

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

Respondents

JOINT LIST OF OPEN ISSUES

By agreeing that a question can be formulated in open, the Respondents are not agreeing that an answer will be provided in Open (including 'yes' or 'no')

References to RASG refer to the paragraphs in the Claimants' Re-Amended Statement of Grounds dated 29 March 2019. References to R refer to paragraphs in the Respondents' Response dated 7 May 2019.

The list of issues may require amendment or further consideration once disclosure and opening-up has been completed.

Standing

1. (a) Do the Claimants have standing in respect of their claim for judicial review?

(b) Do the Claimants, or any of them, have standing in respect of their Human Rights claims (Grounds 5, 6 and 7) (R15)?

Ground 1

2. What are the correct legal principles to apply in determining whether the Security Service's authorisation of Covert Human Intelligence Sources ('CHIS') to participate in criminality is "*in accordance with law*"? (*Footnote 30 to RASG 117(c), R43-46*)

3. Was the Security Service's authorisation of CHIS participation in criminality "*in accordance with law*" for the purpose of the Convention:
 - a. between 2 October 2000 and 27 November 2012, before the policy was supervised by the IS Commissioner;
 - b. between 27 November 2012 and 26 November 2014, during which time the policy was supervised by the IS Commissioner pursuant to an unpublished non-statutory direction;
 - c. between 26 November 2014 and 1 March 2018, during which time the policy was supervised by the IS and IP Commissioners pursuant to an unpublished statutory direction; and/or
 - d. between 1 March 2018 and 8 June 2018, when the statutory direction was published but the policy had not been published in any form?

(*RASG 116-117, R47*)

4. At the date of the Tribunal's consideration, is the Security Service's authorisation of CHIS participation in criminality "*in accordance with the law*"? (*RASG 118, R48*)

Ground 2

5. What are the correct legal principles to apply in determining whether the Security Service's authorisation of CHIS participation in criminality complies with the common law obligations in respect of publication of policies? (*RASG 120, R49-52*)

6. Was there insufficient publication of the policy so as to mean the common law has been breached:
 - a. between 2 October 2000 and 1 March 2018, when the existence of the policy was not published; and/or

- b. between 1 March 2018 and 7 June 2018, when the content of the policy had not been published; and/or
- c. since 8 June 2018, in circumstances where the policy has been partly disclosed?
(*RASG 121, R53*)

Ground 3

- 7. Does section 1 Security Service Act 1989 provide a legal basis for the Security Service's authorisation of CHIS participation in criminality? (*RASG 122-128, R58- 65*)
- 8. If not, is the policy unlawful and was it unlawful at all material times?

Ground 4

- 9. Does the Security Service's authorisation of CHIS participation in criminality unlawfully dispense with the criminal law in (a) England and Wales, (b) Scotland and /or (c) Northern Ireland? (*RASG 129, R69-76*)
- 10. Does the Security Service's authorisation of CHIS participation in criminality unlawfully usurp the proper functions of the prosecutor and/or the police¹ in (a) England and Wales, (b) Scotland and/ or (c) Northern Ireland? (*RASG 130, R77-91*)
- 11. Does the Security Service's authorisation of CHIS participation in criminality interfere unlawfully with the criminal justice systems of either Northern Ireland or Scotland?
(*RASG 131, R92-94*)

Grounds 5-7

- 12. It is common ground that:
 - a. The Security Service is not able to authorise activity which would constitute a breach, by it, of Articles 2, 3, 5 or 6 of the Convention (or indeed of any other

¹ The Claimants have agreed to provide further and better particulars of their allegation that the Security Service usurps the functions of the police.

Articles of the Convention). (*Ground 7*)

- b. Oversight by the Commissioner would not discharge any obligation for a person arrested or detained to be brought promptly before a judge or other officer authorized by law to exercise judicial power (as per Article 5(3)) nor would it constitute the taking of proceedings by a person in order to have the lawfulness of his detention decided speedily by a court (as per Article 5(4)). (*Ground 5*)
- c. Oversight by the Commissioner would not discharge any investigative obligations which arise under Articles 2, 3 and 5 of the Convention. (*Ground 6*)
(*R97*)

13. There is dispute in respect of the following issues:

- a. What is the proper legal test to be applied when determining whether the Security Service is responsible for any alleged breach? (*R101-102*)
- b. The extent to which it is necessary to consider context, purpose and necessity when determining whether there has been a breach of the Convention (*R103-104*).

14. Does the Security Service's policy in respect of the authorisation of CHIS participation in criminality comply with the relevant Convention principles?

15. As to the Security Service's practical application of the policy, in respect of each of the Participation in Criminality ("PiC") forms selected by Counsel to the Tribunal, has the Security Service breached:

- a. the Security Service's policy in respect of the authorisation of CHIS participation in criminality?
- b. Articles 5(3) & (4) ECHR? (*RASG 132*)
- c. The investigative duties imposed by Articles 2, 3 and 5 ECHR? (*RASG 133-134*)

d. Articles 2, 3, 5 and 6 ECHR? (*RASG 135-136*)

Remedy

16. If the Claimants' challenge succeeds, what relief, if any, should be granted?