh" rather than Cavanagh J. This is because the order made by Cavanagh J refusing the application to adjourn is attached.

40 The important point is that notwithstanding the efforts that were made this morning to encourage the claimants to attend, or to attempt to resolve the issue of funding in circumstances where they were going to have a costs order in their favour, no action was taken. The court specifically took a break during this hearing to see if the claimant or his representatives could be encouraged to attend. Neither the claimant nor legal representatives have attended.

41 As to the factual point that Portugal have issued an arrest warrant and that there has been a consent to the extradition to Portugal, and the suggestion that this will substantially impact the arguments made by both parties in relation to this case, there is no indication of how this would impact the arguments at all. The simple points are that the National Crime Agency made an application for a search warrant which was unlawful. They obtained material which they then imaged but did not inspect. We have not permitted them to inspect the images and we have permitted them to apply under section 59 to the Crown Court. All matters, if relevant, can be addressed by the Crown Court. The suggestion that just because there is an extradition to Portugal everything has changed is, in our judgment, not well-founded. We have been given no indication about how this would affect the matter. For all these reasons, we still refuse the adjournment.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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