

IN THE HIGH COURT OF JUSTICE

Claim No: CO/1052/2017

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

Before the Rt Hon Lord Justice Singh and the Hon Mr Justice Holgate

B E T W E E N:

THE QUEEN

on the application of

LIBERTY

Claimant

- and -



(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(2) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendants

ORDER FOLLOWING 27-28 FEBRUARY 2018 HEARING

UPON:

- (1) the Claimant applying for permission to apply for judicial review of certain provisions of the Investigatory Powers Act 2016 by its Claim Form and Statement of Facts and Grounds dated 28 February 2017

- (2) the Claimant having been granted permission in relation to its claim for judicial review insofar as it relates to Part 4 of the Investigatory Powers Act 2016 (the “**Part 4 Claim**”) by Mr Justice Jeremy Baker on 14 June 2017 (the “**Permission Order**”)
- (3) a costs capping order having been made pursuant to sections 88 and 89 of the Criminal Justice and Courts Act 2015 in respect of the Part 4 Claim by Mrs Justice Lang DBE on 4 October 2017 (the “**CCO**”)
- (4) the parties having agreed that the Part 4 Claim insofar as it is based on EU law should be determined before the Part 4 Claim insofar as it is based on the European Convention on Human Rights (“**ECHR**”)
- (5) the Defendants having applied by application notice dated 19 February 2018 for an extension of time to file and serve their skeleton argument (the “**Skeleton Extension Application**”)
- (6) the Defendants having applied on 2 March 2018 to rely upon the Second Witness Statement of Andrew Scurry served on 28 February 2018 (“**Scurry 2**”) and the Third Witness Statement of Andrew Scurry served on 2 March 2018 (“**Scurry 3**”) and their exhibits (the “**Further Evidence Application**”)
- (7) the Court hearing counsel for the Claimant and counsel for the Defendants in relation to the Part 4 Claim insofar as it is based on EU law

IT IS DECLARED THAT:

1. Part 4 of the Investigatory Powers Act 2016 is incompatible with EU law in that (without prejudice to the application of EU law in a national security context) in the area of criminal justice:
 - (1) access to and use of retained data is not limited to the purpose of preventing and detecting serious crime; and
 - (2) access to retained data is not subject to prior review by a court or an independent administrative body.

2. Part 4 of the Investigatory Powers Act 2016 must be amended so as to remedy these incompatibilities within a reasonable time, being no later than by 1 November 2018.

AND IT IS ORDERED THAT:

1. The time to file and serve the Defendants' skeleton argument is extended until 19 February 2018.
2. The Defendants shall pay the Claimant's costs of the Skeleton Extension Application in any event, assessed on an indemnity basis.
3. The parties may rely upon Scurry 2 and Scurry 3 and their exhibits.
4. The Defendants shall pay the Claimant's costs of the Further Evidence Application in any event, assessed on the standard basis.
5. The costs the Defendants shall pay to the Claimant pursuant to paragraphs 2 and 4 of this Order:
 - (1) shall not form part of (and shall be in addition to) the amount fixed as the limit of the liability of the Defendants under paragraph 1 of the CCO; and
 - (2) shall be paid by the Defendants to the Claimant within 21 days of the amount of those costs being agreed or, in default of agreement, detailed assessment.
6. The Part 4 Claim insofar as it is based on EU law is allowed in part, as set out in the declaration above.
7. The Part 4 Claim insofar as it is based on EU law is stayed until 14 days after the day on which a judgment of the Court of Justice of the European Union in the reference made by the Investigatory Powers Tribunal in Case No IPT/151/110/CH (the "**CJEU Judgment**") is handed down, insofar as the Part 4 Claim concerns:
 - (1) the application of EU law in a national security context;
 - (2) any requirement under EU law to retain data within the EU; and

(3) any requirement under EU law to notify persons after data relating to them has been accessed or used,

(the “**Stayed Part 4 Claim**”).

8. Otherwise, the Part 4 Claim insofar as it is based on EU law is dismissed.
9. The Claimant shall file and serve any further Grounds for Review for the Part 4 Claim insofar as it is based on the ECHR (if so advised) within 28 days after the date on which a draft code of practice in relation to Part 4 is laid before Parliament pursuant to Schedule 7 to the Investigatory Powers Act 2016 and the Defendants shall file and serve any further Detailed Grounds of Resistance (if so advised) within a further 28 days thereafter.
10. Upon the CJEU Judgment being handed down:
 - (1) The Claimant and Defendants shall use their best endeavours to agree orders disposing of the Stayed Part 4 Claim and, failing agreement on such orders, directions for the Court’s determination of the Stayed Part 4 Claim.
 - (2) In default of such agreement being reached, the Claimant and the Defendants shall within 14 days after the day on which the CJEU Judgment is handed down file and serve submissions of no longer than five pages on the directions it is submitted the Court should make for determination of the Stayed Part 4 Claim.
11. Save as set out in paragraphs 2 and 4 of this Order, the costs of and occasioned by the hearing on 27–28 February 2018 are reserved.
12. Time for applying to this Court, and for filing an appellant’s notice at the appeal court, for permission to appeal against paragraph 8 of this Order is extended until 21 days after the Stayed Part 4 Claim is disposed of or determined or further order (and the hearing of the Part 4 Claim insofar as it is based on EU law is adjourned accordingly for that purpose).
13. Liberty to apply.

Dated this 27th day of April 2018