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

B E T W E E N:

(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

Respondents

REPLY TO THE RESPONDENTS' NOTE
For hearing: 27 July 2020

References to the bundle are in the format [Tab / Page / § Paragraph]

Introduction

1. There are two issues:

   1.1. Is the requested information and disclosure relevant? The Respondents submit that the requested information and disclosure is not relevant to the IPCO issue. The Claimants submit that it is relevant to the IPCO issue. In any event, there needs to be an adequate investigation into whether an improper and unfair attempt was made to subvert the fairness of the procedure before the Tribunal. Such a possibility is properly a matter of concern to any litigant and every Court.

   1.2. If the material is in principle relevant, what information and disclosure should be produced? There is a large measure of agreement between the parties on this issue. The Respondents broadly concede that if the information sought is relevant, it should be provided.

Relevance

2. The IPCO issue remains for determination by the Tribunal. The issue is how requests to IPCO for information and disclosure should be dealt with. The Respondents object to the Tribunal obtaining information from IPCO without prior consultation with them. The Respondents claim a right to review material held by IPCO before it is seen by the Tribunal or CttT. In a troubling misunderstanding of the basic constitutional principles governing the Tribunal, the Respondents go as far as to claim a power to object to disclosure to the IPT on grounds of (a) sensitivity and (b) that the consent of a foreign partner agency has not been obtained, "*even for a disclosure into closed*" [2/4/§12].

3. The Respondents are correct that it will often be appropriate for them (and the Claimants) to be consulted on any request to IPCO. But not always. As CttT puts it, any resolution of the IPCO issue must ensure that "*the Tribunal… be able to carry out its functions, including making requests for assistance from the IPC, without interference by the parties*" [5/8/§19].

4. There have been attempts by the Agencies to interfere with the proper operation of the oversight bodies. Prior to the present case, three examples were in the public domain:

   4.1. Firstly, in its 2009-2010 report, the Intelligence and Security Committee noted that that "*questions have been raised about the independence of the Committee*" [13/4/§6]. The Committee noted that there had "*within Government*" been "*misunderstandings as to the statutory independence of the Committee and its work and the nature of the relationship between the Committee and the Prime Minister. It was therefore clear that our procedures needed to be set out formally, for the avoidance of doubt, and to ensure that the Committee has clarity in its future dealings with Government and vice versa*" [13/4/§7].

   4.2. The Committee's "Principles" are set out in Annex A to its report. They include a requirement that there be no attempt to access, control or interfere with documents held by the Committee: "*The Intelligence and Security Committee's data and records remain the property of the Committee, and under its responsibility and control*." Further, "*all records and data – while rightly remaining the property of the originator – are controlled by the Committee… individuals outside of the Committee or its Secretariat must not attempt to control, administer or access the Committee's records or data*" [13/24/§5.2] (underlining added).

4.3. That the ISC needed to record these principles makes clear the nature of the "*misunderstandings*". The same principles must apply *a fortiori* to the IPT, a judicial body. SIS were well aware of the fundamental nature of these principles from 2010 at the latest.

4.4. Further, the ISC publicly stated that its staff should not be put under pressure or have their work interfered with by the Agencies ("… *the Secretariat is responsible to the Committee and must not be put under undue pressure or have its work interfered with by others*") [13/23/§4.1].

4.5. Secondly, the Intelligence Services Commissioner's Report for 2015 describes SIS's non-cooperation with an investigation by Sir Mark Waller. Sir Mark concluded that "*the engagement of SIS with the investigations of the ISC and myself was wholly inadequate*". This caused "*considerable frustrations*" and SIS showed "*a troubling tendency to be defensive and unhelpful, it provided inaccurate and incomplete information and generally sought to "fence" with and "close down" lines of enquiry, rather than engage constructively.*" This was "*extremely unsatisfactory… SIS urgently needs to review and improve its engagement with oversight investigations*" [14/16-18/§6.15-§6.18]. This was a second clear warning.

4.6. Thirdly, GCHQ sought to agree "*some sort of appropriate process or protocol by which we, and perhaps the other agencies or wider government, might better liaise with IPCO to manage any circumstances where a piece of litigation… could raise issues in relation to oversight activity*". The context was the BCD/BPD litigation where IPCO had disclosed, at the request of the IPT, documents of critical importance to the case.

4.7. GCHQ sought to agree this "*process or protocol*" with IPCO without reference to the Tribunal (let alone the Claimant). The Tribunal was not copied in. Understandably, the IPC was unimpressed. Sir Adrian Fulford said in reply "*I do not anticipate any situation where that engagement* [with the IPT] *could be the subject of any form of prior agreement, however transparent, especially with a party which is subject to my oversight*" [5/9]. Sir Adrian published GCHQ's letter and his response and sent copies to the Tribunal.

4.8. This correspondence provided the clearest of guidance to the Agencies that they should not attempt to control or subvert the IPT's statutory requests for assistance to IPCO.

5. These three incidents are the context in which the events of March 2019 occurred:

5.1. On 5 March 2019, two SIS staff telephoned the Secretary to the Tribunal and "*asserted that various inspection reports that had been provided to the Tribunal by… IPCO should not be provided to the President and the Tribunal Members* [or] *Counsel to the Tribunal*". SIS had unspecified "*concerns in relation to the material*" and did not wish the Tribunal or CttT to see it.

5.2. The Secretary made clear, in a letter dated 7 March 2019, that the approach to her was inappropriate and that any representations should be made to the Tribunal via GLD. It was therefore "*inappropriate for* [SIS] *to seek to intervene in ongoing legal proceedings in the way that they sought to do*". SIS's conduct was "*inappropriate interference*" [15].

5.3. SIS replied on 12 March 2019 seeking to "*assure you that the sole purpose of those telephone calls was to seek to understand better the nature of SIS information apparently referenced in the attachments*". There is a conflict of evidence between the Secretary's account, which goes considerably beyond an attempt by SIS to "*understand better*" the documentation. It extended to a demand that material not be provided to the Tribunal or its Counsel. The Secretary was offered a partial apology "*… for any misunderstanding that may have arisen as a result of the approach made to the Tribunal*" [16].

5.4. The Tribunal replied on 26 March 2019 with the President noting that it was helpful that it had been clarified that the only appropriate channel to raise concerns was through GLD [17]. It appears that no such concerns were ever raised.

5.5. The first two letters were not provided to the Claimants until 13 May 2020, over a year later.

6. When the Claimants were informed of what happened, they sought an urgent explanation and asked for confirmation that relevant documents would be preserved [6]. No

explanation was offered and GLD declined to respond at all to the request for preservation [7]. The Claimants therefore applied for disclosure and preservation of documents [8].

7. It should go without saying in a claim against a public body that there is a duty on the Respondents to preserve relevant material. As a result, in the Administrative Court, an order for preservation of evidence against a government department is almost unheard of.

8. Here, it was necessary to make an urgent interim application to the Tribunal to preserve relevant material when the Respondents declined to even answer a request for confirmation that "*each of the Respondents has taken steps to preserve all material relevant to the above events*" [6]. The Tribunal made an order for preservation on 1 May 2020 [21].

9. On relevance, the Respondents put their case high. They have suggested in correspondence that "*any kind of detailed exploration of what exactly occurred is a pointless distraction*" [7].

10. In fact, a proper understanding of these events is relevant to the IPCO issue:

    10.1. First, the Agencies have previously been criticised and a formal protocol devised to prevent them from putting improper pressure on the secretariat of the ISC, and seeking to obtain access to or control documentation properly in the hands of the ISC.

    10.2. Secondly, SIS has failed to understand its obligations of co-operation with its oversight bodies and has been criticised as such.

    10.3. Thirdly, a previous attempt in 2017 to bypass the IPT and agree a protocol relating to the IPCO issue directly with IPCO was rebuffed by the IPC.

11. The events of March 2019 appear to be a further example of similar problems. It would be unfair to attempt to determine the IPCO issue without knowing the facts and circumstances of what happened in March 2019. If there has been improper conduct by SIS, particularly strict and clearly drafted procedures may be required to control the Agencies' participation in any request to IPCO and prevent any recurrence.

12. Even if the IPCO issue were not before the Tribunal, the events of March 2019 would still require a full explanation. Any attempt by a party at inappropriate interference or intervention requires investigation by the Tribunal. The Tribunal's duty under the common law (and Article 6 ECHR) is to provide a fair hearing. It has general power over its own procedures (section 68(1) RIPA 2000). Investigating whether a party has made an inappropriate attempt to intervene in proceedings is an essential element of the judicial role. That is *a fortiori* where the conduct takes place in secret and is likely to have an effect on public confidence, and the confidence of the Claimants, in the fairness of proceedings before the Tribunal.

13. In addition, the Respondents have said that the two individuals at SIS who approached the Secretary are no longer involved in the litigation. But SIS have refused to say whether the two officers acted on instructions. Persons involved in the apparently improper events of March 2019 may still be involved in this litigation.

14. The Respondents make two further points:

    14.1. First, it is said that "*there is no broader issue of the co-operation of SIS with oversight bodies. Any such suggestion would obviously transform the nature of the dispute. Should there be such an issue patently this would be of great significance for SIS. It could not be determined by a single cherry-picked report*" [12/§6(ii)]. The Respondents then criticise CttT for even drawing the Tribunal's attention to the 2015 ISC report.

    14.2. The Claimants agree that the issue of the Agencies' co-operation with oversight bodies is an important one. The Claimants also agree that the issue cannot be determined by a single piece of evidence: the Claimants rely on a pattern of conduct dating from 2010, 2015, 2017 and March 2019 as supporting the need for disclosure.

    14.3. The denial by SIS of any "*broader issue*" is why the Tribunal should receive disclosure and information about what happened in March 2019. Depending on what is produced, the Tribunal's approach to the IPCO issue may need to be stricter and more exacting.

14.4. Secondly, it is suggested that "*the Tribunal having taken the view, at the time, that the Respondents' apology was sufficient, it is submitted that there is no basis for any different approach to be taken now*" [9/5/§9]. The Tribunal made no such finding. Nothing in the President's 29 March 2019 email accepts that the response given was "*sufficient*". In any event, as with any *ex parte* judicial comment, it is always open to reconsideration once there has been disclosure and contested argument.

Directions

15. The Claimants requested eight categories of disclosure and information:

15.1. Undertakings: The Respondents have confirmed that the individuals who were involved in the March 2019 incident are no longer involved in this case. They have given assurances that this will remain so. This issue no longer arises. However, if the individuals who made the improper approach to the Secretary did so on instructions, the question of undertakings may need to be revisited once disclosure is provided.

15.2. Identification of the individuals, their grade, job titles, whether they are lawyers and subject to professional regulation and whether any internal disciplinary investigation or proceedings have taken place: The Respondents concede, subject to the issue of relevance, that this information should be set out in a witness statement, anonymising the names of the officials.

15.3. Copies of the letters between SIS and the Tribunal: Now disclosed.

15.4. Particulars of the conduct on 5 March 2019 including what was said, the response of the Secretary to the IPT etc: The Respondents accept, subject to relevance, that this information should be disclosed. They also note that the Secretary could provide material evidence. This is correct. However, the Secretary to the Tribunal has already produced a detailed account in her letter of 7 March 2019. It has not been matched by a similarly detailed account by SIS. Before taking the step of inviting an officer of the Tribunal to produce evidence, it would be sensible to obtain the account of the Respondents.

15.5. Notes and records: The Respondents propose to give disclosure by witness statement alone and not produce their contemporaneous records of what happened. This is not an appropriate approach to resolving an issue of contested fact in the context of a failure relating to disclosure. The ordinary judicial review principles summarised in *Hoareau* [2018] EWHC 1508 (Admin) do not apply to such a situation. Where there were disclosure failures in the BCD/BPD case, the Tribunal insisted on a full account of what occurred, disclosure of relevant documents and, when the account given was unsatisfactory, cross-examination. Here, any contemporaneous notes of the telephone call with the Secretary are likely to be of high relevance. Indeed, they may be the most reliable evidence of what occurred. They ought not be paraphrased or subject to precis.

15.6. The context is that in 2015, Sir Mark Waller held that "*SIS also appeared to demonstrate a mind set in connection with both investigations which was both defensive and dismissive and where its objective was very much one of rebuttal, rather than engagement*". See further, paragraph 20.10: "*In resisting criticisms, SIS also showed a troubling inclination to seize upon and then cling to superficially attractive answers….*" [14].

15.7. Witness statements from the individuals involved: The Respondents have agreed to provide these, subject to relevance.

15.8. The decision not to inform the Claimants: It remains unclear why (save for embarrassment) the Respondents objected to the Claimants being told what had occurred in March 2019. There was no legitimate national security concern. This should be addressed in the witness evidence.

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24 July 2020