IN THE INVESTIGATORY POWERS TRIBUNAL

(The President, the Vice-President and Sir David Calcutt QC)

31 March 2004

IN THE MATTER OF APPLICATION No IPT/03/01/CH

RULINGS OF THE TRIBUNAL ON PRELIMINARY ISSUES OF LAW

REPRESENTATION:

Mr Andrew Nicol QC and Ms Henrietta Hill instructed by the Solicitor and Legal Director, Liberty (Human Rights Litigation Unit) for the Complainant

Mr Philip Sales and Mr Ben Hooper instructed by the Treasury Solicitor for the Respondent

The Hearing

1. On 27 and 28 January 2004 the Tribunal held an oral hearing on two preliminary issues of law. The issues arise in proceedings against the Security Service initiated in the Tribunal on 19 December 2002 in the form of a complaint under s 65(2)(b) and 65(4) of the Regulation of Investigatory Powers Act 2000 (RIPA). There is also a claim under s 7(l)(a) of the Human Rights Act 1998 (HRA). Both the complaint and the claim relate to the same conduct by the Security Service, which is alleged to have been incompatible with Article 8 of the European Convention on Human Rights. The Tribunal is the only appropriate forum for the investigation of the complaint and for the determination of the claim.

2. Although rule 9(6) of the Investigatory Powers Tribunal Rules 2000 (The Rules) requires the Tribunal's proceedings, including any oral hearings, to be conducted in private, the preliminary hearing was held in public and the reasons for the decision of the Tribunal are published in accordance with the principles laid down by the Tribunal in its decision in Application Nos IPT/01/62 and IPT/01/77 published on 21 January 2003.

The Proceedings

3. The Complainant is a Member of Parliament. He believes that the Security Service holds files on him containing personal data relating to his activities with ecological groups 15 or more years ago ("relevant data"). Under s 65(4) RIPA a

person, who is aggrieved by any conduct falling within s 65(5), such as "conduct by or on behalf of any of the intelligence services," is entitled to make a complaint to the Tribunal "if he believes" that the conduct has taken place in relation to him. The Data Controller of the Security Service is named as the Respondent to the proceedings. The Complainant wishes to be told whether files on him exist and, if so, he asks to be given access to them.

4. On 12 July 2000 the Complainant requested the Security Service to give him access to any relevant data held on him. Shortly after his request he received an anonymous letter dated 24 July 2000. It purported to come from a serving officer in the Security Service calling himself "The Mechanic". The letter indicated that data about him had been supplied to the Security Service in the late 1980s and that personal details might have been included in a database and retained, even though the files on him had since been closed.

5. His request for access was refused on U August 2000. The Respondent relied on a certificate signed by the Secretary of State on 22 July 2000 under s 28(2) of the Data Protection Act 1998 (DPA) creating an exemption from the subject access provisions in s 7 for the purposes of safeguarding national security. The Complainant successfully challenged the validity of the certificate on an appeal under s 28(4) to the Information Tribunal (National Security Appeals Panel). On 1 October 2001 the Tribunal quashed the certificate on the ground that it included a blanket exemption, which did not require the Secretary of State to consider

whether national security would be harmed by individual requests and that he had no reasonable grounds for issuing such a certificate: see [2001] UKHRR 1275 ("the Baker Information Tribunal Decision").

6. The Secretary of State signed a fresh certificate on 10 December 2001. On 20 December 2001 the Complainant wrote to the Treasury Solicitor seeking a re-consideration of his request for information about relevant data held on him. On 9 April 2002 the Respondent made a disclosure of certain relevant data to the Complainant, but relied on the new certificate to invoke the policy of "Neither Confirm nor Deny" (NCND) in relation to the holding of relevant data on the Complainant beyond that already disclosed to him.

7. The Complainant began his proceedings in this Tribunal. He contends that the refusal of the Respondent to supply him with any more information about the existence of relevant data held on him is irrational, unlawful and incompatible with his Convention right to respect for his private life. He invites the Tribunal to investigate whether such data are being held on him and, if so, to order the Respondent to confirm that fact and to disclose the data to him; and, if not, to disclose that fact to him.

Preliminary Issues

8. There are two preliminary issues of law. The first concerns alleged interference with the Convention right to respect for private life (the Interference Issue). The

second issue relates the approach to be taken by the Tribunal to consideration of justification of interference (the Justification Issue).

9. The Interference Issue is posited on the hypothesis that the Respondent holds no relevant data on the Complainant. There is no issue between the parties that, if relevant data are held, then Article 8 is engaged. The question is whether the NCND policy response is in itself capable of being an interference with the Complainant's right to respect for private life under Article 8 of the Convention, if there are in fact no relevant data held on him. Article 8 provides

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
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> 2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

10. The parties have framed the Interference Issue in the following terms:

> " Whether the giving of a NCND response by the Respondent to a subject access by a particular individual is capable of amounting to an interference that individual's Article 8 rights, even if no personal data relating to that individual are in fact held by the Respondent."

11. It is agreed that it will be for the Tribunal, in due course, to ascertain in private and, in accordance with the Rules, without involvement of the Complainant, whether any relevant data are in fact held on the Complainant, and why it is said that, in the circumstances of his particular

case, national security interests justify the policy of NCND, which is relied on by the Respondent to refuse to confirm whether or not such personal data is in fact held. The approach which the Tribunal should adopt in this regard has been argued at this stage of the proceedings. This is the Justification Issue. It focuses on the standard of review applicable to the justification of an interference with the Complainant's rights under Article 8(1), namely: how the Tribunal should approach its task of deciding:

(i) whether any interference with the Complainant's rights under Article 8(1) is justified under Article 8(2) as being in pursuit of "the interests of national security" and as "necessary in a democratic society" and

(ii) insofar as Article 8 is found not to apply, after resolution of the Interference Issue, whether the giving of an NCND response was reasonable. The differences between the parties, such as they are, centre on the degree of intensity of review appropriate to the Tribunal's determination of those matters.

12. The Complainant's legal representatives have made it clear that the Tribunal is not being asked to review the lawfulness of the exemption certificate signed by the Secretary of State under s 28 (2) of the DPA (for example, on grounds of incompatibility with Article 6). Nor does the Respondent contend that the existence of that certificate bars the present challenge under RIP A.

The DPA

13. The Complainant's subject access request was made to the Respondent under s 7 of the DPA. The DPA was enacted to implement Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data and the Free Movement of such Data. The objective of the Directive was to protect rights to privacy and the accessing of personal data held by others (data controllers), while facilitating the free movement of data between Member States. The Directive did not apply to the processing of personal data in operations concerning public security, defence and State security (Article 3) and it permitted measures by Member States restricting the scope of the right of access of a data subject, when such a restriction constitutes a necessary measure to safeguard national security (Article 13(1)). Those Articles reflect the derogation provisions in Article 9(2) of the 1981 Council of Europe Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data (Cmnd 8341). The 1981 Convention took a broad view of "private life" in establishing basic principles for data protection and in enabling people to establish the existence of an automated personal data file.

14. While s 7(1) of the DPA conferred on an individual the right to be informed by any data controller whether personal data, of which that individual is the data subject, are being processed by or on behalf of the data controller, s 28(1) exempts personal data from s 7(1), if exemption is required "for the purpose of safeguarding national security." Under s 28(2) the Secretary of State has power to

sign a conclusive certificate certifying exemption form s 7(1) for such purpose, subject to an appeal by a person directly affected to appeal against the certificate to the Information Tribunal, which has power to quash the certificate.

The NCND Policy and National Security

15. In his written reasons for signing the certificate the Secretary of State referred in paragraphs 4 and 5 to considerations underpinning the NCND policy invoked in this case in respect of subject access requests. The Respondent's functions relate to the protection of national security. Secrecy is essential to the work of the Security Service. It is needed to secure the co-operation of individuals. Investigations are undertaken covertly. Techniques used would lose much of their effectiveness if it became known when and how they are used. The NCND policy is needed to help to preserve secrecy.

> "5.3 The Government applies the [NCND] policy to Security Service investigations and to suggestions of whether a particular individual or group is or has been under investigation. To ask whether the Security Service holds personal data on an individual often amounts to asking whether there is or has been an investigation.
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> 5.4 By logical extension, the policy must apply even if no investigation has taken place. If the Security Service said when it did not hold information on a particular person, inevitably over time those on whom it did hold information would be able incrementally to deduce that fact. Not least because they would not receive the same assurance given to others."

16. If individuals, who are intent on damaging national security,, could discover that they are not the subject of interest, then they could undertake their activities with increased confidence and vigour. If they could discover that they are the subject of interest, they could take steps to thwart the

investigation and attempt to discover the methods and techniques of investigation used and the identities of agents and informants involved in the investigation. The result could be to compromise methods and to deter, or even harm, personnel used for the investigation of the subject and for other investigations. That would undermine the effectiveness of the Security Service and its role in safeguarding national security. There has been judicial recognition of the validity of the reasons for the NCND policy: see paragraphs 46-54 of the Tribunal's preliminary rulings in Applications Nos. IPT/01/62 and 77.

17. The certificate signed by the Secretary of State stated in a proviso to paragraph 3:

> "(i) no data shall be exempt from the provisions of s 7 (l)(a) of the Data Protection Act 1998 if the Security Service, after considering any request by a data subject for access to relevant personal data, determines that adherence to the principle of neither confirming nor denying whether the Security Service holds data about an individual is not required for the purpose of safeguarding national security."

18. It was accepted by the Complainant that the NCND policy is not in itself contrary to Article 8 or irrational and unlawful in every case. In some cases it is accepted that it is justified as necessary. The complaint is that the NCND policy ought not to have been invoked in the particular circumstances of this case

A. The Interference Issue

19. The Respondent accepts that if, in the course of its investigation of the complaint and claim, the Tribunal finds that relevant data are held on the Complainant, the NCND response to the request for access would have amounted to an interference with the Complainant's Convention right under Article 8(1). It is. also agreed that the NCND response amounts to "conduct" of the intelligence services within s 65(4) RIP A, which the Tribunal has power to investigate. The Tribunal would then have to consider whether the Respondent could justify the interference as being for a legitimate aim, such as "in the interests of national security," and as "necessary in a democratic society", on which issues of the principles of proportionality would arise. Those issues do not arise at this preliminary stage, which concerns the approach to justification dealt with below as the second preliminary issue.

20. The Complainant's case on interference is that, if the Respondent in fact held no relevant data on him, the giving of an NCND response would be (a) an interference with the Convention right in Article 8(1) and (b) irrational and unlawful in the judicial review sense. It is argued that, from the Complainant's point of view, the NCND response is unsatisfactory:

(a) if relevant data are held, the Complainant is denied the opportunity to refute or correct them, or

(b) if relevant data are not held, but there were reasonable grounds to believe that they were, the non-committal NCND response leaves the lingering suspicion of an interference with the Complainant's exercise of

his right to respect for his private life.

The Complainant is entitled to complain of arbitrary interference with his psychological, as well as with his physical, integrity. Both aspects of privacy are covered by the guarantee of respect for private life: **Botta** v. **Italy** (1998) 26 EHRR 241 at paragraph 32. It was submitted that interference covers a case such as this, where an NCND response was given to a data subject request made in circumstances where there are reasonable grounds to believe that the Respondent does possess relevant data. The Tribunal should be in a position to conclude by reference to Article 8 that national security would not be interfered with by requiring the Respondent to state that no relevant data were held, in order to remove the cloud of suspicion that files have been compiled and maintained.

21. The Respondent's answer is that, if no relevant data are held by the Respondent, the Complainant cannot succeed in his complaint and his claim of interference with his private life. They are bound to fail, if based on Article 8(1) and are only susceptible to normal judicial review principles. The competing contentions turn on the scope of the right guaranteed by Article 8(1).

The scope of Article 8(1)

22. According to the Strasbourg jurisprudence the right to respect for private life within Article 8(1) is not "susceptible to exhaustive definition" and should receive a broad interpretation. Interference with the right occurs when a public authority,

such as the Security Service, gathers, even without the use of intrusive and covert methods, and stores, data relating to an individual's private life, where it uses and releases the stored personal data and where it refuses to allow the subject an opportunity to refute it, even where it relates to his distant past: Leander v. Sweden (1987) 9 EHHR 433 at paragraph 48; **Amann v. Switzerland** (2000) 30 EHHR 843 at paragraph 65, **Rotaru v. Romania** (2000) 8 BHRC 449 at paragraphs 43, 46; PG **and** JH v. UK (Application No 44787/98 ECtHR; Judgment 25 September 2001) at paragraph 57.

23. As already mentioned, it is common ground that that the giving of an NCND response to a subject access request would be an interference where the public authority in fact holds personal data. Is the position the same if no personal data are held? The Respondent relies on the decision of the European Commission on Human Rights that **a** system of carrying out security checks and vetting procedures with the Security Service in respect of BBC employees, however much it may be objected to, does not per se interfere with his right to respect for private life: **Isabel Hilton v UK** (1988) 57 DR 108 (Application No 12015/86). The complaint was of the obtaining and application of personal information about her by the BBC and the Security Service and the continued retention of it on file. It was stated at p 14 that:"An interference with the right to respect for private life only occurs when security checks are based on information about a person's private affairs."

24. The applicant in that case had not substantiated her allegation that the Security

Service had compiled and continued to maintain a file of personal information about her. She should at least have shown that there was a reasonable likelihood that the Security Service had compiled and continued to retain personal information about her. She was unable to show that. The Commission rejected the submission that the Klass case (see below), which it distinguished, had the effect of encompassing every person who considered that the Security Service may have compiled information about them. The Respondent contends that it is the holding of personal data which underpins the Article 8(1) right to complain of interference with respect for private life. If no personal data are held, the right is not interfered with. A fortiori a refusal to confirm that no personal data are held would not be an interference.

25. The Respondent also relies on the context of the interference complaint. The rights of the Complainant are fully protected by the role of the Tribunal under RTPA in investigating the complaint and the claim. Unlike the ordinary courts, the Tribunal has wide ranging and extraordinary powers to ascertain whether relevant data are held or not and to determine the issues of justification, which it is agreed would arise in the event of relevant data being held.

26. There was considerable discussion at the hearing about the case of Klass v. Germany (1978) 2 EHHR 214.at paragraphs 34, 37, 41. For the Complainant it was contended that the case shows how it is not always necessary for a complainant to prove that an interference has in fact occurred under Article 8(1) before a justification is required under Article 8(2). In

that case the government's denial that there had been surveillance of the complainants did not prevent them from having the status of victims, who were entitled to challenge in the courts the compatibility with Article 8 of legislation permitting secret measures of surveillance, without their having to allege or establish that surveillance measures were in fact applied to them. It was unnecessary for them to point to any concrete measure specifically affecting them. It was sufficient that the "menace of surveillance" existed in the legislation, which constituted for all users or potential users of mail and telecommunications a direct interference with the right guaranteed by Article 8(1). It is contended that the system of holding of personal data is a similar "Big Brother" menace, which, like the system for the interception of communications, constitutes an interference, of which individual complaint can be made and which the public authority has to justify.

27. We did not derive much assistance from Klass on the Interference Issue. It was a case of an *actio popularis* challenging the legislation itself rather than the exercise of powers under it. The issue was one of locus for the purposes of that challenge. It was held that, for that purpose, the complainants were victims and had locus to make the challenge. Klass was not a complaint of actual interference by an act of surveillance. In this case, there is no dispute as to locus, because it is accepted that, even if no relevant data are held, the NCND response can still be challenged on rationality grounds, by reference to ordinary judicial review principles.

28. The unique function of the Tribunal is relevant to the complaint. It is an independent body established to investigate the substance of such complaints. By virtue of its powers under R1PA it is in a different position from an ordinary court or from other tribunals, such as the Information Tribunal, faced with a complaint about the holding of personal data and with an NCND response from the intelligence services to a request for access and disclosure. The Tribunal does not have to accept the NCND response as final or as preventing investigation of the facts by it. A decision by this Tribunal thus falls to be distinguished from a case where there is no way of resolving the issue of existence of the data, and a court or tribunal is left to make its decision only on the basis that there may (or are reasonably likely to) be such data, so that the answer has to be provisionally, or assumed to be, yes. That was and would be the case in the Information Tribunal (see the **Baker Information Tribunal Decision** at paragraph 67: "m *any event in this particular case there is evidence consistent with the Appellant's own statement which raises* ***a*** *sufficient case that he may be being denied access to any existing file"* and the European Commission in **Hilton** at pages 16-17: *"the Commission is therefore of the opinion that the Applicant has not shown that there is at least a reasonable likelihood that the Secret Service has compiled and continued to retain personal information about her").* This Tribunal can and must resolve the factual issue as to the existence or non-existence of the relevant data.

29. There are thus two possible outcomes of the Tribunal's investigation on this aspect:

(1) If the Tribunal ascertains that relevant data are held, it is conceded that the NCND response would have been an interference with the right in Article 8(1). The Tribunal will then have to determine whether the holding of the data was justified and also whether the NCND response to the request was justified under Article 8(2).

(2) If the Tribunal ascertains that no relevant data are in fact held on the Complainant, he will have nothing to complain about under Article 8 (1) and the Respondent will have nothing to justify under Article 8(2). The question here is whether an NCND response, where there are in fact found to be no relevant data and thus no risk of use or abuse of them nor any need to refute their contents, is an interference within Article 8, because it disturbs the state of mind of this Complainant, by not allaying his (in this case clearly reasonable) concerns. This would apply to the state of mind of any complainant who has any concerns, reasonable or otherwise, which he or she is looking to have allayed, and who is met by an NCND response, either from the authority or body in question, or indeed from this Tribunal. In our judgment a non-committal response to a request for access to non-existent relevant data is not capable of constituting an interference with the right to respect for private life within Article 8(1). If no relevant data are held, the Complainant's Article 8 right to private life has not been interfered with, there will be nothing to disclose and the refusal to confirm whether or not relevant data are held cannot interfere with his right to

private life. The fact that the request is based on reasonable grounds for a belief that relevant data are held and that the non-committal answer might not be sufficient to allay a lingering suspicion of their existence does not constitute interference with the right to respect for private life. As appears from the decision of the Strasbourg Court in **Zehnalova v. Czech Republic (14** May 2002) at p 12 (following **Botta** above), Article 8 does not apply each time that the complainant believes that his every day life has been disrupted or his feelings or state of mind have been upset. There is no suggestion, on the facts of this case, that the receipt of the NCND response has caused the Complainant either to take, or not to take, any course of action. At the highest it is **a** simple question of discomfiture of his state of mind. On the very limited assistance we can draw from **Hilton,** a security check per se (presumably accompanied by the knowledge of there being, or being about to be, such **a** security check) is not an Article 8 interference: nor similarly are the distress, inconvenience or discomfiture of **a** disabled person unable to use the private beaches in **Botta.** There is no decided case in which effect on the state of mind alone has been considered to be sufficient. Not every personal discomfiture, inconvenience, unallayed concern or disturbance with peace of mind is an interference with private life. The belief of the aggrieved Complainant entitles him to bring the matter to the Tribunal (s 65(4)). Using the powers conferred on them the Tribunal can ascertain from the intelligence services whether or not his beliefs are correct.

30. In our judgment, the giving of the NCND response to a subject request is not an interference with the Article 8 right, if no relevant data are in fact held on the Complainant. The NCND response would be compatible with the Convention right. No issue of justification under Article 8(2) would arise. We conclude that the Complainant's Article 8 rights in this case depend on whether the Respondent in fact holds relevant data on him.

31. Once the role of this Tribunal is appreciated we do not consider that it is an "over technical approach" for the Tribunal to decline to treat a non-committal response to a personal data access request as an interference with the right to respect for private life cf the view of the Information Tribunal in paragraph 67 of its decision in Baker. The existence of the independent and untrammelled right to investigate by this Tribunal (which cannot be met by a non-committal response) should go some way to allaying a complainant's concerns. Unlike the position as expressed by the Information Tribunal, knowledge as to whether files are held is not a precondition of action by the data subject so far as this Tribunal is concerned. Belief is sufficient to entitle an individual to make a complaint under s 65 RIP A. The non-committal answer does not prevent a complaint from being made to this Tribunal. The Tribunal is in a position, not enjoyed by an ordinary court as in Klass, to ascertain for itself from the Respondent whether or not relevant data are held on the Complainant and, if they are, to determine the justification for that conduct. The belief of the Complainant that such conduct has taken place entitles him to invoke the procedures of the Tribunal to investigate the

facts of his complaint, including the complaint about the NCND response, but it does not of itself constitute a ground for holding that a non-committal response by the Respondent is an interference with his right to respect for private life. Such a response does not have a sufficient impact to constitute an interference with Article 8(1) where no relevant data are held. Unlike the ordinary courts and other tribunals like the Information Tribunal, this Tribunal is well placed to ascertain the facts behind the response and to determine whether any interference that has occurred was justified.

B, The Justification Issue

32. If there has been an interference within Article 8(1) by holding relevant data and by giving an NCND response to the subject request, the Tribunal will have to consider whether the Respondent's conduct had a legitimate aim, such as the interests of national security, and whether it was necessary in a democratic society, on which issue questions of proportionality principles arise.

33. The preliminary dispute relates only to the intensity of review to be conducted by the Tribunal on issues of justification. It is provided by RIPA that, in the determination of both complaints and HRA claims, the Tribunal shall apply the same principles as would be applied by a court on an application for judicial review." See s 67 (2) and (3)(c)RIPA

34. The Complainant suggests that a higher degree of scrutiny is appropriate in

personal data cases, as the Convention right to privacy is in issue. The Respondent contends that a lighter touch is appropriate, as national security interests are involved. In that area Member States are allowed a wide margin of appreciation and the national courts recognise that government has a discretionary area of judgment. In particular there has been judicial recognition, both in Strasbourg and the UK, of the special problems involved, for example, in combating terrorism: there are real difficulties in striking a fair balance between the requirements of protecting Convention rights and the need to protect the State and the public against those who would use violence to overthrow the democratic order, which guarantees human rights. Both sides agree that it is not for the Tribunal, in the application of judicial review principles, to decide the merits, as distinct from the lawfulness, of the Respondent's conduct.

The Tribunal's Approach to Justification

Issues (1) If relevant data are held

35. There is no lack of guidance in the authorities on the approach of judicial authorities to a structured review of decisions of the Executive involving a conflict between human rights and matters of national security. The Tribunal is a judicial body entrusted with the determination of civil rights and subject to the guidance given in the ordinary courts in such matters. The following cases were cited: **Leander v. Sweden** [1987] 9 EHRR 433; **Brind v. UK** (1994) 18 EHRR CD 77; **R (Daly)** v. **Secretary of State for the Home Department** [2001] 2 AC 532; **R v**. **Shayler** [2003] 1 AC 247; **Baker Information Tribunal Decision** at paragraph 76; **Association of**

British Civilian Internees v. Secretary of State for Defence [2003] EWCA Civ 473 at paragraphs 32-37.

36. We glean from the authorities the following general guidance which will be relevant to the Tribunal's consideration of the justification available under Article 8(2) for the Respondent's conduct:

> (1) Where there has been interference with a Convention right the principles of proportionality will apply and it will be necessary to weigh and balance different relevant interests. Judicial review principles will generally require **a** more exacting standard of review than in other cases traditionally reviewed on the **Wednesbury** unreasonableness approach of considering the range of decisions available to a reasonable decision maker. A variety of epithets are used to convey the same cautionary concern about the appropriate standard of review to be applied: "rigorous", "intrusive", " greater intensity" "heightened scrutiny" and "precise and sophisticated." The message is clear enough.
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> (2) It will not norrhally be sufficient for the Respondent simply to assert to the Tribunal in general terms that the interests of national security justify the holding, use or withholding of personal data or the giving of the NCND response to a subject data request. The Respondent must address the facts and context of the particular case and satisfy the Tribunal that its

conduct is not arbitrary, but rational and proportionate.

(3) The Tribunal must consider the context in which interference with the Convention right is alleged to have occurred. That involves consideration of the nature of the materials involved, the special and serious duties of the Security Service, the extent and impact of the interference, the force of the countervailing rights and interests of others and the extent of the positive obligations on the part of the State to provide effective protection for the individual against arbitrary interference with respect for private life.

37. The Complainant is right to remind the Tribunal of the relevance of the unique character of its jurisdiction and of its special responsibilities in scrutinising the conduct of those alleged to have interfered with the right conferred by Article 8, usually without the benefit of the normal adversarial procedures of the judicial process as a guarantee of fairness The Tribunal is a judicial body which fully appreciates the importance of its not allowing the plea of national security to be used by public authorities as an unjustified shield against the independent scrutiny which the Tribunal was established to conduct.

(2) If relevant data are not held

38. In this case, Article 8 does not apply j as we have found, and the test as to the appropriateness of the NCND response is one simply of judicial review on rationality principles. There is no need for any additional "intensity", both

because Article 8 does not apply and because the interference with private life by way of the NCND response is, on any basis, at the lower end of the scale of such interference, even had Article 8 applied (see e.g. Brind at CD 83). It is accepted by both parties that, in the balancing act to be carried out on Wednesbury principles, it will be necessary that the Respondent has considered the detriment caused by the interference. In this case the only detriment would be the failure to allay the suspicion. In the context of the NCND policy and its reasonable application in this case, the question would presumably be whether it would be reasonable, in relation to a question from this Complainant as to the existence of relevant data (which in this context would have been found not to exist in his case) to give an NCND, rather than a negative, response: set against consideration of the risk that others might make similar applications in relation to similar files and draw conclusions if they obtained a different response, and of the potential consequences of that, if any, to national security.

Conclusions

39. Our rulings on the preliminary issues are accordingly as follows:

(1) On the assumption that no relevant data are held,

(a) the giving of the NCND response to the request under s7(l) DP A is not an interference with the Complainant's right to private life under Article 8(1) and is not incompatible with it.

(b) The approach as to whether such an NCND response was unlawful or inappropriate in this case must be on ordinary Wednesbury principles, as referred to in paragraph 38 above.

(2) If relevant data are held then, in determining issues arising under Article 8(2) as to the holding of relevant data and the giving of the NCND response, the principles referred to in paragraphs 35-37 above are applicable.