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LETTER BY E TRANSMISSION

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Renata Degener
Deputy Section Registrar
European Court of Human Rights
Council of Europe
F-67075 Strasbourg CEDEX
France

Dear Madam

Application No 60646/14
Privacy International v The United Kingdom

1. The President of the Section has requested the United Kingdom Government's observations on the admissibility and merits of this case by 3 May 2017. The questions to the parties are:

1. Did the applicant have an effective domestic remedy by which to challenge the alleged violation of Article 10? If so, has it failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention? If not, does a separate issue arise under Article 13 of the Convention?

2. In light of the Grand Chamber's recent judgment in *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016, has there been an interference with the applicant's rights under Article 10 of the Convention? If so, was the interference justified?

2. On behalf of the Government of the United Kingdom, I write to request that the question whether the complaint is admissible should be determined separately. Alternatively, if the Court is not prepared to make a separate decision on admissibility, I ask the Court to stay these proceedings pending determination of *The Times & Kennedy v. The United Kingdom* (64367/14).

Admissibility

3. In accordance with rule 54A of the Court's Rules, and Article 29(1) of the Convention, the Court may decide at any stage to take a separate decision on admissibility.

4. On 4 March 2014, the applicant wrote to the Director of GCHQ, purportedly "pursuant to section 1 of the Freedom of Information Act 2000" requesting certain information. The Head of Information Rights at GCHQ responded to the applicant the same day, explaining that, as specified in s.84, GCHQ is not a public authority for the purposes of the Freedom of Information Act 2000 ("FOIA").

5. The applicant contends that this refusal was in breach of Article 10 of the Convention, and yet it has made no attempt whatsoever to challenge GCHQ's decision before any domestic court or tribunal or to seek the information by any non-FOIA route. The applicant has lodged a complaint before the Court without giving the domestic courts any opportunity to consider how it should be addressed as a matter of English law.

6. Although GCHQ is not a public authority for the purposes of the Freedom of Information Act 2000, it is a "public authority" within the meaning of the Human Rights Act 1998 ("the HRA"), as defined in s.6(3)(b) of the HRA. As a matter of English law, it is unlawful for a public authority to act in a way which is incompatible with a Convention right (s.6(1) of the HRA). The "Convention rights" are defined in s.1(1)(a) of the HRA as including Article 10 of the Convention.

7. In accordance with s.7(1) of the HRA, if Privacy International wished to contend that GCHQ's refusal to provide them with information sought pursuant to FOIA was a breach of Article 10 of the Convention, it had a right, as a matter of English law, to make that claim. In accordance with s.65 of the Regulation of Investigatory Powers Act 2000 ("RIPA"), any such claim should have been brought before the Investigatory Powers Tribunal, on which several High Court Judges and other senior lawyers sit.

8. Moreover, given that FOIA makes clear, in express terms, that it does not apply to GCHQ, applying the Supreme Court's judgment in *Kennedy v Charity Commission* [2015] AC 455, Privacy International ought to have looked beyond FOIA to the statute which specifies the duties, functions and powers of GCHQ, namely, the Intelligence Services Act 1994 ("the ISA"). If a request outside FOIA had been made and refused, that refusal could also have been the subject of proceedings before the Investigatory Powers Tribunal.

9. In any such proceedings, the domestic tribunal would have been able to consider:

(a) Whether (leaving aside the HRA) GCHQ had the power, as a matter of English law, to disclose to Privacy International the information it sought. In particular, applying ordinary interpretation techniques, was it open to GCHQ to make such disclosure pursuant to the ISA or FOIA, or has Parliament enacted a statutory bar prohibiting GCHQ from doing so?

(b) If (applying ordinary interpretation techniques) Parliament has enacted a statutory bar prohibiting GCHQ from giving Privacy International the disclosure sought:

(i) does that statutory bar interfere with rights in Article 10 § 1; and
(ii) if so, is the statutory bar justified pursuant to Article 10 § 2?

(c) If a statutory bar on disclosure would be incompatible with Article 10, are the statutory provisions (in the ISA and/or FOIA) which create that bar, capable of being read, applying s.3 of the HRA, in a manner which would be compatible with Article 10?

(d) If (applying ordinary interpretation techniques) GCHQ had the power to give Privacy International the information sought, was the decision to refuse to do so (or would a non-FOIA refusal have been) incompatible with Article 10?

(e) Alternatively, if (applying ordinary interpretation techniques) GCHQ had the power to give such disclosure, did it act lawfully (as a matter of English law, apart from the HRA) in refusing to do so?

(f) If the answer to (c), (d) or (e) is 'yes', what remedy should be given?

10. The domestic tribunal has had no opportunity to address any of these questions because Privacy International has not challenged GCHQ's decision in any proceedings before it.

11. In *Kennedy v United Kingdom* (26839/05) the Fourth Section considered that an applicant was not required to advance his complaint regarding the general compliance of the RIPA regime for internal communications with Article 8 before the IPT in order to satisfy the requirement to exhaust his domestic remedies. However, the reasons the Court reached that conclusion were:

(a) The challenge was to the alleged incompatibility with Article 8 of primary legislation (in circumstances where it was not contended the incompatibility could be remedied by means of the interpretative obligation in s.3 of the HRA), it appeared that the IPT would not have had the power to make a declaration of incompatibility pursuant to s.4 of the HRA, and the legislative practice of giving effect to declarations of incompatibility was not yet sufficiently certain.

(b) It was unlikely that the IPT would be able to provide, in open, any elucidation of the regime and the applicable safeguards, such as would assist the Court in considering the compatibility of the regime with the Convention.

12. Neither of these reasons is applicable here. First, if the domestic tribunal were to find that the relevant legislative provisions are *prima facie* incompatible with Article 10, it would then consider how to interpret those same provisions applying s.3 of the HRA. This is not a case where the only possible remedy, if the legislation were found to be incompatible with Convention rights, would be a declaration of incompatibility. Secondly, given the nature of the questions that the domestic tribunal would consider, it is highly likely that any proceedings before, and decision of, the domestic tribunal would be public. As to this, see the IPT's guidance on the circumstances in which it holds public hearings and gives public judgments following the cases of IPT/01/62 and IPT/01/77, available at http://www.ipt-uk.com/content.asp?id=13.

13. The Government recognise that it will often be appropriate for the Court to determine admissibility and merits together. However, exceptionally, the Government seek a separate determination of admissibility for these reasons:

(1) This is a simple, clear-cut case. In circumstances where the applicant brought no proceedings before any domestic court or tribunal, the applicant has manifestly failed to exhaust effective domestic remedies and the complaint is inadmissible. As the Grand Chamber powerfully reiterated in *Demopolous and others v. Turkey (dec.)* [GC], nos. 46113/99 & ors, ECHR 2010, at §69, the exhaustion of domestic remedies rule is "*an indispensable part of the functioning of this system of protection*". The Court "*cannot, and must not, usurp the role of Contracting States … The Court cannot emphasise enough that it is not a court of first instance*".

(2) The common law and the HRA protect fundamental human rights. The Grand Chamber has recognised "*the established principle that in a legal system providing constitutional protection for*

fundamental rights it is incumbent on the aggrieved individual to test the extent of that protection and, in a common-law system, to allow the domestic courts to develop those rights by way of interpretation": *A, B and C v Ireland* [GC], no.25579/05, §142, ECHR 2010. The applicant made no attempt to challenge GCHQ's decision.

(3) The consequence of the applicant's failure is that the Court does not have the benefit of the domestic tribunal's consideration of the effect of the legal framework (in particular, the ISA) under which GCHQ operates, or, importantly, the domestic tribunal's view of the aims, objectives and justification for the legal framework operating as it does. It is vital that national courts and tribunals should have an opportunity to determine questions of the compatibility of domestic law with the Convention because, as the Grand Chamber explained in *Burden v the United Kingdom* [GC], no.13378/05, §42, ECHR 2008, they have "*direct and continuous contact with the forces of their countries*" and so "*the European Court should have the benefit of [their] views*".

(4) For the reasons explained below, the merits of the application should not, in any event, be considered prior to the determination of *The Times & Kennedy v United Kingdom* case. One option would be to stay the case in its entirety, rather than proceed at this stage to determine admissibility separately. However, whilst the Government put this forward as an alternative proposal below: (a) this does not meet points (1), (2) and (3) above; and (b) the reasons for staying the case do not apply (or at least, not with anything like the same force) to the admissibility question as to the merits because whether Privacy International has failed to exhaust its domestic remedies is based on the specific facts of this case. Proceeding to determine admissibility first would ensure that the question whether Privacy International should first pursue domestic proceedings can be addressed and determined relatively quickly.

Stay

14. Alternatively, as indicated above, the Government ask the Court to stay this case pending determination of *The Times & Kennedy* case.

15. In both this case and *The Times & Kennedy* case, the applicants made requests for information purportedly pursuant to FOIA. In both cases, the public authorities to whom the requests were made explained that the applicants had no right pursuant to FOIA to the information requested (in this case, because GCHQ is not covered by FOIA at all, and in *The Times & Kennedy* case, because an absolute exemption applied). And in both cases, the applicants contend that the decisions that they did not have a right to the information requested pursuant to FOIA breached their rights under Article 10 of the European Convention on Human Rights, applying the judgment of the Grand Chamber in *Magyar Helsinki Bizottság v Hungary* (18030/11). In addition, in both cases the Government contend that the applicants have failed to consider the legislative framework that specifies the duties, functions and powers belonging to the body from whom disclosure was sought, and they have failed to exhaust their domestic remedies.

16. *The Times & Kennedy* case is further advanced than this case. Given the similarities between the cases, it would be sensible if the parties were able to make their observations on the merits of this case (if necessary, having regarding to the observations in respect of admissibility above) with the benefit of the Court's determination of *The Times & Kennedy* case. Such a stay would ensure a more efficient and proportionate use of the Court's and the parties' time and resources.

Conclusion

17. The Government contend that it is necessary and proportionate, for the reasons given above, to determinate admissibility separately. This could be done relatively swiftly and would not need to await determination of *The Times & Kennedy* case

18. If the Court does not agree that the question whether applicant has exhausted its domestic remedies should be determined separately, as a preliminary issue, then the Government's requests a stay of the case pending determination of *The Times & Kennedy* case.

19. Given the current direction to provide observations on the admissibility and merits of the application by 3 May 2017, the United Kingdom Government would be most grateful if this application could be considered speedily.

Yours Sincerely

Amanda Hennedy Goble

Amanda Hennedy Goble
Agent of the Government of the United Kingdom