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The rights of ordinary citizens need to be protected against over-zealous HMRC officials in relation to search and seizure warrants

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Why do barristers need to fight to protect the rights of taxpayers against over-zealous tax officials?

Several recent judicial review cases illustrate the need for barristers to fight courageously in judicial reviews for their clients and have resulted in search warrants obtained by HMRC being quashed and the searches executed pursuant to the warrants being declared unlawful. The reasons for this vary from material misrepresentations by HMRC to the judge when seeking the warrant, lack of proper precision by failing to specify the material sought or the offences alleged through to failure to specify who the alleged offenders were.

We all have a strong interest in HMRC successfully detecting and prosecuting tax cheats and to do this they need to be able to obtain and execute search and seizure warrants against suspected tax evaders who might refuse to co-operate or destroy

evidence if less intrusive methods of inspection were used.

However, the causes of recent failures to act properly by HMRC include what one judge referred to euphemistically as “over enthusiasm” by the HMRC officer through to the need for further training of the staff concerned. In the end however HMRC need to temper the “win at all cost” attitude that increasingly seems to affect their approach to tax investigations because it can lead to the misleading of judges when issuing warrants and the waste of resources when those warrants are quashed. The need to improve the quality of HMRC’s approach is made all the more pressing by the extension of their powers since 31 January 2018 to apply to the High Court for Unexplained Wealth Orders and since 16 April 2018 to forfeit cash including money in bank accounts without a court order.

Misleading the Judge

In *R (Hart & Others) v The Crown Court at Blackfriars and HMRC* [2017] EWCA 3091 (Admin) (in which the author appeared for the claimants) the court noted that the applicant for a warrant has a duty to make full and frank disclosure and to draw the judge’s attention to any material facts including those which indicate that the issue of a warrant may not be

appropriate. If information is withheld, which if disclosed would have led the judge to refuse to issue the warrant, then the warrant can be set aside in judicial review proceedings. In this case HMRC had been conducting a detailed investigation into the claimant's business model and the information demands made by HMRC had been so extensive as to lead the claimants to suspect that HMRC might be engaged in a strategy of economic disruption to their business. The civil investigation became a criminal investigation in July 2016. One of the claimants then made a formal complaint and applied for a case review regarding the conduct of HMRC and he sent copies of these to the investigating officers in November 2016.

In December 2016 HMRC applied for search warrants before HHJ Hillen at Blackfriars Crown Court. The application sought to justify the issuing of search warrants rather than a less intrusive production order which the claimants would have been given notice of and time to comply. HMRC said that the latter form of order would seriously prejudice their investigation. They said that there had been such a serious failure of co-operation that giving notice to the claimants may result in the claimants acting in a way that would undermine the investigation by for example destroying documents. This was not true and was not accompanied by sufficient disclosure of the claimants' previous co-operation with HMRC's enquiries so as to allow the judge to give fair consideration to the matter.

According to the divisional court there had been a material misrepresentation of the facts by HMRC and a material failure to draw relevant matters to the judge's attention. If a fair picture had been given to the judge he might have refused to issue the warrants. The warrants were therefore declared unlawful and costs were awarded to the claimants who remain under criminal investigation.

Too Vague and Too Wide

In *Superior Import/Export and others v HMRC* [2017] EWHC 3172 the High Court found that search warrants executed by HMRC had been unlawful.

HMRC had carried on a criminal investigation in relation to large scale excise duty evasion and the subsequent laundering of the criminal funds generated. The total tax loss to HMRC since April 2010 was estimated at over £440m. The appellants were challenging the Birmingham Magistrates' Court decision to grant three search warrants under section 8 of the Police and Criminal Evidence Act 1984 following an application by HMRC. The appellants also challenged the lawfulness of the execution of the warrants by HMRC.

The court rejected the appellants' contentions that the warrants were too

wide and that there had been excessive searching. It observed, however, that the warrants allowed HMRC to search for material its officers deemed relevant. The warrants thus 'impermissibly delegated the responsibility of applying the access criteria of section 8 and therefore failed to provide the protection required by section 15(6)(b)'. The court also noted that there was 'no attempt whatsoever to identify the nature of the fraud or suspected offences'. Similarly, in relation to the 237 companies and individuals named on the warrants, no 'proper particulars' were given.

Not surprisingly then the warrants were quashed.

Failure to State Who the Offenders Were and What the Offences Were

In *Donaghy & Others Re Judicial Review* [2017] NI QB 123 the applicants were former partners in KPMG and were also partners in a separate enterprise called the Focused Finance Partnership, into which HMRC had opened a civil enquiry into its tax affairs. On 11 August 2014 HMRC had thanked Donaghy for his "detailed and comprehensive reply" to some enquiries and said that it would revert to him after a pre-arranged period of leave by the investigating officer concerned. No further contact was made by HMRC until 25 November 2015 when it executed search

warrants at the homes and workplace of the partners. On judicially reviewing the warrants the court found that nowhere on the face of the warrants to search the residential premises did they specify who the alleged offenders were even though each warrant explained that the target material was that which "may link the alleged offenders to the offences". This the judge said made it impossible for the recipients of the warrants to know which material fell within the authority to search and which fell outside. The warrants to search the business premises failed to specify both who the suspects were and what the offences were and gave the recipients even less to go on in deciding the scope of the authority to search. In addition to those defects the warrants also stated that the investigators could also search for "other items which are likely to be kept" at the target address. This phrase was held to actively undermine all attempts to delimit and make clear the scope of the authority to search.

For all these reasons the warrants were found to have been unlawful.

Conclusion

The failures described above are quite shocking given that any search and seizure will prima facie breach Article 8 ECHR and Article 1 of The First Protocol (right

to privacy and peaceful enjoyment of possessions) unless the intrusion is shown to have been necessary and proportionate. While the failures in *Donaghy* and *Superior Export/Import* might have been caused by simple incompetence in drafting the warrants, the material misleading of the Crown Court judge by HMRC in order to obtain the warrants which occurred in *Hart* raises more profound concerns which it is to be hoped that HMRC are urgently and actively addressing particularly in the light of their extensive powers to seek Unexplained Wealth Orders and to seize cash in taxpayers' bank accounts without a court order.

The need for barristers to remain vigilant and fearlessly protect citizens from over-zealous HMRC officials is as important as ever.

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