Case No: CO/1416/2017

Neutral Citation Number: [2018] EWHC 438 (Admin)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2018

**Before** :

**THE PRESIDENT OF THE QUEEN'S BENCH DIVISION**
**(SIR BRIAN LEVESON)**
**MR JUSTICE MALES**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **THE QUEEN**<br>**(on the application of AMBER DALY)** | **Claimant** |
| **- and -** | |
| **THE COMMISSIONER OF POLICE OF THE METROPOLIS** | **Defendant** |
| **- and –** | |
| **SOUTH EAST MAGISTRATES COURT** | **Interested Party** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Henry Gow** (instructed by **Higgs Newton Kenyon, Liverpool**) for the Claimant
**Pravin Fernando** (instructed by **Department of Legal Services, Metropolitan Police**) for the Defendant
The Interested Party did not appear and was not represented

Hearing date: 13 February 2018

- - - - - - - - - - - - - - - - - - - - -

# Judgment

**Sir Brian Leveson P :**

1. This judicial review challenges the application by the Metropolitan Police for a search warrant pursuant to s. 23 of the Misuse of Drugs Act 1971 addressed to premises at 109 Marsala Road, London, SE13 7AE. The warrant was granted on 12 December 2016 by District Judge (Magistrates Court) Hunter sitting at South East Magistrates Court and is alleged to have been obtained on an entirely misconceived basis.

*The Facts*

2. It is important to start this analysis with the information before the District Judge. The application for the warrant (which was made by Con. Layton) contains the following generic information:

> "Whilst the police helicopter was flying over the local area, the crew noticed the address that is the subject of this … report. It was seen on the thermal image camera to be emitting a significantly greater amount of heat from the roof/chimney stack area compared to all the neighbouring and surrounding premises.
>
> A significantly high proportion of incidences of buildings displaying similar heat levels to this have in the past proven to be caused by the use of hydroponic lighting to accelerate the cultivation of cannabis plants. The heat, which these lights also produce, is usually vented through the loft space which is why the roofs stand out well on an airborne thermal imager. Alternatively, the heat could be routed through multiple flues making the chimney stack stand out in a similar way.
>
> Greater temperature differentials, or greater proportions of any roof being heated, tend to indicate that the factory is very active and cropping is imminent.
>
> There is also a significant risk to public safety due to the elevated risk of fire and overloading and bypassing of the electrical circuits within the premises. For those reasons the ASU recommend a timely investigation into the causes of the high heat emissions from this property."

3. Imagery was available (to which I shall return) but it was also reported that the premises had been seen previously by crew of a 'non-London' aircraft and information passed across (without imagery). The application goes on to make it clear that every effort is made correctly to identify addresses from available mapping but officers must satisfy themselves that the imagery tallies with the correct street address. In that regard, a search was made as to the registered occupants on a voters' registry and a name identified (which was not that of the applicant). The report goes on to reveal enquiries conducted by Con. Layton on 9 December 2016 (based on information provided by the air support unit):

> "As PC Layton passed the location, a scent of cannabis could be smelt in the air upon the terraced housed road. … The lower half of the address bay window open and nets seemed slightly dirty and a bicycle was locked to the railings outside the premises. The upper windows of the address were in complete darkness where it is apparent they have been blacked out with some film or black bag material. PC Layton is a drugs expert and suspects based on information from the air support unit of high heat emitted from the location in combination with the scent of cannabis and the windows being blacked out are in keeping with the premises being used as a cannabis factory."

4. Con. Layton gave evidence before the district judge. He relied on the intelligence and numerous complaints from the local community of anti-social behaviour and drug taking in the area. He also submitted the thermal image obtained by the police helicopter. The note provided by the legal advisor reads:

> "The address came to police attention based on the database system … air support unit. The best you can get. The air unit were not specifically targeting the address. I smelt cannabis. The windows are blacked out. I've been to the address this morning as postman. It appears to be one premises. There were droplets in the air from not using a carbon filter."

5. On that basis the district judge concluded that it was reasonable and proportionate to grant the warrant, based on the contents of the information, recording his reasons to the effect that there were "reasonable grounds to suspect that person(s) on the premises are in possession of controlled drugs" and that it was "necessary and proportionate".

6. Thereafter, on 15 December 2016, a number of police officers forced entry to the address without prior warning. The claimant, Ms Amber Daly, was on the premises; she was handcuffed and detained for around 40 minutes whilst the officers executed the warrant. The search proved negative.

7. Against that background, Ms Daly seeks to challenge the decision made by the Metropolitan Police to apply for, and execute, the search warrant; this is a precursor to further civil proceedings for damages. Permission was refused on paper by Singh J (as he then was). This was on the grounds that the claim had been pursued against the wrong party (on the basis that the Magistrates Court should have been the defendant and the Commissioner the interested party rather than the other way around); that there had been undue delay in bringing the claim without good reason; and that, in any event, Ms Daly had no arguable basis in public law for challenging the decision. A renewed application (relying on further evidence) before Sir Stephen Silber was granted on the basis that both delay and merits would fall to be argued.

8. Mr Henry Gow for Ms Daly explains the delay by the difficulty experienced in obtaining the relevant material from the Metropolitan Police justifying the warrant which was a necessary precursor to this application. For my part, I have real concerns about the form in which the proceedings have been brought (grounds not being served but ostensibly replaced by a skeleton argument) and I am not convinced that the

application was brought in time (being outside three months following the execution of the warrant) but, having regard to the significance of the substantive issue, I put these aspects of the case to one side and turn to the merits.

*The Challenge*

9. In the original skeleton argument, after disclosure of the application for the warrant, it was asserted that it was to be inferred that no investigation had been carried out, that the property had not properly been identified and that there was no reliable intelligence relating to 109 Marsala Road. It was contended that the property had been renovated, that there were roller blinds and that the smell of cannabis is similar to the common plant *phlox subulata*.

10. Following the disclosure of the thermal imaging said to have been taken on 20 November 2016, further evidence was produced on behalf of Ms Daly. Thus, in a statement dated 4 September 2017, without reference to any contemporaneous material, Ionana Giurgi, the Chief Executive Officer of the property management service refurbishing 109 Marsala Road asserted that a new boiler was installed at the property on 14 November 2016 with roller blinds installed on 21 November which was said to be the date on which the refurbishment finished. The statement then states somewhat baldly:

> "The boiler was put on full power thereafter to dry out the renovation work."

11. More significantly, a thermography report was provided by Mr Andy Smale of Expert Energy dated 25 August 2017. He observes that the roof pitch in each image appears dark and "working on the assumption that dark tones represent low temperatures, this suggests a low level of heat radiated from the roof pitch" although referring to the suggestion that the property was unheated, he notes that there was "apparently heat emitting from the separate roof pitch .. so this would seem unlikely unless heating had been isolated to that area". He concludes:

> "There is uncertainty around whether the thermal images supplied represent warm temperatures with light or dark tones and this could not be clarified in the time available. This issue is pivotal to the case and would need to be settled in order to provide a reasonable degree of certainty as to whether or not there is an unusual amount of heat emission from the roof of the Claimant's property.
>
> If it is confirmed that the thermal images follow the usual practice of dark tones representing cold temperatures, then accordingly there is no evidence of unusually high heat emission …"

12. This led to the service by the police of detailed evidence as to the imagery in the form of a statement from David Arnold, a reconnaissance imagery analyst with over 10,000 hours of experience operating the relevant camera. He explains the difference between 'white hot' and 'black hot' imagery and provides his interpretation of the image taken on 20 November 2016 in these terms:

> "The image has been captured in Infra Red and the operator has selected black as the 'hot' source. It has been captured at night where there are no natural sources of heat (sun). … Within the image the vehicle bonnets can clearly be identified and show as 'black' sources. This is because the heat from the vehicles' engines has caused the bonnets to absorb some of this heat from underneath and transmit it into the atmosphere. Equally, the same can be said about a chimney stack in the bottom left of the image … which again clearly shows up as black because it is transmitting heat. …
>
> Therefore my opinion is that the roof of 109 Marsala Road clearly identifiable in black was absorbing some form of active heat source from within the house or loft space which was being transmitted into the atmosphere and viewed by the aircraft's thermal sensor."

13. Civilian Tactical Flight Officer John Redhead (who has 20 years' experience engaged in helicopter operations a significant part of which involved the use of thermal image cameras and the interpretation of the imagery) was part of the crew that obtained the thermal imagery on 20 November 2016. Having been provided intelligence by another crew that there was a potential hot house in Lewisham, he confirmed that the camera was set to 'black' hot and that 109 Marsala Road stood out from its neighbours and "showed clear potential as a cannabis factory". He also referred to confirmation from features shown within the images (car bonnets, street lighting, chimneys).

14. The preceding evidence was all served in proper form and within the time limits laid down by Sir Stephen Silber. Exhibited to a recent skeleton argument from Mr Gow, marked HG1 (itself entirely outwith the appropriate approach to the service of evidence) and out of time is an e-mail from Dave Underwood, the Customer Support Manager of HeliaMedia Ltd in these terms:

> "If you are referring to the IR image, it is definitely using White hot. You can tell by the car in the for ground (sic) has very white areas. All roofs are pale, whereas if black hot it would be reversed."

15. Mr Gow mounts a full-scale attack on the factual basis for the application, arguing that the evidence upon which he relies demonstrates beyond argument that the material placed before the district judge was misconceived and that the objective and independent evidence was overwhelming that the roof of 109 Marsala Road did not justify the conclusion that there was a heat source within it. He submits that the court was misled and that inaccurate information was put before it due to a failure to carry out proper checks prior to the application; the police thereby failed in their duty of disclosure.

16. Mr Gow submitted that whether the inaccuracy was malicious or just mistaken was irrelevant. He agreed that what was revealed by the thermal imagery was at the heart of his application and postulated that Con. Layton may have convinced himself that a heat source was generated from the house. He pointed to the observation in *G v*

*Commissioner of Police for the Metropolis* [2011] EWHC 3331 (Admin) per Laws LJ at [11] that the grounds on which relief was sought was that the information supplied by the police was "inaccurate, misleading and incomplete" and argued that the court had "the inherent right to scrutinise the factual basis on which a warrant is applied for". Later on in his submissions, he argued that although he did not have to prove malice, he did contend that there was malice and if backed into a corner he would assert it.

17. Mr Pravin Fernando for the Metropolitan Police responds to the case advanced by Mr Gow by challenging the proposition that mistake of fact was an available ground for judicial review in circumstances such as these. He also submitted that Con. Layton fully complied with the obligations set out in Part II of the Police and Criminal Evidence Act 1974 ("PACE") when applying for the warrant and provided ample evidence to support reasonable grounds for his suspicions. The evidence from the thermal imaging available to him more than sufficiently justified the application and, although Con. Layton maintained the accuracy of the information given to the district judge, whether the net curtains were "slightly dirty" or the upper windows blacked out or covered with a dark roller blind could not have made any difference to the judicial determination which followed.

18. Mr Fernando went on to argue that it was trite that judicial review proceedings deal with law and not fact although a misdirection as to a relevant fact might support such a claim (see *Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1047). Further, judicial review was not generally amenable to resolving disputes of fact (see *Anufrijeva v London Borough of Southwark* [2004] QB 1124 at 1153G).

19. Mr Fernando also pointed out that there were circumstances in which an error of fact may give rise to a claim where the mistake was as to an existing fact. In those cases, however, that fact must have been 'established' in the sense that it was uncontentious and objectively verifiable: see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 at [66]. That was not the case here where the Metropolitan Police maintained the accuracy of what it reported to the district judge.

20. Mr Gow responded by saying that it could not be right that whether relief was granted depended on whether the facts were in dispute. He repeated that he had produced objective and independent evidence to demonstrate the falsity of the information placed before the court. When challenged with the situation facing the police when provided with what they believed to be reliable information from a named informant (such as the whereabouts of a firearm) which turns out to be mistaken, he argued that the situation was different because here the police could check the information with which they had been provided.

*Search Warrants*

21. The legislative background in this case is that s. 23(3) of the Misuse of Drugs Act 1971 permits a police officer to enter premises, if necessary by force, following the grant of a search warrant by a magistrates court. The power to search premises and to seize and retain property found by him on persons or premises is governed by Part II of PACE and by Code B of the Code of Practice for Searches of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises.

In summary, prior to seeking a warrant, paragraphs 3.1 to 3.3 of the Code require that reasonable steps must be taken to check that information that appears to justify an application is "accurate, recent and not provided maliciously or irresponsibly". Furthermore, reasonable enquiries must have been made to ascertain whether or not anything is known about the current occupiers of the premises.

22. A justice of the peace may only authorise entry and search of a premises if satisfied that there are reasonable grounds for believing that an indictable offence has been committed, that there is material on the premises which is likely to be of substantial value to the investigation of the offence, that the material is likely to be relevant evidence, and that the material would not be subject to legal privilege. Furthermore, the court must also be satisfied that it would not be practicable to communicate with any person entitled to grant entry to the premises.

23. In making an application a constable is duty bound to state the grounds on which he makes this application, the enactment under which the warrant would be issued, and any more information required to make the judge satisfied of the above conditions pursuant to s. 15 PACE. The constable must provide any supporting evidence in writing, and answer on oath anything that the judge seeks to clarify.

24. This is not a power to be undertaken lightly. In *R (Faisaltex) v Preston Crown Court* [2009] 1 WLR 1687 Keene LJ described search warrants as "a draconian power", and in *R (Mercury Tax Group) v HMRC* [2008] EWHC 2721, Underhill LJ characterised them as a "nuclear weapon" in the court's armoury which, unless properly justified, involves a gross infringement of civil liberties. As such Elias LJ asserted that they should only be sought as a "last resort and should not be employed where other less draconian powers can achieve the relevant objective": see *R (on the application of Mills) v Sussex Police and Southwark Crown Court* [2014] EWHC 2523 (Admin). It should only be made in good faith and for a statutory purpose.

25. In *Mills*, Elias LJ went further (at [26(ii-v)]) and specified the procedure that should be adopted by both the police officers and the magistrates court. In summary he states that officers are duty bound to provide the court with full and frank disclosure, highlighting any material which is potentially adverse to the application. This includes a duty not to mislead the judge in any material way. The judge must then apply a rigorous critical analysis to the application so that they can be satisfied that the evidence provided justifies the grant of the warrant, and give reasons for their decision.

26. That brings me to an examination of *E v Secretary of State for the Home Department* [supra] the context of which is vital to an understanding of its true import. The issue in *E* was whether factual evidence was admissible on appeal with a view to showing that the basis on which a claim for asylum had been refused was mistaken. Specifically, the appellants contended that reports by Human Rights Watch and CIPU showed that the Secretary of State and then the Immigration Appeal Tribunal had taken too sanguine a view about conditions in the appellants' respective home countries of Egypt and Afghanistan. The decision was that the IAT ought to have considered whether this new evidence met the well-known *Ladd v Marshall* criteria.

27. Giving the judgment of the court, Carnwath LJ (as he then was) said (at [66]):

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', the sense that it was uncontentious and objectively verifiable. Thirdly, the open (or his advisers) must not have been responsible for the state. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

28. Although this paragraph speaks of appeals on a point of law rather than judicial review, Carnwath LJ had earlier explained that the applicable principles are broadly the same in the two cases: see [40] to [43]. What is critical, however, is that the court was considering the justifiability of a decision affecting status and thus rights in the future (namely the grant of asylum) and was not analysing a decision which was determined on reasonable grounds and then only, entirely properly, on the basis of the information then available. For my part, I would not be prepared to extend mistake of facts into decision making in relation to search warrants. To do so would be to remove search warrants of their potency because whenever the execution of the warrant does not reveal evidence which justifies the reasonable grounds, it will be contended that the mistake of fact effectively removes the protection of police officers acting pursuant to the warrant.

29. I am reinforced in that view by the recent decision of this court in *R (Director of Public Prosecutions) v Sunderland Magistrates' Court* [2018] EWHC 229 (Admin). Judicial review was successfully sought on the ground that in refusing prosecution applications to adjourn proceedings, magistrates' courts in two separate cases had acted under a mistaken belief of fact. After citing the passage in *E* set out above Sweeney J said at [11]:

> "It is therefore clear that, in administrative law, mistake of fact resulting in unfairness can be a ground for judicial review if five conditions are met, namely that:
>
> (1) All the participants had a shared interest in co-operating to achieve the correct result.
>
> (2) There was a mistake as to an existing fact (which could include a mistake as to the availability of evidence on a particular matter).
>
> (3) The fact or evidence has been "established" – in the sense that it is uncontentious and objectively verifiable.

> (4) The person relying on the mistake, and/or his advisers, was not responsible for the mistake.
>
> (5) The mistake played a material (not necessarily decisive) part in the court's reasoning."

30. Sweeney J concluded his judgment at [116] by underlining four points, with which Hamblen LJ expressly agreed at [117]. The first of these was:

> "Given the danger of opening unintended floodgates, my conclusion as to the application of material mistake of fact leading to unfairness being available as a ground of judicial review in the context of criminal proceedings is strictly limited to applications concerned with the determination of applications to adjourn trials in the Magistrates' Courts - which, as *Balogun v DPP* already makes clear, should only be made if the circumstances are exceptional."

31. In my judgment, therefore, *E* cannot simply be translated into criminal jurisprudence: while material mistake of fact leading to unfairness can be available as a ground of judicial review in some circumstances, whether it is in fact available will depend upon the nature of the case before the court.

*Analysis*

32. Mr Gow's submissions must be analysed at two levels. The first is whether subsequently established material mistake of fact can invalidate a warrant otherwise properly obtained. In my judgment, it cannot. Neither is that surprising. Mr Gow did not shrink from making it clear that quashing the search warrant by means of judicial review on the grounds that the information put before the magistrates' court was mistaken would leave the way open to civil action without proof of malice (which is otherwise required when the police act pursuant to a warrant properly obtained).

33. Mr Gow protested that this requirement of malice placed a difficult and often insuperable obstacle in the way of a claimant who seeks to recover such damages. That, however, is to say no more than that the law should not impose such a requirement. But it does: see *Gibbs v Rea* [1998] AC 786 at 797B to 798B. Provided that the police have not misled the court, have made full and frank disclosure, highlighting to the judge any material which is potentially adverse to the application in any material way and have taken reasonable steps along the lines identified in the Code of Practice, the warrant is intended to provide protection in the absence of proof of malice.

34. Mr Gow was therefore thrown back on his supplementary submission that the facts do establish malice not least because of the evidence (which he contends cannot be controverted) that the thermal imagery was wrongly interpreted on the basis that it was set to white rather than black hot and that Con. Layton could not have seen slightly dirty curtains or blackened windows. I have no hesitation in rejecting that submission.

35. First, the expert evidence of the thermal imagery from John Redhead (who was responsible for obtaining it on 20 November 2016) is clear as is that of David Arnold who subsequently analysed it. Andy Smale, who provided expert evidence for Ms Daly, does not assert that the account provided by the police is wrong: he speaks of uncertainty whether heat is represented by light or dark tones and comments that resolving that issue is 'pivotal'. Mr Smale provides no further evidence. The only other material on which Mr Gow relies is the assertion a year later by the contractor renovating the premises that it was the day following that the heat was turned on (unsupported by any documentary material) and the one line e-mail provided by Dave Underwood served attached to his skeleton without any reference to his expertise or the requirements of those providing expert evidence. As for the former, it could hardly be considered as beyond challenge; as for the latter, I would not admit what is no more than an assertion in the form provided by a customer service manager whose expertise to provide the opinion is simply unexplained.

36. In any event, there is no basis for suggesting that Mr Redhead was animated by malice towards the occupants of an address which he could not identify; he was merely looking for a heat source. Neither is there any evidence for suggesting that Con. Layton was activated by malice in accepting at face value the information which Mr Redhead provided and which he passed on to the district judge. He checked that the particular house had been identified (by reference to the adjoining tree), made appropriate enquiries as to the occupation of the premises and made a further visual inspection. The smell (which it is merely asserted could have been other vegetation) and the presence of droplets cannot be contradicted not least because it is not said to have been specific to the house subsequently searched. As for the net curtains and the covering on the windows, even if inaccurately noted, they do not start to justify a complaint of malice or provide material on which this warrant could be struck down.

*Conclusion*

37. It has been necessary to descend into detail analysing the facts and law in this case in order to deal with what, in my judgment, are serious misconceptions in the way in which this case has been presented. Con. Layton clearly presented reasonable grounds to the district judge who properly granted the warrant.

38. In the event, this application for judicial review is misconceived and I would dismiss it.

**Males J :**

39. I agree.