IN THE INVESTIGATORY POWERS TRIBUNAL **REF: IPT/13/132-9H**

Date: 18 November 2014

Before :

MR JUSTICE BURTON (PRESIDENT)
MR SEABROOK QC
MR FLINT QC
MS SUSAN O'BRIEN QC
PROFESSOR GRAHAM ZELLICK CBE QC

Between :

(1) ABDEL-HAKIM BELHAJ
(2) FATIMA BOUDCHAR
(3) SAMI AL SAADI
(4) KARIMA AIT BAAZIZ
(5) KHADIJA SAADI
(6) MUSTAFI AL SAADI
(7) ANAS AL SAADI
(8) ARWA AL SAADI
(9) AMNESTY INTERNATIONAL LIMITED

Claimants

- and -

(1) SECURITY SERVICE
(2) SECRET INTELLIGENCE SERVICE
(3) GOVERNMENT COMMUNICATION HEADQUARTERS
(4) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(5) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Respondents

Dinah Rose QC and Ben Jaffey for the First to Eighth Claimants
Hugh Tomlinson QC, Nicholas Armstrong and Tamara Jaber for the Ninth Claimant
James Eadie QC, Kate Grange and Marina Wheeler for the Respondents
Jonathan Glasson QC as Counsel to the Tribunal

JUDGMENT

1. On 6th November 2014 the Tribunal held a directions hearing in public principally to deal with requests for further information made by the Claimants about the Respondents' Closed Response Addressing the Legal and Policy Regime.

2. The context of this hearing is that there is to be a substantive hearing, on a date to be fixed, of an issue, the terms of which have been agreed between the parties. That issue is framed in following terms:

   "On the hypothetical assumption (the true position being neither confirmed nor denied) that the Claimants' legally privileged materials have been intercepted by the Respondents and/or have been obtained by the Respondents as part of their intelligence sharing regime:

   1. Is the regime for the interception/obtaining, analysis, use, disclosure and destruction of legally privileged material prescribed by law for the purposes of Article 8(2) of the ECHR ?
   2. Has this been the case since January 2010 ?"

3. In preparation for the determination of that issue the Respondents have served an open Response addressing the legal and policy regime which is to be the subject of the issues. They have also served a summary of the closed Response submitted to the Tribunal which gives more information about that legal and policy regime. The first to eighth Claimants served a request for further information about that summary. In response to that request some further information and documents have been provided, but the Claimants argue that more is required.

4. The jurisdiction of the Tribunal to hear and determine these proceedings is derived from section 67 (1) (a) of the Regulation of Investigatory Powers Act 2000. Section 69 (1) gives power to the Secretary of State to make rules regulating the exercise of the Tribunal's jurisdiction. In making rules the Secretary of State is required by section 69 (6) to have regard in particular both to the need to secure that proceedings brought before the Tribunal are properly heard and considered, and to the need to secure that information is not disclosed to an extent or in a manner that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence interests.

5. Under Rule 6 of the Investigatory Powers Tribunal Rules 2000 ("the Rules"), the Tribunal is required "to carry out its functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious

crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence interests". In the context of this case the relevant factors which are particularly required to be secured by the Tribunal are those of national security and the proper functioning of the intelligence agencies. For shorthand those factors are referred to in this judgment below simply as security and intelligence interests.

6. The particular issue which has given rise to this judgment relates to the form in which certain documents have been disclosed by the Respondents to the Claimants. Certain documents have been disclosed not by way of redacted copies, showing the placing and scale of redactions made, but by way of giving the gist of some information or producing retyped versions which give relevant text from the underlying document, to the extent that information can properly be disclosed without prejudicing security and intelligence interests. That form of disclosure has been used by the intelligence agencies in other proceedings (see **R (Maya Evans) v Secretary** [2013] EWHC 3068 (Admin)).

7. Miss Rose QC argues that disclosure of a copy of a relevant redacted document, rather than disclosure by way of summary or retyping, is required as a matter of principle, as an aspect of the best evidence rule. She referred us to the judgment of Sedley LJ in **R (National Association of Health Stores v Department of Health)** [2005] EWCA Civ 154 at paragraphs 47 – 49.

8. It is important to note the differences between this Tribunal and the High Court, and the nature of the issue for which disclosure is required in this case. Rule 6 of the Rules has already been referred to. Under Rule 11 the Tribunal may receive any evidence in any form, and there no rules for disclosure, still less as to the form in which any disclosure made should be provided. But most importantly this Tribunal has the power, not available to the High Court, itself to obtain documents and information from the intelligence agencies under section 68 (6) and to scrutinise such documents and information for the purpose of exercising its functions, including deciding how proceedings may fairly be determined.

9. In this case disclosure is being made for a limited purpose, namely to allow the preliminary issue to be properly heard and determined. The purpose of the Respondents providing information is to establish the precedent facts, as to the legal and policy regime operated during the material time by the Respondents in relation to legally privileged material. The disclosure is not required, as in general civil litigation, to enable a party to pursue a train of enquiry, assess the authenticity of a document or as the basis for cross-examination. For those reasons we do not consider that the best evidence rule, as articulated by Sedley LJ at paragraph 49 of the **Health Stores** judgment is applicable at this stage of these proceedings, particularly as the Tribunal has the power to inspect the original document, if and when required, to

ensure accuracy and authenticity, and is not left to rely upon a second-hand account, as in **Health Stores**.

10. Miss Rose argues that it is not for the Claimants to prove that they need the disclosure in redacted form, nor for the Tribunal to pre-empt any advantage which the Claimants might get from disclosure being made in that manner. But disclosure should only be given to the extent that it is relevant and necessary to enable the preliminary issue to be determined. Provided that the relevant parts of the documents, to the extent and in the manner that they can properly be disclosed without prejudicing security and intelligence interests, have been properly disclosed then there is no need for any further disclosure. Information which might be gleaned from the form and scale of redactions required to excise material is not relevant. Nor is it possible to see how any legitimate advantage could be derived in argument from the form in which material has been disclosed. The preliminary issue is a question of law and its resolution will be determined on the basis of the information which has been disclosed.

11. The Tribunal has inspected the documents in respect of which further disclosure is sought. It is satisfied that the protection of intelligence and security interests does require that disclosure should not be given by way of redacted copies of documents, but by summary or retyping.

12. For those reasons the Tribunal has decided that in principle it is proper for disclosure to be given by the Respondents by way of summary or by way of retyping, where (as here) it is necessary to secure the protection of security and intelligence interests.

13. The Respondents are reviewing the disclosure required, and that disclosure will be reviewed by Counsel to the Tribunal. The Tribunal itself will be prepared to reconsider questions of disclosure if it considers that the arguments, when presented at the hearing of the preliminary issue, may require the extent or form of disclosure to be reconsidered.

14. It follows from this decision that it is not necessary to consider the issue, which has been raised by the Claimants, as to the power of the Tribunal to order a Respondent, where it does not consent to do so, to give disclosure to a Claimant.