

Witness: MI5 Witness 4

Party: 4th Respondent
Number: 1

Exhibits: 1-2 and Annex, Exhibits 3-4
Date: 19/06/2019

Case Nos. IPT/17/86 & 87/CH

IN THE INVESTIGATORY POWERS TRIBUNAL
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 COMMUNICATION HEADQUARTERS
- (4) SECURITY SERVICE
- (5) SECRET INTELLIGENCE SERVICE

Respondents

WITNESS STATEMENT OF MI5 Witness 4

I, MI5 Witness 4, of the Security Service, of Thames House, London SW1, WILL SAY as follows:

Introduction

1. I am a Senior Legal Adviser in MI5 and have worked for MI5 for 17 years. I have provided legal advice on MI5's agent-running capability since 2002. In my current role, I am responsible for the legal teams who provide advice to MI5's investigative sections and MI5's agent-running teams in Great Britain and Northern Ireland.
2. I am authorised to make this statement on behalf of MI5. The contents of this statement are within my own knowledge and are true to the best of my knowledge and belief. Where

[REDACTED]

matters are not within my own knowledge they are based upon documentation made available to me and from discussions with others within MI5.

Purpose of witness statement

3. I make this statement to explain the circumstances in which MI5 notify the police and the relevant prosecutorial authority that a CHIS has been authorised to engage in criminal activity in (a) England and Wales, (b) Northern Ireland and (c) Scotland.

Disclosure in England and Wales

4. [REDACTED]

"Below I address the circumstances in which MI5 may liaise with the police and/or the CPS (a) during the course of a criminal investigation, and (b) after an individual has been charged"

(a) Disclosure prior to charge

5. MI5's relationship with the CPS Counter Terrorism Division ("the CPS") and the police Counter Terrorism Network ("the police") is underpinned by a Memorandum of Understanding ("MoU"). The current version of the MoU was signed by the CPS CTD on 29 March 2016, by the police on 30 March 2016 and by MI5 on 5 April 2016 [REDACTED] 1]. It replaced an earlier version of the MoU, which was signed by the CPS on 1 April 2015 and by MI5 on 13 May 2015 [REDACTED] 2].

6. The purpose of the MoU is set out at paragraph 2:

"Its aim is to identify and provide 'best practice' guidance in relation to the respective roles and responsibilities of CTD, counter terrorism police and MI5 in relation to MI5 material which may be relevant to counter terrorism investigations and prosecutions to ensure effective decision making processes, proper revelation and secure handling."

7. The MoU therefore covers arrangements concerning all MI5 material, which may be relevant to counter terrorism investigations and prosecutions. [REDACTED]

8. MI5 works very closely with the police in its counter-terrorism operations. As set out at paragraph 19 of the MoU, "in most MI5 led intelligence investigations, whether it is intended or anticipated that the operation will result in prosecution or disruption by some other means, a police Senior Investigating Officer ("SIO") is appointed an early stage".

9.

[REDACTED]

" Paragraph 20 of the MoU refers to the initial stage of an investigation. The focus at this stage is on liaising with the police to gather the best possible intelligence and to disrupt the criminal activity in the most effective way possible "

10. However, MI5 do bear in mind the impact their actions may have on the potential for a successful prosecution in the future

[REDACTED]

" The CPS may also be consulted in particularly complex or high risk cases "

11. MI5 may make disclosure direct to the CPS in circumstances where criminal prosecution is reasonably foreseeable.

[REDACTED]

" Paragraph 25 of the MoU sets out a number of circumstances where it may be advisable for there to be early consultation with the CPS "

12. When deciding when to make disclosure, MI5 consider a large number of factors. Those factors include, but are not limited to the extent of the criminality, the likelihood of criminal prosecution, [REDACTED] and the national security considerations accompanying any such disclosure.

[REDACTED]

[REDACTED]

(b) Disclosure post charge

13. Where the CPS make a charging decision, and MI5 hold material that may be relevant to that prosecution, then MI5 will always notify the CPS at that stage. [REDACTED]

" Paragraphs 14 -21 describe the disclosure processes that will be followed by MI5 following a charge, and the liaison process between MI5, the CPS and the Police "

14. [REDACTED]

15. MI5 is a "third party" for the purposes of the Criminal Proceedings and Investigations Act 1996. In order to enable prosecutors to discharge their disclosure obligations, MI5 arrange directly for the CPS to inspect all potentially relevant MI5 material. This may include

" different types of intelligence material "

16. [REDACTED]

17. [REDACTED]

18. [REDACTED]

[REDACTED]

19. [REDACTED]

20. [REDACTED]

21. [REDACTED]

22. It is for the CPS, as the prosecuting authority, not for MI5, to determine what is relevant to the case. [REDACTED]

[REDACTED] Where the material disclosed by MI5 to the CPS includes security-sensitive material which may legitimately be withheld from disclosure on PII (Public Interest Immunity) grounds, the CPS will comply with their disclosure obligations (subject to the Court's supervision and direction) without having to disclose such material to the defence.

Disclosure in Northern Ireland

23. There is a Protocol between the Security and Intelligence Services, the Public Prosecution Service of Northern Ireland ('PPSNI') and the Police Service of Northern Ireland ('PSNI'), which has been in force from 1 October 2006.

[REDACTED]

24. Paragraph 2 sets out that *'the purpose of this Protocol is twofold:*

2.1 *to ensure that in any case where a Service becomes aware that it holds material which may be relevant to a prosecution, it will bring it to the attention of the prosecutor and, as appropriate, the officer in charge of the investigation to enable the prosecutor to decide upon disclosability: and*

2.2 *to regulate the relationship between the Services and those conducting investigations and prosecutors so that the prosecutor, the officer in charge of the investigation and the disclosure officer may properly discharge their statutory obligations under CPIA.'*

25. Like the MoU governing the process in England and Wales, the Protocol does not specifically concern agent participation in criminality. It does not contain any express reference to "authorised" CHIS criminality.

26. Having spoken to colleagues in Northern Ireland, I understand that MI5 generally adopt the same approach to revelation in Northern Ireland as that set out in respect of England and Wales, at paragraphs 5 – 22 above. Paragraph 14 of the Protocol makes clear that:

'In a prosecution where a Service becomes aware that it holds material which may be relevant to that prosecution, it will bring it to the attention of the prosecutor and, as appropriate, the officer in charge of the investigation, to enable the prosecutor to decide upon disclosability'.

27. However, whilst the Central Casework Division of the PPSNI ('CCD') used to provide MI5 with a schedule of all individuals charged with terrorism offences each month as is the practice in England and Wales (see paragraph 14 above), this no longer takes place. Instead, senior crown prosecutors within the CCD, who are responsible for prosecuting serious terrorist offences, will contact MI5 when they have a case about which they believe MI5 may hold relevant material.

28. [REDACTED]

Disclosure in Scotland

29. MI5's relationship with the Scottish police and the Crown Office and Procurator Fiscal ('COPFS') is underpinned by a Memorandum of Understanding ('Scottish MoU'). It was signed by MI5 and the COPFS on 6 January 2012. Its purpose is set out at paragraph 1.2:

'Its aim is to identify and provide 'best practice' guidance in relation to the respective roles and responsibilities of the Security Service and COPFS in relation to Security Service material which may be relevant to prosecutions conducted by COPFS to ensure effective decision making processes, proper revelation and secure handling'.

30. Like the MoU governing the process in England and Wales, the Scottish MoU does not specifically concern agent participation in criminality. It does not contain any express reference to "authorised" criminality.

31. Having spoken to colleagues in Scotland, I understand that MI5 adopt the same approach to revelation in Scotland as that set out in respect of England and Wales, at paragraphs 5 – 22 above (save that the COPFS' disclosure duties arise from the Criminal Justice and Licensing (Scotland) Act 2010 not the CPIA and there is no provision of a monthly schedule of charged individuals by the COPFS to MI5).

32. As set out at paragraph 4.1 of the Scottish MoU, 'The Security Service is not an investigating agency within the meaning of the Criminal Justice and Licensing (Scotland) Act 2010 and the duties under that Act, and any Code of Practice issued under that Act, do not therefore apply to the Security Service.' However, the process for disclosure to the COPFS is similar to the process of disclosure to the CPS in England and Wales:

- a. Where it is established that MI5 are in possession of potentially relevant material then the COPFS should provide MI5 with a copy of the petition, the case summary and a note identifying the key issues (para 4.2 Scottish MoU).
- b. MI5 will then carry out searches for relevant material (para 4.3 Scottish MoU).
- c. The COPFS and not MI5 make a decision as to whether the material is relevant. As set out at paragraph 4.9 of the Scottish MoU, 'It will be the COPFS' lawyer's responsibility to discharge the prosecutor's obligations under the Criminal Justice and Licensing (Scotland) Act 2010 to determine whether such material either undermines the prosecution case or might reasonably be expected to assist the case for the defence.'



Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed by MI5
Witness 4

[INSERT SIGNATURE] ...

19th June 2014

