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

Respondents

OPEN SKELETON ARGUMENT ON BEHALF OF THE RESPONDENTS

FOR DIRECTIONS HEARING 18.07.18

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1. The President of the Tribunal has directed as follows:

> *"The skeleton argument should set out the Respondents' case on limitation and temporal scope of the claims; standing; whether the claims can be dealt with by way of assumed facts as well as their detailed proposals for further directions (e.g. their proposed date for serving full responses to the RFI, their proposed dates for service of OPEN and CLOSED evidence, the consequential disclosure timetable for "opening up" etc.)."*

Limitation and Temporal Scope

2. The Respondents' position is that the claims should be subject to sensible temporal limits. It is apparent from the Claimants' RFI that (as intimated in the Amended Statement of Grounds) they seek to bring a challenge unlimited in time. See, for example, questions 14 – 21, which relate to a period described only as "before 27 November 2012".

3. In the Respondents' respectful submission, the challenge before the IPT should be limited to a sensible time period. Not only is this desirable by reference to practical considerations (memories fade, people move on, a complete set of documents becomes harder to locate, etc), but it is in keeping with – and assists – the Tribunal focussing on what must be the most important question, namely whether current (and perhaps recent) practice is lawful. The Respondents have suggested, in their OPEN Response, that a time period of 12 months is appropriate. This reflects the limitation period under the Human Rights Act 1998 (much as the Respondents do not take a formal limitation point). However, should the IPT take the view that a longer temporal scope is appropriate, in the Respondents' submission the longest period which should be contemplated is six years (which is of course a limitation period with which the courts are well-familiar).

Standing

4. As set out in the OPEN Response, the Respondents do not ask for standing to be determined as a preliminary threshold issue. The Respondents of course understand that the Tribunal might take the view that this is unsatisfactory. The Tribunal might say that standing is either to be determined up front or to be conceded. However, such an approach would place the Respondents in an invidious position. The Respondents do not wish to be taken to accept that the Claimants – the First and Second of whom brought their challenge and pleaded their claim at a time at which they had no knowledge of the contents of the Third Direction – have standing to challenge any and all conduct of the intelligence services. They cannot assume the mantle of challengers-at-large. Nevertheless, the Respondents do not wish to stand in the way of the issues raised by the present claim being ventilated before the Tribunal. For these reasons, the Respondents' position remains that they do not accept that the Claimants have standing, but they do not ask for this to be determined as a preliminary issue.

OPEN / CLOSED

5. The details (both procedural and substantive) of the Security Service's conduct must be secret for the reasons set out in CLOSED.

6. Such secrecy would be undermined by the use of assumed facts. As indicated in §2 of the Respondents' OPEN Response, a mapping of findings made in OPEN onto conclusions made in CLOSED would reveal the very thing which must be kept secret. Similarly, such secrecy would be undermined by requiring the Respondents to respond to questions which, although framed as questions of law, would reveal the facts of the conduct. For example, if a question asks "Do the Respondents say that x is lawful?", and the Respondents plead "no, that would be unlawful", then (when combined with the Respondents' position is that the Security Service's conduct is lawful), it will be revealed that the conduct does not include x. In particular, these vices would clearly apply to §36 RFI (which counsel for the Claimants suggested could be used as assumed facts, by way of email dated 20 June 2018 at 12.43). Moreover, since the Claimants do not appear to be advancing a legal case which is premised on the different offences listed in §36 leading to a different legal outcome, there is no need for such assumed facts in any event.

7. Finally, despite the need to keep the details of the Security Service's conduct secret (and this extending to both the use of assumed facts and legal submissions which reveal facts), there are key issues which can be determined in OPEN. In particular, the Claimants know:
    a. The legal basis for the authorisations (s.1 Security Service Act 1989).
    b. The fact that the authorisations do not purport to render conduct lawful.
    c. The Directions to the Commissioners.
    d. The Guidelines (in redacted form).

8. Those are the basic elements of the legal regime. They enable the Claimants to mount their essential, core legal challenges (public law/vires and ECHR).

Proposed directions

9. The Respondents propose the following directions:

    a. That disclosure be provided, in CLOSED or OPEN as appropriate, by 14 September 2018. Without prejudice to further directions, the Respondents propose that this disclosure include (so far as they exist and so far as they remain within the temporal limits of the claim) the various categories of documents sought by the Claimants (precipitously) as part of their RFI, as per §11(d) below. Such disclosure will also include all authorisations granted in the relevant period.

b. That CTT consider the CLOSED response and documentation and serve any CLOSED submissions in that regard by 4pm on 28 September 2018.

c. That the Respondents serve their response to CTT's submissions by 12 October 2018.

d. That CTT and counsel to the Respondents meet by 19 October 2018 to seek agreement if possible in relation to the issues raised by their respective submissions. A CLOSED hearing to be listed thereafter if necessary.

e. That directions regarding witness statements be set following disclosure.

JAMES EADIE QC
Blackstone Chambers

VICTORIA WAKEFIELD
Brick Court Chambers

4 July 2018

APPENDIX: THE RFI

10. The President directed as follows:

> *"I do not consider it to be reasonable to order the Respondents to reply to the lengthy and detailed RFI, served on 18 June, by 4 July, the date suggested by the Claimants. … The Respondents should append to their skeleton argument their outline responses to the RFI (for example, indicating why they say that any request is not exigible and when they will give a substantive response to any requests that they consider exigible)."*

11. The Respondents' outline position in respect of the RFI is as follows:

    a. By way of preliminary observation, depending on the Tribunal's ruling on the temporal scope of the claim, various requests would fall away. For example:
        i. If the claim is properly limited to 1 year, then Requests 5-21 and 25-31 will fall away.
        ii. If the claim is properly limited to (say) 6 years, then Requests 14-21 and 25-31 will fall away.

    b. As to the various legal submissions which are framed as questions in the RFI:
        iii. The Respondents answer to Request 32 "*Is the Respondents' position that it is lawful for the Security Service to purport to authorise agent participation in criminality?*" is (save for the words "*purport to*", of which the meaning is not understood) "*yes*". The Security Service's conduct is lawful. The Respondents intend to defend the claim.
        iv. Otherwise, it is inappropriate to make legal argument by way of an RFI.

    c. Further, as the President envisaged in his directions, there will be orders made for disclosure and for evidence in due course (with legal argument, against that factual background, to follow at the final hearing). Whilst the Respondents fully recognise the relevance of the CLOSED/OPEN divide in this context, nevertheless the Respondents submit that they should be permitted to develop their case in the normal sequence of events. The proper determination of the lawfulness of the

Security Service's conduct is not best served by precipitously demanding answers to a host of (evidential and legal) questions.

d. Some of the Requests may be useful in terms of indicating the Claimants' desired scope of disclosure and evidence. In the first instance, the Respondents are content to provide, as part of their disclosure, the documents sought in Requests 2, 6, 8, 20, 21, 24, 25, 28, 31 40 and 43 (insofar as they exist and insofar as they remain within the temporal limits of the claim) in CLOSED or OPEN as appropriate.

e. Finally, and in any event:

    i. there are requests in the RFI which are plainly fishing expeditions. For example, Requests 37 and 38 supposedly relate to paragraph 4 of the Guidelines. That paragraph addresses the necessity of criminal activity. However, the requests seek to use this as a springboard to ask a series of questions in respect of tortious liability. Such questions are far removed from the matters in dispute and the relevant requests should not be allowed. The same applies to Requests 52, 53, 58 and 63, which again relate to tortious conduct.

    ii. there are requests in the RFI which are absurd. For example, Request 57 asks whether the Security Service notifies a constable in Northern Ireland in respect of each instance of criminality (undertaken, it will be recalled, by agents who are undercover in terrorist organisations). The answer to that request is "*no*".