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

Date: 07/02/14

Before :

MR JUSTICE BURTON (PRESIDENT)
MR SEABROOK QC
MR FLINT 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 ASSDI
(8) ARWA AL SAADI

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

JUDGMENT

1. This is an interlocutory decision of the Tribunal dealing, on the application of the Claimants, with the terms of interim relief to be granted, by way of undertakings to be offered by the Respondents, and the appropriate practice to be followed in relation to any future closed hearings in this case.

2. The complaint was lodged with the Tribunal on 24th September 2013. The First and Second Claimants are also claimants in a civil action brought against the Secret Intelligence Service and others in the High Court arising out of the circumstances in which those Claimants were subject to rendition to Libya in March 2004. The factual assertions which form the basis of that claim are set out at paragraphs 5 – 17 of a

judgment of Mr. Justice Simon ([2013] EWHC 4111(QB)) handed down on 20th December 2012. The Third to Eighth Claimants also brought proceedings against HM Government and others in respect of their alleged rendition to Libya in March 2004, but those cases were settled in 2012.

3. The Claimants bring these proceedings under section 65 (2) (a) of the Regulation of Investigatory Powers Act 2000 ("RIPA") alleging breaches of articles 6, 8 and 14 of the ECHR arising from the alleged interception of their legally privileged communications. The basis of the proceedings is the assertion that the circumstances of the First and Third Claimants, as members or former members of the Libyan Islamic Fighting Group, are such that they and their families are likely to have been of interest to the intelligence agencies. So it is alleged that there is a strong likelihood that the Respondents have intercepted and are intercepting the legally professionally privileged communications of the Claimants relating to their civil actions against HM Government. The proceedings relate only to communications in respect of which the Claimants can assert legal professional privilege.

4. The Respondents neither confirm nor deny whether any of the Claimants' communications, whether or not legally privileged, have ever been intercepted or read, looked at or listened to by the Respondents.

5. By letter dated 12th December 2013 the Claimants requested the Respondents to give undertakings to protect legally privileged communications and information, pending the determination of these proceedings. The urgent need for such undertakings was asserted to arise from the fact that the Respondents had, as a result of having undertaken searches with a view to preparing their response, recently sought directions from the Tribunal on a closed basis. It was asserted that those facts made it obvious that the legally privileged communications of the Claimants had indeed been subject to interception. By letter dated 16th December the Respondents' solicitors refused to give the undertakings sought and stated that the Claimants were wrong to draw any inference from the fact that a closed issue had been raised with the Tribunal. The Claimant subsequently made this application for interim relief by reference to those undertakings.

6. On 14th January the Tribunal held a directions hearing at which it was ordered that the Claimants' application for interim relief should be listed for hearing on 30th January, and that at the same hearing the Tribunal would consider the appropriate practice to be followed in the event that a closed hearing was requested by the Respondents.

Interim Relief

7. The application for interim relief is made on the clear basis that the Claimants do not, at this interim stage, seek to prevent any continuing lawful interception of their

communications, including any legally privileged material, and accept that the Respondents are entitled neither to confirm nor deny whether any such interception has taken place.

8. By the time the application was heard the Respondents had agreed to give certain undertakings designed to protect the legal privilege of the Claimants in their communications, if any such communications had been intercepted. It is important to note that those undertakings were offered without making any admission that there is any strong likelihood that such communications had been or were being intercepted, and neither confirming nor denying that any such interception had taken place.

9. The undertakings offered were acceptable to the Claimants save in respect of paragraph 6 which reads:

> "*If and to the extent that, having conducted the steps described in paragraphs 1 and 2 above, the Respondents reasonably assess that any lawyer instructed in or policy official working on* ***Belhadj & Boudchar v Straw & ors*** *(HQ12X02603) has read or listened to any of the Complainants' legally privileged material, the Respondents will inform the Investigatory Powers Tribunal in CLOSED of that fact and seek the Tribunal's directions in CLOSED in relation to it*"

10. This outstanding issue as to interim relief, as it emerged in the skeleton arguments and in the course of the hearing, concerns the legal principles which the Tribunal should apply if it should appear that any legally privileged material has been communicated to any lawyer or policy official instructed in or working on the civil claim, so that it becomes necessary for the Respondents to apply in a closed hearing for directions as to what steps should be taken to protect the legal privilege. Those steps could include the grant of an injunction to prevent any use of the privileged material, or to restrain the solicitor or official from continuing to be involved in the defence of the civil claim. The Claimants were prepared to accept the undertakings containing paragraph 6 as offered, but only on the basis that the legal principles which the Tribunal should apply were clear, and that it was not contended by the Respondents that any provision of RIPA, or any other relevant statute, prevented the Tribunal in this particular context from applying those principles.

11. In the course of argument it became clear that the parties were agreed as to the common law or equitable principles that should be applied to the protection of legally privileged material which has come into the possession of another party. Those principles are reflected most recently in the decision of Beatson J in **Stiedl v Enyo Law** [2011] EWHC 2649 (Comm). That case concerned a claim against solicitors who had for the purpose of litigation reviewed documents belonging to the claimant which were legally privileged. In summary that judgment requires a court first to consider whether there is a real risk that privileged information may give an advantage to the solicitor, or a disadvantage to the owner of the privileged

documents, in the civil claim (see paragraph 44), secondly to conduct a balancing exercise taking into account all the relevant circumstances (see paragraph 43), and then to consider the appropriate relief which may consist either of enjoining the solicitor from acting in proceedings, or only from making any use of the privileged documents (see paragraphs 39, 42 and 43). The judge accepted a distinction made in the authorities between a case in which the privileged information had been acquired by the solicitor whilst acting for the claimant and might be used against the claimant, and a case in which the solicitor had not had a previous relationship with the claimant. In the former case the court would in the ordinary course restrain the solicitor from acting; in other cases the court would in the ordinary course only prevent the solicitor from using the information (see paragraphs 39, 42 and 43).

12. At paragraph 38 of the Claimants' skeleton argument it was submitted that:

> "*.. where "there is a real risk that information in the documents over which* [the litigant] *claims privilege and confidentiality can be used so as to yield an advantage … in the main proceedings" the Court will generally grant an injunction restraining the persons involved from continuing to act.*"

However in oral argument Dinah Rose QC for the Claimants made clear that it was accepted that the form of the relief to be granted depended on all the circumstances, applying the principles set out by Beatson J.

13. The real point of difference was the apparent reluctance of Mr. James Eadie QC for the Respondents to accept that the principles to be applied by the Tribunal should be limited to the common law and equitable principles reflected in the judgment in **Stiedl v Enyo**. He submitted that the statutory framework was "not irrelevant" to any determination that might need to be made by the Tribunal under paragraph 6 of the undertakings, and that the Tribunal should take into account all the provisions of RIPA and the Code of Practice set out in the Respondents' Response. Given the hypothetical nature of the issue, and the constraints imposed by the neither confirm nor deny principle, it was difficult to follow whether this stance reflected any real point which might make a difference to any decision which the Tribunal may be called upon to make under paragraph 6 of the undertakings.

14. However in the course of his submissions Mr. Eadie made clear that he was submitting first that all the relevant circumstances must include the circumstances in which, and the statutory powers under which, any privileged material was obtained, and secondly that he was not contending that there was any provision in RIPA, or in any other applicable statute, which had the effect of overriding or regulating the common law or equitable principles of law which applied to any application to protect legally privileged information. In reply Miss Rose accepted that whether there was a real risk was only the first question, and that the Tribunal would be required to consider all the circumstances, but made the point that upon the basis of Mr. Eadie's concession it was difficult to see how the statutory framework could

make any material difference to the issue which the Tribunal might have to determine.

15. The Tribunal is also inclined to doubt whether consideration of the applicable provisions of RIPA could make any difference to the assessment of whether relief requires to be granted to protect legal professional privilege, if it were to be established (a) that legally privileged information had been communicated to a lawyer or official engaged in the civil action and (b) that there is a real risk that communication of that information may give rise to a disadvantage to the claimants. However the circumstances in which and the powers under which the information was obtained are at least relevant background, and it would be wrong , in advance of seeing the facts, to rule out those factors as being potentially material to consideration of whether any relief should be granted, and in what form.

16. But the important point is that the Respondents accept that the principles to be applied are the common law principles set out in **Stiedl v Enyo**, and they do not submit that there is any provision of RIPA, or any other applicable statute, which has the effect of overriding those principles. On that basis the Tribunal is satisfied that paragraph 6 of the undertakings offered by the Respondent does provide proper protection for the interests of the Claimants, and that is the form of undertaking accepted, on an interim basis, by the Tribunal.

Closed Hearings

17. Under section 68 (1) of RIPA the Tribunal is entitled to determine its own procedure, subject to the rules made under section 69 (6).

18. Section 69 (6) provides:

> "*In making rules under this section the Secretary of State shall have regard, in particular, to –*
>
> *(a) the need to secure that matters which are the subject of proceedings, complaints or references brought before or made to the Tribunal are properly heard and considered; and*
> *(b) 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 services.*"

Under Rule 6 (1) 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 interests identified in section 69 (6) at (b).

19. Paragraph 6 (2) of the Tribunal rules provides:

(2) Without prejudice to this general duty, but subject to paragraphs (3) and (4), the Tribunal may not disclose to the complainant or to any other person:
(a) the fact that the Tribunal have held, or propose to hold, an oral hearing under rule 9(4);
(b) any information or document disclosed or provided to the Tribunal in the course of that hearing, or the identity of any witness at that hearing;
(c) any information or document otherwise disclosed or provided to the Tribunal by any person pursuant to section 68(6) of the Act (or provided voluntarily by a person specified in section 68(7));
(d) any information or opinion provided to the Tribunal by a Commissioner pursuant to section 68(2) of the Act;
(e) the fact that any information, document, identity or opinion has been disclosed or provided in the circumstances mentioned in sub-paragraphs (b) to (d).

20. The power to hold closed hearings is contained in Rule 9 (4):

> "*The Tribunal may hold separate oral hearings (at) which:*
> *(a) The person whose conduct is the subject of the complaint …*
> *may be required to attend and at which that person or authority may make representations, give evidence and call witnesses.*"

21. The validity of the Rules was considered by the Tribunal in its ruling on 23rd January 2003 in the **Kennedy** case (IPT/01/62 and 01/77). At paragraph 175 reference was made to rule 6 (2) and at paragraph 181 the Tribunal said this:

> "*The Tribunal conclude that these departures from the adversarial model are within the power conferred on the Secretary of State by section 69 (1), as limited by section 69 (6). … In the context of the factors set out in that provision and, in particular, the need to maintain the NCND policy, the procedures laid down by the Rules provide a fair trial within Article 6 …*"

22. The complainant in the **Kennedy** case complained to the European Court of Human Rights against the final determination of the Tribunal, alleging breaches of article 8 (respect for private life and correspondence) and article 6 (right to fair trial). In a unanimous ruling in **Kennedy v. United Kingdom** (2011) 52 EHRR 4) the Court dismissed those complaints. In relation to Article 6 the Court considered, at paragraphs 184 to 191, the aspects of the rules and procedures of the Tribunal which distinguish it from the conventional adversarial process in a court, including Rule 6 (2). At paragraph 187 of its judgment the Court said:

> "*In respect of the rules limiting disclosure, the Court recalls that the entitlement to disclosure of relevant evidence is not an absolute right. The interests of national security or the need to keep secret methods of investigation of crime must be weighed against the general right to adversarial proceedings. The Court notes that the prohibition on disclosure set out in r.6(2) admits of exceptions, set out in r.6(3) and (4). Accordingly, the prohibition is not an absolute one. The Court further observes that documents submitted to the IPT in respect of a specific complaint, as well as details of any witnesses who have provided evidence, are likely to be highly sensitive, particularly when viewed in light of the Government's "neither confirm nor deny" policy. The Court agrees with the Government that, in the circumstances, it was not possible to disclose redacted documents or to appoint special advocates as these measures*

would not have achieved the aim of preserving the secrecy of whether any interception had taken place. It is also relevant that where the IPT finds in the applicant's favour, it can exercise its discretion to disclose such documents and information under r.6(4)."

23. It follows from the decisions of this Tribunal and the Court in **Kennedy** that rule 6 (2) pursues a legitimate aim, not only in directly protecting national security in particular cases but also in indirectly protecting national security through the "Neither Confirm nor Deny" policy, a policy accepted by the Court as compatible with Article 6. In particular rule 6 (2) (a) avoids the risk of tipping-off a complainant that he may have been a target of intelligence measures, whether through surveillance or interception of communications. The reason for the rule, made consistently with section 69 (6) (b), is to avoid the risk that the interests of national security, or the prevention or detection of serious crime, or the proper functioning of the intelligence services, might be compromised if a complainant were notified of the need for a closed hearing, and thus was able to infer that he had been, or was currently, the target of intelligence measures.

24. In their skeleton argument the Claimants submitted that for future hearings, the Tribunal should adopt the approach to closed hearings set out by Lord Neuberger in **Bank Mellat v HM Treasury (No. 1)** at [2013] UKSC 38 at [67-74]. It was submitted that the Tribunal should hold open hearings whenever possible, the fact of all closed hearings should be notified to Claimants, unless to do so would cause significant harm to national security, and the Tribunal should minimise the extent of a closed hearing. In the interests of fairness the Tribunal should seek to gist any closed material and should consider the appointment of Counsel to the Tribunal or a Special Advocate to represent the interests of the Claimants in any closed hearing.

25. At the hearing Miss Rose did not challenge the legitimate aim of Rule 6 (2) (a), nor the "neither confirm nor deny" policy. The argument as developed was to the effect that the Tribunal has a discretionary power under Rule 9 (4) to hold closed hearings and that discretion should be exercised, consistently with the principles set out by Lord Neuberger in **Bank Mellat v. HM Treasury**, so as to control the circumstances in which closed hearings are permitted. Otherwise it was submitted the blanket nature of the prohibition on disclosure of information, in Rule 6 (2) (a), would conflict with Article 6. Alternatively it was submitted that Rule 6 (2) (a) would need

to be read down so as to be intra vires the rule making power in section 69 (6), or to comply with the principles of legality and equality of arms underlying Article 6.

26. Mr. Eadie resisted the proposition that the Tribunal should at this stage of these proceedings embark on a wide-ranging review of the effect of the Rules, in the absence of a defined issue and at least an assumed factual basis, and, so he submitted, on the basis of an argument from the Claimants which was incorrect in asserting that the effect of the Tribunal's decision in **Kennedy** had been to hold that Rule 6 (2) (a) was ultra vires. It was submitted that the Tribunal should continue to apply its procedural ruling in **Kennedy**. The response from Miss Rose was that the issues raised by the Claimants' submissions need to be decided because at any time a closed hearing could take place without notice to the Claimants.

27. In our judgment this is not the appropriate time at which to re-consider the effect of the rules relating to closed hearings. The basis on which it may be contended that some of the provisions of the rules are ultra vires, or require to be read down, has not been fully argued, and these are issues of importance, not only for these proceedings but also for other cases. The Tribunal would require full argument on the questions, when and if they arise, as to whether there is power in this Tribunal to request the appointment of a Special Advocate who should have access to closed material, or whether there is power to provide to the Claimants, without the consent of the Respondents, a gist or summary of information or submissions which have been made in a closed hearing.

28. At paragraph 8 of the judgment of Lord Neuberger in **Bank Mellat** it was made clear that where Parliament has required a court or tribunal to adopt a closed material procedure then, subject to Article 6, that procedure must be followed.

29. The Tribunal is under a duty, imposed by Rule 6 (1**)**, to carry out its functions to secure that information is not disclosed to an extent or in a manner prejudicial to national security or the continued discharge of the functions of any of the intelligence agencies. Those interests require the "neither confirm nor deny" policy to be respected.

30. The Tribunal has made clear at paragraph 58 of its judgment in **Kennedy** that its procedures must comply with the Convention requirements and that requires consideration of whether the Rules are strictly necessary and proportionate in achieving a reasonable relationship between interference with Convention rights and the objectives of the "neither confirm nor deny" policy. The same considerations must apply when the Tribunal exercises its powers under the Rules.

31. The Tribunal has a discretion under Rule 9 (4) as to the circumstances in which it will hold a closed hearing and in general would expect the Respondents to give good reasons for requesting the Tribunal to take that course. Those reasons may be advanced on a closed basis and, if they are, the Tribunal has no power to disclose them to the Claimants, absent the consent of the Respondents under Rule 6 (3). In deciding whether to accede to an application for a closed hearing the Tribunal will take into account both Article 6, and its duty to respect the "neither confirm nor deny" policy which is essential for the protection of national security and the proper functioning of the intelligence agencies.

32. In principle a closed hearing should only be necessary to protect sensitive information or to comply with the "neither confirm nor deny" policy.

33. It is not necessary or appropriate at this stage to go any further in considering the issues which have been raised by the Claimants as to the procedures which should apply to any future closed hearings. This is an interlocutory hearing and the Tribunal is only required at this stage to give such directions as are necessary to enable these proceedings to continue.