MIGRANT PHONE SEIZURES JUDICIAL REVIEW: BRIEFING NOTE

In its two judgments of 25 March 2022 and 14 October 2022 (published 11 November 2022) in the case of *R (HM, MA & KH) v Secretary of State for the Home Department*, the High Court has comprehensively ruled that the Home Office's secret and blanket policy of seizing mobile phones and extracting data from migrants arriving in the UK by small boat was unlawful and has strongly criticized its conduct of the litigation and breach of the duty of candour .

What had the Home Office been doing?

From at least April 2020 and potentially before, up until 23 November 2020 the Home Office had operated a policy of searching all migrants who arrived by small boat and seizing any mobile phone and SIM card discovered.

Arrivals were told that they must give their PIN number and that it was an offence not to do so. The PIN numbers given were taken to allow the Home Office to extract data from locked phones.

Up until 20 June 2020 the Home Office's policy was to extract **all** data from seized mobile phones. Between 20 June 2020 and 22 July 2020 the Home Office amended their policy to extract all data from the past 30 days (although a lack of technical capability may have meant that full data extractions were still being undertaken despite the change in policy). From 22 July the Home Office would only extract data in more limited circumstances.

In many (though not all) cases a paper receipt would be given for the seizure of mobile phones. Arrivals were told to call the number on the receipt for return of their mobile phones. Later that phone number was changed to an email address. However, the phone was in an unmanned office

and so usually not answered. Emails were also not responded to until at least October 2020 when the Home Office finally began to implement a process to return phones.

We believe that nearly 2000 phones and SIM cards were confiscated by the Home Office under the unlawful policy during 2020. It is unclear how many phones have now been returned. It was revealed through this litigation that the Home Office was unable to return at least 439 phones to their owners as it had not kept appropriate records (see Candour judgment, para 56).

The Candour Judgment

The latest judgment in the case concerned the Home Office's failure to be transparent and provide accurate information about its mobile phone seizure policy during the case. In pre-action correspondence the Defendant had asserted that claims of a blanket policy were nothing more than "*anecdote and surmise*" and denied the existence of the mobile phone policy. The Defendant failed to correct that position in the Acknowledgments of Service that it filed.

The High Court was very critical of its conduct. It found [para 10]:

> *"We are concerned with a failure of governance which allowed an unlawful policy to operate for an unknown length of time prior to November 2020."*

Deprecating the actions of government lawyers who had, in their own words, "*ducked*" and "*sidestepped*" the existence of the blanket policy, the Court criticized a "*collective error of judgement*" [para 38] that led to failings in the duty not to mislead the court and the duty of candour [para 39], which resulted in a "*very unsatisfactory*" [para 40] state of affairs.

The High Court stated that it would have taken the rare step of awarding indemnity costs against the Home Office if it had not already conceded that [para 5]. The judgment usefully affirmed that the Treasury Solicitor's Guidance on the Duty of Candour reflects the law [para 16], which is

important for other litigation amidst indications the government would prefer its lawyers to take a less exacting approach to their legal duties.

The Policy Judgment

In the main judgment of 25 March 2022 the High Court found that the Home Office's policy in operation up to November 2020 was unlawful in several respects:

- The search power relied upon by the Home Office (Schedule 2, paragraph 25B Immigration Act 1971 and s.48 Immigration Act 2016) did not authorize the search of a person for phones or other items [para 88].
- There was no evidence that a second search power relied on (Schedule 2, paragraph 25B Immigration Act 1971) was appropriately relied on [para 54)].
- Seizing and retaining the Claimants' mobile phones under a blanket policy violated Article 8 ECHR [para 135].
- Seizing and retaining the relevant data was also unlawful under the Data Protection Act 2018 [para 34].
- Retaining phones for a minimum period of 3 months was "*capable of giving rise to a disproportionate interference with ECHR rights and data protection legislation*" [para 35].
- A blanket policy of extracting all data was unlawful under the ECHR and DPA 2018 [para 35].
- Requiring PIN numbers to be handed-over was unlawful, as was a policy that required this to be routinely done [para 36].
- The Home Office's Data Protection Impact Assessments were also unlawful as they "*did not properly assess the risks*" [para 34].

Implications for the Future

The Home Office has said that they are no longer operating this policy of routinely seizing all mobile phones from small boat arrivals. Any phone seizures which are now occurring should be

on a much more targeted and proportionate basis and with administrative arrangements in place to ensure their swift return.

The Information Commissioner's Office is now investigating the Home Office failings following a self-referral by the Home Secretary.

The Home Office has written to many people (though possibly not all) whose phones were seized to inform them whether their data protection rights had been breached by their data being extracted. However, the High Court held that this letter was not adequate and unusually, required the Home Office to write further letters to alert the large number of migrants affected to the existence of the ruling. It should now be writing to those that the Home Office has identified as having been affected by this unlawful policy telling them to seek legal advice.

The High Court's Order has been placed on the Home Office website for at least a year. It is available here.

Compensation claims

Anyone who had their mobile phone taken under the Home Office's unlawful policy before 23 November 2020 is eligible for compensation. Anyone wishing to claim compensation should seek legal advice. There is no need to await receipt of a letter from the Home Office informing the person that they were subjected to the unlawful policy.

It would be advisable for anyone wishing to claim compensation to keep a copy of any letters they receive from the Home Office about this issue and/or their seizure receipt.

Gold Jennings solicitors and Deighton Pierce Glynn solicitors (who acted for the Claimants in the litigation) can act for and advise persons affected by the Home Office policy in seeking compensation and the return of missing phones (subject to capacity).

Persons whose phones were seized by the Home Office up to 23 November 2020 may contact: newcaseenquiries@dpglaw.co.uk and info@goldjennings.co.uk