

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

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

**RESPONDENTS' REPLY TO CLAIMANTS' REQUEST
FOR FURTHER INFORMATION DATED 20 MAY 2019**

The Claimants' requests are reproduced below with the Respondents' reply following each request.

The Respondents note that the Claimants "challenge the entirety of the redactions made to the Amended Response, and invite Counsel to the Tribunal to consider them". This is being done in CLOSED as part of the usual opening up process and therefore the Respondents have not responded here regarding each redaction applied to the Amended Response.

AMENDED RESPONSE

Of Paragraph 4:

"As to the criminal nature of any particular conduct, this will depend on the constituent elements of the offence. Where mens rea is an element of the offence, the CHIS may well lack the requisite mens rea. [redacted]. This CHIS would not commit the offence of [redacted] since they would lack the necessary intention. [redacted]"

1. The Respondents' position on the content of the law cannot be secret (cf. the Pat Finucane Report, which considers the potential significance of mens rea on agent participation in crime openly). The Claimants request disclosure of the redacted parts of paragraph 4

Response

1. The redactions to the Amended Response are being considered as part of the opening up process pursuant to the Directions Order made at the February hearing (as amended). The Respondents have provided their justification for any redactions challenged by CTT in CLOSED and do not consider it appropriate to provide further information in OPEN.

Of Paragraph 9:

"The criticism [redacted] has no foundation in law, since the "authorisation" is not, and cannot be equated to, a forbidden "proleptic grant of immunity" (as per Lord Bingham, R (Pretty) v DPP [2002] 1 AC 800, §39)..."

2. It is not understood how the redacted section of paragraph 9 can be secret. The Respondents appear to be criticising the OPEN grounds on the basis of a submission as to the law. The Claimants request disclosure of the redacted part of paragraph 9.

Response

2. The redactions to the Amended Response are being considered as part of the opening up process pursuant to the Directions Order made at the February hearing (as amended). The Respondents have provided their justification for any redactions challenged by CTT in CLOSED and do not consider it appropriate to provide further information in OPEN.

Of Paragraph 11:

3. Paragraph 11 addresses the limits of the Third Direction policy. For the reasons set out above, the limits to the policy should be disclosed.

Response

3. The redactions to the Amended Response are being considered as part of the opening up process pursuant to the Directions Order made at the February hearing (as amended). The Respondents have provided their justification for any redactions challenged by CTT in CLOSED and do not consider it appropriate to provide further information in OPEN.

Of Paragraph 17:

"§23 is admitted, save that the parallel which the Claimants seek to draw with the Consolidated Guidance is inapposite. [redacted]"

4. It is not understood how the Respondents' response to the Claimants' comparison between the Third Direction and the Consolidated Guidance, for the purposes of highlighting that the latter imposes a clear and absolute prohibition on torture, could be secret. The Claimants request disclosure of the redacted parts of paragraph 17.

Response

4. The redactions to the Amended Response are being considered as part of the opening up process pursuant to the Directions Order made at the February hearing (as amended). The Respondents have provided their justification for any redactions challenged by CTT in CLOSED and do not consider it appropriate to provide further information in OPEN.

Of Paragraphs 24-27:

"There are various issues in §§32-48 RASG, with regard to the accuracy of those paragraphs as follows. [redacted]... For the avoidance of doubt, the Respondents accept that the Security Service is not able to "authorise" activity which would constitute a breach by it of the Convention..."

5. The majority of paragraphs 24 to 27 have been redacted without gist or explanation. Those paragraphs appear to set out supposed misunderstandings of the effect of the Third Direction policy. The Claimants need to understand the Respondents' position in this respect. The Claimants request disclosure of the reacted parts of paragraphs 24 to 27, alternatively a gist sufficient to disclose the nature of the case against them.

Response

5. **The redactions to the Amended Response are being considered as part of the opening up process pursuant to the Directions Order made at the February hearing (as amended). The Respondents have provided their justification for any redactions challenged by CTT in CLOSED and do not consider it appropriate to provide further information in OPEN.**

Of Paragraph 30:

"As to §41:

(a) the Memorandum of Understanding with the CPS for England and Wales does not specifically concern agent participation in criminality. [redacted]

(c) the CPS are aware of the Guidelines. The DPP was provided with a copy on 3rd September 2012."

6. The Claimants have previously requested disclosure of the Memorandum of Understanding with the CPS (see further the Claimants' letter to GLD of 19 February 2019). The Memorandum of Understanding is now referred to in the Amended Response. The Claimants repeat their request for disclosure of that document, so far as is relevant.
7. Paragraph 30(c) notes that the DPP was provided with a copy of the Memorandum of Understanding with the CPS on 3 September 2012. Please provide the correspondence accompanying the Memorandum, and any further correspondence with the DPP in this respect, including (but not limited to) the response of the DPP.

Response

6. **This is being discussed with CTT/the IPT in CLOSED as part of the opening up process pursuant to the Directions Order made at the February hearing (as amended). The Respondents do not consider it appropriate to provide further information in OPEN.**
7. **The request mistakenly refers to the Memorandum of Understanding when it should refer to the Guidelines. The letter dated 3 September 2012 has been provided to CTT in closed.**

Of Paragraph 31:

"As to §42, so far as Northern Ireland is concerned:

(a) There is a Protocol with PPSNI. Again it does not specifically concern agent participation in criminality. Unlike the MoU in England and Wales, it does not contain any express reference to "authorised" criminality. [redacted]

(c) The PPSNI is aware of the existence of the Guidelines."

8. The Claimants request disclosure of the protocol with the PPSNI, so far as is relevant.
9. Paragraph 31(c) notes that the PPSNI is aware of the Guidelines. When was the PPSNI first told about the Guidelines? Please provide the correspondence by which the PPSNI was made aware of the Guidelines, and any further correspondence with the PPSNI in this respect, including (but not limited to) the PPSNI's response.

Response

8. **This has been provided to CTT in closed.**

9. **The Respondents have not been able to locate formal correspondence which makes clear when the PPSNI was first notified of the Guidelines.**

Of Paragraph 32:

"As to §43, so far as Scotland is concerned:

- (a) There is a Memorandum of Understanding with the Crown Office and Procurator Fiscal Service. Again, it does not specifically concern agent participation in criminality. [redacted]*
(c) The Lord Advocate is now aware of the existence of the Guidelines."

10. The Claimants request disclosure of the Memorandum of Understanding with the Crown Office and Procurator Fiscal Service, so far as is relevant.
11. Paragraph 32(c) states that the Lord Advocate is "now" aware of the existence of the Guidelines. When was the Lord Advocate first told about the Guidelines? Please provide the correspondence by which the Lord Advocate was made aware of the Guidelines, and any further correspondence with the Lord Advocate in this respect, including (but not limited to) the Lord Advocate's response.

Response

10. **This has been provided to CTT in closed.**
11. **The Respondents have not been able to locate formal correspondence which makes clear when the Lord Advocate was first notified of the Guidelines.**

Of Paragraph 89(b):

*"Accordingly, in Northern Ireland, there is no offence at common law in respect of misprision or compounding of a felony, and the only available offence (save in respect of the compounding treason) is that set out in s.5 CL(NI)A 1967. Even were s.5 to apply to the Crown, its constituent elements are not made out in respect of the relevant offences "authorised" pursuant to the Guidelines. In particular: ...
(b) there is "reasonable excuse" for non-disclosure. The conduct involves agents reporting covertly on individuals and organisations which pose a threat to national security. Their work is [redacted] vitally important [redacted]."*

12. The Claimants request disclosure of the nature of the reasonable excuse for not telling a PSNI Special Branch constable with the appropriate security clearance of any offence purportedly authorised by the Security Service.

Response

12. **The nature of the reasonable excuse has been redacted in the Amended Response. Those redactions are being considered as part of the opening up process pursuant to the Directions Order made at the February hearing (as amended). The Respondents have provided their justification for any redactions challenged by CTT in CLOSED and do not consider it appropriate to provide further information in OPEN.**

Of Paragraph 101:

13. For the reasons set out above, the limits to the policy should be disclosed.

Response

13. **The Tribunal is aware in CLOSED of the Respondents' position on this repeated request.**

Of Paragraph 106(e):

“The Respondents agree that Teixeira de Castro and Looseley are the two most important authorities in respect of entrapment and a consequential unfair trial. However:

...

(e) [redacted].”

14. Paragraph 106(e) appears to be part of an explanation as to why Article 6 will not be breached, in circumstances where the prosecutor and the judge will never be told of any agent participation in criminality. It is difficult to understand how a fair trial can be achieved in such circumstances. The Claimants request disclosure of the redacted part of this paragraph.

Response

- 14. The redactions to the Amended Response are being considered as part of the opening up process pursuant to the Directions Order made at the February hearing (as amended). The Respondents have provided their justification for any redactions challenged by CTT in CLOSED and do not consider it appropriate to provide further information in OPEN.**

DISCLOSURE PURSUANT TO PARAGRAPH 11 OF THE AMENDED ORDER

Of the email dated 24 August 2012:

On 2 May 2019, the Claimants were provided with additional disclosure pursuant to paragraph 11 of the Amended Order. That included a draft invitation letter to the ISC, which accompanied an email dated 24 August 2012. The email notes that its sender has *“has asked SyS to discuss the Policy in general terms with their CPS contacts and they will report back in due course. I can imagine they will say:*

- *They cannot comment on the policy in general [redacted]*
- *The Prosecutors code of conduct provides clear advice on the public interest, including acts done in the interests of national security.”*

15. It is not understood how the anticipated reaction of the CPS to disclosure of the existence of the Third Direction policy or its general terms can be secret. The Claimants request disclosure of the redacted part of the email above.

Response

- 15. These documents have already been through a completed opening up process pursuant to the Directions Order. Any outstanding areas of disagreement regarding any of the disclosure will be dealt with in CLOSED at the hearing on 25 July 2019. The Respondents do not consider it appropriate to provide further information in OPEN.**

Of the letter of 23 September 2011:

16. The redaction at paragraph 3 of the letter from Andrew Parker to Sir Mark Waller has been redacted without gist or other explanation. The Claimants request disclosure of those paragraphs, alternatively a gist of the extensive redaction therein.

Response

- 16. These documents have already been through a completed opening up process pursuant to the Directions Order. Any outstanding areas of disagreement regarding any of the disclosure will be dealt with in CLOSED at the hearing on 25 July 2019. The Respondents do not consider it appropriate to provide further information in OPEN.**

REMOVAL OF REDACTIONS IN RESPECT OF THE LIMITS OF THE THIRD DIRECTION POLICY

17. As set out above, the limits of the Third Direction Policy are in the public domain in the *Pat Finucane Review*. The Claimants request:
- a. disclosure of the redacted parts of any documents provided to date, where any disclosure has been made in respect of the limits of the Third Direction policy. This includes, but is not limited to, the removal of redactions to:
 - i. the witness statement of MI5 Witness 2;
 - ii. all Guidelines provided to date;
 - iii. any correspondence with the IP or IS Commissioners; and
 - iv. the Annual Reports and inspection reports of the Commissioners;
 - b. an explanation as to how and why those redactions were made, in circumstances where the information in question was already in the public domain; and
 - c. disclosure of the documents in Chapter 4 of the *Pat Finucane Review*.

Response

- 17. The Respondents have provided their response to the Claimants' request previously (see letter dated 17 May 2019). The Respondents rely on the reasons set out in that letter. The documents have already been through a completed opening up process pursuant to the Directions Order and agreement was reached regarding the opening up of them prior to the February hearing. The Claimant was in a position to make these arguments at the February hearing, but did not do so. The Respondents do not consider it appropriate to revisit the completed opening up process.**