

UK search warrants following an international Letter of Request (R (on the application of Terra Services Ltd) v NCA)

08/07/2020

Corporate Crime analysis: This judgment is the latest in an application for judicial review brought by Terra Services Ltd against the National Crime Agency (NCA), Secretary of State and Inner London Crown Court. The challenges centre around a search warrant applied for by the NCA on the basis of a direction under section 13 of the Crime (International Cooperation) Act 2003 (C(ICA) 2003) from the UK Central Authority (UKCA)—a direction made following a Letter of Request (LOR) from the US Department of Justice (DOJ) seeking assistance with a search of a storage unit. All challenges were dismissed by the court. It was held that C(ICA) 2003, ss 13 and 16 did not require the UKCA to decide for itself which statutory search power should be the subject of a direction; it was for the relevant authority to carry out a PACE-compliant inquiry. Written by Gemma Rose and John McNamara, barristers at 5 St Andrew’s Hill Chambers.

R (on the application of Terra Services Ltd) v National Crime Agency and others [\[2020\] EWHC 1640 \(Admin\)](#), [\[2020\] All ER \(D\) 139 \(Jun\)](#)

What are the practical implications of this case?

This judgment provides a clear distinction on the roles of the UKCA acting on behalf of the Secretary of State and the ‘relevant authority’, in this case the NCA, when considering Letters of Request and the carrying out of any subsequent direction under [C\(ICA\) 2003, ss 13](#) and [16](#).

What was the background?

The US DOJ issued a LOR to the UKCA on 7 December 2018 requesting assistance with obtaining evidence, thought to be relevant in an ongoing US investigation into a number of criminal offences committed by two US subjects.

After considering the request, the UKCA directed the NCA under [C\(ICA\) 2003, s 13](#) to apply for ‘a search warrant (or other appropriate measure)’ under [C\(ICA\) 2003, s 16](#). The UKCA informed the NCA via email that the ‘conduct under investigation is Money Laundering, Tax Offences, Fraud—Non-Cyber Enabled and other offences in the United States’.

An application for a search warrant was filed by the NCA on 12 December 2018, made pursuant to the direction and to [C\(ICA\) 2003, s 16\(1\)](#), and [section 9](#), paragraph 12 of [Schedule 1](#) to the Police and Criminal Evidence Act 1984 ([PACE 1984](#)). The application was granted on 13 December 2018 at an *ex parte* hearing at Inner London Crown Court. On the same day the NCA executed a PACE search warrant at a storage facility. Officers seized 11 boxes of documentation in both paper and electronic form belonging to Terra Services.

Terra Services challenged the following:

- the *ex parte* application for the search warrant
- the search warrant itself
- the decision said to have been made by the NCA on 26 November 2018 under [section 93](#) of the Police Act 1997 ([PA 1997](#)) to authorise a covert search and examination of the material stored at the unit (the existence of this was neither confirmed nor denied by the NCA)
- the decision of the Secretary of State to direct the NCA under [C\(ICA\) 2003, s 13](#) to apply for ‘a search warrant (or other appropriate measure)’ to obtain material from the unit

The claim proceeded by way of a 'rolled up' hearing which included a closed material procedure (in line with principles set out in *R (on the application of Haralambous) v Crown Court at St Albans and another* [\[2018\] UKSC 1](#), [\[2018\] All ER \(D\) 95 \(Jan\)](#)). Submissions were considered both in open and closed proceedings and a closed judgment was also handed down.

What did the court decide?

The first two challenges were dealt with together. It was submitted on behalf of Terra Services that the NCA had failed in its duty of candour to give full and frank disclosure to the court and that the PACE criteria had not been fulfilled. It was said that the warrant itself was too wide and ambiguous, with no date parameters. It was also said that the judge had not given proper scrutiny to the application. The court disagreed and refused permission on these challenges.

In respect of the arguments made in relation to the authorisation said to have been granted by the NCA pursuant to [PA 1997, s 93](#), permission was refused. The NCA never confirmed nor denied the existence of such an authorisation but agreed the proceedings could continue on the hypothetical basis that a covert search and examination had been authorised. The use of a 'hypothetical assumption' is a familiar approach to the Investigatory Powers Tribunal (IPT) but less so to the Administrative Court. It allows for full argument on the law where it is relevant and necessary while preserving law enforcement's confidential or sensitive information and techniques.

The court found that there was an alternative remedy open to Terra Services, namely that the matter could be referred to and decided by the IPT pursuant to [section 65\(2\)](#) of Regulation of Investigatory Powers Act 2000 ([RIPA 2000](#)). It was held that Terra Services had not demonstrated any exceptional circumstances to enable the discretionary remedy of judicial review to be invoked.

The fourth challenge brought against the Secretary of State was in relation to the decision to direct the NCA to apply for a search warrant pursuant to [C\(ICA\) 2003, s 13\(1\)](#). It was submitted on behalf of Terra Services that the UKCA, acting on behalf of the Secretary of State, had a discretion on whether to accede to the request and, in exercising that discretion, scrutiny must be given to the letter of request to ensure the assistance would be lawful. It was also submitted that the UKCA was duty-bound to consider what measure should be directed and that the scrutiny carried out by the UKCA in this case was inadequate given the speed at which the direction was given.

Terra Services relied on the case of *R v Secretary of State for the Home Department; Ex parte Propend Finance Pty Ltd and Others; R v Central Criminal Court; Ex parte Same; R v Secretary of State for the Home Department, E* [1996] 2 Cr App Rep 26 (not reported by LexisNexis® UK), submitting that it was authority for the proposition that a direction which did not identify the measure to be taken in specific and unequivocal terms was unlawful. Terra Services were granted permission to apply for judicial review on the basis of *Propend*.

However, the court highlighted that *Propend* was decided in relation to [section 7\(4\)](#) of the Criminal Justice (International Co-operation) Act 1990. The submission on behalf of the Secretary of State that [C\(ICA\) 2003, ss 13](#) and [16](#) did not require the UKCA to decide for itself which statutory search power should be the subject of the direction was accepted by the court. It was said that the UKCA is not in a position to properly assess whether a search warrant is truly required; it requires a PACE-compliant inquiry to be carried out by the relevant authority. The court stated at para [67] that: 'There is no basis here for importing a public law obligation to inquire or investigate in circumstances where the statute itself makes it clear (under section 16) that UKCA is not charged with the power to make the appropriate application'.

The court dismissed Terra Services' application for judicial review, stating that *Propend* should be regarded as an authority confined to the previous legislative regime or, that it should not be followed.

The court also held at para [43] that a storage container was not an 'office' for the purposes of [PA 1997](#). Therefore a covert search can take place without judicial approval.

The court mirrored the concerns raised in the recent case of *National Crime Agency v Baker and others* [\[2020\] EWHC 822 \(Admin\)](#), [\[2020\] All ER \(D\) 59 \(Apr\)](#) at the practice of a solicitor

providing hearsay evidence that ought really to come from the lay client. Hearsay is of course admissible in judicial review proceedings, but where the evidence is important, direct evidence is preferable.

Case details

- Court: Queen's Bench Division (Administrative Court)
- Judge: Lord Burnett CJ and Mr Justice Jay
- Date of judgment: 24 June 2020

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