IN THE INVESTIGATORY POWERS TRIBUNAL Case 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

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**CLAIMANTS' SKELETON ARGUMENT**
**For directions hearing: 18 July 2018, 2 hours**

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## I: INTRODUCTION AND SUMMARY

1. The Prime Minister directed the Intelligence Services Commissioner (the "IS Commissioner") and now the Investigatory Powers Commissioner (the "IP Commissioner") to oversee covert criminal activities by Security Service agents. There appear to be three Directions dating back to 2012. They are each concerned with "*the application of the Security Service guidelines on the use of agents who participate in criminality and authorisations issued in accordance with them*".[1]

2. The Claimants contend that the conduct purportedly authorised by the directions, and the directions themselves, are unlawful for the reasons set out in the Amended Grounds ("the Grounds").

3. On 8 June 2018, the Respondents served their Response to the Grounds, along with a heavily redacted version of the current "*Guidelines on the use of Agents who participate in Criminality (Official Guidance)*" (the "Guidelines"). In their three page Response the Respondents' failed to plead to the Grounds in any meaningful way, including in respect of pure issues of law.

[1] See further the wording of the 2017 Direction, which was published on 1 March 2018, seemingly in response to the commencement of these proceedings.

4. Instead of pleading to the issues in the claim, the Respondents have sought to limit the temporal scope of the claim to 12 months and to "*put down a marker*" (Skeleton, §12) that they did not accept the Claimants' standing (without asking for this to be determined as a preliminary issue).

5. On 18 June 2017, the Claimants requested further information and disclosure (the "RFI") from the Respondents. On 26 June 2018, the President directed the Respondents to file and serve a skeleton argument, setting out their case on the temporal scope of the claims and on standing, and appending "*outline responses*" to the RFI. The Respondents' Skeleton fails to comply with that direction, and fails to set out the Respondents' position even on issues of law.

6. The Tribunal is invited to:

    a. Direct the production of the further information and disclosure sought in the RFI by Friday 27 July 2018 in OPEN or CLOSED as necessary.

    b. Direct that the case proceed on assumed facts and identify preliminary issues of law for determination, in the form of the example facts raised in §36 of the RFI and the legal issues in the Amended Grounds.

    c. Provide for the Counsel to the Tribunal to consider and the Tribunal to rule on the disclosure of the CLOSED Response.

## II: LIMITATION

*The Claimants' position*

7. The Respondents contend that the Claimants "*seek to bring a challenge unlimited in time*" (Skeleton, §2). However, the Claimants cannot reasonably be expected to identify the temporal scope of their claim while the underlying conduct in question is secret. The RFI therefore requests further information on:

    a. when the Guidelines - which remain heavily redacted - were first promulgated (§22);

    b. when agents first participated in criminality (RFI §14); and

    c. when the authorisation and/or oversight of any such participation began (RFI §§ 15 and 16).

*The Respondents' Position*

8. In their Response, the Respondents sought to limit the temporal scope of the claim to 12 months. While noting that they did "*not take any formal limitation point*", they contended

that it was necessary to limit the scope of the claim in this way to ensure it was subject to "*sensible temporal limits*" (§11).

9. The Tribunal directed the Respondents to clarify that position in their Skeleton.

10. The Respondents now propose two limits: 12 months or 6 years. The former is the ordinary limitation period under the Human Rights Act 1998 (s.7(5)(a)). The latter is the standard limitation period for a breach of contract or tort claim (Limitation Act 1980, s.5). The Respondent has failed to explain why or on what legal basis the Tribunal would apply either limitation period to the Claimants' claims.

11. The 12-month or 6-year limitation period under either Act would be inappropriate:

    a. The HRA 1998 applies to conduct that arose more than 12 months ago, where it is part of an unlawful course of conduct: *O'Connor v Bar Standards Board* [2017] 1 WLR 4833. The Respondents have been authorising criminality pursuant to the Directions since at least 2012, while agents acting on their behalf have participated in the same (potentially for a much longer period). Both amount to a course of conduct.

    b. The HRA 1998 also allows an extension of time where it would be "*equitable in all the circumstances*": HRA 1998, s.7(5)(b). The limitation period for a breach of contract is similarly postponed for any period in which the defendant deliberately concealed any fact relevant to the claimant's right of action: Limitation Act 1980, s.32(1)(b). The Respondents have deliberately concealed agent participation in criminality and their own authorisation of the same. The Claimants note that:

        i. The fact of the existence of the Third Direction was disclosed in the course of other proceedings.

        ii. The subject and content of the Direction was only disclosed on 1 March 2018, well after the Claimant commenced proceedings against the Respondents, presumably only as a result of these proceedings.

        iii. The existence of the non-statutory Direction was disclosed for the first time in the Response, dated 8 June 2018. Its content remains undisclosed.

        iv. The criminal conduct in question remains concealed. Even the police have not been informed of the criminal conduct involved.

12. The Respondents offer two justifications for their proposed temporal limit:

    a. Administrative convenience: The Respondents rely on the fact that "*memories fade, people move on, a complete set of documents becomes hard to locate, etc*" (§3). Those "*practical considerations*", however, are a feature of all types of litigation, which the

courts resolve primarily through the rules of evidence. None of them justifies the imposition of an arbitrary temporal limit, less still a limit determined in the abstract, without reference to the facts arising in any particular case. Rules on limitation are not designed for the administrative convenience of government, especially where the relevant unlawful conduct has been deliberately concealed, thus making any legal challenge impossible until very recently.

b. Past and present wrongs: The Respondents invite the Tribunal to focus on what they suggest is the "*most important question, namely whether current (and perhaps recent) practice is lawful*" (§3). These proceedings concern participation of state agents in criminality and the Security Service's authorisation thereof. Any past conduct is likely to involve serious breaches of the law. As the guardian of those rights, with exclusive jurisdiction to hear this dispute, the Tribunal cannot abdicate its responsibility to do so: *R (International Transport Roth GmbH) v Secretary of State for the Home Department* [2003] QB 728, per Simon Brown LJ at [27].

## III: STANDING

13. The Respondents neither admit nor deny that the Claimants have standing. The Claimants are unable to improve on the Respondents' comment that "*the Tribunal might take the view that this is unsatisfactory*" (Skeleton, §4). The Respondents' position is particularly unsatisfactory in circumstances where they have been directed to particularise their case on the issue of standing.

14. The Respondents have therefore failed to comply with the Tribunal's directions. The justification is as follows:

> *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 service.*

15. As to this:

a. First, the Claimants have never claimed they have standing to challenge any and all conduct of the intelligence services. The claim is a narrow challenge to the Third Direction and conduct purportedly authorised under it by a group of Claimants who are uniquely well-placed to pursue it.

b. Second, the Tribunal has already heard submissions from the parties in respect of the First and Second Claimants' standing to challenge the Third Direction. On 18 December 2017, it determined the issue of standing in favour of the Claimants.

c. Third, the Respondents offer no explanation as to why it is said they cannot particularise their arguments on standing further, if there is further detail to provide.

16. The Claimants invite the Tribunal to direct the Respondents to provide proper particulars of any objection they have to the standing of each or any of the Claimants.

## IV: ASSUMED FACTS AND CLOSED RESPONSE

17. The Claimant's basic case is straightforward. First, by passing the Human Rights Act 1998, incorporating the Convention into domestic law, Parliament has imposed limits on any interference with fundamental rights. Under the Convention, for example, public authorities cannot authorise a breach of Article 2 (the right to life) or Article 3 (the prohibition on torture, inhuman or degrading treatment). In *AKJ v Commissioner of Police of the Metropolis* [2013] 1 WLR 2734, women brought claims against the Metropolitan Police, after being deceived into entering sexual relationships with undercover police officers. Tugendhat J stated as follows [92]:

> *... it is plain that an authorisation can only be granted for conduct, or for the use of information, which will interfere with one of the qualified Convention rights, such as article 8.* ***The unqualified rights, namely article 2 (right to life) and article 3 cannot be interfered with for any reason****... There can be no licence for torture or for any other inhuman or degrading treatment.*

18. Secondly, the content of the law cannot be secret. What the law is can be argued and determined in public. Indeed, this principle has been an important feature of the Tribunal's jurisprudence in recent years.

19. In light the Claimants' understanding of the law, the Claimants asked in the RFI (§36) whether, on the Respondents' case, they could lawfully authorise the following conduct: murder; torture; inhuman and degrading treatment; rape; any other sexual offence under the Sexual Offences Act 2003; battery; assault; wounding; poisoning; assault occasioning actual bodily harm; grievous bodily harm; kidnapping and/or false imprisonment.

20. Answering those questions would have required the Respondents to set out their position on a matter of law. An answer does not require the Respondents to confirm or deny whether they have ever carried out any particular activity, or even to disclose what the Guidance says. Despite that, the Respondents' have refused to do so. The alleged justification for refusing to agree those assumed facts is that "*requiring the Respondents to respond to questions which, although framed as questions of law, would reveal the facts of the conduct*" that they wish to keep secret (Skeleton, §6).

21. The Respondents refusal to agree preliminary issues of law and assume facts is difficult to understand. The Tribunal's exclusive jurisdiction in respect of claims against the Security and Intelligence Service is premised on the fact that it is well-equipped to deal with

matters concerning national security and secrecy, as a body which "*operates subject to special procedures apt for the subject matter in hand*": per Laws LJ, in A v B [2010] 2 AC 1. The use of assumed facts is one such procedure which the Tribunal itself recognises may enable it to hear arguments in open court in the security field "*without risk to our national security*".[2] As the Tribunal explains on its website:

> *"The Tribunal is a court which investigates and determines complaints which allege that public authorities or law enforcement agencies have unlawfully used covert techniques and infringed our right to privacy, as well as claims against the security and intelligence agencies for conduct which breaches a wider range of our human rights.*
>
> *More than that, we are at the forefront of our field, operating the most open and equitable process in the world for hearing cases of this sensitivity. We are the first court of our kind to establish 'inter partes' hearings in open court in the security field. These hearings allow us to hear arguments on both sides on the basis of 'assumed facts' without risk to our national security. This means that where there is a substantial issue of law to consider, and without at that stage taking a decision as to whether the allegation in a complaint is true, we invite the parties involved to present issues of law for the Tribunal to decide, which are based on the assumption that the facts alleged in the complaint are true.*
>
> *This means that we have been able to hold hearings in public, including full adversarial argument, as to whether the conduct alleged, if it had occurred, would have been lawful. We may then hold 'closed' hearings in private to apply the legal conclusions from the open hearings to the facts."*

22. The Respondents refusal to answer the matters at §36 of the RFI and/or agree assumed facts on that basis raises a basic constitutional point. The content of the law cannot be secret. Secrecy about what the law is cannot be reconciled with the rule of law. Lord Diplock, in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenbyrg AG [1975] AC 591, at 638D, enunciated this principle as follows.

> *The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course action, should be able to know in advance what are the legal principles which flow from it.*

23. The idea that the content of the law must be accessible is also a basic tenet of the ECHR. In Sunday Times v United Kingdom (1979) 2 EHRR 245, at [49], for example, the European Court of Human Rights recognised that:

> *The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case... a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct...*

[2] https://www.ipt-uk.com

24. The Tribunal's duty is to declare what the law is, so that the public and the Agencies know what the law permits, and what it does not. This is what Tugendhat J did in *AHJ*, without any difficulty. The Tribunal is invited to direct that the conduct at §36 of the Claimants' RFI be treated as assumed facts to test the issues of law in the Amended Grounds against. The claim has been drafted with care to plead and identify issues of law which are capable of being (and therefore ought to be) determined in open.

25. The Respondents' case to the contrary is illogical. They contend that:

> *... 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.*

26. But this is to say no more than that limits are imposed by the law on the conduct of the Agencies, and their position is that they comply with those limits. There is no harm to national security in a statement by the Agencies (a) as to what they say the law permits; and (b) a statement that they comply with their understanding of what the law permits. This is to say no more than that the Agencies are subject to the law, and they in fact obey the law. And it is the duty of the Tribunal to say what the law is, and what limits the law imposes on the conduct of the Agencies.

## V: OUTLINE RFI RESPONSE

27. Despite the President's direction, the Respondents have failed to deal with the RFI in any real way:

    a. Temporal scope: the Respondents have refused to engage with the majority of the RFI on the basis that sections of it may be outside the temporal restrictions they seek to impose on the claim. The Claimants' position on that issue is set out above. It is in any event incorrect to suggest that all conduct before the non-statutory direction (RFI §§14-21) is irrelevant if the claim is limited to 6 years. The claim was brought on 26 June 2017. Even if a 6-year limitation period was applied, the Claimants could claim in respect of any conduct on or after 26 June 2011.

    b. Content of the law: without explanation, the Respondents' have failed to answer various questions which sought to clarify their position on the legal issues raised by this claim. Far from being inappropriate *"legal argument"* (§11(b)(ii)), the Respondents ought to respond to the Grounds (which they have thus far failed to do). The Respondents contend that they should be *"permitted to develop their case in the normal sequence of events"* (§11c). The normal time to set out any defence would have been in the Response.

    c. Purporting to authorise criminal conduct: the Respondents have clarified that, on their case, *"the Security Service's conduct is lawful"*. As set above, the Claimants' case is that the Respondents cannot lawfully purport to authorise a breach of Article 2 or 3 of the ECHR. In those circumstances, the Respondents' refusal to answer the

questions at §36 is not understood. It is impossible to decide whether the Security Service's conduct is lawful until what the law *is* has been identified. A dispute about what limits are imposed on the Guidelines by statute is plainly suitable for OPEN determination. It is a pure question of law.

d. Non-publication of the non-statutory direction: the Respondents propose to disclose the non-statutory direction in due course. Any alleged limitation period for claims in respect of conduct purportedly authorised under that direction cannot begin to run unless and until it is disclosed. The non-statutory direction remains deliberately undisclosed.

e. Redacted guidelines: the Respondents are proposing to provide less heavily redacted Guidelines. In the interim, they remain inaccessible and any conduct authorised cannot be in accordance with law.

f. Tortious liability:
   i. it is plain that the type of criminality that the Security Services are purporting to authorise may give rise to tortious liability.
   ii. For example, the Security Service would be liable in tort if it authorises an agent to kneecap an alleged informant.
   iii. Far from being *"far removed"* from the matters in dispute, they are inextricably linked.

**BEN JAFFEY QC**

**CELIA ROONEY**

**11 July 2018**