IN THE INVESTIGATORY POWERS TRIBUNAL **Case Nos. IPT/17/86 & 87CH**

B E T W E E N:

(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

CLAIMANTS' OPEN SUBMISSIONS ON THE RELEVANCE OF POLICY REVIEWS BY OFFICIALS

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1. The Tribunal has invited submissions on "*whether policy reviews by officials regarding participation in criminality of agents, including any oversight of the authorisation of such activity, are relevant*".

2. The claim concerns the lawfulness of criminal conduct in the UK by MI5 agents. The Security Service purports to "*authorise*" its agents to carry out crimes.

3. The Claimants contend that this practice usurps the proper functions of the police and the UK's prosecution services. Serious crime can be committed in secret but not disclosed for investigation or prosecution which undermines the rule of law. The *de facto* effect of the policy is to enable the Security Service to exercise a dispensing power over the criminal law, without statutory authority.

4. The Claimant also criticises the arrangements for oversight. Prior to 2012, there was no oversight at all. Latterly, the oversight has been inadequate because it does not cover either the legality of the policy, or whether the police or prosecution authorities should be notified of criminality.

5. Internal reviews of the substance and operation of the policy are plainly relevant to the issues before the Tribunal:

a. At §116 of the Re-Amended Statement of Grounds, the Claimants expressly plead that "*the authorisation regime did not contain adequate safeguards, sufficiently accessible to the public, to provide proper protection against arbitrary conduct*".

b. At §117 the Claimants plead that "*any interference with a Convention right must be "in accordance with law". It requires a legal regime that complies with the rule of law by providing both (i) adequate safeguards against abuse of executive power, including judicial or quasi-judicial oversight and (ii) sufficient clarity to enable individuals to appreciate the existence and nature of those powers*".

c. The quality of the legal regime is not simply measured by a theoretical examination of the policy itself. The Tribunal must consider the effectiveness of the safeguards and oversight in practice. See, for example, *Association for European Integration v Bulgaria* (Application 62540/00) at §92–93. The ECtHR at [79]–[84] held that the scope of application and authorisation procedure for a Bulgarian surveillance law was sufficiently clear and detailed. At [85]–[91] however it noted the absence of any real safeguards in relation to the implementation of surveillance and remedies where it was incorrectly carried out (see e.g. [90]-[91] concerning absence of notification). It then concluded that the safeguards were not effective in practice [92]–[93].

d. Indeed, such consideration is an established part of the Tribunal's jurisprudence. See *Privacy International* [2016] UKIPTrib 15_110-CH (17 October 2016, BCD/BPD) at §62(vi) and §72-80 where the Tribunal took into account the presence and content of internal (i.e. by officials) and external (i.e. by Commissioners) arrangements for oversight and review, and their practical effectiveness. The absence of effective review led to a finding of a breach of the Convention.

e. The quality and effectiveness of internal and external review, and whether any recommendations made were implemented are therefore directly relevant to the claim. The point is *a fortiori* if the internal reviews by officials have identified any defects in the operation of the scheme, or have identified significant risks or areas for improvement.

6. Further, the Respondents have voluntarily disclosed material suggesting that there is no realistic alternative to the policy in its present form. See the letter of 23 September 2011 from Sir Andrew Parker (then Deputy Director General of the Security Service) to Sir Mark Waller (then Intelligence Services Commissioner) contending that "… *the guidelines give us the flexibility we need to run these agent cases to the best effect and, perhaps above all, a better alternative that is practical and deliverable has yet to be identified*" (underlining added). At §89(b) of the Defence, it is also suggested that there is a reasonable excuse for the failure to make disclosure of agent criminality to the police. This plea, and the assertion of Sir Andrew Parker, both require testing against the evidence, including by reference

to the analysis of officials as to whether the policy is working effectively, is being complied with in practice and could be improved.

7. The Respondents submissions to the contrary are wrong. They claim that the views of officials on the "*current (at the time) state of the law, policy and practice … are irrelevant*". In fact, such materials are likely to be the best evidence of whether the policy:

    a. was in practice being complied with;

    b. was effective;

    c. was being subjected to adequate internal and external review; and

    d. could be improved.

8. For example, internal review documents prepared by officials which:

    a. show a breach of the policy;

    b. evidenced inadequate oversight;

    c. showed the policy could be less secret, or narrower in scope; or

    d. expressed concern about relationship between the policy and the criminal law

    would all be of central relevance.

9. Official reviews were of also critical importance to Sir Desmond de Silva QC's *Pat Finucane Review*. Chapter 4 of the *PFR* discloses the genesis, drafting and initial adoption of the policy now under challenge. The policy was drawn up by a Northern Ireland Office working group in 1989-1990. It was then adopted by the RUC and then by the Security Service <u>without</u> ministerial approval (§4.61). The limits on the policy as then drafted were published in the *PFR* ("*…he should be warned that he should not expect to avoid criminal proceedings if he is detected committing… any physical assaults, or attacks on property causing serious damage, or acts of extortion*" §4.55). The Law Officers strongly criticised the proposals.

10. The proposals were then reviewed by a senior official (Sir John Blelloch) who concluded that the policy was "*about as good as can be achieved*" because "*legislation would be politically unobtainable*". The official also noted that he was unsure that Ministers would be willing to themselves approve the guidelines "*for fear that may involve them in allegations of conspiratorial criminality*". Nevertheless, Sir John Blelloch approved the guidelines in his report (§4.64).

11. A working group of officials was then set up, chaired by Sir John Chilcot. The group concluded that the guidelines (the current version of which are under challenge in these proceedings) were "*not satisfactory*" and leave all concerned "*unduly exposed*" under the "*existing law*" as well as creating "*political and ethical*" drawbacks. A "*stable and satisfactory*" solution required "*new legislation*" (§4.71). This is precisely the sort of material that the Respondents claim is irrelevant to these proceedings.

12. The IRA then agreed to a ceasefire and the peace process "*diminished the impetus to resolve the problem*". Subsequent official reviews are not described in the *PFR*, given the timing of Mr Finucane's murder, but are undoubtedly relevant to this claim.

13. Even today, it is unclear whether the policy under challenge has received ministerial approval. Further, the above documents show the central role of official reviews in its genesis, amendment and development. Accordingly, the Respondents' submission that "*policy reviews by officials regarding participation in criminality of agents, including any oversight of the authorisation of such activity, are irrelevant*" is wrong, both in principle and in the unusual circumstances of this claim.

14. Finally:

    a. The Tribunal has an inquisitorial function and is hearing a human rights claim. It is investigating the legality and operation of a policy for the commission of crimes by the Security Service, developed and overseen by officials in secret. Without disclosure of the official reviews, it will be exceptionally difficult for the Tribunal to properly understand what has happened, what may have gone wrong and where the key strengths and defects in the policy lie. The reviews were central to enabling Sir Desmond de Silva QC to understand the policy and its introduction. They are likely to be similarly valuable to the Tribunal.

    b. It is at least possible that the official reviews may disclose additional and previously unappreciated grounds of challenge. It should not be assumed that the Claimants has been able to fully plead their claim in respect of a secret policy operated in secret. The Government Legal Department's guidance on the duty of candour correctly notes (at §1.2) that:

        "*The duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge*" citing *R v Barnsley MBC, ex p Hook* [1976] 1 WLR 1052.

BEN JAFFEY QC

CELIA ROONEY

26 June 2019