

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

**RESPONDENTS' OPEN SUBMISSIONS ON
THE RELEVANCE OF POLICY REVIEWS BY OFFICIALS**

1. On 31 May 2019, the President made the following direction:

“In the course of their disclosure submissions CtT requested disclosure into OPEN of a Home Office policy paper which IPCO had provided to the Tribunal pursuant to a statutory request for assistance. The Respondents resisted disclosure as they argued that the paper was not relevant. Subsequently CLOSED submissions on the issue of relevance were filed by CtT and by the Respondents.

The President has directed that there should now be OPEN submissions from the parties. The submissions should address the question as to whether policy reviews by officials regarding participation in criminality of agents, including any oversight of the authorisation of such activity, are relevant.”

Overview

2. In the Respondents' submission, “*policy reviews by officials regarding participation in criminality of agents, including any oversight of the authorisation of such activity*” are not relevant to the issues in this challenge. As developed below, this is because such papers do not assist in determining whether the Security Service's “authorisation” of CHIS participation in criminality: (a) is “*in accordance with law*” (ground 1; issues 2-4); (b) complies with the common law obligations in respect of publication of policies (ground 2; issues 5-6); (c) has a

legal basis and complies with constitutional principle (grounds 3 and 4; issues 7-11); and (d) is in breach of the convention (grounds 5, 6 and 7; issues 12-15). Those are questions of fact and law which the Tribunal will, and should, determine with no regard to the opinions held by officials within, or by others advising, the Respondents.

Submissions

3. Firstly, the Tribunal will determine the Claimants' grounds of challenge by reference to the law and policy which is actually in place and the facts which have actually occurred. The views of officials about possible changes to law, policy or practice are of no assistance in this regard. To the extent that changes were made, the Tribunal will know about them. To the extent that changes were not made, they are irrelevant (and, moreover, the reasons for not making changes can only be speculated at: §5 below).
4. Secondly, the views of officials on the current (at the time) state of the law, policy and practice are irrelevant. This holds good whether those views are positive or negative. Just as the Tribunal would be entirely unassisted by an internal clean bill of health being given, and would still ask whether in fact there had been unlawful conduct, the Tribunal would equally be unassisted by negative views being expressed internally. The only proper arbiter of those questions is the Tribunal.
5. Thirdly, even if the Tribunal were to take the view that such reviews might be capable of providing some limited assistance to it, this raises the question of what further information would be needed in order properly to extract such relevance. By way of example, if an opinion in a policy review is said to be of potential relevance, this will require exploration of, for example, who said it, who agreed with it, who disagreed with it, how it was taken forward (or not), etc. In the Respondents' submission, it does not make sense to distract resources onto the resolution of such questions, many of which may never be answerable (and which should, in any event, properly be seen as being of no relevance to the issues in dispute: see paragraphs 3 and 4 above).
6. In conclusion, the Respondents invite the Tribunal to rule that policy reviews by officials regarding participation in criminality of agents, including any oversight of the authorisation of such activity, are irrelevant.

**SIR JAMES EADIE QC
VICTORIA WAKEFIELD QC
14 JUNE 2019**