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' REPLACEMENT SKELETON ARGUMENT
For directions hearing: 4 October 2018

References are in the form [Tab/Page].

This replacement skeleton argument is served in substitution of the skeleton argument prepared for the adjourned directions hearing in July 2018. It contains the submissions in the July 2018 skeleton, updated and amended to reflect the documents disclosed in September 2018.

A. Introduction

1. This case is about criminal conduct carried out in the UK by covert agents recruited by the Security Service. Under a hitherto secret policy, the Security Service purports to "*authorise*" its agents[1] to carry out crimes **[9/1-3]**.

2. The policy has no legal basis. No meaningful limits to it have been disclosed. It appears that the Security Service thinks it could, if it thinks it would be in the public interest, authorise participation in murder, torture, sexual assault or other grave criminality in the

[1] "*Agents*" is the term used in the policy under challenge. Such agents are not officers of the Security Service but individuals recruited to provide intelligence. Of course, when an officer in the Security Service purports to "*authorise*" criminal conduct, he or she will be also will be guilty of an inchoate offence under the national criminal laws of the UK (e.g. in England and Wales under Part 2 of the Serious Crime Act 2007).

UK. Neither the victim of the crime, the police or the Crown Prosecution Service are notified of authorisations. In practice, this will mean that criminal conduct will not be investigated or prosecuted. Authorisations are granted by officials (cf. an authorisation under s. 7 ISA in respect of criminal conduct abroad which is granted by the Secretary of State).

3. The only oversight provided to date has been carried out by the Intelligence Services Commissioner and now the Investigatory Powers Commissioner. This oversight is so narrow as to be ineffective. For example, the Commissioner has been expressly told not to provide any comment on the legality of the secret policy, and not to express a view on whether a case should be referred to the prosecuting authorities:

> "For the avoidance of doubt I should be clear that such oversight would not provide endorsement of the legality of the policy; you would not be asked to provide a view on whether any particular case should be referred to the prosecuting authorities" (Letter from the Prime Minister to Sir Mark Waller, Investigatory Powers Commissioner, 27 November 2012). **[20]**

4. These limitations are reflected in the (redacted) oversight reports **[21]**:

   a. "*As part of my oversight, I am not concerned if CHIS go ahead with criminal activity. Instead, I am looking at the public interest* [redacted]" (2013 report).

   b. "*MI5 had failed to accurately reflect the CHIS's participation in criminal activity"* (2016 report). **[21/20]**

   c. "*It seemed that MI5 had given approval for this operation confirming that it was necessary and proportionate… I was concerned that MI5 should not have approved* [redacted] *MI5 wrote to me… explaining that* [redacted] *I accepted that the public interest test would be satisfied*" (2015 Report). **[21/14]**

   d. "*The Security Service cannot currently identify precisely how many CHIS authorisations involve participation in criminality. In future they will keep a record of this*" (2014 Report) **[21/51]**

   e. "*The Commissioner raised his concern that MI5 had failed to accurately reflect the CHIS's participation in criminal activity* [redacted] (2016 R2 report).

5. The issues are of considerable public importance. In the past, the authorisation of participation in criminality by agents may have led to grave breaches of fundamental rights. Two examples suffice:

   a. On 12 February 1989 a British and Irish human rights lawyer, Pat Finucane, was murdered by loyalist paramilitaries. Mr Finucane was "*shot 14 times as he sat down for dinner with his wife and three children*" (statement of the Prime Minister on 12 September 2012). The Prime Minister accepted that "*… there was State collusion in*

the murder… in areas such as identifying, targeting and murdering Mr Finucane, supplying a weapon and facilitating its later disappearance… shocking levels of State collusion." Public officials "*had prior notice of a series of planned UDA assassinations, yet nothing was done by the RUC to seek to prevent these attacks… it is really shocking that this happened in our country*." Agents "*in the pay of the state were involved… it cannot be argued that these were rogue agents*". Further, "*an RUC officer or officers did propose Patrick Finucane as a UDA target when speaking to loyalist paramilitary.*"[2]

b. Mr Freddie Scappaticci is alleged to be a former senior member of the IRA and a security service agent working under the codename 'Stakeknife'. See *Scappaticci's Application for Judicial Review* [2003] NIQB 56. It has been alleged that whilst working as an agent, Stakeknife was involved in "*kidnap, torture and murder*". The police[3] are currently investigating Stakeknife and "*whether there is evidence of criminal offences having been committed by members of… the Security Services or other government personnel*".

B. Procedural history

6. In Privacy International's Bulk Communications Data/Bulk Personal Datasets claim, the Agencies disclosed that the Prime Minister had issued three directions to the Intelligence Services Commissioner (*Privacy International v SSFCA* IPT/15/110/CH). The first direction was public. The second direction was made public in the course of the BCD/BPD claim. But the subject matter and date of the third direction was secret.

7. In June 2017, C1 and C2 issued proceedings alleging that the conduct overseen under the third direction was unlawful, not least because it was entirely secret **[1/1-23]**.

8. The Respondents invited the Tribunal to strike out the claim on the basis that the Claimants had no standing **[2/1-2]**. On 18 December 2017, the Tribunal rejected the application.

9. Faced with the prospect of defending these proceedings, HM Government published the third direction on 1 March 2018 **[6]**.

10. In April 2018, the Committee on the Administration of Justice and the Pat Finucane Centre joined as claimants and Amended Grounds were served **[7/1-32]**.

11. On 8 June 2018, the Respondents served their open Response **[8/1-3]**, along with a heavily redacted copy of the "*Guidelines on the use of Agents who participate in Criminality (Official*

[2] https://www.gov.uk/government/speeches/prime-minister-david-cameron-statement-on-patrick-finucane--2

[3] The investigation is known as "*Operation Kenova*" (www.opkenova.co.uk), "*an investigation into the alleged activities of the person known as Stakeknife*". It has been reported that Mr Scappaticci was arrested in the course of the investigation in January 2018 and subsequently released on bail. See https://www.bbc.co.uk/news/uk-northern-ireland-42920197

Guidance)" (the "Guidelines") **[9/1-3]**. The three page Response does not plead to the Grounds in any meaningful way, even in respect of pure issues of law.

12. On 18 June 2018, the Claimants served a Request for Information **[10/1-12]**.

13. On 26 June 2018, the President directed the Respondents to file and serve a skeleton argument, setting out their case on the temporal scope of the claims and on standing, and appending "*outline responses*" to the RFI **[11/1]**. In their skeleton, the Respondents have sought to limit the temporal scope of the claim to 12 months and to "*put down a marker*" (Skeleton, §12) that they did not accept the Claimants' standing (without asking for this to be determined as a preliminary issue) **[8/3]**.

14. In September 2018, certain redacted materials were disclosed, including the letter from the Prime Minister of 27 November 2012 **[20]** and heavily redacted versions of the ISC/IPCO reports **[21]**. None of these documents have yet gone through the process of being reviewed by Counsel to the Tribunal or submissions made to the Tribunal under Rule 6 about whether more can be made open.

15. This is the first directions hearing. The Claimants seek directions to ensure the prompt resolution of the pleaded issues of law.

C. Proposed directions

16. The Tribunal is invited to:

    a. Direct the production of the further information and disclosure sought in the RFI from and including 2 October 2000.

    b. Provide for the Counsel to the Tribunal to consider and the Tribunal to rule on the CLOSED Response and documentation.

    c. List a preliminary hearing to determine the issues of law identified in the Amended Grounds:

        i. Is the policy and/or the guidance lawful (Ground 5)? Specifically:

            1. Does the current policy and/or guidance have a legal basis and is it consistent with the statutory powers granted (and not granted) in the relevant legislation?

            2. Was the policy and/or guidance lawful prior to its (partial) disclosure (Ground 1)?

        ii. Can the Security Service lawfully purport to authorise criminal conduct amounting to a breach of Articles 2, 3, 5 or 6 ECHR (Grounds 4 and 6)? In addition:

1. Can criminal conduct involving deprivation of liberty be lawful if supervised by the Intelligence Services Commissioner or the Investigatory Powers Commissioner (Ground 2)?

2. Is the oversight of the Intelligence Services Commissioner or the Investigatory Powers Commissioner sufficient to ensure there is no breach of the investigative obligation in Articles 2 and 3 ECHR (Ground 3).

D. Limitation

17. The Respondents contend that the Claimants "*seek to bring a challenge unlimited in time*" (Skeleton, §2) **[12]**. The Claimants could not identify the temporal scope of their claim while the underlying conduct in question was secret. It has now been disclosed that participation in criminality has occurred since the 1990s, but without any oversight until 2012.

18. Despite this, in their Response, the Respondents sought to limit the temporal scope of the claim at 12 months. While noting that they did "*not take any formal limitation point*", they contended that it was necessary to limit the scope of the claim in this way to ensure it was subject to "*sensible temporal limits*" (§11) **[8/3]**.

19. The Tribunal directed the Respondents to clarify that position in their Skeleton **[11/1]**.

20. The Respondents now propose two limits: 12 months or 6 years **[12]**. The former is the ordinary limitation period under the Human Rights Act 1998 (s.7(5)(a)). The latter is the standard limitation period for a breach of contract or tort claim (Limitation Act 1980, s.5). The Respondent has failed to explain why or on what legal basis the Tribunal would apply either limitation period to the Claimants' claims.

21. The 12-month or 6-year limitation period under either Act would be inappropriate:

    a. The HRA 1998 applies to conduct that arose more than 12 months ago, where it is part of an unlawful course of conduct: O'Connor v Bar Standards Board [2017] 1 WLR 4833. The Respondents have been authorising criminality pursuant to unpublished Guidance since "*the early 1990s*" (ISC Report 2015). Both amount to a course of conduct.

    b. The HRA 1998 also allows an extension of time where it would be "*equitable in all the circumstances*": HRA 1998, s.7(5)(b). The Limitation Act 1980 limitation period is similarly postponed for any period in which the defendant deliberately concealed any fact relevant to the claimant's right of action: s.32(1)(b). The Respondents have deliberately concealed agent participation in criminality and their own purported authorisation of the same. The Claimants note that:

i. The fact of the existence of the Third Direction was only disclosed in the course of other proceedings.

ii. The subject and content of the Direction was only disclosed on 1 March 2018 **[6]**, well after the Claimant commenced proceedings against the Respondents, apparently only as a result of these proceedings.

iii. The existence of the non-statutory Direction was disclosed for the first time in the Response, dated 8 June 2018 **[8/2]**. Its content was only disclosed in September 2018.

iv. The criminal conduct in question remains concealed. Even the police and the CPS have not been informed of the criminal conduct involved.

22. The facts are therefore very similar to the deliberate concealment of the holdings of Bulk Personal Datasets and Bulk Communications Data. As a result of the Agencies' decision to conceal their conduct, a legal challenge was impossible for many years. Once the conduct had been disclosed, the Tribunal considered the legality of the activities in the period running back to 2 October 2000 (the date on which the HRA 1998 came into force). For example, the Tribunal recently held that "*most of the relevant* [BCD] *directions made between 29 November 2001 and 7 November 2012 were not lawfully made under s. 94. In the closed judgment we list the relevant directions… and set out in summary form our reasons*" (Privacy International v SSFCA BCD/BCD [2018] UKIPTrib IPT_15_110_CH, 23 July 2018 at [53]).

23. The Respondents offer two justifications for their proposed temporal limit:

a. Administrative convenience: The Respondents rely on the fact that "*memories fade, people move on, a complete set of documents becomes hard to locate, etc*" (§3) **[12]**. Those "*practical considerations*", however, are a feature of all types of litigation, which the courts resolve primarily through the rules of evidence. None of them justifies the imposition of an arbitrary temporal limit, less still a limit determined in the abstract, without reference to the facts arising in any particular case. Rules on limitation are not designed for the administrative convenience of government, especially where the relevant unlawful conduct has been deliberately concealed, thus making any legal challenge impossible.

b. Past and present wrongs: The Respondents invite the Tribunal to focus on what they suggest is the "*most important question, namely whether current (and perhaps recent) practice is lawful*" (§3) **[12]**. These proceedings concern participation of state agents in criminality and the Security Service's authorisation thereof. Any past conduct is likely to involve serious breaches of the law. Making determinations about whether the law has been breached in respect of concealed covert conduct once it has come to light is the core of the Tribunal's function. See *R (International*

Transport Roth GmbH) v Secretary of State for the Home Department [2003] QB 728, per Simon Brown LJ at [27].

24. Nevertheless, the Tribunal does not need to make a final decision on limitation at this hearing. It should however, ensure that the disclosure it is given covers all of the relevant period (i.e. from 2 October 2000 onwards).

E. Standing

25. The Respondents neither admit nor deny that the Claimants have standing. The Claimants are unable to improve on the Respondents' comment that "*the Tribunal might take the view that this is unsatisfactory*" (Skeleton, §4) **[12]**. The Respondents' position is particularly unsatisfactory in circumstances where they have been directed by the Tribunal to particularise their case on the issue of standing.

26. The Respondents have therefore failed to comply with the Tribunal's directions. The purported justification is as follows (§4) **[12]**:

> "The Respondents do not wish to be taken to accept that the Claimants - the First and Second of whom brought their challenge and pleaded their claim at a time at which they had no knowledge of the contents of the Third Direction – have standing to challenge any and all conduct of the intelligence service."

27. As to this:

    a. The Claimants have never claimed they have standing to challenge any and all conduct of the intelligence services. The case is a narrow challenge to the Third Direction and conduct purportedly authorised under it by a group of Claimants who are uniquely well-placed to pursue it.

    b. The Tribunal has already heard submissions from the parties in respect of C1 and C2's standing. On 18 December 2017, the Tribunal determined the issue of standing in favour of the Claimants.

    c. The Respondents offer no explanation as to why it is said they cannot particularise their arguments on standing further, if there is further detail to provide.

28. The Claimants invite the Tribunal to direct the Respondents to provide proper particulars of any objection they have to the standing of each or any of the Claimants.

F. Preliminary issues of law

29. By passing the Human Rights Act 1998 Parliament has imposed limits on any interference with fundamental rights. Under the Convention, for example, public authorities cannot authorise a breach of Article 2 (the right to life) or Article 3 (the prohibition on torture, inhuman or degrading treatment). In *AKJ v Commissioner of Police of the Metropolis* [2013] 1

WLR 2734, women brought claims against the Metropolitan Police, after being deceived into entering sexual relationships with undercover police officers. Tugendhat J stated as follows [92].

> "… it is plain that an authorisation can only be granted for conduct, or for the use of information, which will interfere with one of the qualified Convention rights, such as article 8. **The unqualified rights, namely article 2 (right to life) and article 3 cannot be interfered with for any reason**… There can be no licence for torture or for any other inhuman or degrading treatment."

30. In light the Claimants' understanding of the law, the Claimants asked in the RFI (§36) **[10/6]** whether, on the Respondents' case, they could in principle lawfully authorise crimes such as murder, torture, inhuman and degrading treatment, rape, kidnapping or false imprisonment.

31. Answering those questions would have required the Respondents to set out their position on a matter of law. An answer does not require the Respondents to confirm or deny whether they have ever carried out any particular activity. Despite that, the Respondents' have refused to do so. The alleged justification for refusing to preliminary issues of law is that "*requiring the Respondents to respond to questions which, although framed as questions of law, would reveal the facts of the conduct*" that they wish to keep secret (Skeleton, §6) **[12]**.

32. The Respondents' refusal to agree assumed facts is difficult to understand. The argument is effectively 'we can't say whether or not we give our agents authority to torture and kill people in the UK, because then people under investigation would know what limits are placed on our agents' conduct'. But this makes the basic error of assuming that those limits are in the discretion of the Security Service and may be set by a secret government policy. In fact, the law made by Parliament prohibits the Security Service from authorising their agents to do certain things. And it is the duty of the Tribunal to declare what the law is, and to test the policy against the requirements of the law. That may mean that "*not all means are permitted… not all the methods used by* [our] *enemies are open. At times democracy fights with one hand tied behind her back. Despite that democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance*" (*Public Committee against Torture v Israel*, (1994) 53(4) PD 817 at 835 per Barak P).[4]

33. The Tribunal's exclusive jurisdiction in respect of claims against the Security and Intelligence Service is premised on the fact that it is well-equipped to deal with matters concerning national security and secrecy, as a body which "*operates subject to special procedures apt for the subject matter in hand*": per Laws LJ, in A v B [2010] 2 AC 1. Hearing

[4] See also Barak J in *Sharif v GOC Home Front Command* (1996) 50(4) PD 485 at 491: "*Even when the cannons roar and the muses are silent, the law exists, and acts, and determines what is permissible and what is forbidden; what is legal and what is illegal. As the law exists, so exists the Court, which determines what is permissible and what is forbidden, what is legal and what is illegal*."

preliminary issues on questions of law is one such procedure which the Tribunal has used in almost all cases of substance since the *Kennedy Procedural Ruling* in 2003. Where necessary, the Tribunal will (like any Court hearing a preliminary issue of law) proceed on the basis of assumed facts. The IPT Report for 2011-2015 explained the use of assumed facts as follows:

> "2.7 … the Tribunal's policies and procedures have been carefully developed and have evolved with the aim of balancing the principles of open justice for the complainant with a need to protect sensitive material. The approach of hearing a case on the basis of assumed facts has proved to be of great value.
>
> 2.8 Assumed facts: This means that, without making any finding on the substance of the complaint, where points of law arise the Tribunal may be prepared to assume for the sake of argument that the facts asserted by the claimant are true; and then, acting upon that assumption, decide whether they would constitute lawful or unlawful conduct. This has enabled hearings to take place in public with full adversarial argument as to whether the con duct alleged, if it had taken place, would have been lawful and proportionate."

34. The Respondents' refusal to answer the questions at §36 of the RFI **[10/6]** and/or agree appropriate preliminary issues of law raises a basic constitutional point. The content of the law cannot be secret. Lord Diplock, in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, at 638D, identified the principle as follows:

> "The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it."

35. The idea that the content of the law must be accessible is also a basic tenet of the ECHR. In *Sunday Times v United Kingdom* (1979) 2 EHRR 245, at [49] the European Court of Human Rights recognised that:

> "The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case… a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct…"

36. The Tribunal's duty is to declare what the law is, so that the public, the Agencies (and their agents) know what the law permits, and what it does not. This is what Tugendhat J did in *AHJ*, without any difficulty. The Tribunal is invited to direct the hearing of the preliminary issues of law set out above.

G. Outline RFI response

37. The Respondents have failed to deal with the RFI in any real way:

a. Temporal scope: the Respondents have refused to engage with the majority of the RFI on the basis that sections of it may be outside the temporal restrictions they seek to impose on the claim. The Claimants' position on that issue is set out above. It is in any event incorrect to suggest that all conduct before the non-statutory direction (RFI §§14-21 **[10/3-4]**) is irrelevant if the claim is limited to 6 years. The claim was brought on 26 June 2017. Even if a 6-year limitation period was applied, the Claimants claim in respect of any conduct on or after 26 June 2011.

b. Content of the law: without explanation, the Respondents' have failed to answer any of the questions which sought to clarify their position on the legal issues raised by this claim. Far from being inappropriate "*legal argument*" (§11(b)(ii) **[12]**), the Respondents ought to respond to the Grounds (which they have thus far failed to do). The Respondents contend that they should be "*permitted to develop their case in the normal sequence of events*" (§11c) **[12]**. The normal time to particularise the defence as a matter of law would have been in the Response.

c. Purporting to authorise criminal conduct: the Respondents have clarified that, on their case, "*the Security Service's conduct is lawful*". As outlined above, the Claimants' case on the law is that the Respondents cannot lawfully purport to authorise a breach of Article 2 or 3 of the ECHR. In those circumstances, the Respondents' refusal to answer the questions at §36 is not understood.

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BHATT MURPHY

1 October 2018