[redacted]

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

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

CLOSED RESPONSE

8 June 2018

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1. This CLOSED Response responds to the Claimants' Amended Statement of Grounds of 16 April 2018. It should be read with the Defendants' OPEN Response of 8 June 2018.

2. Much of the Defendants' Response must be provided in CLOSED. [redacted]

[redacted]

[redacted]

Overview

3. The functions of the Security Service are set out in s.1(2)-(4) of the Security Service Act 1989, namely:

> *"(2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.*
>
> *(3) It shall also be the function of the Service to safeguard the wellbeing of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.*
>
> *(4) It shall also be the function of the Service to act in support of the activities of police forces, the National Crime Agency and other law enforcement agencies in the prevention and detection of serious crime."*

4. It would be impossible to fulfil these functions effectively without the use of agents. They are indispensable to the work of the Security Service, and thus to its ability to protect the public from the range of current threats, notably from terrorist attacks.

5. That was the position before the enactment of the 1989 Act and it remains the position today.

6. Given the undercover nature of agents, and given the types of person with whom and entities with which they have relationships, they need to behave in certain ways and participate in certain activities. As to the criminal nature of some such activities, the disruptive intention of the agent may mean that he or she lacks the relevant *mens rea* to commit a criminal offence [redacted]

7. However, on occasion the agent will or may be committing a criminal offence. The ability of agents to participate in such criminality or possible criminality is absolutely critical to the work of the Security Service. As set out in §5 of the Guidelines on the use of Agents who participate in criminality: *"the nature of the work of the Service is such that its agents are frequently tasked to report on sophisticated terrorist and other individuals and organisations whose activities may pose a threat to national security and/or involve the commission of serious offences. In those circumstances it may sometimes be necessary and proportionate for agents to participate in criminality in order to secure or maintain access to intelligence that can be used to save life or disrupt more serious criminality, or to ensure the agent's continued safety, security and ability to pass such intelligence."* [redacted]

[redacted]

8. In those circumstances, detailed policies, [redacted] apply (including the very oversight which is challenged in the present case) in respect of the "authorisation" of the agent to participate in criminality. As set out in the OPEN submissions, the Security Service's "authorisation" process does not purport to confer immunity from criminal liability. The "authorisation" process is a mechanism by which the Security Service assesses, and records, the public interest in the agent's participation in the act in question.

9. The Security Service's obligations under the Human Rights Act 1998 were and remain central to the shaping of the guidance – especially the concepts of necessity and proportionality.

10. Attached to this Response are tables which set out the authorisations granted by the Security Service over the last 5 years.

11. Finally, much of the Claimants' case relates to the secret nature of the relevant guidance, [redacted] in respect of participation of agents in criminality. As developed below, the national security context is obviously vital when considering the degree of public disclosure which is possible without serious damage to the public interest, and indeed placing those agents who do vital undercover work to protect the public at risk.

12. It is submitted that the policies, [redacted] (including oversight by the Commissioner and indeed including this Tribunal) ensure that there is adequate protection against arbitrary interference and sufficient compliance with the ECHR requirement of legality.

13. For the avoidance of doubt, this Response addresses the position of the Security Service. This reflects the Amended Statement of Grounds, in which the grounds of challenge (§69 onwards) focus entirely on the Security Service (and indeed pray in aid s.7 of the Intelligence Services Act 1994 by way of contradistinction to the "authorisations" which are the target of the present challenge: see §§69 and 80.1). In fairness to the Claimants, the presence of the other Defendants as parties to the challenge pre-dates the Claimants' knowledge of the content of the Third Direction (which is of course limited to the Security Service).

Ground 1: Allegedly not in accordance with law: unsupervised conduct/conduct overseen under a secret direction/ conduct authorised in accordance with unpublished guidelines

14. It appears that the "conduct" which is challenged under Ground 1 is the participation by agents in criminality.

[redacted]

15. The "authorisation" of such conduct involves the following policies, [redacted]

[redacted]

b. [redacted] the Authorising Officer records his or her authorisation. The Security Service would be happy to facilitate the Tribunal's consideration of any (or all) of the authorisation forms from the last five years.

[An authorisation form is completed on which]

c. As set out in §7 of the Guidelines, the test for the Authorising Officer is as follows:

(i) There is a real prospect that the agent will be able to provide information concerning serious crime, [redacted]

(ii) The required information cannot readily be obtained by any other means;

(iii) The need for the information that may be obtained by the use of the agent justifies his use notwithstanding the criminal activity in which the agent is or will be participating. In §8 of the Guidelines, it is explained that this criterion will not be satisfied unless the authorising officer is satisfied that the potential harm to the public interest from the criminal activity of the agent is outweighed by the benefit to the public interest from the information it is anticipated that the agent may provide and that the benefit is proportionate to the criminal activity in question.

d. [redacted] includes legal training on the Human Rights Act 1998 as

[Training]

[redacted]

well as a detailed briefing on how the Security Service approaches agent participation in criminality.

[redacted]

16. As set out in the OPEN response, the "authorisations" have been subject to oversight by the Intelligence Services Commissioner and now the Investigatory Powers Commissioner since 27 November 2012. The Commissioner has full access to all authorisations.

17. Moreover, the conduct of the Security Service is of course subject to the scrutiny of the present Tribunal.

18. As to the allegation that the conduct was not "in accordance with law" at the time at which the title and the content of the direction to the Commissioner(s) was secret (as per §§73 & 74 of the Amended Statement of Grounds), this is denied. In particular:

[The redacted text relates to why they need to participate in criminality]

a. The underlying conduct – namely the participation in criminal activities by agents – was widely known and entirely obvious. It was and is to be expected, as obvious, that the Security Service uses agents and plain that on occasion they will have to participate in activities that are or may be criminal. [redacted] There is no need in this context for more specific 'signposting' of the activity.

b. The activity is a paradigm example of activity that a reasonable person would understand as falling squarely within the basic functions of the Security Service – as a necessary component of protecting the public from threats to national security and to the public posed by terrorist organisations.

c. The direction to the Commissioner is simply one part of the system for preventing arbitrary and unfettered executive decision-making. Its avowal is not to be viewed as if it amounts to the first avowal of the underlying activity.

d. Accordingly, whilst the oversight direction(s) remained secret until 1 March 2018, the conduct itself was sufficiently public to be adequately foreseeable.

[redacted]

19. As to the allegation (in §75 of the Amended Statement of Grounds) that the guidelines must be published, since *"where a discretion is exercised in accordance with unpublished guidelines, the law will be inadequately accessible and unforeseeable"*. This is wrong:

    a. As per the judgment of the Tribunal in the *Liberty/Privacy* case [2014] UKIPTrib 131-77-H, in the field of national security much less is required to be put into the public domain and therefore the degree of foreseeability must be reduced, because otherwise the whole purpose of the steps taken to protect national security would be put at risk (see §§38-40 and §137).

    b. As per the *British Irish Rights Watch* case dated 9 December 2004 (which decision was expressly affirmed in the *Liberty/Privacy* judgment §87): *"foreseeability is only expected to a degree that is reasonable in the circumstances, and the circumstances here are those of national security"*.

    c. Further, the ECtHR has consistently recognised that the foreseeability requirement *"cannot mean that an individual should be enabled to foresee when the authorities are likely to resort to secret measures so that he can adapt his conduct accordingly"*: *Malone v UK* (1984) 7 EHRR 14 §67; *Leander v Sweden* [1987] 9 EHRR 433 §51; and *Weber & Saravia v Germany* [2008] 46 EHRR §93.

    d. In the premises, and in application of those tests, there is no basis on which publication of the Guidelines is necessary in order to render the conduct *"in accordance with law"*.

Ground 2: alleged breaches of Article 5(3) and (4) procedural rights

20. This Ground of challenge is inapposite (indeed, the Amended Grounds are scarcely amended here, with a focus on "secret deprivation of liberty" and being held "incommunicado"). In particular, the Defendants do not suggest that "secret review" by the Commissioner would constitute judicial oversight of detention by the state (as alleged in §76.5). Nor is it accepted that a hypothetical authorisation of an agent to engage in activity in which a member of the public is held by a terrorist organisation is to be equated with state detention under Article 5.

Ground 3: alleged breaches of investigative duties under Articles 2, 3 and/or 5

21. Again, this Ground of challenge is inapposite. The Defendants do not contend that the Commissioner's function would fulfil any investigative duty under Articles 2, 3 and/or 5, contrary to §77 of the Amended Statement of Grounds. Accordingly, there is no basis for the allegation that *"the oversight of the IS and IP Commissioners is in breach of Article 2, 3 and/or 5"* (as per §78).

[redacted]

Ground 4: alleged breaches of negative or preventative Article 2, 3, 5 and/or 6 obligations

22. Again, this Ground of challenge is inapposite. It consists of an assertion that "*any purported "authorisation" of conduct in breach of certain articles of the Convention would be unlawful*" and a list of Articles 2, 3, 5 and 6 (§79). It is of course unassailable that, if it were right that there was a breach of certain articles of the Convention, this would be unlawful [redacted]

Ground 5: Judicial review

23. The Defendants again submit that the Claimants' concerns are predicated on a misconception. As set out in OPEN, the regime in issue does not purport to "authorise" criminal conduct in the sense of rendering it lawful or conferring immunity on the perpetrator. Further, as set out in §17 above, it was and is to be expected, as obvious, that the Security Service uses agents and plain that on occasion they will have to participate in activities that are or may be criminal. As further set out above, the secrecy of the Guidelines (and indeed other documents) is lawful in this context.

24. As to the contention that Parliament has not provided any authority for the Security Service's conduct, again this is premised on the mistaken assumption that the Security Service purports to confer immunity. It does no such thing. What Parliament has done is to provide for the functions of the Security Service. In performing those functions it is, and was at the time of the 1989 Act, obvious that those functions would involve the use of agents [redacted] [and] that the agents might well need to become involved in criminality (or possible criminality). In those circumstances, the position is as follows:

[The redacted text provides an example of a situation where that might be necessary]

a. The Security Service has the statutory functions set out in s. 1(2)– (4) of the Security Service Act 1989

b. It would be practically impossible for it to fulfil those functions without the use of agents.

[The redacted text explains why agents may need to participate in criminality]

c. [redacted]

d. Whether that action is or is not properly viewed as criminal will depend upon the constituent elements for the relevant offence [redacted] *[in particular whether the legal requirements of the offence were present]*

[redacted]

e. However, should that action be properly viewed as criminal, the Security Service must, by necessary implication, have the power to consider, and to record, whether (in its view) that action best serves the public interest, and to inform and/or direct the agent accordingly.

25. For the avoidance of doubt, whilst RIPA provides that conduct may be lawful for all purposes in some circumstances, the Security Service's policies and practices are based rather on its basic statutory functions as permitting the [redacted] "authorisations" that are provided in relation to the engagement of its agents in criminality or possible criminality. Thus, for present purposes, no positive reliance is place on RIPA (the precise reach of which is thus not addressed).

Ground 6: alleged breach of Articles 2, 3, 5 and/or 6

26. It is alleged in Ground 6 that *"to the extent that any conduct purports to be "authorised" under the guidelines breaches or breached any of those rights, it was or is unlawful. It is not within the state's gift to purport to give "authority" for violations of such rights."* (§82). As with Ground 4, it is unassailable that, if it were right that there was a breach of certain articles of the Convention, this would be unlawful. [redacted] As to the last sentence of §87, the "authorisations" do not confer, nor purport to confer, any immunity from the application of Articles 2, 3, 5 or 6 (or indeed any other articles), to the extent that those Articles would be of any application in any event.

Standing

27. As set out in the OPEN response, 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 as having 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).

[In relation to these Claimants, the factual position, following relevant searches, is as follows]

28. [redacted]

[redacted]

JAMES EADIE QC

VICTORIA WAKEFIELD

8 JUNE 2018