Judicial Communications Office

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COURT DISMISSES APPEAL IN CASE WHERE POLICE TRIED TO RECRUIT THE APPELLANT AS AN INFORMER

Summary of Judgment

The Court of Appeal today dismissed an appeal brought by a man who claimed to have been approached by the police in an attempt to recruit him as an "informer".

Brian Sheridan ("the appellant") pleaded guilty in 2011 to offences relating to rifles and handguns being in a car in which he was travelling. It was alleged that he and his friends were going to bury the weapons. Press reports at the time suggested that he was a member of the Real IRA or another proscribed organisation, although the appellant has always denied this. He did not explain why the weapons were in the car and did not identify his "friends" who were in the car with him or say what motivated him to commit the offences.

The appellant claimed that he was approached by three men while on holiday in Norway with his partner in February 2015. The men said they were from the police and wanted to speak to him. He claims he told them that he didn't want to speak to them and that the approach caused him alarm and distress. The appellant had no further contact with the police until 6.00 am on 22 October 2015 when he was stopped at a police check-point on the Newry Road in Armagh. He claimed that an unmarked car pulled up behind him and one of the men who had approached him in Norway got out. The appellant said he consistently told the men that he did not want to speak to them but one gave him a card with a mobile number on it and told him to give him a call.

The appellant contacted his solicitor. The solicitor phoned the mobile number and was told by the person who answered the call words to the effect of, "If I wanted to speak to Brian, I will get him again". The appellant told his solicitor that he felt he was being put at risk by the police publicly seeking to recruit him to provide intelligence and that other members of the community may have perceived wrongly that he was a police informant. He felt the police officers had failed to take adequate steps to protect his life, security and personal autonomy in breach of Articles 2, 3 and 8 of the European Convention on Human Rights ("ECHR"). The solicitor submitted a statement to the Police Ombudsman ("the Ombudsman") asking for the matter to be treated as urgent.

On 22 February 2016 the Ombudsman advised the appellant that his complaint had been rejected on the basis that there was insufficient evidence to support the allegations. The appellant's solicitor wrote to the Ombudsman to request that he provide reasons for having rejected the complaint. The Ombudsman replied on 15 April 2016 stating that, having reviewed the material, he was satisfied that on these occasions the actions of the officers

were proportionate, necessary and conducted within the relevant legal framework. The appellant's solicitor also wrote to the Chief Constable who replied on 22 April 2016 to say that the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000 ("RIPA") was the proper forum to bring his complaint.

On 23 May2016 the appellant commenced judicial review proceedings. On 3 February 2017 the High Court refused the appellant's application for leave to bring a judicial review holding that there was an alternative remedy open to him (the Tribunal). The judge, having determined that there was an arguable case against the Ombudsman (in respect of his decision that there was insufficient evidence to support the allegations), considered that the proceedings should be stayed until after the determination of the Tribunal proceedings. The appellant challenged these decisions in the Court of Appeal.

Did the approaches to the appellant fall within Part II of RIPA

Section 26 of RIPA provides that Part II of the Act applies to the conduct and use of covert human intelligence sources ("CHIS"). References to the use of a CHIS are references to inducing, asking or assisting a person to engage in the conduct of such a source or to obtain information by means of the conduct of such a source. It is necessary that the CHIS establishes or maintains a personal or other relationship with a person and that he covertly uses such a relationship to obtain or to provide access to information or he covertly discloses information obtained by the use of such a relationship, or a consequence of the existence of such a relationship.

The Home Office published the Covert Human Intelligence Sources Code of Practice in December 2014. The Court of Appeal considered that the relevant paragraphs suggest that a public authority may induce an individual to become a CHIS either expressly or implicitly and it is the activity of the CHIS in exploiting a relationship for a covert purpose which is ultimately authorised by RIPA, whether or not that CHIS is asked to do so by a public authority.

The Court of Appeal said this case concerned an approach to the appellant and accordingly the question was "what is he being induced or asked or assisted to do". It considered that if to *any extent* he is being induced or asked or assisted to do any of the following then the approach falls within Part II of RIPA:

- To engage in establishing or maintaining a personal or other relationship for the covert purpose of obtaining information or to provide access to any information to another person or disclosing information obtained by the use or as a consequence of such a relationship;
- To engage in obtaining information by means of establishing or maintain such a relationship for the covert purpose noted above; or
- To engage in conduct incidental to establishing or maintaining such a relationship for the covert purpose noted above.

The Court commented:

> "It matters not whether the relationship between the CHIS and the subject would have continued in any event or if the information being provided is incidental to that relationship. What is objectionable is *any* manipulation of a relationship by a public authority. That is what engages Article 8 ECHR which article includes the right to establish and develop relationships."

Application to the facts of this case

The Court of Appeal found that the appellant was at the very least being induced to engage in maintaining a personal relationship with his "friends" and to engage in maintaining or establishing relationships with other members of the community for the covert purpose of facilitating the use of such relationships to obtain information and to disclose information obtained by the use of such relationships in relation to dissident republican terrorist activities:

> "Applying the proper construction of section 26 to the facts of this case we consider that [the trial judge] was entirely correct to come to that factual conclusion. We consider that it is plain that the approaches fall within Part II of RIPA. That means that it is plain that the approaches were regulated and it is plain that the Code does apply, so that the judge was correct to refuse leave in relation to the challenge that the approach was unregulated."

The Human Rights claim

An approach by a public body to an individual seeking to engage him in the conduct of a CHIS requires not only to be compliant with Articles 2, 3 and 8 ECHR but the effectiveness of the individual, if he agrees to be a covert source, depends on his identity and activities being kept confidential. The Court said that a public approach such as occurred on the main Newry Road may not only be in breach of Convention obligations, but also may not be in the public interest as it might be an ineffective method of encouraging the supply of information to the police.

The Court of Appeal considered that, on the present facts of this case, a human rights claim by the appellant was clearly arguable against the Chief Constable and the question was whether that claim is one within the exclusive jurisdiction of the Tribunal.

Section 65 of RIPA and the impact on the application for leave against the Chief Constable

Section 65 of RIPA establishes a tribunal for the purpose of section 7 of the Human Rights Act 1998 in relation to any proceedings for actions incompatible with Convention rights.

The Court of Appeal held that the conduct in this case was the conduct of asking or inducing or assisting the appellant to be a CHIS and so it was conduct to which Part II of RIPA applies and the Tribunal was therefore the only appropriate tribunal for proceedings against the Chief Constable for actions incompatible with Convention rights.

The Court of Appeal agreed with the trial judge's conclusion that, in relation to the application for leave against the Chief Constable, the complaints the applicant sought to make should be made to the Investigatory Powers Tribunal and that "there is no arguable case in respect of which the court should grant leave to apply for judicial review against the PSNI and that any complaint the applicant may have in this area should be directed to the Investigatory Powers Tribunal and not this court." It dismissed the appeal in so far as it related to the application for leave to apply for judicial review in respect of the decisions of the Chief Constable.

The alternative ground of delay and the challenge to the decision of the Chief Constable

The High Court held in the alternative that the proceedings against the Chief Constable were not initiated promptly or within a period of 3 months from the matters complained about so that leave should also be refused on that basis. However, the appellant contended that the complaint related to a continuing lack of a publicly accessible policy in place to regulate approaches that did not fall within Part II of RIPA. The Court of Appeal said that in the event the question of an ongoing breach did not arise as it had considered the approaches fell within Part II of RIPA and it was therefore a matter for the Tribunal and not a judicial review.

The challenge to the decision of the Ombudsman

The High Court held that it was arguable that the Ombudsman was under a duty to provide reasons for his conclusions and that it was arguable that the content of the Ombudsman's letters failed to explain sufficiently the process by which the decisions arrived at were made. However, the judge also reached the conclusion that the appellant's complaints as a whole were complaints which could be made to the Tribunal and on that basis he stayed the judicial review proceedings against the Ombudsman as the correct way to proceed is to make a complaint to the Tribunal.

The Court of Appeal noted, however, that the Ombudsman is not mentioned in subsection 65(6) of RIPA and so a decision as to whether there has been a failure by the Ombudsman to investigate Convention rights complaints or a failure by the Ombudsman to give adequate reasons in relation to any determination of an investigation into Convention rights complaints is not within the jurisdiction of the Tribunal. On that basis the judicial review proceedings could have proceeded against the Ombudsman despite the fact that the Tribunal was the only appropriate tribunal for proceedings against the Chief Constable for actions incompatible with Convention rights.

The Court of Appeal however considered that the trial judge was correct to conclude that the appellant's case was, and remained, centrally concerned with the question whether the Chief Constable acted lawfully when approaching him in 2015 so that it was first and foremost a case about the Chief Constable. The reason for the appellant's complaint to the Ombudsman was his complaint that the Chief Constable had acted unlawfully and that was also the reason for the initiation of judicial review proceedings against the Ombudsman and the Chief Constable. The Court agreed with the judge and dismissed the appeal against that part of the judge's order.

The question of delay in relation to the challenge to the decision of the Ombudsman

The High Court judge left open the question of delay in so far as it relates to the proceedings against the Ombudsman. The Court of Appeal, however, considered that the proceedings were commenced within 3 months of the matters complained of given that the Central Office was closed on Sunday 22 May 2016 and the proceedings were commenced on the next day. It further noted that an amendment to Order 53 rule 4 is contemplated to omit the words "promptly and in any event" as a consequence of a decision of the European Court of Justice in which it was held that the requirement of promptitude is insufficiently certain and incompatible with the principles of certainty and effectiveness in European law.

The Court of Appeal held that as there had been no determination of the question of delay there was accordingly no need for it to make any order in relation to that issue.

Conclusion

The Court of Appeal dismissed the appeal.

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

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