IN THE INVESTIGATORY POWERS TRIBUNAL **Case Nos. IPT/17/86 & 87CH**

BETWEEN:

(1) PRIVACY INTERNATIONAL
(2) REPRIEVE
(3) COMMITTEE ON THE ADMINISTRATION OF JUSTICE
(4) PAT FINUCANE CENTRE

Claimants

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS
(4) SECURITY SERVICE
(5) SECRET INTELLIGENCE SERVICE

Defendants

OPEN RESPONSE

8 June 2018

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1. This OPEN response responds to the Claimants' Amended Statement of Grounds of 16 April 2018.[1]

2. Save as follows, it is not possible to respond in OPEN. In particular, the release of any further details would place Covert Human Intelligence Sources (CHIS) at risk of harm, both now and in the future. This would have collateral consequences for the acquisition of intelligence and for the Security Service's ability to recruit and deploy CHIS. For the same reasons, it is not possible for any agreed or assumed facts to be used. Any such facts (in particular once mapped onto any findings made in CLOSED) risk revealing details which would pose the same unacceptable risks to CHIS safety and collateral consequences.

[1] The Amended Statement of Grounds includes the Secretary of State for Northern Ireland as a Defendant. By email of 1 May 2018, the Claimants withdrew their claim against that Defendant.

THE DIRECTIONS

3. Pursuant to her powers under s. 230 of the Investigatory Powers Act 2016, on 22 August 2017 the Prime Minister made the "*Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Security Service agent participation in criminality) Direction 2017*". It provides as follows:

   > *"The Investigatory Powers Commissioner shall keep under review the application of the Security Service guidelines on the use of agents who participate in criminality and the authorisations issued in accordance with them."*

4. This direction ("*the 2017 Direction*") came into force on 1 September 2017 and was published on 1 March 2018.

5. The 2017 Direction replaced a materially identical earlier direction, made by the Prime Minister pursuant to s.59A of the Regulation of Investigatory Powers Act 2000. The "*Intelligence Services Commissioner (Additional Review Functions) (Security Service agent participation in criminality) Direction 2014*" was made by the Prime Minister on 27 November 2014 and came into force on 28 November 2014.

6. That direction ("*the 2014 Direction*") provided as follows:

   > *"The Intelligence Services Commissioner shall keep under review the application of the Security Service guidelines on the use of agents who participate in criminality and the authorisations issued under them."*

7. The 2014 Direction replaced a non-statutory direction to the Intelligence Services Commissioner, made on 27 November 2012, which similarly related to agent participation in criminality.

THE GUIDELINES

8. The "*Guidelines on the use of Agents who participate in Criminality*", to which the 2017 Direction and the 2014 Direction refer, have been in force since 2011. They are attached to this Response. They are redacted in order to protect national security.

9. Of particular relevance is paragraph 9, entitled "*effect of an authorisation*". That paragraph provides as follows:

   > *"An authorisation of the use of a participating agent has no legal effect and does not confer on either the agent or those involved in the authorisation process any immunity from prosecution. Rather, the authorisation will be the Service's explanation and justification of its decisions should*

> *the criminal activity of the agent come under scrutiny by an external body, e.g. the police or prosecuting authorities. In particular, the authorisation process and associated records may form the basis of representations by the Service to the prosecuting authorities that prosecution is not in the public interest. Accordingly, any such authorisation should, on its face, clearly establish that the criteria for authorisation are met, in terms which will be readily understood by a prosecutor."*

10. Accordingly, the Claimants' case proceeds on the basis of a misapprehension, namely that the Security Service's "authorisations" confer, or purport to confer, immunity for criminal acts. This is not the case. Criminal acts remain criminal acts, regardless of whether participation in the act in question has been "authorised" by the Security Service. The Security Service has power to "authorise" such participation as a necessary part of its statutory functions, set out in s.1 Security Service Act 1989.

<u>THE TEMPORAL LIMITS OF THE CHALLENGE</u>

11. Although the Defendants do not take any formal limitation point, nevertheless the challenge should be subject to sensible temporal limits. The Claimants' challenge does not specify any such temporal limits (at §70.1 reference is made to conduct "*prior to 28 November 2014"*, unlimited in time). In the Defendants' submission, the challenge should go back no further than 12 months.

<u>STANDING</u>

12. The Defendants do not ask for standing to be determined as a preliminary threshold issue. However, they wish to put down a marker, namely that they do not accept (and should not be taken to have accepted) that the Claimants have standing to bring either their Human Rights claims (Grounds 1, 2, 3, 4 and 6) nor their judicial review complaint (Ground 5).

<u>CONCLUSION</u>

13. The Defendants submit that the Claimants' challenge should be dismissed.

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VICTORIA WAKEFIELD

8 JUNE 2018