

**IN THE INFORMATION TRIBUNAL
NATIONAL SECURITY APPEALS PANEL**

BETWEEN :-

JOHN STEVENSON

Appellant

- and -

**SECRETARY OF STATE FOR
THE HOME DEPARTMENT**

Respondent

DECISION

INTRODUCTION

1. We were:-

- (1) Appointed Members of the Data Protection Tribunal (now renamed the Information Tribunal) (“the Tribunal”), under Section 6(4) of the Data Protection Act 1998 (“the Act”); and

(2) Designated by the Lord Chancellor to hear National Security Appeals, pursuant to paragraph 2(1) of Schedule 6 to the Act.

2. This Appeal is brought by John Stevenson (“the Appellant”). It is brought under Section 28(4) of the Act.

3. The Security Service (“the Service”), commonly known as “MI5” is a “Data Controller” for the purposes of the Act. The Appellant requested the Service to disclose any of his “personal data” which the Service holds (“the First Request”).

4. The Service claimed exemption from the provisions of the Act. They did so pursuant to Section 28(1) of the Act, on the ground that the exemption was required for the purpose of safeguarding national security.

5. The Service relied upon a Certificate (“the Certificate”) signed by the Secretary of State for the Home Department (“the Respondent”), dated 10 December 2001. The Certificate was issued pursuant to Section 28(2) of the Act.

6. Section 28(4) of the Act provides that a person directly affected by the issuing of such a Certificate may appeal to the Tribunal against the Certificate. The Appellant is a person entitled to exercise that right of appeal.

7. By Section 28(5) of the Act, if, on an appeal under Section 28(4) the Tribunal finds that, applying the principles applied by the Court on an application for Judicial Review, the Respondent did not have reasonable grounds for issuing the Certificate, the Tribunal may allow the Appeal, and quash the Certificate.

THE PRINCIPLES

8. In Baker v Secretary of State for the Home Department (2001) U.K.H.R.R. 1275 the Tribunal (Sir Anthony Evans PC, Hon Michael J Beloff QC and James Goudie QC) held that:-

- (1) The 1998 Act must be read “so far as it is possible to do so” in a manner which protects human rights under the European Convention of Human Rights (“the ECHR”) and the Human Rights Act 1998;

- (2) The Tribunal must in consequence apply the notion of “proportionality”;
- (3) The Tribunal must also construe the Act, so far as it is possible to do so, so as to accord with the European Community Data Protection Directive, made by the European Parliament and Council on 24 October 1995, and indeed that Directive is correctly enforceable against the Respondent as an emanation of the UK State;
- (4) The question therefore in any case is whether the issue by the Respondent of his Certificate is reasonable in the extended sense of proportionate by reference to the precepts of the ECHR, and especially Article 8 thereof, as interpreted by the European Court of Human Rights and the UK Courts;
- (5) Given that national security is a legitimate aim, the concept of proportionality is the key issue;
- (6) A margin of judgment is to be allowed to the Respondent; and

- (7) The intensity of Supervision by the Tribunal is to be dictated by context, including the national security context.

THE STARTING POINT

9. The Appellant made a subject access request to the Service on 23 January 2002, and formalised the First Request on 20 February 2002. The Service responded on 14 March 2002. The Service gave a “neither confirm nor deny” (“NCND”) response.

10. The Service notified the Appellant of the First Certificate. On 3 June 2002 the Appellant appealed against the First Certificate. On 20 September 2002 he amended his Grounds of Appeal. The Respondent served an amended Response in December 2002.

GOSLING

11. The Respondent has submitted that the Appellant’s case is bound to be dismissed, because it is indistinguishable from the case of Gosling v Secretary

of State for the Home Department (“Gosling”), in which on 1 August 2003 the Tribunal (Sir Anthony Evans PC, Robin Purchas QC and Kenneth Parker QC) dismissed an appeal against the same Certificate.

12. In Gosling the Tribunal expressed “serious doubts” whether Parliament could have intended that the Service itself would exclusively, without any form of “independent scrutiny, determine the application to particular cases of the NCND policy”.

13. However, in Gosling the Tribunal was satisfied that the Investigatory Powers Tribunal (“the IPT”), set up under Section 65 of the Regulation of Investigatory Powers Act 2000 (“RIPA”), could consider a complaint made by a data subject about the giving of an NCND response by the Service to his subject access request. That complaint would either be that the Service’s conduct in relation to him in giving him an NCND response was unlawful, and/or that the Service had acted incompatibly with his ECHR rights (and therefore unlawfully) in giving him an NCND response.

14. Thus, the Service’s decision that an NCND response should be given is liable to be subject to independent scrutiny by the IPT. On that basis, the

Tribunal was satisfied that the delegation by the Respondent to the Service of the decision in Gosling whether the NCND policy should apply in any particular case was not unreasonable, and therefore in Gosling dismissed the appeal.

THE IPT

15. The Appellant in 2007 submitted a complaint to the IPT (“the First IPT Complaint”) which failed as it appears essentially because it was out of time. Nor was complaint made by the Appellant about reliance upon the Certificate by the Service.

THE PRESENT APPLICATION

16. The Respondent invited the Tribunal to exercise its power under Rule 12(1) of the Information Tribunal (National Security Rules) 2005, SI 2005/13 (“the Rules”) to determine the Appellant’s appeal by dismissing it forthwith.

17. Rule 12 (Summary disposal of appeals) provides, inter alia:-

- “(1) Where, having considered -
- (a) the notice of appeal,
 - (b) the relevant Minister’s notice in reply, and
 - (c) In the case of an appeal under section 28(6) of the 1998 Act, the respondent data controller’s reply,

the Tribunal is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith, it may, subject to the provisions of this rule, so determine the appeal.

(2) Where the Tribunal proposes to determine an appeal under paragraph (1) above, it must first notify the appellant and the relevant Minister of the proposal.

(3) A notification to the appellant under paragraph (2) above must contain particulars of the appellant’s entitlements set out in paragraph (4) below.

(4) An appellant notified in accordance with paragraph (2) above is entitled, within such time as the Tribunal may reasonably allow -

- (a) to make written representations, and
- (b) to request the Tribunal to hear oral representations

against the proposal to determine the appeal under paragraph (1) above.”

18. The notification provisions of Rule 12 were complied with. The Appellant chose, through his Solicitors, to make written representations.

THE SECOND REQUEST

19. On 7 August 2008 the Appellant made an updated subject access request under Section 7 of the Act (“the Second Request”). The Service responded on 12 September 2008. The Service reiterated the NCND response.

THE APPELLANT’S CASE

20. By letter dated 20 October 2008 the Appellant’s Solicitors write:-

“1. It is submitted that the application by Mr Stevenson should stayed and not dismissed. The submission of the Treasury Solicitors relying on the case of “Gosling” was that this tribunal was not the appropriate forum for the complaint pursued by the applicant but that it was more appropriate and that his proper remedy was before the Investigatory Powers Tribunal.

2. It is accepted on behalf of Mr Stevenson that an application was made by him to the Investigatory Powers Tribunal and that application was rejected by that body on the basis that they had no jurisdiction.

The reason that the Investigatory Powers Tribunal declined jurisdiction was that Mr Stevenson’s application to them was framed in relation to

breaches that had occurred prior to the setting up of the tribunal itself. It is conceded on behalf of Mr Stevenson that that was an appropriate position for the Investigatory Powers Tribunal to reach.

3. However a further application has been submitted to the Investigatory Powers Tribunal arising out of an alleged breach by them which, if accepted, would clearly have arisen during a period in which the Investigatory Powers Tribunal has jurisdiction.

4. It is therefore submitted by the applicant that in the interests of justice it would be right for him to pursue that application and that the pending appeal to the Tribunal Service be stayed pending the outcome.

5. It is submitted that it would prejudice no party to stay this appeal on such a basis. The only party affected by any delay in coming to a resolution might be the applicant himself and it is the applicant that makes this application.”

THE RESPONDENT'S CASE

21. The Respondent by letter dated 22 October 2008 opposed the stay for the following reasons:-

“1. The appeal relates to alleged events going back to the 1970s. It was commenced over six years ago in June 2002, and the

Appellant still claims that he is not yet in a position to have it determined.

2. This appeal is unarguable as the facts are indistinguishable from those in that of Gosling and I refer to my Counsel's Note sent on 26 June setting out why this appeal should be summarily dismissed under rule 12(1).
3. I agreed in April 2007 to a stay of the appeal pending the Appellant's application to the Investigatory Powers Tribunal (IPT) which dismissed his complaint on 15 June 2007. This was not a concession on my part that the Respondent's arguments in this case were in any way dependent on the success or otherwise of the IPT complaint.
4. This request for a further stay is for yet another application to the IPT and the reason for this, it would appear, is that the earlier complaint was inadequately pleaded.
5. It may be that some remedy will be obtained before the Investigatory Powers Tribunal but that will be a separate matter from this appeal. Whatever the outcome, it cannot affect this appeal which is clearly covered by the Gosling decision.

I would ask, therefore, that the request for a further stay of this appeal be refused and that the Tribunal now proceed to dismiss this appeal summarily under rule 12(1)."

SUBSEQUENT DEVELOPMENTS

22. Before a decision was made to grant or refuse a stay pending the Appellant making a further complaint to the IPT, the Appellant's Solicitors, by letter dated 20 February 2009, wrote that the Appellant had taken the matter back before the IPT, who on 30 December 2008 had decided the matter ("the Second IPT Complaint") against him, and that the Appellant's case remains that his case is distinguishable from the authorities quoted by the Respondent (in particular Gosling) in that there is not a remedy available to the Appellant before the IPT and that any such remedy is only available through the proceedings before this Tribunal.

23. The Second IPT Complaint failed on 30 December 2008 because it was simply a repeat of the First IPT Complaint, which was ruled as being out of time, and was therefore an abuse of process.

THE ISSUE

24. The sole issue before us is whether Gosling is distinguishable.

25. The Appellant has advanced no sufficient argument for distinguishing Gosling. Nor do we for our part see any. The appeal is in our judgment doomed to failure.

26. There is appropriate machinery for independent scrutiny in a case such as the Appellant's, namely by the IPT; and the Appellant has twice made a complaint to the IPT about the Service's NCND response. That scrutiny is, however, subject to legitimate procedural safeguards, for example in relation to the time within which any complaint must be made. If an Appellant does not succeed in obtaining a remedy pursuant to that machinery, having regard to those safeguards, that is not in our judgment a sufficient basis for distinguishing Gosling. Nor, in our judgment, is it a sufficient basis for distinguishing Gosling that the complaint relates to matters occurring before RIPA came into force.

DISPOSAL

27. Having considered the Appellant's representations, we summarily dismiss the Appeal under Rule 12(1).

30 April 2009

JAMES GOUDIE QC

HON MICHAEL J BELOFF QC

ROBIN PURCHAS QC

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