IN THE INVESTIGATORY POWERS TRIBUNAL **CASE NOS. IPT/17/86 & 87H**

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

PRESS SUMMARY

Judgment to be handed down on **Friday 20 December 2019 at 10 am**

NOTE: This summary is provided to assist in understanding the Investigatory Powers Tribunal's decision in this case. It does not form part of the reasons for the decision. The full judgment is the only authoritative reasons for the decision. Judgments are available at: https://www.ipt-uk.com/ and http://www.bailii.org/

1. This case raises one of the most profound issues which can face a democratic society governed by the rule of law. The Claimants, which are all non-governmental organisations, challenge a policy which was publicly acknowledged to exist by the then Prime Minister on 1 March 2018, which they submit purports to "authorise" the commission of criminal offences by officials and agents of the Security Service (often known as MI5). The Claimants submit that the policy is unlawful, both as a matter of domestic public law and as being contrary to the rights in the European Convention on Human Rights ("ECHR"), as set out in Schedule 1 to the Human Rights Act 1998 ("HRA").

2. The Claimants advanced seven grounds of challenge, which are addressed in the following order in the judgments:

    1. There is no lawful basis for the policy, either in statute or at common law.
    2. The policy amounts to an unlawful *de facto* power to dispense with the criminal law.
    3. The secret nature of the policy, both in the past and now, means that it is unlawful under domestic principles of public law.
    4. For the purposes of the ECHR, the policy was not and is not "in accordance with law".
    5. Any deprivation of liberty effected pursuant to a purported authorisation given under the policy violates the procedural rights under Article 5 of the ECHR.
    6. Supervision of the operation of the policy by the Intelligence Services Commissioner ("ISC") in the past, and now the Investigatory Powers Commissioner ("IPC"), does not satisfy the positive investigative duty imposed by Articles 2, 3 and 5 of the ECHR.

7. Conduct authorised under the policy in breach of Articles 2, 3, 5 and 6 of the ECHR is in breach of the negative and preventative obligations in the ECHR. It is submitted that the policy itself is unlawful to the extent that it sanctions or acquiesces such conduct.

3. The Investigatory Powers Tribunal, which was established by Parliament in 2000 and whose functions include considering cases concerning the conduct of the intelligence agencies, has rejected all of those grounds of challenge. The majority judgment is given by Lord Justice Singh (President of the Tribunal), Lord Boyd (Vice-President) and Sir Richard McLaughlin. There are dissenting judgments by Mr Charles Flint QC and Professor Graham Zellick QC. The dissenting judgments agree with the majority save insofar as set out in those judgments. They also agree with the CLOSED judgment, which cannot be disclosed for reasons of national security and the public interest. The Tribunal was assisted by Counsel to the Tribunal, who were able to take part fully in the CLOSED proceedings.

4. The relevant direction was made by the Prime Minister at the time to the IPC on 22 August 2017: the Investigatory Powers Commissioner (Additional Directive Oversight Functions) (Security Service's Agent Participation in Criminality) Direction 2017.

5. The Security Service has issued guidelines on the use of agents who participate in criminality: the current version was issued in March 2011. Para. (9) of the Guidelines states:

> "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 decision 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."

6. The Security Service was placed on a statutory basis by the Security Service Act 1989. Section 1 sets out the functions of the Security Service and section 2 provides that the operations of the Service shall continue to be under the control of a Director-General appointed by the Secretary of State.

7. The principal difference between the majority judgment and the minority judgments arises in relation to the first issue in the case.

8. The majority judgment concludes that there is an implied power in the 1989 Act for the Security Service to engage in the activities which are the subject of the policy under challenge: see paras. 48-71, in particular para. 60. Para. 67 of the majority judgment states:

> "We conclude on the first issue that the Security Service does have that power as a matter of public law. It is important to appreciate that this does *not* mean that it has any power to confer immunity from liability under either the criminal law or the civil law … on either its own officers or on agents handled by them. It does not purport to confer any such immunity and has no power to do so."

9. At para. 71 the Tribunal concludes on the first issue:

> "… We emphasise again that it not the effect of either the Respondents' submissions or the judgment of the majority in this Tribunal that the Security

Service has the power to confer any immunity from the ordinary criminal law of this country (or the civil law)."

10. The majority judgment considers the second issue at paras. 72-85; the third issue at paras. 86-91; the fourth issue at paras. 92-96; and the fifth, sixth and seventh issues at paras. 97-101.

11. The Tribunal concludes, in the majority judgment at para. 112, that the claim will be dismissed.