IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
[2020] EWHC 2967 (Admin)

No. CO/3275/2020

Royal Courts of Justice

Monday, 26 October 2020

Before:

THE RIGHT HONOURABLE LORD JUSTICE SINGH
THE HONOURABLE MR JUSTICE DOVE

B E T W E E N :

THE QUEEN
on the application of
C

Claimant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS — Defendant

- and -

(1) NATIONAL CRIME AGENCY
and Four Others

Interested Parties

REPORTING RESTRICTIONS APPLY

MR R. BOWERS QC and MS S. VINE (instructed by Hogan Brown) appeared on behalf of the Claimant.

MR A. BIRD (instructed by the Crown Prosecution Service) appeared on behalf of the Defendant.

THE INTERESTED PARTIES did not attend and were not represented.

J U D G M E N T

LORD JUSTICE SINGH:

1 This is the judgment of the court to which both its members have contributed. We are grateful to all counsel for their written and oral submissions. We heard submissions at the hearing this morning from Mr Rupert Bowers QC, for the claimant, and Mr Andrew Bird, for the defendant.

INTRODUCTION

2 This is an application for permission to bring a claim for judicial review in relation to a European Investigation Order ("the EIO") which was submitted by the defendant to the authorities in France on 11 March 2020. By virtue of that EIO, the defendant was provided with access to material, which had been obtained through investigation of what is known as the EncroChat system of communication. The nature of the French authorities' investigations is set out below, but, in short, as a result of the passing of the material to the defendant and the first interested party, pursuant to the EIO, and its use in law enforcement, over 1,000 arrests have occurred and many cases are now awaiting trial reliant, at least to some extent, upon the EncroChat evidence.

3 EncroChat is a system of encrypted communication. It operates using specific handsets provided by the EncroChat operator and functions on the basis that the EncroChat devices can only communicate with other EncroChat devices. It is the contention of the defendant and the first interested party that the EncroChat system is used exclusively by criminals engaged in serious organised crime. The reasons provided for this conclusion include, firstly, that the use of EncroChat devices and communications has featured in investigations undertaken by the first interested party from around 2016. It is said that there is both an international and domestic consensus that EncroChat devices are used exclusively by criminals. The system provides a secure means for organised crime groups to communicate in relation to their criminal activity.

THE FACTUAL BACKGROUND

4 In the light of the concern, both of the defendant and the first interested party, in relation to the use of EncroChat as a means of facilitating serious criminal activity and its growth and impact in recent times, on 5 December 2019 the first interested party submitted a proposal for the creation of Project Venetic. This was ratified on 16 January 2020 as an overarching vehicle designed to mitigate the serious organised crime threat from the use of the EncroChat system. The purposes of Project Venetic were the development of a capability to collect intelligence and evidence, to mitigate the impact of the use of the system, along with identifying its vulnerabilities, and the targeting of UK users of EncroChat, based on the assessment that the entire system user base were criminals.

5 It appears that, in late 2019, the French authorities had discovered that an EncroChat server was located in Roubaix as a result of investigations underway at the Lille Regional Court. They were able to obtain images of the EncroChat servers in France, which were subsequently analysed.

6 On 22 January 2020, representatives of the defendant and officers of the first interested party were briefed by French and Dutch prosecutors that they were about to form a joint investigation team ("the JIT") to investigate the EncroChat communication system. The first interested party wished to discuss at the meeting the means whereby they could have access to the server images that had been obtained by the French authorities to examine them for

themselves. At the meeting the French authorities disclosed that they were developing a capability to enable them to collect data from EncroChat handset devices.

7 Whilst, as a consequence of the UK's then imminent departure from the European Union (or the EU) on 31 January 2020, the UK were not able to join the JIT, the French and Dutch authorities were keen for the UK to work jointly with them on the Project, albeit in an operational task force.

8 On 11 February 2020, a formal invitation was received inviting representatives from the UK to attend a meeting with the JIT at Europol, on 19 and 21 February 2020, to be briefed in relation to what was known by the JIT as Operation Emma.

9 On 17 February 2020, the first interested party's Deputy Director of Investigations, Matthew Horne, addressed a meeting in Birmingham, attended by the Unit Head of Organised Crime, North in the International Justice and Organised Crime Division of the CPS, Ian Lee, at which Mr Horne explained that organised crime groups were exploiting the EncroChat communication system for criminal purposes and that the EncroChat platform featured in many organised crime cases. Mr Lee was told that there was not believed to be any legitimate use for these devices.

10 On the evening of 17 February 2020, Mr Lee was emailed the details of the relevant French authorities, having been encouraged to engage with them. On 19 February 2020, the status of Project Venetic was changed to an intelligence development operation and known thereafter as Operation Venetic.

11 Representatives of the first interested party attended the meeting at Europol and the JIT, where the JIT explained that they had developed a capability to obtain data from EncroChat devices which they were expecting to deploy, commencing activity on 10 March 2020. It was explained that the date of commencement of the activity was controlled exclusively by the JIT and that the activity would be undertaken worldwide, including handsets in the UK, regardless of whether the UK gave permission for the activity or not. It was explained that there were two stages to the exploitation of the EncroChat devices. Firstly, when the implant was instructed an image of all data stored on the device would be gathered, including user names, handles, chat messages and notes. Secondly, thereafter, messages would be gathered on an ongoing basis as they were stored in handsets after transmission. The JIT explained that, in order to receive their historic data, a country would need to provide a formal written request and confirmation (i.e. an EIO or Letter of Request) whereupon the data would be shared, but as intelligence only.

12 In order for the first interested party to give consideration to how the information might lawfully be received in the UK, one of the NCA personnel present at the meeting, Emma Sweeting, obtained an explanation on 21 February 2020 from the French lead investigator, Jeremy Decou. Her note of what she was told records as follows:

> "Stage 1 (historical data collection)
>
> An implant within an application will be placed on all EncroChat devices worldwide. This will be placed on devices via an update from the update server in France. On deployment, this implant will collect data stored on the device and transmit this to French authorities. This will include all data on the devices, such as identifiers (for example, INEI and user names) stored chat messages and notes (list not exhaustive). The implant will then remain installed on the device to enable stage 2.

> Stage 2 (forward facing collection) communications (chat messages) on the EncroChat devices will then be collected on an ongoing basis. The messages are collected when they have been stored on the EncroChat devices. Simultaneously, the messages are sent via the chat server, but they will not be collected in transmission, they will be collected from the devices."

13 Mr Horne was briefed in relation to the information obtained at the meeting. He formed the opinion that the operation, which the French authorities were proposing, was, in UK terms, a targeted equipment interference ("TEI") operation or activity. In his evidence, Mr Horne explains that he formed this view on the basis that the communications were encrypted on an "end-to-end" basis and it would, thus, be futile to intercept the data whilst in transmission.

14 What Mr Horne understood the French operation to entail was deploying a piece of software code covertly into the handsets, where it would collect and egress, firstly, historic stored data and then ongoing communications. As such, this was a TEI activity. Furthermore, Mr Horne explains in his evidence that the material provided from Operation Emma was consistent with it being a TEI activity. The first data egress from most devices included seven days' worth of messages, sent and received prior to collection commencing, which was consistent with a burn time being set within the handset by the user. This was also consistent with the data being obtained from the handset rather than in the course of transmission. In addition, the egress data included data which would only be maintained on the device, such as phone books, which was inconsistent with data being captured in the course of transmission. Mr Horne instructed his operational team to seek legal advice on the type of authorisation or warrantry required.

15 On 3 March 2020, Mr Lee emailed Ms Sweeting a template entitled "Police Request to CPS to draft a European Investigation Order (EIO) template" ("the Request Form") Mr Lee wished to understand the specific investigative measures which were to be deployed and the reasons for doing so. This was to enable him to understand whether the activities were lawful.

16 In the meantime, the first interested party prepared and submitted a warrant application for a TEI for the activities to be undertaken within Operation Emma, which was approved by a Judicial Commissioner at the Office of the Investigatory Powers Commissioner ("IPCO") on 4 March 2020. On 5 March 2020, Mr Lee received a completed version of the Request Form, which he had sent earlier, which he forwarded to the allocated CPS lawyer within the International Justice and Organised Crime division, Fran Gough. Ms Gough explains in her evidence that the Request Form that she received from Mr Lee contained a list of 16 named individuals who were believed by the first interested party to be linked to the distribution of EncroChat devices in the UK and who it was believed might be guilty of participating in an organised crime group. She considered that it was apparent from the document that the purpose of the investigation and the EIO was to obtain the content of EncroChat devices to use as evidence in connection with the investigation and prosecution of substantive crimes rather than against those involved in the distribution of the devices. She, therefore, concluded that it was inappropriate to name the individuals in the EIO or to cite the offence of participating in an organised crime group. In her evidence, she explains her view as follows:

> "Experience tells me it is not always possible to specify the exact offences that may ultimately be charged at the outset of an investigation. I considered from the information supplied to me that the most likely offences, which would be revealed from the content of the EncroChat devices, would be offences

> committed by serious organised criminals, such as the supply/importation of drugs and firearms and/or money laundering …
>
> Pursuant to regulation 7 of the Criminal Justice (European Investigation Order) Regulations 2017, it appeared to me that there were reasonable grounds for suspecting that offences had been committed and were being investigated. I formed this opinion on the basis that I was informed 'EncroChat devices have been developed for and are marketed specifically for the criminal community in order to facilitate criminality' and 'the use of these devices has been shown through existing NCA and partner investigations to be underpinning serious and organised crime … Access to this data system would provide investigative opportunities to focus resources against the users of these devices and to prosecute offences under a range of legislation.'"

17 Having finalised a draft of the EIO, Ms Gough completed a record of decision making which she forwarded, together with the EIO, to Mr Lee for approval. On 11 March 2020, Mr Lee and Ms Gough met to discuss the draft EIO and, following some final revisions, it was authorised for transmission to the French authorities.

18 For the reasons which are set out below, the EIO was required to be completed on a specified form. In relation to section B, urgency, the EIO observed that Operation Emma was to be commenced by a date to be fixed, but believed to be around 24 March 2020, and it was requested that the Order be ready for execution "simultaneously with the commencement of the collection process".

19 Within section C(1), the assistance/investigative measures required were described as follows:

> "We request access to data obtained by the French authorities in respect of all EncroChat devices identified as located in the UK. We anticipate the data will be disseminated by Europol systems set up specifically for this purpose. In addition, we ask the French prosecutor to confirm a list of handling conditions for the EncroChat data, confirmation that the data can be shared with the other law enforcement agencies within the United Kingdom by the National Crime Agency (NCA), including with Police Scotland and the Police Service of Northern Ireland, confirmation that UK authorities will be informed once the data handling conditions are lifted and that the data may thereafter be used as evidence in criminal proceedings, if appropriate."

20 Under Section F, the type of proceedings for which the EIO was issued were stated to be

> "with respect to criminal proceedings brought by or that may be brought before a judicial authority in respect of a criminal offence under the national law of the issuing state."

21 Within Section G, the grounds for issuing the EIO, in response to the request in the form to set out the reasons why the EIO is being issued, including the underlying facts and "a description of offences charged or under investigation, the stage the investigation has reached" and any risk factors or other relevant information, the EIO stated as follows:

> "Project Venetic is the National Crime Agency's (NCA) response to the UK support of a global strategic response to EncroChat devices believed to be used exclusively by serious and organised crime. The possession and sale of

EcroChat devices in the UK is not an offence. However, it is believed that EncroChat devices have been developed for and are marketed specifically for the criminal community in order to facilitate criminality in the UK. EncroChat is believed to be the most prolific "criminally dedicated secure communications" platform in the UK, with an estimated UK user base of 9,000 and a worldwide user base in excess of 50,000. It is believed that the use of EncroChat devices has significantly increased during 2019, from an estimated 7,000 devices at the beginning of the year to 9,000 at the end of the year. They are in use by those individuals involved in criminal activities and those who facilitate the logistical and technical support.

The use of EncroChat devices has been reported across NCA and police operations throughout the UK. The highly-encrypted nature of the EncroChat service creates a barrier to the ability of law enforcement to collect both intelligence and evidence in respect of the most serious crimes. The use of these devices has been shown through investigations to underpin serious and organised crime and, therefore, the ability to access this dataset will provide investigative opportunities to focus resources against the users of these devices and to prosecute offences under a range of legislation. It is reasonably expected that this will include the Misuse of Drugs Act 1971, the Proceeds of Crime Act 2002, Firearms Act 1968 and Customs and Excise Management Act 1979. It is believed that the majority if not all users of this platform are from the criminal fraternity, using the platform intentionally to defeat law enforcement. It is believed that there are few valid reasons for which an individual not involved in crime would have use for such highly-expensive and complex methods of communications. It is widely known by those involved in crime that much reliance is placed on attributable evidential telecommunications data during criminal prosecutions and the use of encrypted communications devices, such as EncroChat, allows criminals to arrange their illicit activities safe in the knowledge that such networks cannot be penetrated by law enforcement.

The objectives of this investigation are to develop the intelligence picture and fill the intelligence gaps that remain around EncroChat, including how the UK marketplace links into the upstream organised crime group (OCG), how the devices are sold and who to. In addition, it is proposed in the first instance to create and disseminate intelligence packages to law enforcement agencies to support ongoing investigations and prosecutions, where the use of EncroChat devices has already been identified. Thereafter any remaining data will be used to identify other criminal networks and commence investigations and prosecutions, where appropriate".

22 The receipt of the EIO by the French authorities was confirmed on 12 March 2020. On 24 March 2020, the first interested party was notified that the French authorities' proposed operation had been amended to enable the EncroChat handset, when instructed by the implant, to identify wi-fi access points in the vicinity of the handset. It was concluded that this amendment required a cancellation of the existing TEI warrant and a further application was made explaining this additional capability. This further application for a TEI was approved by a Judicial Commissioner - in fact, the IPC himself - on 26 March 2020.

23 In France, the court at Lille had, successively, authorised the capture of data from the EncroChat servers located in Group A on 30 January, 12 February, 4 March, 20 March and 31 March 2020. Each of the Orders granted on these dates is included within the material

before the court. In fact, the initiation of the data capture by Operation Emma did not commence on 24 March but started on 1 April 2020. On 31 March 2020, Monsieur Decou had been sent the EIO. Pursuant to the Order, the first interested party received the first data from the exploitation on 3 April 2020.

24 The claimant is at present facing criminal proceedings in the Crown Court at Liverpool in which he is charged, along with other defendants, on an indictment containing counts of conspiracy to supply Class A drugs and conspiracy to murder. The essence of the prosecution case against him is that, from EncroChat messages sent and received between the claimant and his co-accused between March and June 2020, it is clear that they were involved in an organised crime group who were trading in the supply of large quantities of Class A drugs and based in the Merseyside area. The prosecution contend that the claimant used the EncroChat platform deploying the user handle "Moonlit Boat". The evidence of EncroChat messages shows the claimant discussing the storage of large quantities of drugs, in particular heroin and cocaine, in safe houses and its movement and sale for substantial quantities of money.

THE LAW

25 The power to issue an EIO is established by the EU Directive 2014/41/EU made in regard to EIOs in criminal matters. The relevant provisions from the Recitals to the Directive are as follows:

> "(7) This new approach is based on a single instrument called the European Investigation Order (EIO). An EIO is to be issued for the purpose of having one or several specific investigative measure(s) carried out in the State executing the EIO ('the executing State') with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority.
> (8) The EIO should have a horizontal scope and therefore should apply to all investigative measures aimed at gathering evidence. However, the setting up of a joint investigation team and the gathering of evidence within such a team require specific rules which are better dealt with separately. Without prejudice to the application of this Directive, existing instruments should therefore continue to apply to this type of investigative measure."

26 The relevant articles of the Directive for the purposes of this case are as follows. Article 1, which has the heading "The European Investigation Order and obligation to execute it", provides:

> "1. A European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State ('the issuing State') to have one or several specific investigative measure(s) carried out in another Member State ('the executing State') to obtain evidence in accordance with this Directive.
>
> The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.
>
> 2. Member States shall execute an EIO on the basis of the principle of mutual recognition and in accordance with this Directive

….

4. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU [the Treaty on European Union] including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected."

Article 2, which is the definition provision, provides:

"For the purposes of this Directive the following definitions apply:

…

(c) 'issuing authority' means:

(i) a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or

(ii) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. In addition, before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1, by a judge, court, investigating judge or a public prosecutor in the issuing State. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO …"

Article 4, which is headed, "Types of proceedings for which the EIO can be issued", provides as follows:

"An EIO may be issued:

(a) with respect to criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;

(b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters.

(c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;

(d) in connection with proceedings referred to in points (a), (b) and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State."

Article 5, which is headed "Content and form of the EIO", provides as follows:

"1. The EIO in the form set out in Annex A shall be completed, signed, and its content certified as accurate and correct by the issuing authority.

The EIO shall, in particular, contain the following information:

(a) data about the issuing authority and, where applicable, the validating authority;
(b) the object of and reasons for the EIO;

(c) the necessary information available on the person(s) concerned.

(d) a description of the criminal act, which is the subject of the investigation or proceedings, and the applicable provisions of the criminal law of the issuing State.

(e) a description of the investigative measure(s) requested and the evidence to be obtained …"

27 These provisions of the Directive have been transposed into domestic law in the provisions of the Criminal Judgment (European Investigation Order) Regulations 2017. In particular, the relevant provisions of Regulations 7 and 8 of the 2017 Regulations provide as follows:

"Power of a designated public prosecutor to make or validate a European investigation order

7.(1) If it appears to a designated public prosecutor—

(a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and

(b) proceedings have been instituted in respect of the offence in question or it is being investigated,

the prosecutor may make an order under this regulation.

(2) A designated public prosecutor in England and Wales and Northern Ireland may, at the request of a designated investigating authority, validate an order under this regulation where it appears to the prosecutor that the conditions in paragraph (1) are satisfied.

(3) An order under this regulation is an order specifying one or more investigative measures to be carried out in a participating State ('the executing State') for the purpose of obtaining evidence for use either in the investigation or the proceedings in question or both.

(4) But an order under this regulation may only be made or validated if it appears to the designated public prosecutor that—

(a) it is necessary and proportionate to make or validate the order for the purposes of the investigation or proceedings in question;

(b) the investigative measures to be specified in the order could lawfully have been ordered or undertaken under the same conditions in a similar domestic case (see regulation 11), and

(c) where the order is for an investigative measure in relation to which specific provision is made in Chapter 2 of this Part, any conditions imposed by virtue of such provision are satisfied.

Form and content of a European investigation order

8. A European investigation order must—

(a) be in the form set out in Annex A to the Directive;

(b) contain the specified information [we would interpose that that term is not as such defined, but it seems clear that that must mean the information specified in the form set out in Annex A to the Directive];

(c) contain any further information as may be required under Chapter 2 of this Part;

(d) be signed by or on behalf of the person making or validating it (the signature may be an electronic one), and

(e) include a statement certifying that the information given in it is accurate and correct."

28. Finally, in the context of the Regulations, we should refer to Regulation 12, which, so far as material, provides,

"Use of evidence obtained under this Part

(1) This regulation applies to evidence obtained from a participating State pursuant to a European investigation order made or validated under this Chapter.

(2) The evidence obtained—

(a) may be used or disclosed for the purposes of the investigation or proceedings in relation to which the order was made or validated;

(b) may not be used or disclosed for any other purpose, without the consent of the participating State from which it was obtained."

29. The researches of counsel were unable to identify any previous cases in which the provisions of the 2017 Regulations have had to be considered by the UK courts. Whilst our attention was drawn, firstly, to authority in relation to the Directive in the Court of Justice of the European Union (or CJEU) and, secondly, to analogies to be drawn with the law in relation to other instruments of criminal investigation, such as letters of request or search warrants, it is unnecessary to rehearse that material for the purposes of this judgment. The focus of the present case and the grounds upon which it is advanced is the question of the correct statutory construction of the 2017 Regulations and, in particular, Regulation 7.

THE GROUNDS AND SUBMISSIONS

30. The claimant's case is advanced on the basis of two grounds: ground one is the contention that the statutory criteria for issuing or validating the EIO were not satisfied and, therefore, the EIO was issued without jurisdiction. In particular, the claimant contends that, prior to the power under Regulation 7(1) of the 2017 Regulations being available, or in order for it to be exercised, there must be a particular offence related to a specified set of facts which has already been committed, which is under consideration and to which the EIO is related at the time when it is issued. The claimant emphasises that the EIO in the present case does not request any investigative measure, but, rather, only seeks the evidence already in the possession of the French authorities at the time of issue.

31. At the time when the EIO was issued, there was no evidence relevant to the charges faced by the claimant in the case before Liverpool Crown Court. There was no request within the EIO that the French authorities undertake a data-collection exercise. Whilst the TEI warrant had been obtained, that was not presented as being an equivalent provision in domestic law for the purposes of satisfying Regulation 7 (4)(b), nor did the EIO request that the French authorities take any step which might be construed as equivalent to that authorised by the TEI warrant. The EIO did not request the transfer of evidence in relation to any specific offence or the *actus reus* of any known criminal offence and this was fatal to its validity. In addition, the claimant contends that Regulation 12 cannot be applied in relation to the use of

evidence obtained because, again, it refers, in the claimant's submission, to a specific investigation, the details of which are required to be provided as part of the specified information required by Regulation 8(b) and Article 5(1)(d) of the Directive. The EIO requests data from some 9,000 handsets without any crime being specifically alleged in relation to any of them.

32. Ground two is that the EIO did not request that the French authorities conduct the interference of the UK-based handsets on behalf of the UK authorities and, therefore, there was no lawful authority for the extraterritorial interference with UK-located handsets. Since it is accepted by the defendant that neither the EIO nor the TEI warrant provided lawful authority for the French interference with the EncroChat handsets in the UK, the existence of the TEI could provide no comfort to the defendant when issuing the EIO.

33. In response to these submissions, the defendant contends that the construction of Regulation 7 advanced by the claimant is unsustainable. The language of Regulation 7 does not preclude the issue of an EIO in circumstances where there is a reasonable suspicion that an offence has been committed, but the particulars of the offence and circumstances of its commission are unknown at the date when the EIO is issued. The defendant submits that the claimant's construction elides the simple requirement of Regulation 7, that there be reasonable suspicion that an offence has been committed, with the use to which material obtained under an EIO may be put, if it discloses other offences.

34. In relation to the latter, any submissions as to the use or admissibility of the material can be made, and should be made, in the Crown Court considering any subsequent proceedings. It is pointed out that there is nothing in either the Directive or the Regulations requiring the evidence subject to the EIO to be in the possession of the executing State at the time when the EIO is issued and, therefore, the claimant's complaint, based on the fact that the material relevant to investigations was not in the possession of the French authorities at the time that the EIO was issued, is untenable. Furthermore, and adopting a purposive approach to the construction of the Regulations, the approach which the claimant contends for is inconsistent with the objective of the Directive. The Directive was devised to facilitate the sharing of material relating to criminal activity to enhance the efficiency of the enforcement of law and order on a cross-boundary basis between participating States. The EIO system was intended to expedite and simplify these processes, whereas the claimant's construction introduces technicality and complexity, serving no good purpose measured against the objective specified as the purpose of the Directive.

35. In relation to ground two, the defendant submits that it is difficult to see what, if anything, this adds to ground one. He observes that the existence of the TEI warrant is irrelevant to the lawfulness of the EIO. It was, however, a reassurance to Mr Lee, since it authorised an investigative measure equivalent to those prepared by the French authorities in executing Operation Emma. As a consequence, none of the submissions under ground two amounts to any proper challenge to the lawfulness of the decision to issue the EIO.

36. At an earlier stage of the proceedings, the defendant pursued a point in relation to delay. The defendant continues to contend that these proceedings have been brought out of time on the basis that time ran for the bringing of challenge to the decision to issue the EIO from the date of that decision and not the date when it came to the attention of the claimant.

Nonetheless, the defendant accepts that it would not object to an application being made by the claimant to extend time.

37. The defendant continues to submit that the claimant does not have standing to bring these proceedings. Whilst it is accepted by the defendant that the claimant has sufficient interest in the use of the material obtained in response to the EIO, he does not have sufficient interest in the EIO itself. The use of that matter is a matter related to a trial on indictment and, therefore, firstly, the claimant has no remedy before the High Court, which has no jurisdiction pursuant to s.29(3) of the Senior Courts Act 1981; and, secondly, in respect of which he has a statutory remedy for the exclusion of evidence under s.78 of the Police and Criminal Evidence Act 1984. In fact, the claimant denies that he was a user of the EncroChat system and disavows any interest, whether private or proprietary, in the material obtained under the EIO. In the circumstances, he is, in truth, little more than a "busybody".

38. In response to these submissions on standing, the claimant submits that, on the basis that he faces criminal prosecution founded upon the material passed to the defendant and others, pursuant to the issuing of the EIO, he is directly and adversely affected by the decision to issue it and, therefore, has sufficient standing to bring the claim for judicial review.

39. Whilst further submissions were made in writing, both in relation to the question of whether or not the court should receive evidence in closed session and also in respect of the form of relief which ought to be granted, in the event of the claimant succeeding, it is unnecessary, in the circumstances which have arisen, to set out those contentions in detail.

CONCLUSIONS

Extension of time

40. Strictly speaking, the claimant requires an extension of time because he seeks to challenge a decision made on 11 March 2020. That is when the grounds for the application first arose, not when the claimant first knew about the decision. Although it is ultimately a matter for the court and not for the parties, we note that no objection is taken on behalf of the defendant to such an extension. In the circumstances, we grant that application for an extension.

Standing

41. The test for standing in a claim for judicial review is whether the claimant has a sufficient interest in the matter to which the application relates. In the circumstances of this case, we consider that this cannot readily be isolated from the legal merits of the grounds, which the claimant wishes to advance in this claim for judicial review, and we would not refuse permission on the ground of standing if otherwise the grounds for judicial review had merit.

Jurisdiction of the High Court

42. Section 29(3) of the Senior Courts Act 1981 provides:

> "In relation to the jurisdiction of the Crown Court, *other than its jurisdiction in matters relating to trial on indictment*, the High Court shall have all such jurisdiction to make mandatory, prohibiting or quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court." (emphasis added)

It will be seen, therefore, that what is excluded from the jurisdiction of the High Court in a claim for judicial review is the Crown Court's jurisdiction "in matters relating to trial on indictment". We have come to the conclusion that this case does not raise matters which fall within that exception. The challenge is to the EIO dated 11 March 2020 and not to any matter relating to the claimant's trial on indictment in the Crown Court.

Adequate alternative remedy

43. The fact that an adequate alternative remedy exists does not "oust of the jurisdiction of this court", as appears to have been the understanding by the claimant of the contention (see, for example, para.62(a) of his skeleton argument). As became clear during the course of the hearing before us, it goes to the court's discretion, not its jurisdiction. The principle does, however, generally apply, because this court will usually exercise its discretion not to permit a claim for judicial review to proceed where there is an adequate alternative remedy. Judicial review is generally a remedy of last resort.

44. In our view, reliance by the claimant on decisions which have concerned, for example, challenges to search warrants by way of judicial review, are not properly analogous (see, for example, *Hargreaves & Others v. Powys County Council Trading Standards Department* 2015 CTLC 138). Such cases concern a warrant that is issued in respect of an individual, for example, to search that person's premises. If the warrant has been unlawfully issued, there will, on the face of it, be a trespass to land and to goods. It is an insufficient answer to such a challenge to say that any evidence obtained as a result of an illegal search can be excluded from a criminal trial. The interests at stake are wider than that. But that is not the situation in a case like the present where the EIO did not concern this individual claimant's person or property at all. The fundamental point in the present case is that the claimant's practical concern is not about the EIO, as such. Indeed, it is his own case that at the date of the EIO, nothing was known about him by the authorities. His fundamental complaint is not about the validity of the EIO itself, but, rather, the use to which the product of the EIO may be put in subsequent criminal proceedings against him. That is exactly what has now happened by way of the indictment in the Crown Court. What that underlines, in our judgment, is that the claimant does, indeed, have an adequate alternative remedy for the only complaint of substance which he can make. That remedy is to be found in the power of the Crown Court to exclude evidence where it would adversely affect the fairness of the proceedings under section 78 of the Police and Criminal Evidence Act 1984 (or PACE).

45. We now turn to address each of the two grounds of challenge, but will consider ground two first, since, on proper analysis, it adds nothing to the substance of this challenge which is to be found in ground one.

Ground two

46. Ground two is that the EIO did not request that the French authorities conduct the interference with the UK-based handsets on behalf of the UK authorities. There was no operative lawful authority for the extraterritorial interference with the UK-located handsets. In support of that ground, the claimant's skeleton argument made the following submissions at paras.56 to 60, submissions which were developed only briefly at the hearing before us.

47. First, it is submitted that it appears to be accepted by the defendant that neither the EIO nor the TEI warrant provided any lawful authority for the French interference with EncroChat handsets located in the UK. Further, it is submitted that, as a consequence, the existence or otherwise of the TEI warrant could have provided no comfort to the defendant in considering whether to issue the EIO.

48. Ms Gough recognised that she was not requesting that the French authorities either execute or implement the TIO warrant, pursuant to either section 99(5)(b) or section 126(2) of the Investigatory Powers Act 2016, or asking them to take any equivalent action. Further, it is submitted that the French authorities needed to be able to act lawfully on behalf of the UK authorities in interfering with the handsets located in the UK. An EIO could not request that a foreign territory conduct a speculative intelligence-gathering exercise on behalf of the UK authorities. The criteria in Regulation 7(1) needed to be satisfied.

49. In conclusion, therefore, it is submitted that the position was reached whereby no legal instrument existed that permitted the French activity, conducted with the complicity of the UK authorities: the EIO did not do so.

50. In our view, none of these submissions has any material bearing on the validity of the EIO. Insofar as the complaint is that an EIO could not request a foreign authority to conduct a speculative intelligence-gathering exercise, because the criteria in Regulation 7(1) do not permit that, that is properly the subject of ground one. It adds nothing to raise it under ground two. No complaint has been or could be made in these proceedings in this jurisdiction against the lawfulness of the French activities. Those activities were governed by French law. Nor is there any complaint made in these proceedings as to the validity of the TEI warrants. Leaving aside the point that no challenge could be brought in this court to those warrants, since any challenge would properly have to be made in the Investigatory Powers Tribunal, the fact is that there is no challenge made in this court to those warrants. The position, therefore, is that those warrants must be treated as being valid for the purpose of these proceedings. The fundamental point, as we have said, is that ground two raises no point which has any material bearing on the validity of the EIO, which is the only decision which is the subject of challenge in this claim for judicial review.

51. We, therefore, turn to the substance of this case which rests upon ground one.

Ground one

52. Ground one, which was developed in the skeleton argument for the claimant, at paras.26 to 55, and was the focus of Mr Bowers' oral submissions, is that the statutory criteria for the issuance/validation of the EIO were not satisfied. It is submitted, on behalf of the claimant, that before a designated public prosecutor may make or validate an EIO, she must be satisfied of the criteria in both Regulation 7(1)(a) and (b). It is submitted that, in respect of the first criterion, it is axiomatic that a particular offence relating to a specified set of facts is

under consideration. If this were not clear from the wording of para.(a) itself, it is made plain by the second criterion in para.(d). Furthermore, reliance is placed on the wording of Regulation 7(3) which defines an EIO. It is submitted that Regulation 7(3) uses the definite article in relation to both "the proceedings" or "the investigation". It, therefore, demands specificity. It is submitted that there can be no proceedings for a criminal offence unless there is a known specified *actus reus*. Similarly, it is submitted there can be no investigation into an offence that is unknown to the investigating authority or that has not been permitted.

53. We disagree. That last proposition contains a logical fallacy. Proceedings may be one thing, but the legislation clearly also covers investigations into criminal offences which may or may not have been committed. That is one of the purposes of an investigation. It is precisely to establish whether an offence has, in fact, been committed or not. In our view, the claimant's submissions founder on the true interpretation of Regulation 7 itself.

54. First, it covers investigations as well as proceedings. There can be an investigation "in respect of the offence in question" even if it turns out that no offence has, in fact, been committed. It certainly does not need to be established that the offence is already known to the investigating authority at that time.

55. Secondly, there is no significance to be attached to the fact that the legislation uses the singular: "an offence" or "the offence". Indeed, Mr Bowers made clear at the hearing before us that it was not his submission that there is any significance to be attached to this. He was right to do so. It is a well-established principle of statutory interpretation that, unless the contrary appears, words in the singular include the plural and vice-versa (see section 6(c) of the Interpretation Act 1978). In the present context, we cannot see that the "contrary appears".

56. Thirdly, it is not necessary at the investigation stage to set out any particular person who is suspected of having committed an offence. Mr Bowers made it clear at the hearing before us that he does not contend otherwise. At the investigation stage, when an EIO is issued, it may not be known that there is an identified, or even identifiable, individual who is the suspected person. That will often be the whole purpose of the investigation.

57. Finally, this is a context in which it is appropriate to refer to the underlying Directive to which the Regulations give effect in domestic law. In our view, it is clear that the underlying purpose of the Directive is to enable mutual cooperation to assist investigations of possible criminal conduct. A broad interpretation is appropriate in order to give effect to that purpose. We can see no reason to give it a narrow or restricted interpretation which would tend to impede or frustrate the achievement of the purpose of the Directive.

58. Before this court, Mr Bowers submitted that this was a classic case of a "fishing expedition". Indeed, he submitted that the defendant has used a trawler in that expedition. In our view, any complaint about the scope of an EIO (for example, that it is overbroad) would properly go to the questions of necessity and proportionality, which expressly have to be considered by the issuing authority under Regulation 7(4)(a). It does not undermine the jurisdiction of the defendant to issue the EIO in the first place. In the present case, no challenge has been made on the grounds of necessity or proportionality; rather the challenge is made at an earlier threshold stage. It is contended that the defendant simply did not have the jurisdiction to issue this EIO at all. We do not accept that ground of challenge.

59. We turn to the terms of the EIO in the present case, in particular section G, which we have set out earlier. In our view, it is clear, when that document is read fairly and as a whole, that Ms Gough did set out certain offences which it was reasonably suspected had been committed. That does not preclude the EIO from also being used to obtain other evidence which may assist in the investigation of other offences.

60. Finally, in this context, we note that at the hearing before us Mr Bowers submitted that this case was an intelligence-gathering exercise and not a request for evidence at all. We do not accept that submission. The EIO requested evidence which the French authorities already had in their possession. As it happens, and as Mr Bird submitted to us, there can be circumstances in which the Directive and the Regulations permit an EIO to request the executing State to engage in the gathering of evidence, which is not yet in their possession. This might happen in "real time"; for example, when a person is kept under surveillance. That possibility in the legislation supports the defendant's submission, which we accept, that there is no requirement in law that an offence has already been committed. It may be committed while a person is under surveillance.

61. Our conclusion on the merits of the two grounds of judicial review then brings us back to the question of whether there is an adequate alternative remedy. We have reached the conclusion that there is an adequate alternative remedy in the form of the ability of the Crown Court to exclude evidence under section 78 of PACE.

DISPOSAL

62. For the reasons that we have given, this application for permission to bring a claim for judicial review is refused.

63. Although we are refusing permission, our judgment addresses a number of issues of principle. We accordingly give permission for it to be cited.

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