IN THE EUROPEAN COURT OF HUMAN RIGHTS **Application no: 60646/14**

FIRST SECTION

B E T W E E N:

PRIVACY INTERNATIONAL **Applicant**

- v -

THE UNITED KINGDOM **Respondent**

OBSERVATIONS OF THE GOVERNMENT OF THE UNITED KINGDOM IN RESPONSE TO THE APPLICANT'S SUBMISSIONS OF 16 MAY 2017

Foreign and Commonwealth Office

LONDON SW1A 2AH

13 July 2017

INTRODUCTION

1.1. These observations are submitted pursuant to the permission granted by the Court, as indicated in the letter from the Section Registrar dated 29 June 2017, in response to the Applicant's submissions dated 16 May 2017.

1.2. The Applicant takes issue with the Government's submission that the Court should determine admissibility separately or, alternatively, stay these proceedings pending the determination of *The Times & Kennedy v. United Kingdom* (64367/14).

1.3. The Applicant's key contention is that the Investigatory Powers Tribunal ("IPT"), when considering the scope of the Applicant's rights pursuant to Article 10, would be bound to follow the Supreme Court in *Kennedy v Charity Commission* [2015] AC 455 rather than the Grand Chamber in *Magyar Helsinki Bizottság v. Hungary* (18030/11). This contention is based on a flawed understanding of the Supreme Court's judgment and it is wrong.

ADMISSIBILITY

2.1. The Applicant acknowledges that a claim against GCHQ for breach of ECHR rights can be brought before the IPT. However, the Applicant contends that this would not be an effective remedy in this case because the "*Supreme Court judgment in Kennedy … remains binding on all UK courts and tribunals despite the subsequent development of the jurisprudence of the European Court of Human Rights*" (Applicant's submissions, §10).

2.2. As the Applicant states in its submissions at §5, its "*case is that Article 10 contains a positive right of access to certain information held by a public body*". In this regard, the Applicant wishes to rely on *Magyar Helsinki Bizottság v. Hungary* and contends that it would not be able to do so before the IPT because the "*domestic authority of the Kennedy decision can be revised only by a further decision of the UK Supreme Court*" (Applicant's submissions, §11), and the Applicant cannot appeal to the Supreme Court from the IPT.

2.3. The Government agree with the Applicant that it cannot take its case to the Supreme Court, only to the IPT. The Government also agree with the Applicant that courts and tribunals in the United Kingdom are bound by the domestic rules of precedent when considering cases involving ECHR rights. But the rules of precedent have the effect that the IPT would have to apply the *ratio decidendi* of the Supreme Court's judgment in *Kennedy v Charity Commission*, insofar as it is relevant. The IPT would not be bound by any part of the judgments of the Justices of the Supreme Court which is an *obiter dictum.*

2.4. The Applicant has failed to appreciate that the Supreme Court's conclusion as regards the scope of the rights inherent in Article 10 is *obiter* and therefore the IPT is not bound by this aspect of the judgment.

2.5. The fact that it is *obiter* is made clear by Lord Mance JSC, with whom Lord Neuberger PSC, Lord Clarke JSC, Lord Toulson JSC (see §150) and Lord Sumption (see §152) agreed, in the leading judgment which he gave.

2.6. In his judgment, Lord Mance first addressed the question of the ordinary construction of section 32 of the Freedom of Information Act ("FOIA") at §§24-34, and then he posed the question whether Article 10 was "*relevant*" when construing section 32 (*Kennedy v Charity Commission*, heading above §35). Lord Mance gave five reasons for concluding that, even if Mr Kennedy was right about the content of Article 10, it would have no effect on the interpretation of section 32 of FOIA. Lord Mance's conclusion that Article 10, even if engaged, could have no impact on the construction of section 32 of FOIA was a core part of the Supreme Court's decision and forms part of the *ratio decidendi*.

2.7. At §57, Lord Mance observed that, in light of the conclusions he had already expressed regarding the domestic law remedy available to Mr Kennedy, "*whether or not Mr Kennedy's claim to disclosure by the Charity Commission engages article 10 cannot affect the outcome of this appeal*". He made clear at §42 and §57 that his analysis of the content of Article 10, although detailed, constituted *obiter dicta*.

2.8. Similarly, Lord Toulson acknowledged that in view of the approach he, too, had taken he could deal shortly with the argument in respect of the scope of Article 10 (§143). Like Lord Mance, with whose judgment and reasons Lord Toulson agreed (§150), Lord Toulson's observations regarding the scope of Mr Kennedy's Article 10 rights were *obiter*.

2.9. The Government acknowledge that a lower court or tribunal would, in practice, pay careful attention to detailed analysis from the Supreme Court, even though it is not binding. Nevertheless, it would undoubtedly be open to the IPT to revisit the question of the scope of Article 10, having regard to the Grand Chamber's case-law subsequent to *Kennedy*. Moreover, the fact that this case could not proceed to the Supreme Court would, no doubt, be an important and potentially distinguishing factor for the IPT in considering whether it should revisit the issue in light of *Magyar Helsinki Bizottság v. Hungary*. Once this is understood, the Applicant's contention that it has no effective domestic remedy falls away.

2.10. The Government agree with the Applicant that he cannot seek disclosure from GCHQ pursuant to FOIA because, as the Applicant acknowledges at §17, that would be contrary to the "*plain words*" of s.84 of FOIA. But the Applicant has to look beyond FOIA, as the Supreme Court made clear in *Kennedy v Charity Commission*, and consider the specific legislative scheme applicable to the public authority from whom disclosure is sought. In this case, that is the Intelligence Services Act 1994 ("the ISA").

2.11. It is no answer for the Applicant to say that the Government do not concede that the ISA contains a power enabling GCHQ to give disclosure to a body such as the Applicant on request. The Government contest the Applicant's contention that it had any Article 10 right to the information sought. If the Applicant were to bring proceedings before the IPT it would be the Government's case that the Applicant has no right to disclosure of the information sought pursuant to Article 10, FOIA or the ISA. But the question whether the Applicant has an effective domestic remedy depends on whether these contested issues can be tested and determined by the domestic courts. A domestic remedy does not cease to be effective simply because the Government defends the claim. The

Applicant cannot rely on "*mere doubts as to the prospects of success of a particular remedy which is not obviously futile*" as a "valid reason for failing to exhaust domestic remedies" (*Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, §52, ECHR 2013).

2.12. As a matter of ordinary construction, section 4 of the ISA (unlike section 84 of FOIA) contains a statutory bar prohibiting disclosure by GCHQ save to the extent such disclosure is in accordance with the provision. However, if (contrary to the Government's case) the IPT were to decide that the Applicant has an Article 10 right to the information sought (or any part of it), the IPT would have to consider whether the ISA could be read compatibly with that right. As the Government have made clear in their letter of 7 April 2017 at §12, it would not be the Government's position in any such domestic proceedings that the only possible remedy would be a declaration of incompatibility.

2.13. The Human Rights Act 1998 enables the Applicant to enforce any rights it has pursuant to Article 10 before the domestic courts and tribunals. In this instance, the forum is the IPT. The Applicant has given the domestic tribunal no opportunity at all to consider its allegation that GCHQ has breached Article 10. The Applicant could seek a determination of its claim by the domestic tribunal, but it has chosen not to do so. The position is clear-cut and simple. In these circumstances, the Applicant has manifestly failed to exhaust its effective domestic remedies and the application should be declared inadmissible.

STAY PENDING *THE TIMES & KENNEDY V UNITED KINGDOM*

3.1. The Applicant takes issue with the Government's contention that this case and *The Times & Kennedy v United Kingdom* "involve similar issues of non-exhaustion" (Applicant's submissions, §26).

3.2. In fact, the Government's primary position is that admissibility should be determined because "*the reasons for staying the case do not apply (or at least, not with anything like the same force) to the admissibility question as to the merits because whether Privacy International has failed to exhaust its domestic remedies is based on the specific facts of this case*" (Government's letter of 7 April 2017, §13(4)). The Applicant has said nothing about the actual reasons

given by the Government for applying for a stay, which concern the degree of similarity between the cases at the merits stage (Government's letter of 7 April 2017, §§15-16).

3.3. In any event, although the admissibility arguments differ because the Charity Commission and GCHQ are governed by different statutory regimes, the Applicant's focus on FOIA and failure to consider the specific legislative regime applicable to the public authority from whom information was requested applies in both cases. In addition, the Applicant's contention at §26(b) that the IPT does not provide an effective remedy because it cannot revisit *Kennedy v Charity Commission* is wrong. As explained above, the IPT could consider the the scope of Article 10, and the rights contained therein, in light of jurisprudence of the Court since *Kennedy v Charity Commission* because the observations of the Supreme Court on the issue were expressly *obiter.*

Conclusion

4.1. For the reasons set out above and in the Government's letter of 7 April 2017, the Government respectfully submit that the Court should determine admissibility separately or stay the proceedings pending determination of *The Times & Kennedy v. United Kingdom*.

Amanda Hennedy Goble

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13 July 2017