IN THE EUROPEAN COURT OF HUMAN RIGHTS **Application no 58243/00**

(1) LIBERTY
(2) BRITISH-IRISH RIGHTS WATCH
(3) THE IRISH COUNCIL FOR CIVIL LIBERTIES

Applicants

v.

UNITED KINGDOM

Respondent Government

APPLICANTS' REPLY TO THE SUPPLEMENTARY OBSERVATIONS OF THE UK GOVERNMENT DATED 14 FEBRUARY 2005

Introduction

1. The Respondent Government submitted Supplementary Observations on 14 February 2005 following Rulings of the Investigatory Powers Tribunal ("IPT") made on 9 December 2004. Those Rulings dealt with a preliminary issue of law in parallel domestic proceedings brought by the Applicants in relation to interception of their communications after 2 October 2000 under provisions of the Regulation of Investigatory Powers Act 2000 ("RIPA") which replaced the provisions of IOCA 1985 at issue in the present proceedings before the Court.

2. The Rulings of 9 December 2004 were confined to a single preliminary point: whether, as regards the "filtering" stage of processing of intercept product, the regime created by RIPA ss. 15 and 16 (under which the Secretary of State makes unpublished "arrangements" for certain purposes), the interference with the Applicants' Article 8(1) rights arising from interception of their communications and subsequent processing of intercept product met the "in accordance with the law" requirement of Article 8(2). The IPT found against the Applicants on that question for the reasons set out in its Rulings.

3. The remaining issues in the IPT proceedings, including the compatibility of the ss. 15/16 regime with the proportionality requirement, and the overall question whether any interference with the Applicants' Article 8(1) rights in this case was justified under Article 8(2), were apparently determined against the Applicants. That appears from the IPT's letter of 21 April 2005 to the Applicant's solicitor informing him that "no determination has been made in your clients' favour on your complaint or Human Rights claim". No reasons were given, nor was there any statement or summary of the IPT's findings on any individual issue of law or fact.

4. The Applicants are grateful to the Court for the opportunity to make these Observations, which:

   a. Respond to the Government's Supplementary Observations as regards the issue dealt with in the IPT's reasoned Rulings on 9 December 2004;

   b. Respond to those Observations insofar as the Government relies on the IPT's Rulings in relation to other issues in the present proceedings;

   c. Comment further on the Government's objection from non-exhaustion in the light of the IPT's findings on preliminary issues in a case hear in parallel with the Applicants' case.

5. In summary, the Applicants say:

   a. As regards the "in accordance with the law" issue in relation to "filtering" of intercept material, the IPT's reasons reveal that it has seriously misunderstood and misapplied the Strasbourg case-law. Its conclusions are simply wrong, and should not deflect the Court from finding in the Applicants' favour on the admissibility and merits of their case in relation to interception under IOCA.

b. The IPT's Rulings give the Respondent Government no support on any other issue in the present case, whether as regards the "in accordance with the law" point or the proportionality of the interference with the Applicants' rights.

c. The Respondent Government relies on the IPT's conclusions for the additional reason that the IPT received detailed and extensive "closed" evidence not revealed to the Applicants (Supplementary Observations, paras. 0.1, 1.3, 1.10) But that is if anything a further reason for this Court to view the Government's case with circumspection. The Court should determine the question of violation of Article 8 by reference to the material before it which has been seen by both sides, not on the faith of the Government's submissions about the weight supposedly attached by a domestic tribunal to material which the Court and the Applicants are precluded from seeing.

d. The Respondent Government gets no assistance from the IPT's unreasoned dismissal of the remainder of the Applicant's domestic complaint. Rather, the opaque way in which the case was dealt with – notwithstanding an earlier decision of the IPT that Article 6(1) applied to the proceedings on the complaint – undermines the Government's attempt to rely on the IPT decision in support of its case generally. Indeed, the IPT's unreasoned decision is itself a further breach of Article 6 since a court must give reasons for its judgment so that any party with an interest in the case is informed of the basis of the decision, so that the public in a democratic society may know the reasons for judicial decisions: see *Hadjianastassiou v Greece* (1992) 16 EHRR 219 para 33. A court must indicate the grounds on which the decision is based with 'sufficient clarity' (see *Hadjianastassiou* para. 31) and if a point would be decisive for the case if accepted, it should be addressed specifically and expressly by the court: see *Hiro Balani v Spain* (1994) 19 EHRR 565 para 28; and *Ruiz Torija v Spain* (1994) 19 EHRR 542 para 30. It also provides a further answer to the non-exhaustion objection raised by the Government in its earlier Observations.

The IPT's Rulings on the "in accordance with the law" issue in relation to "filtering" of intercept material

The IPT's findings on the preliminary issue

6. The preliminary issue on which the IPT was ultimately asked to rule was whether the Applicants were correct to submit that "*the process of filtering intercepted telephone calls made from the UK to overseas telephones... breaches Article 8(2) because it is not 'in accordance with the law'*". (Rulings, para. 3). In summary, the IPT held as follows.

7. A warrant issued under s. 8(1) RIPA (ie. a warrant for interception of communications internal to the UK – the equivalent of IOCA s. 3(1)) is "far more circumscribed in its effect" than a "certificated" warrant issued under s. 8(4) RIPA (a warrant for interception of external communications – the equivalent of IOCA s. 3(2). That is because a s. 8(1) warrant is "targeted" in the sense that it can only be issued in relation to an identified person or set of premises, whereas a s. 8(4) warrant "may result in interception of all communications between the UK and an identified city or country". Hence the IPT accepted that "inference with the privacy of communications is likely to be greater by virtue of a s. 8(4) warrant than as a result of a s. 8(1) warrant. (Rulings, Paras. 7, 8, 9, 11).

8. The IPT understood the Applicants' complaint as concerning the "absence of, or absence of publicity of, 'selection criteria'", ie. the search terms or criteria that define which parts of the mass of intercept product would be accessed for examination. The person whose international communications were among the mass of intercepted material had no means of knowing, in relation to the selection of his communications at the "filtering" stage for subsequent examination: "why me?" (Rulings, paras. 10, 15, 21).

9. The IPT recognised the Convention principles of accessibility and foreseeability as set out and applied in the line of judgments including *Silver v. UK*, and accepted the applicability of those principles to clandestine interception of communications, *per* judgments of the Court including *Valenzuela Contreras v. Spain* (1998) 28 EHRR 483.

However, reliance on *Valenzuela Contreras* had to "be tempered by subsequent jurisprudence". In that regard the IPT referred in particular to the Commission decision in *Christie v. UK* (1994) 78 D.R. 119, on which the Respondents had relied heavily. (Rulings paras. 24 to 31).

10. The IPT noted the Applicants' contention that this was a "*Silver*" case because (i) the publicly available material (including the legislation itself) failed to provide the necessary foreseeability, and (ii) any material which might provide the necessary foreseeability was unpublished and therefore inaccessible. The Applicants did not contend that the Government should go so far as to publish a list of search terms, but submitted that there should be some "publicly stated material indicating that a relevant person is satisfied that the accessing of a particular individual's telephone call is proportionate", and that the selection "should not simply be left to the discretion of officials". (Rulings, paras. 32-35).

11. The IPT rejected these submissions, concluding that, by contrast with *Silver* where "the legislation itself was inadequate and the guidelines unpublished", in the case of RIPA "the legislation is adequate and the guidelines are clear" (Rulings, para. 38). The precise way in which the IPT's reasoning combines the various factors is not altogether clear from the Rulings. But it is submitted that the following is a fair account of the way in which it reached its conclusion:

    a. The Court's judgment in *Valenzuela Contreras* was in the different context of the making of a judicial order leading to admission of evidence in a criminal trial, and moreover where the interception was "targeted" in much the same way as a s. 8(1) warrant, which explained the court's reference to "people liable to have their telephones tapped" (Rulings, para. 29.1);

    b. The footnotes to *Valenzuela Contreras* approved *Malone* and thus the Court's observation in *Malone* that the foreseeability requirement "cannot be exactly the same in the special context of interception of communications for the purpose of police investigations as [where the object of the law] is to place restrictions on the conduct of individuals". That proposition was *a fortiori* where the State acts in

the interests of national security, for reasons recognised by the Court in *Klass v Germany* (Rulings, para. 29).

c. The criteria set out in RIPA s. 5(3) for issue of a warrant apply equally to warrants under s. 8(1) and 8(4), and the Applicants made no complaint about the warrant procedure as such. Moreover there is in fact no distinction between the filtering systems applied to material intercepted under, respectively, s. 8(1) warrants (as to which the Applicants made no complaint) and s. 8(4) warrants. (Rulings, paras. 19, 20).

d. Against that background, the IPT accepted the Respondents' contention that the requirement of foreseeability, as regards the selection of particular communications from the mass of material intercepted under a s. 8(4) warrant, was satisfied by the cumulation of the following publicly available material:

- RIPA s. 5(3) (the general criteria for evaluating the necessity of issuing a warrant under s. 8(1) or 8(4)), taken in conjunction with the Human Rights Act 1998 s. 6(1) (which requires a public authority to act compatibly with Convention rights and thus imposes a duty to act proportionately in applying the s 5(3) criteria to the intercepted material);
- the stated requirement under RIPA s. 16 of "additional operating procedures" in respect of s. 8(4) warrants, and the Secretary of State's obligation under s. 15(1)(b) to ensure the existence of such procedures;
- the publicly known existence of seven specific "safeguards", including the Code of Practice issued under RIPA, the oversight functions of the Commissioner, and availability of proceedings before the IPT itself. The requirements of foreseeability and accessibility did not mean the "precise details" of any of these safeguards had to be published, and it was not necessary for the Code of Practice to be extended to include eg. a limited description of operating procedures of the kind appearing in the witness statement served by the Respondents.

(Rulings, paras. 34-38)

e. The IPT was influenced by the fact that the existence of the predecessor Commissioner and Tribunal under IOCA had "alone expressly weighed with the Commission in its decision in *Christie*" (Rulings, para. 35). The IPT also found, *via* the Respondent's reliance on RIPA s. 5(3), that *Christie* provided an answer to the Applicants' case notwithstanding that there had been no argument in that case about the absence of selection criteria (Rulings para. 31).

Applicants' comments on the IPT's findings

12. The IPT affects to have acknowledged that the Applicants disclaimed any suggestion that the Court's case-law on accessibility requires individuals to know in advance whether they are intended targets of secret interception. Yet the IPT's treatment of the Applicants' arguments – in particular its characterisation of the accessibility requirement as the question "why me?" – indicates that it did not quite grasp the principle on which the Applicants relied. As the Court put it at para. 67 of its *Malone* judgment:

> "...the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence". [emphasis added]

13. In *Valenzuela Contreras* the Court recognised that interception is a multi-stage process, beginning with an initial authorisation but involving numerous subsequent and ancillary steps, each capable of constituting or contributing to an infringement of rights and thus each requiring adequate rules and safeguards. At paragraph 46, the Court cited its *Kruslin and Huvig v. France* judgments (1990) 12 EHRR 528 & 547 as authority for the proposition that, in addition to the general *Malone* requirements (law to provide adequate indication of circumstances and conditions etc.):

> "It is essential to have clear, detailed rules on the subject, especially as the technology available for use is constantly becoming more sophisticated" (para. 46(iii), emphasis added).

The Court drew from *Kruslin and Huvig*:

> "...the following minimum safeguards that should be set out in the statute in order to avoid abuses of power: a definition of the categories of people liable to have their telephones tapped by judicial order, the nature of the

> offences which may give rise to such an order, a limit on the duration of telephone tapping, the procedure for drawing up the summary reports containing intercepted conversations, the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and by the defence and the circumstances in which recordings may or must be erased or the tapes destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court". (para. 46(iv)).

14. The Court found that the law failed the foreseeability requirement. The Government was able to point to certain guarantees, but these,

> "...deduced from a wide construction of statutory provisions or court decisions, were not apparent from the actual wording of Article 18(3) of the Constitution or, for the most part, from the provisions of the Code of Criminal Procedure which the judge considered when ordering the monitoring of the applicant's telephone communications". (para. 57)

15. Similar reasoning is found in *Malone*. Absent an *adequately foreseeable and accessible law* prescribing the necessary rules and safeguards, the fact that there existed safeguards -- and indeed evidence that they may have been of some effect -- was no answer to the applicant's complaint:

> "Detailed procedures concerning interception of communications on behalf of the police in England and Wales do exist. What is more, published statistics show the efficacy of those procedures in keeping the number of warrant granted relatively low... The public have been made aware of the applicable arrangements and principles through publication of the Birkett report and the White Paper and through statements by responsible Ministers in Parliament. Nonetheless, on the evidence before the Court, it cannot be said with any reasonably certainty what elements of the powers to intercept are contained in legal rules and what elements remain in the discretion of the executive." (para. 79).

16. Thus the issue for the IPT was purely whether there were sufficiently "clear, detailed rules" governing the "filtering" stage under a s. 8(4) warrant so that individual members of the public could understand, "with reasonable certainty", the scope of and the constraints upon the authorities' power to select information from or about particular individuals' communications from the pool of intercepted material. The issue did not involve – as the IPT appears to have thought – consideration of whether particular search terms used in filtering should have been made public.

17. As the Applicants have pointed out in their previous submissions to the Court in the present case, all a member of the public can glean from IOCA 1985 is that the Secretary of State must make unpublished, and unspecified, "arrangements" (IOCA s. 6). The position is the same under the equivalent provisions of RIPA (ss. 15, 16). The problem is materially identical to that identified by the Court in *Malone*: it is impossible for members of the public to know which aspects of the process are the subject of legal rules and which are simply left to operational discretion.

18. It was in this context that the Applicants contrasted the "targeted" s. 8(1) regime with the much looser s. 8(4) regime. The key point is that while the intercept product under a s. 8(1) warrant will be narrowed by the fact that the warrant is issued in relation to a named individual or set of premises, the s. 8(4) warrant and certificate enable the interception of a huge volume of communications and result in a correspondingly large and indiscriminate data pool. In this regard the Applicants relied on evidence of Mr. Campbell in similar terms to his evidence in the present case; the Government did not dispute this element of his evidence, and indeed the IPT at Rulings para. 9 accepts the potential breadth of the communications covered by a certificated warrant.

19. The significance of this contrast, which the IPT ought to have but failed to recognise, is that whereas the "filtering" stage for intercept product under a s. 8(1)/s. 3(1) warrant adds little (if anything) to the specificity of the material selected for further processing, under a s. 8(4)/ s.3(2) warrant the filtering stage plays an absolutely critical role in identifying which, and whose, communications are selected for further processing. In reality, the filtering stage performs the same function in relation to interception under s. 8(4)/s. 3(2) as the warrant itself performs in relation to interception under s. 8(1)/3(1).

20. For that reason, it was no answer to the Applicants' case in the IPT for the Government to point to provisions on the face of the statute (especially s. 5), and in the published Code of Practice, which govern the process of applying for and issuing external warrants. In order to comply with the predictability and accessibility requirements in relation to

external communications, it would be necessary for the legislation, supplemented by a Code of Practice or other published material, to contain provisions defining the process for operating the filtering system for s. 8(4)/s.3(2) material to the same extent as RIPA s. 5 and the Code define the process for operating the warrantry system under s. 8(1).

21. The Court is invited to test the point in this way. Suppose that, in lieu of the provisions of RIPA governing authorisation of domestic interception (sections 5 and 8(1)), the statute simply contained a short provision – along the lines of s. 16 – providing that "the Secretary of State shall make arrangements for the purpose of ensuring that communications are not listened to without authorisation". That provision, if the "arrangements" themselves remained unpublished, would indisputably be wholly inadequate to satisfy the predictability and accessibility criteria. Yet this is effectively the position in relation to external communications.

22. It is to be noted that IOCA makes no provision, as RIPA does, for the publication of a Code of Practice or similar (the Court will recall that IOCA is to be found at Annex O to the Government's 28.11.02 Observations).

23. The "open" evidence of the Respondents in the IPT proceedings contained a description of important elements of the filtering process. It was in very similar terms to paragraphs 5 to 11 of the Second Witness Statement of Mr. Boys Smith in the present case. It included, as does the evidence of Mr. Boys Smith, a description of an authorisation process of sorts (albeit less formal than the warrantry process) governing the use of proposed selection criteria. The description is limited, but nevertheless identifies a limit or constraint on otherwise wholly open-ended Executive power, capable of satisfying the *Malone* principle. There is nothing approaching such a description on the face of the 1985 or 2000 Acts, nor in the RIPA Code of Practice or indeed in any other published form. More importantly, no reason or justification has ever been put forward to explain why the information contained in Mr Boys Smith's witness statement could not have been published generally to meet the accessibility obligation under Article 8.

24. Consequently the Government cannot now argue that, at the time the interception in question took place, national security considerations required this limited but potentially significant description of the process to remain secret. (See paragraph 8 of the Applicants' Reply of 15 July 2003 to the Government's Further Observations of 23 May 2003).

25. The IPT's failure to address these issues correctly was exacerbated by its erroneous approach to the Court's case-law, in particular in its attempt to dilute or distinguish the principles enunciated in *Valenzuela Contreras*. The Applicants observe:

a. *Valenzuela Contreras* – and in particular the Court's insistence on adequate safeguards and constraints on executive power at every stage of the process of interception and subsequent treatment of intercept product -- is rendered not less but, if anything, more pertinent to interception under s. 8(4)/s. 3(2) by the fact that the Court was there dealing with "targeted" interception which gave rise to material for use in criminal proceedings.

b. The element of targeting, and the fact that the interception subject will in due course come to know of the interception and may challenge the admissibility and cogency of the material in adversarial proceedings, lessen the risk of abuse of executive power. Here by contrast the s. 8(4)/s.3(2) warrantry process is entirely untargeted, and the Government's "neither confirm nor deny" policy means that the victim – the person "liable to have his telephone tapped" -- is never advised, even long after the event, that his communications have been selected for examination.

c. The IPT sought to "temper" *Valenzuela Contreras* by reference to "subsequent" case-law. But the case-law to which it refers – in particular *Christie* – all pre-dates *Valenzuela Contreras*. It is plain from *Valenzuela Contreras* that the Court has not followed the *laissez-faire* approach to interception reflected in the former Commission's 1993 decision in *Christie*, and continues to insist on the highest standards of domestic legal underpinning for this "secretive and potentially dangerous practice".

d. There is no reason why a less transparent standard of accessibility of the relevant law should apply where the object of interception is to further national security than where the object is investigation of crime. Nothing in the Court's *Klass* judgment supports that proposition. Quite the contrary: the Court's judgment in that case includes the passage:

> "Contracting States [do not] enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever method they deem appropriate."

It is in any event difficult to imagine an act that is sufficiently prejudicial to national security to justify interception of the suspect's communications that is not also contrary to a State's criminal law.

e. The Commission's *Christie* decision simply did not address the issue under consideration by the IPT. Nor did it address the issues now before the Court: see paragraphs 29 and 20 of the Applicants' Reply to the Government's 28.11.02 Observations and paragraphs 72 and 73 of their written submissions to the IPT (Annex B to the Government's Supplementary Observations)..

26. The IPT was wrong to conclude that the seven publicly known "safeguards" undermined the need for the formulation of published the legal rules governing the filtering process. First, that conclusion was wrong in principle for exactly the reason given by the Court in para. 79 of *Malone* (see above). Second, on analysis, none of the supposed "safeguards" is of any real assistance. So far as the "safeguards" considered by the IPT are relied on by the Government in the present proceedings, the Applicants observe:

a. <u>The criminal law: Government's Observations 28.11.02, paras. 2.3, 2.4</u>

The provisions relied on are entirely parasitic on the scope of the underlying powers to carry out interception and subsequent processing, including disclosure. In the case of external communications, the authority to intercept for the purposes of IOCA s. 1 derives from the certificated warrant, which will be in extremely broad terms. The s. 1(1) offence cannot operate as a means of controlling the

scope of particular interception or processing carried out behind the curtain of the warrant. Likewise, if an official is authorised to disseminate intercept material, no offence is committed under s. 19(1) or the Official Secrets Act 1979 s. 4(1) even if the material derives from an excessively broad selection of intercept product. The offence cannot operate to control the scope of the selection. The very fact that officials have a complete defence in these circumstances highlights the need for the practice of interception under the s. 8(4)/s.3(2) regime to be governed by adequate, foreseeable and accessible safeguards.

b. The Secretary of State's involvement in the warrantry procedure: Government's Observations 28.11.02, paras. 2.6—2.17

The Secretary of State's role in relation to s. 8(4)/s.3(2) interception is confined to issue of a certificated warrant, which (as indicated above) is likely be very broad and general in its coverage; for example, a warrant to intercept all communications between the UK and Baghdad. Hence the Secretary of State's function in the interception process as a whole are in reality very limited. The procedures and safeguards associated with the process of applying for and issuing a warrant, even if themselves sufficiently precise and accessible, cannot remedy the failure of other elements of the interception process, in particular the filtering stage (in whose operation the Secretary of State has no apparent function) to meet Convention standards.

c. The Commissioner: Government's Observations 28.11.02, paras.2.36-2.63

The powers and practice of the Commissioner under IOCA as regards the filtering process were very limited. As appears from Mr. Campbell's evidence in these proceedings, the content of the "dictionary"— the search terms or selection criteria applied in individual cases — were (and under the RIPA regime still are) determined "below the view" of the Commissioner. Nothing in the Commissioners' Reports submitted by the Government suggests that the Commissioner ever concerned himself with this element of the process, and there is no evidence that records of search terms were among the material made available for scrutiny by the Commissioner. Mr. Campbell's evidence is that there would be no audit trail for the Commissioner to follow from selected

material back to the choice of search terms: see his Second Statement, paras. 12-19. In any event, the Convention criterion of accessibility requires publication of sufficient material to the affected public, not merely to a public official who is himself within the "ring of secrecy".

d. The Interception of Communications Tribunal: Government's Observations 28.11.02, paras. 2.28-2.35

The jurisdiction of the IOCA Tribunal was considerably more limited than the IPT. The Government's Observations do not suggest that the IOCA Tribunal could itself scrutinise compliance with the detail of the "arrangements" made under s. 6 IOCA. In any event, the scope of investigation by the IOCA Tribunal does not resolve the issue whether those unpublished arrangements provide "clear and detailed rules" sufficient to satisfy the foreseeability criterion, and even if the Tribunal could measure conduct of Government officials against material not in the public domain, the material cannot satisfy the accessibility criterion. That criterion refers to accessibility of rules to the public, not to a body operating under conditions of secrecy.

27. Among the "safeguards" the Government relied on in relation to RIPA was the publication of a Code of Practice under sections 71 and 72 of that Act (see Annex R to the Government's 28.11.02 Observations). But as noted above, the Government is unable to point to any comparable publication under IOCA.

28. The IPT further erred in relying on s. 6(1) of the Human Rights Act 1998 ("HRA") as itself contributing to the foreseeability of the operation of the selection process. The point of this provision is to provide a remedy for persons who complain that conduct by a public authority violates a Convention right. As part of that, in an Article 8 case the court or tribunal to whom a claim is made must consider, as this Court does, whether any interference with rights under Article 8(1) is "in accordance with the law", and if so "necessary in a democratic society", under Article 8(2). The availability of a remedy under the HRA in the event either of those questions is answered negative cannot possibly assist in answering either question positively. That would be hopelessly circular.

It would be equivalent to a submission to this Court that the Strasbourg institutions' insistence that any interference with rights under Article 8(1) be both in accordance with the law and proportionate can provides a domestic legal basis for the interference that would otherwise be lacking. Such a proposition is plainly wrong as a matter of Convention law, whether applied by the European or domestic judiciary.

The Government's wider reliance on the IPT's Rulings

29. Since the IPT dealt only with a narrow issue relating to the "in accordance with the law" requirement, its Rulings – even assuming they could assist the Court on that point -- can provide no such assistance on any other aspect of the Article 8(2) issues arising in this case.

30. The Government is wrong to characterise the Applicants as having "abandoned" other aspects of their arguments in the IPT proceedings. The preliminary point in the IPT proceedings was heard in parallel with different preliminary issues of law in a linked case, in which the Applicant Liberty acted as legal representative for an individual who complained of interception and other interferences with his Article 8 rights. The IPT declined to make more than a single day available to hear argument on all preliminary issues in both cases, despite the joint view of the parties that longer was likely to be needed. In those circumstances the Applicants took the pragmatic decision to focus their arguments at the hearing on the question whether the "filtering" stage met the predictability and accessibility requirements. It was not their intention that the IPT should disregard those issues when finally determining the case.

31. On that basis, following receipt of the Rulings the Applicants made final submissions (attached) inviting the IPT to consider the outstanding "in principle" issues. The Government objected to that course. The opaque terms of the IPT's final decision of 21 April make it impossible to know whether the IPT examined those issues. Still less is it possible to identify the IPT's reasoning (if any) on them.

Closed evidence

32. Notwithstanding paragraphs 0.1, 1.3, 1.10 of the Government's Supplementary Observations, there is in fact no indication in the Rulings that the IPT placed any weight on the closed material submitted by the Government. Indeed the Applicants at para. 45 of their written submissions to the IPT (Annex B to the Government's Supplementary Observations) counselled against reliance on anything in the closed evidence because this was incapable, as a matter of principle, of assisting the Government on the "in accordance with the law" issue.

33. In any event, this Court should base its determination on the case on the material before it which has (in accordance with the Court's usual practice) been exchanged between the parties. It would be wrong for the Court to be influenced by the Government's speculative comments on what a domestic tribunal may (or may not) have made of evidence presented to it by executive officials under conditions of secrecy.

Further comments on exhaustion of domestic remedies

34. The Applicants deal in their previous submissions with the Government's objection from non-exhaustion: see paragraph 35 of the Applicants' Reply to the Government's 28.1.02 Observations and paragraphs 18 and 19 of their Reply to the Government's Further Observations of 23.5.03.

35. Paragraph 19 of the latter Reply recalls the limited nature of the grounds of judicial review in English law before commencement of the HRA on 2 October 2000. The Applicants refer above (paragraph 30) to the IPT's consideration of preliminary issues in parallel proceedings (Case no. IPT/01/62). One of those issues was whether a complainant to the IPT in relation to conduct pre-dating 2 October 2000 could rely on principles of domestic law analogous to the Article 8(1) right to respect for private life and correspondence and the Article 8(2) principle of proportionality. The IPT applies the same legal tests to a claim or complaint as an English court applies in judicial review proceedings (RIPA, s. 67(2) and (3)(c)).

36. The question was therefore whether the pre-HRA grounds of judicial review included the principles on which the complainant sought to rely. The Government argued that they did not. In its Rulings of 9 December 2004 in that case, the IPT found in the Government's favour. See paragraphs 15 to 22 of the attached Rulings.

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Gordon Nardell

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on behalf of the Applicants
Date: 30 June 2005

Annexes:

(1) Applicants' final submissions to the IPT dated 28 January 2005

(2) Rulings of the IPT dated 9 December 2004 in Case IPT/01/62