IN THE EUROPEAN COURT OF HUMAN RIGHTS **Application no. 60646/14**
FIRST SECTION

PRIVACY INTERNATIONAL **Applicant**

- and -

UNITED KINGDOM **Respondent**

APPLICANT'S SUBMISSIONS IN RESPONSE TO THE UNITED KINGDOM'S LETTER DATED 7 APRIL 2017

Background and summary of Applicant's submissions

1. The President of the First Section requested the UK Government's observations on the admissibility and merits of the present case by 3 May 2017. On 7 April 2017, the UK Government wrote to the Court to request that the question of admissibility be determined separately from the substantive claim and, alternatively, to request a stay of the present proceedings pending determination of *Times Newspapers and Kennedy v United Kingdom* (64367/14). These submissions are made by the Applicant in response to the Government's requests.

2. In summary:

   (a) There are no adequate domestic remedies.

   (b) The application is therefore admissible.

   (c) There is no good reason to stay the present proceedings until *Times Newspapers and Kennedy* has been decided.

   (d) Accordingly:

      (i) there is no benefit in the Court making a separate determination of admissibility; and

(ii) the Court is invited to direct the UK Government to file its observations promptly.

3. The only admissibility objection raised by the Government concerns the Applicant's alleged failure to exhaust domestic legal remedies (Article 35(1) of the Convention). The objection is unfounded:

   (a) At the time the application was made and now, there was and is no effective legal remedy available to the Applicant in the UK. The UK's Freedom of Information Act 2000 (the "FOIA") contains a blanket absolute exemption for the GCHQ (Government Communications Headquarters, the part of the UK security and intelligence services relevant in the present proceedings) from any information disclosure obligations.

   (b) The Government's suggestion that disclosure to the extent required by Article 10 of the Convention might be obtained under the Intelligence Services Act 1994 (the "ISA") is unsupported by any judicial precedent.

   (c) The Applicant can only bring proceedings in the UK for breaches of its Convention rights before the Investigatory Powers Tribunal (the "IPT"). The IPT is bound by the decision of the UK Supreme Court in *Kennedy v Charity Commission* [2014] UKSC 20; [2014] 2 WLR 808 rejecting the approach to Article 10 on which the Applicant's case depends, despite the fact that such interpretation has subsequently been accepted by the Grand Chamber in *Magyar Helsinki Bizottság v Hungary* (18030/11). There is currently no right of appeal from the IPT. Nor is it currently possible to bring a claim for judicial review of a decision of the IPT.

4. No good reason has been identified for a stay pending *Times Newspapers and Kennedy*.

Lack of domestic remedy

The interpretation of Article 10 in the UK

5. The present case concerns GCHQ's refusal to provide information requested by the Applicant: see §§2 to 21 of the Applicant's submissions accompanying its application form. The Applicant's case is that Article 10 contains a positive right of access to certain information held by a public body.

6. On 26 March 2014, the Supreme Court gave judgment in *Kennedy*. The majority in that case rejected the suggestion that Article 10 could give rise to such a right of access to information: see the judgments of Lord Mance, at [93] to [100], and Lord Toulson at [143] to [150].

7. Both majority judgments considered that the case law of the European Court of Human Rights, as it then stood, precluded such an interpretation of Article 10. Lord Toulson considered that the more expansive interpretation, on which the Applicant in the present case relies, was "flatly contradictory to the Grand Chamber decision in *Leander*" (at [147]; see also the judgment of Lord Mance at [94]). Lord Toulson went on to say, at [148]:

> "If the *Leander* principle is to be abrogated, or modified, in favour of an interpretation of article 10 which makes disclosure of information by a public body in some circumstances obligatory, it seems to me with respect that what the new interpretation would require is a clear, high level exegesis of the salient principle and its essential components."

8. On 8 November 2016, the Grand Chamber of the Court gave judgment in the *Magyar Helsinki* case. The Court held, at [156]:

> "The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However […] such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular 'the freedom to receive and impart information' and where its denial constitutes an interference with that right."

9. The Court went on to consider the circumstances in which Article 10 could give rise to a right to receive information (and therefore an obligation on a government to impart information). The relevant circumstances included the nature of the information sought (factual information on matters of public interest where disclosure provides for transparency in the conduct of public affairs); the role of the applicant (press, watchdogs and non-governmental organisations); and the requirement that information requested be readily available: see [157] to [169].

10. The judgment of the Grand Chamber in *Magyar Helsinki* does not, however, affect the law enforceable in UK courts and tribunals. Moreover, courts and tribunals in the UK remain bound by the rules of domestic legal hierarchy when considering cases involving rights under the Convention and must follow domestic authority in preference to Strasbourg authority in the event of a conflict: see *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 WLR 570, at [40] to [45], per Lord Bingham (with whom all other members of the panel agreed on this point, at [50], [62], [121], [177], [178] and [213]). In *Kay*, Lord Bingham said, at [43]:

> "As Lord Hailsham observed […] 'in legal matters, some degree of certainty is at least as valuable a part of justice as perfection'. That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here."

11. The Supreme Court judgment in *Kennedy* therefore remains binding on all UK courts and tribunals despite the subsequent development of the jurisprudence of the European Court of Human Rights. The domestic authority of the *Kennedy* decision can be revised *only* by a further decision of the UK Supreme Court.

12. For a litigant with access to the ordinary UK court system, there is no difficulty. A challenge to the *Kennedy* decision could be brought by an appeal from the decision of a lower court, as contemplated in Lord Bingham's judgment in *Kay*.

13. The problem is that claims against GCHQ for a breach of Convention rights cannot be brought in the ordinary courts. Sections 65(2)(a) and (3) of the Regulation of Investigatory Powers Act 2000 ("RIPA") provide that proceedings against GCHQ for actions incompatible with Convention rights may *only* be brought in the IPT. In addition, unlike most other courts or tribunals in the UK, there is no route of appeal against a decision of the IPT and its decisions cannot even be challenged by way of judicial review, even if the IPT makes a plain error of law: see RIPA, s. 67(8). This position was recently confirmed by the High Court in *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), albeit that decision is subject to appeal.

14. It follows that in determining a claim under Article 10 ECHR against GCHQ, the IPT would be bound to apply *Kennedy* and there would be no opportunity to appeal on this point. An Article 10 claim would therefore fail if brought in the IPT. As the IPT is the only judicial venue available to the Applicant to assert its Article 10 claim against GCHQ, it follows that there is no domestic remedy available to the Applicant in the UK. A domestic claim would have been pointless.

The domestic legal basis of GCHQ's power or obligation to disclose

15. Even if the interpretation of Article 10 set out by the Grand Chamber in the *Magyar Helsinki* case were applied in the UK by the IPT, there would still be no basis in domestic law by which GCHQ could be ordered to give the disclosure which the Applicant seeks.

16. GCHQ is not a public authority for the purposes of the FOIA and is therefore not subject to the disclosure obligations imposed on public authorities by that Act: see Schedule 1, part 1 and the definition of "government department" in s. 84, which expressly excludes "… Government Communications Headquarters". The statute contains no ambiguity. Nevertheless, the Government in its letter raises the question whether the statutory provisions of FOIA might be capable "of being read, applying s. 3 of the HRA, in a manner which would be compatible with Article 10" (§§9(c), 12).

17. The interpretive obligation on courts and tribunals under HRA, s. 3 is a limited one. Section 3(1) provides (emphasis added):

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

It is clear that s. 3 would not allow a court or tribunal to interpret s. 84, which on its plain words excludes GCHQ from the effects of FOIA, as in fact imposing such obligations on GCHQ. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, Lord Rodger summarised the limits of s. 3 as follows, at [110]:

> "[However] powerful the obligation in section 3(1) may be, it does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen."

18. Further, the IPT does not have the power to make a declaration of incompatibility under s. 4 of the HRA (as is apparent from the fact that the IPT is not listed among the courts

competent to make a declaration in s.4(5)). Such a declaration does not alter the law, but permits Parliament to take steps to remedy the breach of the Convention. In any event, a mere declaration would provide no relief to the Applicant and is therefore not a domestic remedy it is required to exhaust: see *Malcolm Kennedy v the United Kingdom* (26839/05) at [90] and *Burden v the United Kingdom* (13378/05) at [43] and [44].

19. The UK Government then suggests that a power to disclose the information sought by the Applicant might be found in the ISA. No section of the ISA deals expressly with a power to disclose information to the public upon an application. No suggestion that the ISA contains such a power is to be found in any Government guidance on the Act. The Government points to no decided case supporting the view that the Act is capable of having this effect. Further, the Government's submissions are carefully worded. It is not conceded that the ISA does contain a power to disclose information upon request. The Government appears to reserve the right to argue in the IPT that such a right does not in fact exist or is very narrow.

Judicial review in accordance within English common law principles

20. In §9(e) of its letter, the Government suggests that (assuming GCHQ had a power to disclose the information sought) the Applicants ought to have asked an English court or tribunal to determine whether GCHQ's refusal to disclose the information was lawful "as a matter of English law, apart from the HRA". In order for such a claim to provide the Applicants with a domestic remedy, it would be necessary that English common law recognises a right of access to information in similar terms to that recognised by the European Court of Human Rights under Article 10 in the *Magyar Helsinki* case.

21. There is no authority for the view that English common law principles recognise such a right. In the Supreme Court's *Kennedy* decision, Lord Toulson expressed the view (*obiter*) that "article 10 […] adds nothing to the common law in the present context" (at [133]). The context of that case, however, was that the Supreme Court had rejected the interpretation of Article 10 on which the Applicant relies in the present case (i.e. the *Magyar Helsinki* approach). The judgments of the majority in *Kennedy* therefore tend against, not in favour of, the view that English common law principles would be capable of vindicating the right for which the Applicant contends.

22. In order for a common law challenge by the Applicant to succeed it would also likely require the courts to consider the proportionality of GCHQ's refusal, not merely whether the refusal was irrational. Irrationality is the standard of review which remains applicable in cases not engaging EU law or Convention rights and does not offer equivalent protection to a review of the proportionality of a decision: see *Smith and Grady v the United Kingdom* (33985 and 33986/96) at [138].

Conclusions on domestic remedy

23. In *Selmouni v France* (25803/94) the Grand Chamber held at [75]:

> "[The] only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied."

24. The UK Government has not discharged the burden placed on it to establish that the conditions necessary for the application of Article 35 are satisfied. The admissibility of the Applicant's case is clear. Nothing would be served by this Court determining admissibility separately from the merits of the case.

A stay of proceedings

25. As an alternative to separate determination of the admissibility question, the Government invites the Court to stay the present proceedings pending determination of *Times Newspapers and Kennedy*.

26. The Government states that the two cases involve similar issues of non-exhaustion (at §15 of its letter). In fact, the admissibility arguments are different:

    (a) The two cases involve different statutory schemes under which, on the Government's cases, the applicants may have domestic remedies (the ISA in the present case and charity legislation in *Times Newspapers and Kennedy*).

    (b) Unlike in *Times Newspapers and Kennedy*, the Applicant cannot challenge a determination of the IPT by appeal or judicial review in the ordinary courts. As a consequence, the Applicant has no route by which to cause the Supreme Court to

revisit its restrictive interpretation of Article 10. That issue does not arise in the *Times Newspapers and Kennedy* case.

There would therefore be no advantage to the Court or the parties in delaying these proceedings to wait for *Times Newspapers and Kennedy*. There would be inevitable prejudice to the Applicant and advantage to the Government to be derived from a delay in vindicating the Applicant's rights.

Conclusion

27. The Court is respectfully invited to reject the Government's requests and to direct the UK Government to serve its observations promptly.

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LEIGH DAY

16 May 2017