IN THE INVESTIGATORY POWERS TRIBUNAL **Case No. IPT/15/110/CH**

BETWEEN:

PRIVACY INTERNATIONAL

Claimant

-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

SKELETON ARGUMENT
ON BEHALF OF THE RESPONDENTS
For hearing on 25 September 2018

Introduction

1. These OPEN submissions are served for the purposes of the hearing in these proceedings listed to take place on 25 September 2018.

2. The purpose of the hearing is described at paragraph 13 of the Tribunal's Order dated 23 July 2018, which provides as follows:

> "A hearing (at which the Claimant may make OPEN and the Respondents and Counsel to the Tribunal may, as necessary, make OPEN and/or CLOSED submissions) shall be fixed for 10.30 am Tuesday 25 September 2018 to rule on (a) disclosure; and (b) to hear OPEN and CLOSED submissions on what, if any, determination the Tribunal should make"

Should the Tribunal make a determination at this stage of the proceedings?

3. The wording of the Tribunal's order quoted above (*"…what, if any, determination the Tribunal should make"*) raises a question as to whether the Tribunal should in fact make any determination at this stage of the proceedings. That is presumably because, with the CJEU reference still outstanding, the proceedings have not yet reached their conclusion, which is the normal time for a determination to be made. Putting the matter a different way, if a

determination is made now, it is possible, depending on the outcome of the reference and the Tribunal's subsequent ruling, that a further determination will be necessary at some stage in the future.

4. The Respondents accept that the Tribunal has the power to determine the ECHR element of these proceedings at this point, whilst leaving the EU law element extant and to be determined in due course.

5. It is clear from the Claimant's skeleton argument that it wishes the Tribunal to make a determination relating to the ECHR issues now. Subject to the following two caveats, the Respondents would not seek to dissuade the Tribunal from adopting that course.

6. The first caveat is that if the Tribunal issues a determination in respect of the ECHR issues now, then that element of the claim will have been brought to an end. It follows that it will not be possible for the Tribunal to return to the ECHR claim following the CJEU's ruling on the reference. As the Respondents understand the Claimant's ECHR claim (see Re-Amended Statement of Grounds, paragraphs 51-52), it includes an argument that the BPD / BCD regimes are not in accordance with the law for the purposes of Article 8 because those regimes are in breach of EU law. For obvious reasons, the Tribunal has not yet ruled on that part of the ECHR claim. If the Claimant maintains its invitation to the Tribunal to determine its ECHR claim now, then it must be assumed that the Claimant no longer wishes to pursue that ground of its Article 8 claim.

7. The second caveat relates to rule 6. It is common ground between the parties that any findings that the Tribunal makes in support of a determination must comply with rule 6(1). The Tribunal's task of ensuring that it does not make any findings that harm national security will be complicated if it makes findings in two stages, with the first set of findings made at a time when it does not know what findings it may wish to make at the second stage. There is a risk that inconsistency between the findings may itself breach rule 6(1). If findings are

to be made in two stages, this difficulty will require the Tribunal to adopt a cautious approach at the first stage.

The determination

8. The terms of any determination that the Tribunal may make are mandated by RIPA s.68(4)(a) – it must be confined to *"a statement that they have made a determination in [the Claimant's] favour"*.

Findings of fact

9. The Respondents make the following submissions of principle regarding OPEN findings of fact made by the Tribunal under rule 13(2) in support of a determination.

10. First, as stated above, findings that the Tribunal makes must not breach rule 6(1). This is accepted by the Claimant (skeleton, paragraph 20) and is in any event clear from the express terms of rule 13(4), as recognized at paragraph 21 of the Tribunal's ruling in *Belhaj*.

11. Second, it is for the Tribunal to decide what findings are necessary and appropriate in the circumstances of the case. The purpose of the exercise is not to make general findings about the Respondents' BPD and BCD regimes, still less to record any associated expressions of concern (cf Claimant's skeleton, paragraph 18). Rather, as is clear from RIPA s.69(2)(i), the much more restricted purpose of the exercise is to provide the Claimant with *"information about … [the] determination"*.

12. Third, the Tribunal will wish to consider making findings, as it did in *Belhaj*, that make clear the limited nature of its high level rulings as to the illegality of the BPD and BCD regimes. Such findings might be drawn from the analysis at paragraphs 67-84 of the October 2016 Judgment and paragraphs 54, 55 and 59(i) of the July 2018 Judgment.

13. Fourth, in formulating findings that do not breach rule 6(1), the obvious starting point is the Tribunal's OPEN judgments (which have already been through the

security checking process) and the OPEN documents filed by the Respondents in the course of proceedings (for example, the OPEN Re-Amended Report on Searches and the Re-Amended OPEN Response to the Claimant's Request for Further Information Relating to Searches).

14. Finally, and by contrast, where proposed findings seek to put a gloss on and/or draw inferences from the language that has been used in those OPEN documents, issues may well arise both as to the accuracy of the proposed finding and/or as to a potential breach of rule 6(1).

15. The Respondents will make CLOSED submissions on the detail of proposed findings.

Request for production of witness statement

16. At paragraph 16.2 of its skeleton argument, the Claimant invites the Tribunal to direct the Security Service to provide a witness statement explaining the searches of the 'Workings' that took place in August and September 2017. The suggested need for a witness statement is made very late in the day; the Claimant has been aware of this issue since the service of the Re-Amended OPEN Response to the Claimant's Request for Further Information Relating to Searches very nearly a year ago on 6 October 2017. The Respondents have been asked to disclose to the Tribunal the exchanges of correspondence between MI5 and IPCO on this issue, and will do so prior to the hearing.

Remedy

17. The Claimant has indicated (skeleton, paragraphs 23-24) that it will not be in a position to address the Tribunal on remedy until after the Tribunal has made its findings of fact. On that basis, it will be necessary for the question of remedy to be dealt with at a future hearing.

Report under s.68(5) RIPA

18. It is accepted that, if a determination is made at this stage, the requirements of s.68(5) will be fulfilled.

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21 September 2018