R v Secretary of State for the Home Department ex p David Davis MP, Tom Watson MP, Peter Brice and Geoffrey Lewis [2015] EWCA Civ 1185

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The Court of Appeal recently handed down judgment in an appeal concerning the Data Retention and Investigatory Powers Act 2014 ("DRIPA"). This piece of coalition government emergency legislation, which received royal assent on 17 July 2014, was challenged by MPs David Davis and Tom Watson, represented by Liberty. The judicial review concerned the Home Secretary's powers to order the retention of communications data under section 1 of the Act. The Home Secretary appealed against the judgment of the Divisional Court ([2015] EWHC 2092 (Admin)), which found section 1 of DRIPA to be contrary to the CJEU's judgment in Joined Cases C/293/12 and C/594/12 *Digital Rights Ireland Ltd* and *Seitlinger and Others* ("Digital Rights Ireland"). The Divisional Court's order disapplied section 1 with effect from March 2016. The Court of Appeal accepted, on a provisional basis, the Home Secretary's argument that *Digital Rights Ireland* did not lay down mandatory requirements applicable to all Member States' domestic data retention regimes, contrary to the Divisional Court's interpretation. The Court of Appeal has decided to refer questions to the CJEU concerning the meaning of the *Digital Rights Ireland* judgment.

Factual background

Section 1 of DRIPA empowers the Home Secretary to issue a notice requiring any public telecommunications operator to retain relevant communications data for up to 12 months. The Home Secretary must consider the requirement to be necessary and proportionate for one or more of the purposes in s22(2)(a)-(h) of the Regulation of Investigatory Powers Act 2000. These purposes include national security, crime prevention and public safety. There is no requirement in the legislation that the issuing of a retention notice be subject to prior judicial or independent authorisation.

Access to the retained data is governed by Chapter 2 of Part 1 of RIPA, by which public authorities may by notice require communications service providers to disclose the data to them. Safeguards include, for example, that acquisition must be considered necessary and proportionate for a specified purpose by a designated person. Access may also be by court order or other judicial authorisation or warrant, or as provided by regulations.

Communications data does not include the content of a communication but does reveal the other information about it including the sender, recipient, time, place and method

of communication. It was common ground in this litigation that communications data can be highly revealing and informative despite not including communications content. They are increasingly used by security services to combat serious crime and as a counter-terrorism tool. The human rights and privacy implications of mass retention of such data prompted interventions from Open Rights Group, Privacy International and the Law Society of England and Wales.

Digital Rights Ireland

On 8 April 2014, the CJEU gave judgment in *Digital Rights Ireland*. It was common ground between the parties in the DRIPA litigation that the *Digital Rights Ireland* judgment invalidated the Data Retention Directive (2006/24/EC) as it was found to be incompatible with Articles 7 and 8 of the EU Charter and Article 8 ECHR. It was also unambiguous that at various points in the judgment, the CJEU identified safeguards which were absent from the Data Retention Directive (especially from [54] to [68]). These included a lack of clear rules governing access to the retained data and specifically the absence of any requirement for prior judicial or independent authorisation for access.

However, in other respects the judgment in *Digital Rights Ireland* has proved ambiguous and has been interpreted differently across Member States. Some countries, including Austria, Slovenia, Belgium and Romania, have interpreted the judgment as laying down mandatory requirements of EU law. They have taken the view that the Court of Justice was not merely pointing out flaws with the Data Retention Directive, but was instead identifying features which are required of any data retention legislation, whether at the EU or the domestic level. This was the submission of the Claimants in the present litigation.

Sweden has taken the view that the judgment was sufficiently ambiguous to merit a reference to the CJEU on its proper interpretation, and the Stockholm Administrative Court of Appeals' reference is now pending as Case C-203/15 *Tele2 Sverige AB*.

The Secretary of State's position in the DRIPA litigation is that the Court of Justice in *Digital Rights Ireland* was not laying down mandatory requirements of EU law. It was considering a reference concerning the validity of the Data Retention Directive and so was not required to – and did not - consider the validity of any domestic legislation.

A further area of uncertainty surrounding the judgment is whether the Court of Justice intended to expand the scope of Articles 7 and 8 of the EU Charter beyond the content of Article 8 ECHR.

Divisional Court Judgment

The Divisional Court accepted the Claimants' view that Digital Rights Ireland lays down mandatory requirements of EU law applicable to Member States' domestic legislation. Based on this interpretation, it accepted the Claimants' argument that the data retention regime in s.1 DRIPA is incompatible with Articles 7 and 8 of the EU Charter and Article 8 ECHR. It concluded that section 1 of DRIPA is inconsistent with EU law because some of those mandatory requirements were not met. Specifically:

(a) section 1 DRIPA does not lay down clear and precise rules providing for access to and use of communications data retained pursuant to a retention notice to be strictly restricted to the purpose of preventing and detecting precisely defined serious offences or of conducting criminal prosecutions relating to such offences; and

(b) access to the data is not made dependent on a prior review by a court or an independent administrative body whose decision limits access to and use of the data to what is strictly necessary for the purpose of attaining the objective pursued.

Court of Appeal

The Secretary of State appealed on the basis that the judgment below was based on a misunderstanding of the CJEU's judgment in *Digital Rights Ireland*. The Home Secretary again argued that this judgment merely invalidated the EU data retention regime without laying down rules for domestic regimes. It was her submission that the points at which the CJEU identified features of the Data Retention Directive which caused it to be invalidated were nothing more than the CJEU describing protections absent from the EU regime.

In its judgment, the Court of Appeal expressed a provisional view accepting, in large part, the Home Secretary's interpretation. It held that *Digital Rights Ireland* does not lay down mandatory requirements of EU law with which national legislation must comply. It also expressed doubt that the CJEU in that case intended to go beyond Strasbourg Art 8 ECHR jurisprudence in interpreting Articles 7 and 8 of the EU Charter.

The Order of the Divisional Court is suspended until further Order of the Court of Appeal following the preliminary ruling of the Court of Justice.

Reference to CJEU

At the request of the Home Secretary, the Court of Appeal decided to refer questions as to the correct interpretation of *Digital Rights Ireland* to the CJEU. The request for a preliminary ruling was made on 4 December 2015. The Court of Appeal asked that the Court of Justice expedite the reference, if possible joining it to, or hearing it with, the *Tele2* reference.

The questions referred are:

> (1) Does the judgment of the Court of Justice in Joined Cases C-293/12 and C-594/12 ***Digital Rights Ireland and Seitlinger***, ECLI:EU:C:2014:238 ("***Digital Rights Ireland***") (including, in particular, paragraphs 60 to 62 thereof) lay down mandatory requirements of EU law applicable to a Member State's domestic regime governing access to data retained in accordance with national legislation, in order to comply with Articles 7 and 8 of the EU Charter ("the EU Charter")?
>
> (2) Does the judgment of the Court of Justice in ***Digital Rights Ireland*** expand the scope of Articles 7 and/or 8 of the EU Charter beyond that of Article 8 of the European Convention of Human Rights ("**ECHR**") as established in the jurisprudence of the European Court of Human Rights ("**ECtHR**")?

Comment

Given the subject matter and terms of the judgment in *Digital Rights Ireland*, it has implications for how Member States are - and are not - permitted to legislate in respect of communications data in the important areas of counter-terrorism and serious crime, amongst others. Continuing uncertainty as to the effect of the judgment is therefore problematic and it is to be welcomed that an answer will ultimately now be provided by the CJEU.

DRIPA contains a sunset clause, which has the effect that the Act will expire on 31 December 2016. It is nonetheless crucial for Member States to obtain a ruling from the CJEU to clarify the true effect of the judgment in *Digital Rights Ireland,* as the continuing uncertainty calls into question the validity of all legislation concerned with the retention of and access to communications data. This is true not just in the UK but also across the Union.

The questions referred by the Court of Appeal, together with the questions referred by the Swedish court in *Tele2 Sverige*, now provide a useful opportunity for the CJEU to revisit *Digital Rights Ireland* and either confirm that it did indeed intend to lay down general rules under EU law applicable to

all national data retention laws, or clarify that the judgment was not intended to have the dramatic impact it has been found to have by a number of national courts.

Daniel Beard QC and Gerry Facenna acted for the Secretary of State for the Home Department. Azeem Suterwalla (instructed by Bhatia Best Solicitors) acted for the Respondents Brice and Lewis.

The judgment is available at: http://www.bailii.org/ew/cases/EWCA/Civ/2015/1185.html

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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