

Judicial Communications Office

Monday 6 November 2017

COURT DISMISSES APPEAL AGAINST REFUSAL TO GRANT INJUNCTION

Summary of Judgment

The Court of Appeal today dismissed an appeal against a decision to refuse to grant an interlocutory injunction to a person who alleges he was threatened by police after refusing to become an informant.

The appellant, "X", alleged that in 2013 two police officers offered him money to persuade him to provide information about named individuals. He said he did not provide any information or accept any money and that he refused to be an informer. The appellant made a complaint to the Police Ombudsman for Northern Ireland ("PONI") but it was not upheld as "there was insufficient evidence to support the allegations". The appellant alleged that he was also approached in 2017 by the same two police officers but on this occasion they threatened to identify him as having been an informant in 2013. He issued proceedings the following day for an ex parte interlocutory injunction restraining the Chief Constable or police officers from disclosing his personal information to any third party and from harassing or causing him to be harassed. The High Court refused to grant the interim injunction and the appellant challenged that decision in the Court of Appeal.

The Trial Judge's Decision

The trial judge held that:

- The approach to the appellant fell within Part II of the Regulation of Investigatory Powers Act 2000 ("RIPA") so that the Investigatory Powers Tribunal ("the IPT") had exclusive jurisdiction in relation to the appellant's proceedings for actions incompatible with Articles 2, 3 and 8 ECHR;
- As the IPT had exclusive jurisdiction, the court had no power to grant injunctive relief;
- The court had jurisdiction to deal with other torts which may arise out of the alleged activity of the PSNI; and
- There was no serious question to be tried in relation to the torts of assault, misfeasance in public office or harassment.

The trial judge refused to grant an injunction on the basis that the main complaint lay within the jurisdiction of the IPT.

The Grounds of Appeal

The grounds of appeal can be summarised as follows:

- The appellant contended that the burden of establishing that the approach to him was within Part II of RIPA rests on the Chief Constable and that given the lack of any evidence on the part of the Chief Constable that burden had not been discharged. It was claimed that the trial judge incorrectly concluded that the case fell within Part II of RIPA and that the IPT had

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exclusive jurisdiction for the appellant's proceedings for actions incompatible with Convention rights.

- In the alternative, the appellant contended that if the case did fall within Part II of RIPA then the court must still retain jurisdiction to grant an injunction for threatened breaches of the appellants Convention rights given that the IPT cannot grant an injunction;
- A threat of the kind made to the appellant would amount to an assault, or misfeasance in public office, or harassment, or misuse of private information and an interlocutory injunction ought to have been granted based on any of those torts.

Before turning to the grounds of appeal, the Court of Appeal commented on the form of the injunction sought by the appellant and the disclosure made on his behalf. The Court of Appeal stated that the form of words for the interim injunction suggested by the appellant was very wide and would not be capable of enforcement. It deprecated the suggestion that an applicant for an injunction can put forward a draft in wide unfocused terms placing the responsibility on the judge to hone it down to meet the particular facts of the case. The Court also stated that it is inappropriate for the appeal process to be used as a method of advancing a narrower and focused form of injunction which was not advanced or considered at first instance. It said there may be consequences if such an approach is adopted, either as a factor to be taken into account in determining the appeal or in relation to whether the costs should be borne by the clients and not by the public purse in the form of legal aid.

The application for an interlocutory injunction was originally made ex parte. The obligation in ex parte applications is to proceed "with the highest good faith" and to make full and frank disclosure of all material facts including those that are favourable to the defendant. This arises because the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard. The Court of Appeal said it had a number of concerns in relation to the disclosure made by the appellant in his affidavit:

- There is no personal information including whether he has any criminal convictions or whether he associates with individuals whom he is aware have criminal convictions or whom he is aware are suspected by the police of being involved in criminal activity;
- The appellant did not disclose the detail of his complaint to the PONI and the conclusion of the PONI's investigation;
- The appellant states that in 2013 he was subject to an approach to provide information on individuals who were named to him but he gave the court no details of these persons or why they might be of interest to the police or what information was being sought by the police.

The Court of Appeal stated that these failures mean that the appellant has not given full and frank disclosure to the court and this entitles the court to refuse to make an order even if the circumstances would otherwise justify the granting of an order. The court, however in exercising its discretion, must maintain a due sense of proportion between marking the court's displeasure at the non-disclosure and doing justice between the parties. The exercise of discretion also takes into account that there are other sanctions available to the court including the court disallowing costs or making an indemnity costs order.

Legal principles and discussion

The appellant contends that the burden of establishing that the approach was within Part II of RIPA rests on the Chief Constable and that as the Chief Constable was neither confirming nor denying that

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any approach had been made to the appellant there was no evidence upon which the judge, in the circumstances of this case, could have concluded that this was not an approach to the appellant would not have been within Part II. The significance of that submission is that if the case did not fall within Part II of RIPA then the IPT under section 65 of RIPA would not be the only appropriate tribunal for the appellant's proceedings for actions incompatible with Convention rights. This in turn would mean that the High Court and the Court of Appeal would have jurisdiction to grant an injunction to prevent a threatened breach of the appellant's Convention rights.

The Court of Appeal said that a number of issues arise:

- Whether the burden lies on the Chief Constable to establish that Part II applies;
- Irrespective of the burden of proof whether there was sufficient evidence to support the trial judge's conclusion that the approach to the appellant fell within Part II; and
- Whether the court retains jurisdiction to grant an injunction to prevent threatened breaches of Convention rights even if the IPT is the only appropriate tribunal to hear and determine the appellant's proceedings for actions incompatible with those Convention rights.

The Court said that the issues are to be seen in the context that the courts retain jurisdiction to hear and determine proceedings other than proceedings for actions incompatible with Convention rights even if those proceedings arise out of the same facts. Accordingly other causes of action, despite being based on the same facts, do not fall within the jurisdiction of the IPT. The significance is that **if the appellant can establish that the facts supporting the proceedings for actions incompatible with Convention rights also give rise to any other cause of action such as assault, misuse of private information, harassment or misfeasance in public office then those proceedings can still be brought in the courts and injunctive relief can be granted to prevent threatened further invasions of the rights protected by such causes of action.**

The Court of Appeal noted the competing arguments of the parties in relation to the burden of proof as to jurisdiction. It said that the question of jurisdiction is not one between the parties but rather that the court has to satisfy itself as to its own jurisdiction irrespective of the attitude of either party. The Court did not receive full submissions in relation to this issue but said the matter is not answered by reference to burdens of proof. Another potential solution might be found in the obligation to make full and frank disclosure which can also arise in relation to an application on notice where the other party can be heard. The obligation to make full and frank disclosure as to the jurisdiction of the court might arise in cases of approaches by the police to informers. In such cases the Chief Constable has a neither confirm nor deny policy ("NCND policy") for valid public interest reasons. The Court of Appeal considered that the public policy reasons are equally applicable to approaches to individuals to induce, ask or assist that person to engage in the conduct of an informer so that it applies not only to an individual who may or may not be an informer but also to a person who may or may not have been induced, asked or assisted to be an informer.

That means that, as in this case, the Chief Constable applying the NCND policy does not put any evidence before the court as to whether the approach to the appellant to be an informer falls within Part II of the RIPA. It is only if the approach falls within Part II that the IPT is the only appropriate tribunal in relation to any proceedings for actions incompatible with Convention rights. There are some approaches to persons to be an informer which do and some that do not fall within Part II of RIPA. For instance if an individual is induced or asked or assisted to provide information which he had obtained from a past personal or other relationship, which relationship was no longer maintained, and if he is not either expressly or implicitly being induced or asked or assisted to re-

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establish that relationship then the approach to him would not fall within Part II of RIPA. The Court of Appeal said that in such circumstances where a defendant cannot adduce evidence for what the court considers to be appropriate public policy reasons and where that evidence is necessary for the court to give consideration as to whether it has jurisdiction or whether the IPT has jurisdiction under section 65 of RIPA, it may be that the obligation on the appellant to make full and frank disclosure of all material facts in relation to that issue continues even if the hearing is on notice.

In relation to the issue as to whether there was sufficient evidence to support the factual conclusion that the approach to the appellant fell within Part II of RIPA the Court of Appeal considered that the various background factors taken in isolation and particularly when combined with the lack of detail in the appellant's affidavit were sufficient to support the learned judge's factual conclusion: "At the least the likely subjective effect on the appellant of the influences brought to bear on him would have been to induce him to maintain personal relationships for the covert purpose of obtaining information and providing access to information".

Counsel on behalf of the Chief Constable conceded that the court, as a public authority, retains jurisdiction to grant an injunction under section 6 of the Human Rights Act 1998 in certain circumstances particularly involving an immediate and serious risk to life even if the IPT is the only appropriate tribunal to hear and determine the appellant's proceedings for actions incompatible with his Convention rights. The Court of Appeal stated that there may be a distinction between on the one hand the process of authorisation under RIPA which insofar as it involves proceedings for actions incompatible with human rights would clearly fall within the jurisdiction of IPT and on the other hand actions which have nothing to do with the authorisation process and are plainly not defensible. A threat such as is alleged to have been made to the appellant in this case, would fall into the second category.

The other causes of action

The Court of Appeal then considered the other causes of actions relied on by the appellant as supporting his entitlement to an interlocutory injunction.

(a) Misfeasance in public office

This tort was not raised before the trial judge. The appellant contends that the police officer was a public officer, that he was exercising his powers as a public officer when he made the alleged threat and that there is a serious question to be tried as to the state of mind of the police officer which it is contended fell into either the form of a targeted malice or bad faith. The Court of Appeal considered that at this stage and on the evidence presented to the court there is a strong case that the police officer issued a threat to the appellant in 2017 and that the threat was a threat to his life or bodily integrity. It also considered that there was no conceivable justification for such a threat and that there is a serious issue to be tried as to whether this would have been known to the police officer. Furthermore it considered that there is a duty of care to informants and to persons who are approached to be informants and that the potential for informants to come forward is adversely affected if they perceive that they might be subject to threats of this nature.

While the Court of Appeal considered that there is a serious issue to be tried in relation to the tort of misfeasance in public office, it did not consider it appropriate to grant an interlocutory injunction for the following reasons:-

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- Several months have elapsed since the alleged threat was made and there is no evidence that the threat was ever carried out. An interlocutory injunction looks to the future and its purpose is to restrain threatened breaches of the plaintiff's rights pending trial. The Court considered that any threatened breach in the circumstances of this case has now passed so that on the balance of probabilities no future threat exists;
- The Court was informed that a complaint has been made by the appellant to the PONI and it considered that the PONI investigation will have a serious chilling effect in relation to the potential for future threats of the type alleged by the appellant for which there can be no justification.

(b) Misuse of private information

The Court of Appeal considered that the disclosure of information (whether true or false) that the appellant was an informer would establish this cause of action but the question then arises as to whether these proceedings would be subject to the jurisdiction of the IPT. The Court declined to give a preliminary view on this cause of action as it is not necessary for the determination of this appeal.

(c) Assault

The Court of Appeal considered that the trial judge was correct to determine that there was no serious question to be tried in relation to the tort of assault as there was no evidence of an apprehension of immediate personal violence. The threat was not a threat of immediately disclosing to a terrorist organisation with the consequence of an immediate apprehension of personal violence.

(d) Harassment

One of the constituent elements of harassment is a course of conduct which involves conduct on at least two occasions. The facts as contained in the appellant's affidavit did not support two threats having been made to him and the Court of Appeal held that the trial judge was correct to conclude that there is no serious issue to be tried that the defendant harassed the appellant.

Conclusion

The Court of Appeal held that there is a serious question to be tried in relation to the tort of misfeasance in public office but declined to grant an interlocutory injunction. The appeal was dismissed.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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