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

CLAIMANTS' SUBMISSIONS
on the Respondents' Application to re-assert LPP

Introduction

1. The Respondents claim to have inadvertently disclosed privileged material to the Tribunal and Counsel to the Tribunal (***CtT***). They now seek to reassert legal professional privilege (***LPP***).

2. The Court is invited to determine this issue at the hearing on 25 July 2019, with the assistance of OPEN oral submissions.

Background

3. The Claimants challenge a policy under which the Security Service purports to "*authorise*" its agents to participate in crime. The Claimants have received limited disclosure from the Respondents, most of which has been heavily redacted in OPEN. The redacted documents have been disclosed in full to CtT and to the Tribunal.

4. The Respondents now apply to reassert privilege over two parts of the material disclosed to date.[1] The relevant sections of the material were disclosed to the Tribunal and CtT on

[1] The relevant sections are identified in the Respondents' letter of 8 April 2019. See further the documents entitled *Agent Running and Participation in Criminality (Official Guidance)* (Tab 13, page 73, paragraph 2) and *Security Service Guidelines on the use of Agents who Participate in Criminality* (Tab 19, page 102, paragraph 4).

24 January 2018 (the ***January 2018 Disclosure***) and 30 November 2018 (the ***November 2018 Disclosure***) respectively. It is assumed that the CtT and the Tribunal have already read and considered the full version of these documents.

5. The exact date upon which the Respondents became aware of their purported error is unclear. Nor have the Respondents provided any explanation of the circumstances in which the alleged error occurred.

Law

6. The relevant principles were set out by the Court of Appeal in *Al Fayed v Commissioner of Police for the Metropolis* [2002] EWCA Civ 780, per Lord Justice Clarke at [16]. The Court of Appeal recognised that:

    a. "*… where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief*" [16(iv)];

    b. that general rule was subject to exceptions, for example, "*in the case of inspection procured by fraud*" [16(v)];

    c. in the absence of such fraud, a Court has a discretion to intervene "*if the documents have been made available for inspection as a result of an obvious mistake*" [16(vi)]; and

    d. "*there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief*" [16(ix)].

7. Even in cases of fraud or obvious mistake, the Courts have recognised that they may refuse injunctive relief on the usual grounds, including delay: see, for example, *Istil Group Inc v Zahoor* [2003] 2 All ER 252, per Lawrence Collins J at [74].

8. The Court applied the principles outlined above in the context of CLOSED proceedings in *Belhaj v DPP* [2018] EWHC 514 and [2018] EWHC 977 (Admin).

Submissions

9. In their letter of 8 April 2019, the Respondents contend that the principles identified in *Belhaj* should be modified in the instant case as "*this is not purely adversarial litigation; there has been no disclosure as to the claimants; and there has been no inspection by any solicitors (assuming that CtT is not to be treated as analogous)*".

10. There is no basis for any such modification to the law. First, this is adversarial litigation. The Claimants are bringing a claim for remedies under the Human Rights Act 1988 and for judicial review which is allocated by statute to the IPT. The Tribunal has an

inquisitorial role in relation to the facts (which are often secret, and so this is necessary), but it is hearing conventional adversarial litigation between opposing parties.

11. Nor is this position changed by the appointment of the CtT. The role of CtT was summarised in *Liberty (No. 1)* at [10] as follows:

> "19.1 The role of counsel to the Tribunal is in principle distinct from that of Special Advocate. The function of the former is to assist the Tribunal by performing such functions as he or she is directed by the Tribunal to perform. The precise roles played by counsel to the Tribunal may therefore vary depending on the circumstances.
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> 19.2 However. in the present circumstances, there is a broad measure of agreement between the Claimants and the Respondents that counsel to the Tribunal can best assist the Tribunal by performing the following roles: (i) identifying documents, parts of documents or gists that ought properly to be disclosed; (ii) making such submissions to the Tribunal in favour of disclosure as are in the interests of the Claimants and open justice; and (iii) ensuring that all the relevant arguments on the facts and the law are put before the Tribunal. In relation to (iii), the Tribunal will expect its counsel to make submissions from the perspective of the Claimants' interests (since the Respondents will be able to make their own submissions). If the Tribunal decides to receive closed oral evidence from one or more of the Respondent's witnesses, it may also direct its counsel to cross-examine them. In practice, the roles performed by counsel to the Tribunal at this stage of the current proceedings will be similar to those performed by a Special Advocate in closed material proceedings.

These principles are now codified in Rule 12 of the IPT Rules 2018.

12. Second, the Respondents seek to distinguish this case from *Belhaj* on the basis that neither the Claimants nor their solicitors have inspected the material. That was also true in *Belhaj*, where the material was disclosed to the Special Advocates only: [2018] EWHC 514 (Admin), at [8]. The position of CtT in the current disclosure exercise is analogous to the position of the Special Advocates in *Belhaj*, and does not justify a modified approach. CtT have been performing the same role as Special Advocates – identifying materials that ought to be disclosed and making submissions from the perspective of the Claimants' interests at any CLOSED hearings.

13. There is therefore no basis upon which the Tribunal should depart from the principles identified by the Divisional Court in *Belhaj*. As to the application of those principles, in particular whether the mistake in question was an obvious one is ultimately a matter for submissions by CtT and the Respondents. Without sight of the relevant material, the Claimants are unable to assist in detail. The Claimants nonetheless note that the notion that there was an obvious mistake is unlikely where the alleged mistake in respect of the original January 2018 Disclosure was not identified for over a year. Indeed, instead of rectifying that error in the intervening period, the Respondents disclosed the same material for a second time.

14. In any event, it would be inequitable for the Tribunal to grant the Respondents' application in light of their delay. The delay in *Belhaj*, which appears to have been less

than 2 months, is incomparable to the present case where (without explanation) the Respondents have failed to identify their error for well over a year.

BEN JAFFEY QC

CELIA ROONEY

15 April 2019