

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

CLAIMANT'S REQUEST FOR FURTHER INFORMATION AND DISCLOSURE
CONCERNING THE RESPONDENTS' OPEN RESPONSE

On 8 June 2018, the Claimants were provided with a copy of the Respondents' Open Response (the "**Response**"), responding to the Claimants' Amended Statement of Grounds, dated 16 April 2018 (the "**Amended Grounds**"). A redacted copy of a document entitled "*Guidelines on the use of Agents who participate in Criminality (Official Guidance)*" (the "**redacted Guidelines**") was attached to the Response.

The Response does not plead to any of the Amended Grounds. The Tribunal is invited to direct a proper response to the pleadings as to issues of law in the Amended Grounds. The Respondents' response to the issues of law raised in the claim cannot be secret.

The Claimants invite Counsel to the Tribunal to consider whether additional further information in the Respondents' Closed Response or the redacted Guidelines can be disclosed to the Claimant. Counsel to the Tribunal is invited to consider whether any further relevant materials exist and whether they ought to be disclosed.

The Claimants request the following further information and disclosure in respect of the Respondents' Response and the redacted Guidelines. References to paragraph numbers below are to paragraphs of the Response, except where otherwise stated.

CLOSED RESPONSE

Of Paragraph 2:

"Save as follows, it is not possible to respond in OPEN. In particular, the release of any further details would place Covert Human Intelligence Sources (CHIS) at risk of harm, both now and in the future. This would have collateral consequences for the acquisition of intelligence and for the Security Service's ability to recruit and deploy CHIS. For the same reasons, it is not possible for any agreed or assumed facts to be used. Any such facts (in particular once mapped onto any findings made in CLOSED) risk revealing details which would pose the same unacceptable risks to CHIS safety and collateral consequences."

1. The Respondents' OPEN Response does not even attempt to respond to the Amended Statement of Grounds in any way. Indeed, the only attempt to deal with the substance of the Claimants' case appears in paragraph 10 of the Response. The content of the law cannot be secret. Please provide an OPEN Response that addresses each assertion as to the law raised in the Amended Statement of Grounds.

THE DIRECTIONS

Of Paragraphs 3 and 4:

"Pursuant to her powers under s.230 of the Investigatory Powers Act 2016, on 22 August 2017 the Prime Minister made the "Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Security Service agent participation in criminality) Direction 2017". It provides as follows:

"The Investigatory Powers Commissioner shall keep under review the application of the Security Service guidelines on the use of agents who participate in criminality and the authorisations issued in accordance with them."

This direction ("the 2017 Direction") came into force on 1 September 2017 and was published on 1 March 2018."

2. Please provide copies of the reports produced by the Investigatory Powers Commissioner to the 2017 Direction, redacted as is necessary and proportionate on legitimate grounds.
3. Prior to 1 March 2018, had it been avowed that the Security Service authorised agents to participate in criminality? If yes, when and how?
4. Is it the Respondents' case that, prior to 1 March 2018, the process by which they purport to authorise agent participation in criminality and/or the Investigatory Powers Commissioner's oversight of that process was *"in accordance with law"* and otherwise compatible with Convention rights? If so, when did the participation become lawful, and why?

Of paragraphs 5 and 6:

"The 2017 Direction replaced a materially identical earlier direction, made by the Prime Minister pursuant to s.59A of the Regulation of Investigatory Powers Act 2000. The "Intelligence Services Commissioner (Additional Review Functions) Security Service agent participation in criminality) Direction 2014" was made by the Prime Minister on 27 November 2014 and came into force on 28 November 2014.

That direction ("the 2014 Direction") provided as follows:

"The Intelligence Services Commissioner shall keep under review the application of the Security Service guidelines on the use of agents who participate in criminality and the authorisations issued under them."

5. When was the existence of the 2014 Direction first made public?
6. Please provide copies of all oversight reports produced by the Intelligence Services Commissioner relating to the 2014 Direction, redacted as is necessary and proportionate on legitimate grounds.

Of paragraph 7:

"The 2014 Direction replaced a non-statutory direction to the Intelligence Services Commissioner, made on 27 November 2012, which similarly related to agent participation in criminality."

7. Did the non-statutory direction have a title? If so, what was it?
8. Please provide a copy of the non-statutory direction.
9. Who made the non-statutory direction?
10. On what legal basis was the non-statutory direction made?
11. Why was the non-statutory direction issued?
12. Prior to the Respondents' OPEN Response, dated 8 June 2018, had the existence of the non-statutory direction ever been disclosed?
13. Is it the Respondents' position that oversight of agent participation in criminality (or authorisation of the same) under this non-statutory direction was *"in accordance with law"* and otherwise compatible with Convention rights? If so, why?
14. Did Security Service agents participate in criminality before 27 November 2012?
15. If so, was such criminality authorised? If so, by whom?

16. What, if any, oversight of agent participation in criminality existed before 27 November 2012?
17. If agents participated in criminality before 27 November 2012, has the process by which any such conduct was authorised and/or mechanism for overseeing that process or conduct ever been published? If not, is it the Respondents' position that any such authorisation process and/or oversight mechanism was "*in accordance with law*"?
18. When was the Intelligence Services Commissioner first notified that the Agencies purport to authorise and/or encourage and/or allow agent participation in criminality? Was it before 27 November 2012?
19. How, if at all, did the nature and/or scope of the Commissioner's oversight change as a result of the non-statutory direction?
20. Please provide copies of all oversight reports produced by the Intelligence Services Commissioner relating to agent participation in criminality since 27 November 2012, redacted as is necessary and proportionate on legitimate grounds.
21. Please provide copies of all oversight reports and/or other documents relating to agent participation in criminality before 27 November 2012, redacted as is necessary and proportionate on legitimate grounds.

THE GUIDELINES

Of paragraph 8:

"The "Guidelines on the use of Agents who participate in Criminality", to which the 2017 and 2014 Direction refer, have been in force since 2011. They are attached to this Response. They are redacted in order to protect national security."

22. Prior to the Respondents' OPEN Response, dated 8 June 2018, had the content of the Guidelines ever been published or otherwise disclosed to the public?
23. If not, do the Respondents accept that any purported authorisation under the Guidelines before 8 June 2018 was "*not in accordance with law*" and therefore unlawful and otherwise not compatible with Convention rights?
24. The Claimants have been provided with a heavily redacted copy of the Guidelines. The Claimants challenge the extent of the redactions in circumstances where they appear to conceal general information as to: (1) when an authorisation is required as a matter of law (paragraphs 3 and 4 of the Guidelines); (2) the conditions of any authorisation (paragraph 6 of the Guidelines); (3) the effect of an authorisation (see further paragraphs 3 and 4, 6 and 9 of the Guidelines, respectively). Guidance as to: the content of the law; the general

principles to be applied under an authorisation scheme; and the effect of a hypothetical authorisation, is not and cannot be secret and any redaction to the Guidelines should not conceal information which would set out the legal parameters of permitted conduct under an authorisation. Please provide an unredacted copy of the Guidelines or a copy of the Guidelines redacted only as is necessary and proportionate on legitimate grounds.

25. Please provide copies of all previous drafts of the Guidelines, redacted as is necessary and proportionate on legitimate grounds, stating the dates of each version's applicability. Where previous versions have been amended or repealed, please explain in each case why they were amended or repealed.
26. The Guidelines are dated March 2011. Why were the Guidelines made at that time, which was prior to any statutory or non-statutory oversight commencing?
27. Please confirm whether agents participated in criminality before 2011. If so, was such criminality authorised? If so, by whom?
28. What, if any, guidelines or other guidance existed before 2011 in respect of: (a) agent participation in criminality; and (b) any authorisation thereof? Please provide copies of the same, redacted as is necessary and proportionate on legitimate grounds. Please identify the date of any such guidance or guidelines and the date of any revisions to it.
29. Did the non-statutory direction (made on 27 November 2012) refer to the Guidelines (made in 2011)?
30. The Guidelines appear to have been reviewed in January 2014. How, if at all, were the Guidelines amended following that review? What prompted that review?
31. Please provide copies of the findings of that review, redacted as is necessary and proportionate on legitimate grounds.

Of Paragraph 10:

"... Criminal acts remain criminal acts, regardless of whether participation in the act in question has been "authorised" by the Security Service. The Security Service has power to "authorise" such participation as a necessary part of its statutory functions, set out in s.1 Security Service Act 1989."

32. Is the Respondents' position that it is lawful for the Security Service to purport to authorise agent participation in criminality?
33. If the only alleged legal basis is s.1 of the Security Services Act 1989:
 - a. On the Respondents' case, which words of s.1 provide the Security Services with such a power?

- b. In the absence of any such express words, on the Respondents' case, how is such a power accessible and/or sufficiently foreseeable and precise so as to be in accordance with the principle of legality at common law and/or under the ECHR?
- 34. On the Respondents' case, are there any limits on the type of criminal conduct that a member of the Security Services could lawfully purport to authorise?
- 35. In particular, do the Respondents accept that they cannot authorise conduct under the Guidelines which amounts to a breach of Articles 2, 3, 5 and/or 6 of the ECHR or the equivalent fundamental rights recognised by the common law? If not, please clarify the circumstances in which, on the Respondents' case, such conduct may be lawfully authorised (specifying the relevant Convention Article as appropriate). It is noted that the content of the law cannot be secret.
- 36. On the Respondents' case, could a member of the Security Service lawfully "authorize" an agent to commit:
 - a. Murder. On the Respondents' case, could a member of the Security Service lawfully purport to authorise an agent to participate in: (1) a targeted killing; and/or (2) a killing to maintain his or her cover?
 - b. Torture. On the Respondents' case, can a member of the Security Service lawfully purport to authorise an agent to torture someone?
 - c. Inhuman or degrading treatment. On the Respondents' case, can a member of the Security Service lawfully purport to authorise an agent to carry out inhuman and degrading treatment, for example using the so-called "five techniques" employed in Ireland v United Kingdom (1979-1980) 2 EHRR 25.
 - d. Rape or any other offence under the Sexual Offences Act 2003. On the Respondents' case, can a member of the Security Service lawfully purport to authorise an agent to participate in an assault by penetration as part of an interrogation or punishment?
 - e. Battery, assault, wounding, poisoning, assault occasioning actual bodily harm and/or inflicting grievous bodily harm. On the Respondents' case, could a member of the Security Service lawfully purport to authorise an agent to participate in a punishment beating or 'kneecapping'?
 - f. Kidnapping. On the Respondents' case, could a member of the Security Service lawfully purport to authorise an agent to participate in the kidnapping of an alleged informant?

- g. False imprisonment. On the Respondents' case, could a member of the Security Service lawfully purport to authorise an agent to participate in a forcible detention?

Of Paragraph 4 of the Guidelines:

"... the nature of the work of the Service is such that its agents are frequently tasked to report on sophisticated terrorist and other individuals and organisations whose activities may pose a threat to national security and/or involve the commission of serious offences. In those circumstances it may sometimes be necessary and proportionate for agents to participate in criminality in order to secure or maintain access to intelligence that can be used to save life or disrupt more serious criminality, or to ensure the agent's continued safety, security and ability to pass such intelligence. "

37. Serious criminal conduct will usually also give rise to tortious liability. To the extent that an agent participates in criminality giving rise to tortious liability, is it the Respondents' position that it is lawful to purport to authorise a tort? For example:

- a. Is the Respondents' position that it is lawful to purport to authorise agent participation in: assault; battery and/or false imprisonment?
- b. Such conduct may give rise to tortious liability for trespass to the person. Is the Respondents' position that it lawful for the Security Service to purport to authorise such a tort?

38. Is it the Respondents' position that it would be lawful for a member of the Security Service to purport to authorise an agent's participation in criminality for the sole purpose of: (a) intelligence exploitation; and/or (b) assisting an agent to maintain his or her cover? On the Respondents' case, would such a purported authorisation be lawful if, for example, an agent sought authorisation to participate in the false imprisonment of others?

Of Paragraph 6, 7 and 8 of the Guidelines:

"An officer empowered to issue a CHIS authorisation under RIPA (an "authorizing officer") may in appropriate cases authorise the use of an agent participating in crime"

39. What safeguards are in place under the regime for authorisations under the Guidelines to ensure they are only given when it is necessary and proportionate to do so?

40. Are such safeguards provided for in the Guidelines themselves? If not, please provide copies of the document(s) in which they are set out.

41. Were any safeguards in the Guidelines approved by: (a) the Investigatory Powers Commissioner; and/or (b) the Intelligence Services Commissioner? If yes, when?

Of Paragraphs 9 and 10 of the Guidelines:

“An authorisation of the use of a participating agent has no legal effect and does not confer on either the agent or those involved in the authorisation process any immunity from prosecution. Rather, the authorisation will be the Service’s explanation and justification of its decisions should the criminal activity of the agent come under scrutiny by an external body, e.g. the police or prosecuting authorities. In particular, the authorisation process and associated records may form the basis of representations by the Service to the prosecuting authorities that prosecution is not in the public interest. Accordingly, any such authorisation should, on its face, clearly establish that the criteria for authorisation are met, in terms which will be readily understood by a prosecutor.”

42. Please explain the process by which agents are authorised to participate in criminality?
43. Please supply copies of any relevant authorisation procedures which have been in force at any time since: (a) the Guidelines were issued; and (b) the HRA 1998 came into force, stating the date of each version’s applicability.
44. What “associated records” are kept of this process?
45. What are the criteria for authorisation?
46. What (if any) steps do the Respondents take to monitor an agent’s compliance with those criteria and/or any other condition of authorisation after it has been granted?
47. What (if any) steps do the Respondents take to prevent an agent’s participation in criminality if the criteria for authorisation are not met?
48. Is it the Respondents’ position that, in order to be lawful, an authorisation must be given before the agent participates in criminality?
49. What (if any) steps will the Respondents take if: (a) an agent participates in crime without first seeking authorisation; and/or (b) an agent goes beyond the scope of any authorisation granted? Will the Respondents take any steps to bring the conduct of the agent in those circumstances to the attention of the Investigatory Powers Commissioner, the Intelligence Services Commissioner, the Crown Prosecution Service, the Public Prosecution Service for Northern Ireland and/or the victim of the crime?
50. Does the Investigatory Powers Commissioner have the power to notify the Crown Prosecution Service, the Public Prosecution Service for Northern Ireland or the police of the participation of an agent in any crime (whether authorised under the Guidelines or not)? If so, has he done so?

51. Did the Intelligence Services Commissioner have such a power before the 2017 Direction came into force? If so, did they ever do so?
52. Does the Investigatory Powers Commissioner have the power to notify the victims of any tort of the existence of the tort and the involvement of the agent and/or the Security Service in the same? If so, has he done so?
53. Did the Intelligence Services Commissioner have such a power before the 2017 Direction came into force? If so, did they ever do so?
54. How many times has the Investigatory Powers Commissioner, the Intelligence Services Commissioner and/or the Respondents notified the CPS, the Public Prosecution Service for Northern Ireland or the police of an agent's participation in crime and/or any authorisation thereof?
55. How often has the CPS and/or the Public Prosecution Service for Northern Ireland decided that it was not in the public interest to prosecute an agent and/or a member of the Security Service for a crime after being notified of an authorisation under the Guidelines and/or having been provided with the records associated with such an authorisation?
56. Does the Security Service pro-actively notify the Police, the CPS and/or the Public Prosecution Service for Northern Ireland of agent participation in crimes so that they can make an independent assessment of whether prosecution is in the public interest?
57. Section 5 of the Criminal Law (Northern Ireland) Act 1967 is set out below. In every case where a member of the Security Service has authorised an agent to participate in a crime in Northern Ireland, have the Security Service, the Intelligence Services Commissioner and/or the Investigatory Powers Commissioner (or any other Respondent with knowledge or belief that such an offence has been committed) notified a constable within reasonable time in accordance with s.5, so that the Police Service of Northern Ireland can make an independent assessment of whether prosecution is in the public interest?

5. Penalties for concealing offences etc.

(1) Subject to the succeeding provisions of this section, where a person has committed a relevant offence, it shall be the duty of every other person, who knows or believes –

(a) that the offence or some other relevant offence has been committed; and

(b) that he has information which is likely to secure, or to be of material assistance in securing, the apprehension, prosecution or conviction of any person for that offence;

to give that information, within a reasonable time, to a constable and if, without reasonable excuse, he fails to do so he shall be guilty of an offence and shall be liable on conviction on

indictment to imprisonment according to the gravity of the offence about which he does not give that information, as follows: –

(i) if that offence is one for which the court is required by law to sentence an offender to death or to imprisonment for life or to detention during the pleasure of the Governor of Northern Ireland, he shall be liable to imprisonment for not more than ten years;

(ii) if it is one for which a person (of full age and capacity and not previously convicted) may be sentenced to imprisonment for a term of fourteen years, he shall be liable to imprisonment for not more than seven years;

(iii) if it is not one included above but is one for which a person (of full age and capacity and not previously convicted) may be sentenced to imprisonment for a term of ten years, he shall be liable to imprisonment for not more than five years;

(iv) in any other case, he shall be liable to imprisonment for not more than three years.

(2) It shall not be an offence under this section for the person suffering loss or injury by reason of the commission of the offence (in this section referred to as “the injured person”) or some other person acting on his behalf not to disclose information upon that loss or injury being made good to the injured person or upon the injured person being reasonably recompensed therefor so long as no further or other consideration is received for or on account of such non-disclosure.

(3) Where a person causes any wasteful employment of the police by knowingly making to any person a false report or statement tending to show that an offence has been committed, whether by himself or by another person, or to give rise to apprehension for the safety of any persons or property, or tending to show that he has information material to any police inquiry, he shall be liable on summary conviction to imprisonment for not more than six months or to a fine of not more than level 4 on the standard scale or to both.

(3A) Notwithstanding any provision in any Act prescribing the period within which summary proceedings may be commenced, proceedings for an offence under subsection (3) (causing wasteful employment of the police by knowingly making false report or statement) may be commenced at any time within the period of twelve months after the commission of the offence.

(4) No proceedings shall be instituted for an offence under this section except by or with the consent of the Attorney-General.

(5) The compounding of an offence other than treason shall not be an offence otherwise than under this section

58. In circumstances where an agent's participation in crime gives rise to tortious liability, how often has the Investigatory Powers Commissioner, the Intelligence Services Commissioner and/or the Respondents notified the victims of any such tort of an agent's participation in the relevant conduct and/or any authorisation thereof?

Of Paragraph 13 of the Guidelines:

"No member of the Security Service shall encourage, counsel or procure the commission by an agent of a criminal offence, save and to the extent that the offence is covered by an authorisation issued under these Guidelines."

59. Do members of the Security Service encourage, counsel or procure agents to commit criminal offences?
60. Where an offence is covered by an authorisation made in accordance with the Guidelines, do the Respondents contend that members of the Security Service are entitled as a matter of public law to encourage, counsel or procure an agent to commit a criminal offence?
61. To the extent that members of the Security Service encourage, counsel or procure agents to commit criminal offences, do the Respondents accept that the member of the Security Service will be liable as an accessory and will commit a crime himself or herself, where he or she did so with intent?
62. Do the Respondents accept that authorisation of an agent's participation in a crime will itself amount to encouragement and/or procurement of the offence itself, where it is done with the necessary intent?
63. The Guidelines appear to allow a member of the Security Services to encourage, counsel and/or procure conduct that may amount to a tort. What is the legal basis for this?

THE TEMPORAL LIMITS OF THE CHALLENGE

Of Paragraph 11:

"Although the Respondents do not take any formal limitation point, nevertheless the challenge should be subject to sensible temporal limits. The Claimants' challenge does not specify any such temporal limits (at §70.1 reference is made to conduct "prior to 28 November 2014", unlimited in time). In the Respondents' submission the challenge should go back no further than 12 months."

64. Please provide the reasons why, on the Respondents' case, this claim should go back no further than 12 months given that (1) it has only been clear that this matter concerns the participation of agents in criminality (and the Security Service's authorisation thereof) since 1 March 2018, at which point the Third Direction was published for the first time;

and (2) the existence of the non-statutory direction and the (heavily redacted) content of the 2011 Guidelines appear to have been published for the first time on 8 June 2018.

STANDING

Of Paragraph 12:

“The Respondents do not ask for standing to be determined as a preliminary threshold issue. However, they wish to put down a marker, namely that they do not accept (and should to be taken to have accepted) that the Claimants have standing to bring either their Human Rights claims (Grounds 1, 2, 3, 4 and 6) nor their judicial review complaint (Ground 5).”

65. Please provide full and complete particulars of the Respondents’ position on standing for each Ground of challenge (including the judicial review complaint) and in respect of each Claimant.

BEN JAFFEY QC

CELIA ROONEY

BHATT MURPHY

18 JUNE 2017