

R (National Council for Civil Liberties) v Secretary of State for the Home Department & Anr

Judgment of Divisional Court: 29 July 2019

Judges: Lord Justice Singh, Mr Justice Holgate

Press summary

1. In [R \(National Council for Civil Liberties\) v Secretary of State for the Home Department \[2018\] EWHC 975 \(Admin\); \[2019\] QB 481](#) the Divisional Court (a part of the High Court, when there is more than one judge) gave judgment on the first part of the Claimant's challenge to the Investigatory Powers Act 2016 ("the 2016 Act"). That challenge was brought under European Union ("EU") law. It concerned only Part 4 of the 2016 Act, concerning powers to require the retention of "communications data", which was the relevant part which had then been brought into force.
2. In the present case the Court was now concerned with the second part of the Claimant's challenge, which arises under the Human Rights Act 1998 ("HRA"). This challenge concerns various other parts of the 2016 Act, which have now been brought into force on various dates. The only remedy which the Claimant sought is a declaration of incompatibility under section 4 of the HRA.
3. The Claimant challenged four different sets of provisions in the 2016 Act. What they all have in common is that they concern "bulk" powers rather than powers which are directed at any particular individual who may be a potential subject of interest (sometimes called "targeted" surveillance). The relevant provisions are as follows:
 - (1) Part 6, Chapter 1, which relates to bulk interception warrants.

(2) Part 6, Chapter 3, and Part 5: these concern warrants for bulk and thematic “equipment interference”.

(3) Part 7, which relates to warrants for bulk personal datasets.

(4) Part 6, Chapter 2, and Parts 3-4: respectively warrants for bulk acquisition of “communications data” and retention notices for, and acquisition of, communications data. “Communications data” is not the “content” of communications but other matters such as “where, when and who”.

4. In broad terms the Claimant’s case is that:

(1) The provisions of the 2016 Act under challenge are incompatible with Article 8 (the right to respect for private life and correspondence) and Article 10 (the right to freedom of expression) of the European Convention on Human Rights (“ECHR”) because they are too wide. They lack the “minimum safeguards” established by the European Court of Human Rights for secret surveillance regimes. They are neither necessary in a democratic society nor proportionate.

(2) Further or alternatively, the powers lack sufficient safeguards to comply with the “minimum requirements” taken together. For this reason they are said not to be “in accordance with the law” (the phrase used in Article 8) or “prescribed by law” (that used in Article 10). This was the main focus of the Claimant’s submissions before us.

(3) The powers lack sufficient safeguards for lawyer-client communications and journalistic material, including the confidential sources of a journalist’s information.

5. A further ground of challenge has arisen only recently as the result of disclosures made by the Defendants pursuant to their duty of candour and co-operation with the Court. This argument is to the effect that the way in which the Security Service (MI5) has in fact operated its handling procedures in the last few years has been unlawful; and that this demonstrates that the safeguards in the 2016 Act against the risk of abuse of power, even if they were adequate in theory, are not effective in practice.
6. The Divisional Court (Lord Justice Singh and Mr Justice Holgate) refused the application for judicial review. In its conclusions at paras. 394-398 the Court said:

“394. We can readily understand that the Claimant, the NUJ and others in society have concerns about the existence of “bulk” powers to obtain large amounts of data, much of which will be of no interest to the intelligence and security agencies. Similar concerns have been expressed both within and outside Parliament. Having had regard to those concerns, Parliament decided to enact the Investigatory Powers Act 2016 in the form which it did. This included a suite of inter-locking safeguards against the possible abuse of power, including the creation of the office of the Investigatory Powers Commissioner.

395. Important though the function of this Court is, the only question which is before us is whether the 2016 Act is compatible with the Convention rights, an exercise which is entrusted to the Court under section 4 of the Human Rights Act 1998.

396. The question which is before this Court has to be addressed against the background that the First Section of the European Court of Human Rights has already held, in the *Big Brother Watch* case, that in principle bulk powers are compatible with the ECHR. There is no requirement for there to be reasonable grounds for suspicion in the case of any individual. For that reason that question was not the subject of argument before

this Court but will be considered by the Grand Chamber of the European Court of Human Rights in *Big Brother Watch*.

397. The primary focus of the arguments before this Court has been on the ground that the 2016 Act does not contain sufficient safeguards against the risk of abuse of power and that, accordingly, it is inconsistent with the requirement that interference with human rights must be “in accordance with the law”. For the reasons we have given above we do not accept those arguments.

398. Furthermore, we are very conscious that the recent disclosures made by the Defendants about MI5’s handling procedures have caused the Investigatory Powers Commissioner obvious concern and will cause others in society concern too. However, for the reasons we have explained above, those matters do not persuade us that the 2016 Act itself is incompatible with the Convention rights. We would also observe that those matters continue to be the subject of further investigation and supervision by the IPC. They may also be the subject of future litigation. It would not be appropriate for this Court to pre-empt anything that might be said in such future proceedings.”

NOTE: This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <https://www.judiciary.uk/judgments/>