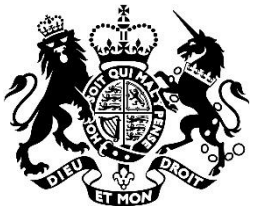

Neutral Citation Number: [2021] UKIPTrib IPT_17_86_CH

Case No: **IPT/17/86 & 87/CH**

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 21/10/2021

Before :

LORD JUSTICE SINGH (PRESIDENT)
LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)
and
SIR RICHARD McLAUGHLIN

- -

Between :

(1) Privacy International **(2) Reprieve** **(3) Committee on the Administration of Justice** **(4) Pat Finucane Centre**	**Claimants**
- v -	
(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**

- -
- -

Sir James Eadie QC, Victoria Wakefield QC and Natasha Barnes (instructed by the **Treasury Solicitor**) for the **Respondents**
Ben Jaffey QC and Celia Rooney (instructed by **Bhatt Murphy**) for the **Claimants**
Tom Hickman QC for the **Investigatory Powers Commissioner**
Jonathan Glasson QC and Sarah Hannett QC as **Counsel to the Tribunal**

Hearing date: 5 October 2021

- -

JUDGMENT ON THE "IPCO ISSUE"

Lord Justice Singh :

Introduction

1. This is the unanimous judgment of the Tribunal. It concerns what has become known in these proceedings as "the IPCO issue". That issue relates to "the mechanisms that the Tribunal should use when it seeks statutory assistance from the Investigatory Powers Commissioner under section 232(1) of the Investigatory Powers Act 2016": see para. 4 of the Tribunal's order dated 26 September 2019.

2. The IPCO issue has arisen in the context of the proceedings which have become known as "the Third Direction" case. The Tribunal gave judgment on the substantive issues in that case on 20 December 2019. An appeal to the Court of Appeal of England and Wales was dismissed on 9 March 2021: [2021] EWCA Civ 330; [2021] 2 WLR 1333.

3. We have had helpful written and oral submissions on behalf of the parties and also from the Investigatory Powers Commissioner ("IPC") and Counsel to the Tribunal ("CTT").

Factual background

4. A factual summary of the background to the IPCO issue was agreed by counsel for the Respondents and CTT in a document dated 2 August 2019. Of particular relevance for present purposes are paras. 1-4:

> "1. On 18 December 2017, the Tribunal wrote to the Investigatory Powers Commissioner's Office ('IPCO') for statutory assistance in this claim pursuant to section 232(1) of the Investigatory Powers Act 2016 ('the 2016 Act'). The Tribunal explained that it was currently at a preliminary stage in investigating the complaints and asked for copies of all reports and inspections by the Commissioner (and his predecessors) relevant to the Third Direction.
>
> 2. On 25 January 2018, IPCO:
>
> a. Provided the Confidential Annexes to the Intelligence Service Commissioner's Annual reports for 2011-2016 and inspection reports for 2014-2017. On 6 August 2018 the then President of the Tribunal ordered the disclosure of these reports and they were provided to the Tribunal by the Respondents in September 2018, and have been provided to the Claimants (redacted or gisted as necessary).
>
> b. Indicated that an initial analysis of their system included 13 further documents that were not supplied as the matter was at a preliminary stage. It also referred to a CLOSED issue. On 11 February 2019, pursuant to section 232(1) of the 2016 Act, the Tribunal wrote to IPCO requesting copies of the 13 documents and a list

of the material held in relation to the CLOSED issue. So far as is relevant (in particular omitting duplicates and drafts), and subject to the next sentence, the 13 documents referred to above have now been provided to the Claimants (redacted or gisted as necessary). One document which has not been provided is a policy review, the relevance of which was disputed by the Respondents and which the Tribunal determined on 25 July was not relevant.

3. On 27 February 2019, the Tribunal asked IPCO to clarify the date of the policy review and to provide copies of the documents relating to the CLOSED issue which had been listed by IPCO (referred to in 2b) above). The Respondents had seen the list of the documents (the summary referred to above), but were not aware that the documents had been requested by the Tribunal or provided by IPCO. The documents that were listed were in the Respondents' possession. When the Respondents became aware that the documents had been provided to the Tribunal, the Respondents requested a CLOSED hearing for the Tribunal to rule on the mechanisms that it should use when it seeks statutory assistance from IPCO under s.232(1) Investigatory Powers Act 2016. The President decided that the Claimants should be notified of this request.

4. The documents were formally provided to the Respondents by the Tribunal on 17 July 2019. The documents have not been provided to the Claimants. The documents relate to an entirely CLOSED issue. On 25 July 2019, the Tribunal made a decision about that issue which will be reviewed, if appropriate, following the substantive hearing."

5. The background is described in more detail in the judgment of this Tribunal (comprising Singh LJ (President), Lord Boyd of Duncansby (Vice-President) and Mr Charles Flint QC) dated 27 July 2020, in particular at paras. 4-11. At para. 5 the following was recorded:

> "… In the submissions on the IPCO issue by counsel to the tribunal dated 24 April 2020, the following was said at paragraph 19:
>
> '... the tribunal must be able to carry out its functions including making requests for assistance from the IPC without interference by the parties. In this case, there appears to have been such an instance which CTT sought to have included in the note as follows:
>
> "On 5 March 2019, two members of the respondents' staff contacted the tribunal secretary to state that the documents should not have been provided to the tribunal. On 7 March

> 2019, the tribunal secretary wrote to the respondents at the request of the President and stated that it was inappropriate to seek to intervene in the way that they had sought to do. On 12 March 2019, the respondents wrote to the tribunal secretary apologising for any misunderstanding."""

6. We also note what were described by this Tribunal at paras. 20-24 as "certain fundamental principles". In particular, at para. 20, it was said:

> "Before we conclude, we wish to reiterate certain fundamental principles so that no one is in any doubt, whether that is the claimants, the respondents or the general public, about these matters. First, this tribunal is, in substance, a court which is completely independent of the government, the intelligence agencies and everyone else. Its President is a judge of the Court of Appeal of England and Wales; its Vice-president is a Senator of the College of Justice in Scotland (he is a judge of the Outer House of the Court of Session); and its other members are either serving or retired judges or are Queen's Counsel. We all act in a judicial capacity when we sit as members of this tribunal."

7. At para. 24 it was said:

> "Fifthly, in March 2019, it was recognised that the direct communication which took place with the tribunal was inappropriate. An apology was given and it was clearly recognised that nothing like this should happen in the future. At the hearing before us, Sir James Eadie acknowledged that everyone had recognised that something serious had gone wrong."

Material legislation

8. The jurisdiction and powers of the Tribunal are governed by sections 65-70 of the Regulation of Investigatory Powers Act 2000 ("RIPA").

9. Section 68 provides:

> "(1) Subject to any rules made under 69, the Tribunal shall be entitled to determine their own procedure in relation to any proceedings, complaint or reference brought before or made to them.
>
> (2) The Tribunal shall have power –

(a) in connection with the investigation of any matter, or

(b) otherwise for the purposes of the Tribunal's consideration or determination of any matter,

to require a relevant Commissioner appearing to the Tribunal to have functions in relation to the matter in question to provide the Tribunal with all such assistance (including that Commissioner's opinion as to any issue falling to be determined by the Tribunal) as the Tribunal thinks fit.

(3) Where the Tribunal hear or consider any proceedings, complaint or reference relating to any matter, they shall secure that every relevant Commissioner appearing to them to have function in relation to that matter –

(a) is aware that the matter is the subject of proceedings, a complaint or a reference brought before or made to the Tribunal; and

(b) is kept informed of any determination, award, order or other decision made by the Tribunal with respect to that matter.

…"

10. The Investigatory Powers Act 2016 ("the 2016 Act") created the office of the IPC, which replaced various earlier Commissioners established under legislation going back to the Interception of Communications Act 1985. Section 232 of the 2016 Act provides:

"(1) A Judicial Commissioner must give the Investigatory Powers Tribunal all such documents, information and other assistance (including the Commissioner's opinion as to any issue falling to be determined by the Tribunal) as the Tribunal may require –

(a) in connection with the investigation of any matter by the Tribunal, or

(b) otherwise for the purposes of the Tribunal's consideration or determination of any matter.

(2) A Judicial Commissioner may provide advice or information to any public authority or other person in relation to matters for which a Judicial Commissioner is responsible.

(3) But a Judicial Commissioner must consult the Secretary of State before providing any advice or information under subsection (2) if it appears to the Commissioner that providing

> the advice or information might be contrary to the public interest or prejudicial to –
>
> (a) national security,
>
> (b) the prevention or detection of serious crime,
>
> (c) the economic well-being of the United Kingdom, or
>
> (d) the continued discharge of the function of any public authority whose activities include activities that are subject to review by the Investigatory Powers Commissioner.
>
> …"

11. The power to require a relevant Commissioner to provide assistance under section 68(2) of RIPA may be exercised by a single member of the Tribunal: see rule 6(b) of the Investigatory Powers Tribunal Rules 2018 (SI 2018 No. 1334) ("the 2018 Rules").

12. Rule 7(1) sets out the general duty of the Tribunal to carry out their 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 various interests, which are then listed and include national security and the continued discharge of the functions of any of the intelligence services.

13. Without prejudice to that general duty, but subject to paras. (3)-(6), the Tribunal may not disclose to the complainant or to any other person other than CTT various matters, including any information, document or opinion provided to the Tribunal by a relevant Commissioner pursuant to section 68(2) of RIPA: see rule 7(2)(c). There is then set out the procedure for considering representations as to disclosure and the power to order disclosure by the respondent in sub-paras. (3)-(6).

Relevant authorities on procedural fairness

14. The duty to act fairly, or the rules of procedural fairness, used at one time to be called the rules of natural justice.

15. In *Wiseman v Borneman* [1971] AC 297, at 308, Lord Reid said:

> "Natural justice requires that the procedure for any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this

> unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

16. It is common ground before us that the wording of section 68(2) of RIPA and section 232(1) of the 2016 Act does not override the principle of legal professional privilege ("LPP"). A general power in legislation will not be interpreted to override that fundamental principle: see *R (Morgan Grenfell & Co Ltd) v Special Commissioner for Income Tax* [2002] UKHL 21; [2003] 1 AC 563. Accordingly, it is common ground that this Tribunal cannot require the IPC to disclose material to it which is the subject of LPP belonging to the Respondents; and the IPC has neither the duty nor the power to disclose such material.

17. It is also common ground that, in the present context, the requirements of the European Convention on Human Rights ("ECHR"), and in particular Article 6, do not add anything material to the common law duty of fairness. That is even if Article 6 is in principle applicable to the proceedings of this Tribunal. This Tribunal has previously held that it is applicable: see *Kennedy* IPT/01/62 and IPT/01/77, judgment of 23 January 2003 (Mummery LJ (President) and Burton J (Vice-President)). This is disputed by the Respondents and has never been the subject of conclusive determination in the European Court of Human Rights: see e.g. *Kennedy v United Kingdom* (2011) 52 EHRR 4, at para. 179. In that case, the Court said that it was unnecessary to reach a conclusion as to whether Article 6(1) applies to proceedings of this nature because, even assuming that it does apply, the Court considered that this Tribunal's rules of procedure complied with its requirements.

18. It is unnecessary for present purposes to dwell upon this issue because it is not material in the present case. It may, however, have to be considered by this Tribunal on a future occasion if it is material. For now we would simply note that the decision of this Tribunal in *Kennedy* was a very early decision and, in particular, pre-dated the line of authority in the House of Lords and subsequently the Supreme Court as to the circumstances in which it is appropriate for courts and tribunals in this country to follow the principles established in the case law of the European Court of Human Rights (sometimes called "the *Ullah* principle", after the decision of the House of Lords in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323): see, for a recent summary, *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2021] 3 WLR 494, at paras. 54-59 (Lord Reed PSC). It is clear from that line of authority that domestic courts and tribunals should normally follow the clear and constant jurisprudence of the Strasbourg Court but no more and no less.

19. The authorities on the common law duty of fairness were summarised by Singh LJ in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812; [2018] 4 WLR 123, at paras. 68-85. As he put it at para. 85:

> "It is well established that what fairness requires depends on the particular context, both legal and factual."

20. In *Lloyd v McMahon* [1987] AC 625, at 702-703, Lord Bridge of Harwich said:

> "… The so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

21. In *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, at 560, Lord Mustill said:

> "… I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

Evolution of the issues before this Tribunal

22. The issues in this case have evolved significantly over time. We have had no fewer than three rounds of written submissions, dating from March 2020 through to April 2021. We held a hearing on 16 December 2020 but that was not effective because it quickly became clear that, in view of the Tribunal's concerns, the parties would need more time to reflect on their positions. We have been assisted by further written submissions, in which their positions were substantially revised. The stance taken by the Respondents was refined again in the oral submissions presented on their behalf by Sir James Eadie QC at the hearing before us on 5 October 2021.

23. It is unnecessary to rehearse the procedural history in detail because what is important is how the issues are now presented but, in order to appreciate their context, we will set out the history in outline.

24. Initially, the Respondents were concerned to ensure that, when the Tribunal has made a request for assistance, the Respondents and (if OPEN) the Claimant should be informed both that a request has been made and of its terms. This was described as "stage 1". It was then submitted that at "stage 2" the Respondents should be given an opportunity to review that material for (i) LPP; (ii) sensitivity; and (iii) relevance. It was envisaged that "stage 3" would be when the material would be supplied by IPCO to the Tribunal: see the Respondents' written submissions dated 19 March 2020, in particular at para. 1.

25. In written submissions on behalf of the Claimants dated 26 March 2020, the Claimants agreed with much, but not all, of the Respondents' analysis. However, they submitted that, at stage 1, the Tribunal should ordinarily consult with all parties about "any proposed request to IPCO": see para. 5. In other words, the Claimants' position (which had not been that of the Respondents) was that the duty to notify the parties arose *before* and not after this Tribunal makes a request for assistance to the IPC.

26. In written submissions on behalf of the IPC dated 6 April 2020, it was submitted that the parties (and in any event a Respondent) should be given an opportunity to make representations to the Tribunal "prior to any request being made to the IPC": see para. 3(1) (emphasis in original).

27. In view of the way in which the Claimants and the IPC were putting their positions, the Respondents proposed a revised five-stage approach in their written submissions dated 26 October 2020. In particular, at para. 2(i) it was submitted that, when the Tribunal "proposes" to make a request for assistance (stage 1), the Respondents and (if OPEN) the Claimant should ordinarily be informed of the proposed request and its terms. It was submitted that they would then be given the opportunity to make submissions to the Tribunal on the scope and appropriate terms of the request, but where the content of a request could not be disclosed or gisted into OPEN then CTT should make representations on behalf of the Claimant.

28. In written submissions dated 9 November 2020 on behalf of the Claimants, and 20 November 2020 on behalf of the IPC, although other matters were disputed, this proposal as to what was envisaged at stage 1 was not in dispute: see the Claimants' submissions, at para. 4; and the submissions on behalf of the IPC, at para. 4.

29. At the hearing on 16 December 2020 this Tribunal made clear that it had serious concerns about this aspect of the proposed procedure in particular (albeit on a provisional basis only because it had not yet heard submissions). One reason for our concerns was that it would impose an elaborate and complicated procedure, apparently in all cases concerning a proposed request by this Tribunal to the IPC, in circumstances where there had not even been a request made, in other words at an early stage in this Tribunal's processes. We were also concerned that it may not have been sufficiently appreciated by the parties that this kind of case is the exception rather than the norm in the work of this Tribunal. Much of the work of this Tribunal arises from complaints and claims which are made by individual members of the public, often without legal representation. There are not usually formal pleadings. It is unusual for CTT to be appointed. The present case, important as it is, is a relative rarity in the work of the Tribunal. This is a case which in many respects resembles ordinary litigation in the courts. There are leading counsel for all parties. CTT have been appointed. But even in such a case, CTT would often not have been appointed at an early stage in the Tribunal's consideration of a case, in particular at the stage where it may be considering making a request for assistance from the IPC.

30. In consequence, the parties filed revised written submissions. The Respondents' submissions dated 26 February 2021 entirely replaced their earlier submissions. Very significantly, they now proposed a revised process. At stage 1 it was submitted that they should be notified when a request for assistance "has been made and be given its terms": see para. 32. Subject to OPEN/CLOSED constraints, it was submitted that there would appear to be no objection to the complainant also being informed. At para. 33, it was submitted that, whilst the parties would not routinely be informed until after the request had been made, it would always be open to the Tribunal to invite submissions about the scope of the request prior to making a request for assistance "should it be considered appropriate."

31. The Claimants agreed with that position as to stage 1: see para. 10 of their written submissions dated 15 March 2021. The written submissions on behalf of the IPC dated 26 March 2021 took a slightly more nuanced position but not, as we understand it, a substantially different one. At para. 3, it was submitted that "the statutory regime does not envisage that ordinarily there should be a right for public bodies to make submissions to the Tribunal before such a request is made, or indeed for them to make submissions to the IPC in responding to such a complaint." Para. 4 continued:

> "However, there may be contexts where, in fairness to a public authority, prior notice of such a request should be given, and in any event, this would be desirable in certain cases. The cases in which it would be desirable are those where the scope of a request may be contentious or unclear. It is in general desirable for any issues about the scope of a request to be flushed-out and resolved prior to the request being made, rather than afterwards. This will avoid the IPC potentially providing unnecessary or irrelevant material to the Tribunal."

32. We respectfully agree with the change of stance which has occurred. We do not think that there is any requirement in law for the Tribunal to notify the parties or to invite

their representations before it makes a request to the IPC for assistance exercising its statutory powers. We would endorse the way in which the principle is summarised by CTT at para. 41(a) of their written submissions dated 16 April 2021:

> "Whether to make a request for statutory assistance, and the scope of that request, is a question for the Tribunal. The Tribunal does not need to notify the parties in advance of making a request or seek the parties' input into the scope of the request. It is possible that on the facts of a particular case fairness may require a public authority to be notified in advance of the request being made. Further, the Tribunal retains a discretion to seek the assistance of the parties prior to a request being made where it considers that to be desirable."

33. We also endorse what is submitted in those submissions by CTT at para. 41(b):

> "Fairness may (but will not always) require a respondent and a claimant (the latter subject to OPEN/CLOSED constraints) to be notified after a response to a request for assistance has been provided by the IPC. Whether fairness requires this will depend upon the use to be made of the material by the Tribunal."

34. One reason why we have come to the view which we have in relation to the procedure to be adopted, at least before a request is made by the Tribunal to the IPC, is that it is of vital importance that the Tribunal should be free to make such a request as it thinks fit, for example where it asks the IPC to make an unannounced inspection of a respondent. We can illustrate this by reference to an example which is now in the public domain.

35. In the IPC's Annual Report for 2019 (published in December 2020), reference was made to the assistance which the IPC had given in that year to the Tribunal. Of particular interest for present purposes is what was said at para. 2.19(d):

> "For the purposes of a complaint to the IPT, by an individual in relation to a police force, the IPT sought assistance in verifying the police force's assertion that, following searches carried out by it, it did not hold any relevant information. Our Inspectors attended the police force's offices, interviewed staff and reviewed the force's records before providing a report the to IPT on their findings."

36. This is an important example of the sort of circumstances in which it may be important for the Tribunal to be able to request assistance from the IPC without having to notify the respondent concerned. The possibility that a respondent may be the subject of an unannounced inspection by the IPC at the request of the Tribunal is an important

safeguard both to prevent the risk of "tipping off", with the consequences which may follow (for example the destruction of relevant documents or deletion of records from a computer); and to maintain public confidence in the effectiveness of the system to supervise what public authorities do, particularly in the present context, where they are entrusted by the law with surveillance powers which frequently have to be exercised in secret for obvious reasons.

37. Furthermore, we consider that Parliament has deliberately given this Tribunal a broad and open-ended discretion to seek assistance from the IPC. It would not be right in principle, for example, to seek to constrain this broad power by requiring that the Tribunal must have some reason to think that a respondent might destroy relevant material if it were to be notified of the request. It is precisely because every respondent authority knows that it may be subject to an unannounced inspection by the IPC on the request of the Tribunal that the integrity of the system overall can be secured. The public can therefore have confidence that the system of supervision by this Tribunal is effective.

38. This is one reason why we were very concerned at the suggestion which was made at one time on behalf of the parties that they had the right to be notified of a request by the Tribunal to the IPC before it is made, subject to there being a good reason not to do so (for example where an unannounced inspection is required).

39. We turn briefly to consider the position after material has been disclosed by the IPC to the Tribunal in response to a request for assistance. At this stage, it seems to us that the normal procedures of the Tribunal will apply and there is no evidence that they have caused any difficulties in practice. The Tribunal will, of course, comply with its duty to act fairly. The Respondents will have the opportunity, as they have always had to date, to make submissions to the Tribunal as to the relevance or sensitivity of any material. If it is possible to consider these matters in OPEN, that will be done. To the extent that it is not possible, these matters will be considered in CLOSED, with the assistance of CTT. Although at one time, the Respondents made submissions to the effect that they should have the opportunity to check material for relevance and sensitivity *before* it was disclosed by the IPC to the Tribunal, that was (rightly) not the stance adopted on their behalf by the time of the hearing before us on 5 October 2021.

40. Furthermore, this Tribunal has in place appropriate systems for handling sensitive material.

<u>Should this Tribunal give general guidance on the IPCO issue?</u>

41. The parties are agreed that, in principle, guidance from this Tribunal on the IPCO issue would be desirable. We do wish to be as helpful as we can be, not only to the parties but also to the IPC. Nevertheless, we see considerable force in the submissions made by CTT dated 16 April 2021, at paras. 32-40, setting out why it may be undesirable to do so.

42. First, although it goes without saying that this Tribunal must always act fairly, including when exercising its powers under section 68(2) of RIPA, as we have said earlier, what fairness requires in any particular context is highly fact-specific.

43. Secondly, on the facts of this particular case, the specific issues which arose concerning the disclosure of LPP material to the Tribunal and the disclosure of irrelevant material have been resolved.

44. Thirdly, the facts of this case (outlined above) illustrate the need to avoid any impression that might risk compromising the Tribunal's independence, or even the appearance of independence, if a respondent becomes involved in the process by which requests for assistance are made by this Tribunal to the IPC and the response of the IPC.

45. Fourthly, the Tribunal's Procedure Rules have recently been amended. The original Rules dating from the inception of the Tribunal in 2000 were repealed and replaced by the 2018 Rules. These Rules were drafted following a period of consultation and were subject to consideration by Parliament. There was no suggestion made in the consultation process or otherwise that there was a need for there to be rules specifically governing the process by which this Tribunal seeks the assistance of the IPC.

46. Fifthly, as we have said earlier, this case is relatively unusual as compared with the bulk of this Tribunal's work.

47. Sixthly, if any general guidance is to be given there can be no principled reason for confining it to cases concerning the UK intelligence community. For example, police forces and local authorities may well have similar interests to protect, particularly in respect of LPP. We cannot see any good reason to distinguish between different potential respondents. We then need to bear in mind that other kinds of public authority have had no opportunity to participate in these proceedings.

48. Seventhly, this leads to our final point of concern. We are not a legislative body. There can be circumstances in which it may be appropriate for a court or tribunal to issue general procedural rules or guidance, for example in the shape of a practice note. We were informed by CTT that the Special Immigration Appeals Commission produced a practice note on anonymity orders and related issues in June 2019. Significantly, however, this was done after consultation with a users' group and after the opportunity had been given, for example, to the media to make representations to the Commission.

49. Ultimately, we have reached the conclusion that what the issue in the present context essentially involves is the exercise of this Tribunal's case management powers, albeit important ones. As such, it seems to us that it is intrinsically likely to be highly fact-specific. It is very difficult and would be undesirable to lay down any general rubric, even if it were expressly said to be by way of guidance only.

50. Furthermore, in this context, we must bear in mind that each member of this Tribunal is independent of every other and acts judicially. Although this panel includes both the President and Vice-President, what we say cannot in any way bind the individual and independent judgement of any other member of the Tribunal in any future case. It is questionable therefore how valuable any guidance from us in this case would be for hypothetical future cases.

51. The main substantial issue which remains in dispute between the parties relates to the procedure to be followed in relation to material held by the IPC which may be the subject of LPP, where the privilege is that of the Respondents. It is to that issue we now turn.

Legal Professional Privilege

52. In substance we consider that the only issue which requires determination at this stage is that arising from the undoubted fact that some documents in the possession of the IPC may attract LPP and the owner of that privilege is one of the Respondents.

53. There is an obvious public interest in full disclosure being made by the Respondents to the IPC for the purposes of his functions. The documents disclosed to the IPC may therefore include those which are privileged. This may assist the IPC to be confident that the Respondents have fully complied with their legal obligations. There is also the practical consideration that it may often be difficult and time-consuming to have to redact documents for LPP before they are disclosed to the IPC. Accordingly, there is only a partial waiver of privilege when documents are disclosed by the Respondents to the IPC. No-one else, including this Tribunal, is entitled to see those documents to the extent that they are privileged.

54. Furthermore, as is common ground, the statutory power of this Tribunal to require assistance from the IPC, and his statutory duty to provide such assistance, do not override (either expressly or by necessary implication) the fundamental principle of LPP. None of that is in dispute.

55. For that reason, Sir James Eadie contends on behalf of the Respondents that they have legitimate legal rights and/or interests which may be adversely affected if there were, for example, inadvertent disclosure of privileged material from the IPC to this Tribunal before the Respondents have had the opportunity to make any representations about the issue.

56. It seems to us therefore that there does need to be a procedure in place generally to ensure that the legitimate interests of the Respondents in LPP are not adversely affected before this Tribunal is able to adjudicate. But it does not follow that the full breadth of the Respondents' contention must be accepted. On behalf of the Respondents Sir James Eadie contended that there would have to be a system whereby, after the IPC has collated the relevant material but before he discloses it to this Tribunal, it must all be checked by the Respondents for LPP.

57. We do not accept that broad submission. The conclusion does not follow from the premise. Much of the material may not, on any view, attract LPP. Some of the material may be the product of other bodies, including the IPC himself, and have nothing to do with the Respondents. We accept, of course, that there may be documents which have not been generated by the Respondents themselves but which nevertheless may cross-refer to privileged material which belongs to them. Care would need to be taken to avoid inadvertent disclosure of such material as well as other privileged material.

58. None of that, however, leads to the conclusion that the Respondents must have access to all the material which has been collated by the IPC for disclosure to the Tribunal. It would suffice, in our view, as was submitted by Mr Tom Hickman QC on behalf of the IPC, supported by the Claimants and CTT, that there should be in place a standard direction when a request is made to the IPC by this Tribunal to the effect that, when collating the material, documents should be flagged up which arguably attract LPP. Everything else could then be disclosed to the Tribunal but those documents would not be disclosed at that stage.

59. It is possible that other material, which is disclosed to the Tribunal, may turn out to contain LPP material. The Tribunal is well capable of dealing with such contingencies if they arise. Either a ruling can be made and the panel can put the material out of its mind. If that is thought not to be appropriate, a procedure can be devised by which a differently constituted panel could consider the issue of LPP and adjudicate upon it. We note that in other cases involving these Respondents this Tribunal has had to rule on whether, for example, LPP had been waived.

60. The procedure we envisage would also have the advantage, in our view, that it would be entirely conducted under the auspices of this Tribunal. There would be no direct communications between the Respondents and the IPC except with the approval of, or under the direction of, this Tribunal. This will underline the strict independence of both the IPC and this Tribunal from the Respondents. We can readily see, for example, the practical advantage in the IPC asking the Respondents to check material which may attract LPP, so that appropriate redactions can be made before disclosure to this Tribunal, but this should only be done under the auspices of the Tribunal.

61. If, at the end of this stage of the process, material can be properly put into OPEN the Claimants will then have the opportunity to argue, if they wish to, that the material does not in fact attract LPP or that LPP has been waived. It was common ground before us that ultimately this Tribunal would have to adjudicate on such disputes if they arise. In other cases, where material must remain CLOSED, no doubt CTT could make appropriate submissions in effect putting the points that the Claimants would do if they had access to CLOSED material – but, under the procedure we envisage, that would only be done with the approval of, or under the direction of, this Tribunal.

62. We hope that it will be helpful if we summarise the procedure that we envisage that would usually be followed, although we stress again that this is not intended to constrain the case management powers of the Tribunal in individual cases:-

(1) The Tribunal makes its request to the IPC.

(2) IPCO collates the material that is covered by the request.

(3) IPCO flags up any material that is arguably subject to the Respondents' LPP.

(4) IPCO discloses the unflagged material to the Tribunal but asks the Tribunal for its directions in relation to the flagged material.

(5) The Tribunal asks IPCO to provide the flagged material to the Respondents to check for LPP.

(6) If the Respondents do assert LPP in relation to any material, it will not be disclosed to the Tribunal but the Respondents must explain in writing on what grounds the claim to LPP is made.

(7) If there remains a dispute about LPP, the Tribunal will adjudicate on it, if necessary with a different panel constituted to consider the issue of LPP. To the extent that this adjudication can take place in OPEN, it will be. To the extent that it cannot be, it will be conducted in CLOSED, with the assistance, as appropriate, of CTT.

Conclusion

63. For the reasons we have given, we do not think it necessary or appropriate to give general guidance on the IPCO issue save as set out above in relation to LPP.