Neutral Citation Number: [2023] UKIPTrib 5

Case No: IPT/21/01/C

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 26 May 2023

Before:

LORD JUSTICE SINGH (PRESIDENT)
LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)
ANNABEL DARLOW KC

- -

Between:

MUSTAFA ADAM AHMED AL-HAWSAWI	**Complainant**
- v -	
(1) SECURITY SERVICE **(2) SECRET INTELLIGENCE SERVICE** **(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS** **(4) MINISTRY OF DEFENCE**	**Respondents**

- -
- -

Richard Hermer KC, **Edward Craven** and **Florence Iveson** (instructed by **Redress**) for the **Complainant**
Rory Phillips KC, **Natasha Barnes** and **Rosalind Earis** (instructed by the **Treasury Solicitor**) for the **Respondents**
Samantha Broadfoot KC appeared as Counsel to the Tribunal

Hearing date: 16 May 2023

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JUDGMENT

Lord Justice Singh:

Introduction

1. This is the unanimous judgment of the Tribunal.

2. On 16 May 2023 this Tribunal held an entirely OPEN hearing to consider the following preliminary issues:

   (1) to what extent the Tribunal has jurisdiction to determine the matters raised in this complaint ("the jurisdiction issue"); and

   (2) whether it would be equitable to consider this complaint notwithstanding that it was lodged more than one year after the conduct to which it relates ("the timing issue").

3. The timing issue only arises if this Tribunal has jurisdiction.

4. For the purpose of these preliminary issues, this Tribunal will proceed, in accordance with its normal practice, of assuming that the facts alleged in the complaint are true. In this way the Tribunal is able to deal with these issues in OPEN. The Respondents are content to proceed on that basis, although, again in accordance with their normal practice, they neither confirm nor deny that the Complainant was a subject of interest.

The complaint before this Tribunal

5. The complaint was lodged with this Tribunal on 24 February 2021. The prescribed form (Form T2) was used.

6. It was not possible for the Complainant to sign his Form T2, because he is detained at Guantánamo Bay in highly restrictive conditions, so that it is very difficult to communicate with his legal representatives in this country. In the exceptional circumstances of this case the Tribunal waived the normal requirement of a signature under rule 9(2) of the Investigatory Powers Tribunal Rules 2018 (SI 2018 No. 1334) ("the Rules").

7. There was attached to the Form T2 a 'Narrative Complaint Form'. This is in effect the particulars of the complaint as pleaded by the Complainant's legal representatives and we will refer to it as "the pleading".

8. The preamble to the pleading states as follows:

> "As explained in detail below, between 2003 and 2006 Mr al-Hawsawi was held in incommunicado arbitrary detention at various secret prisons operated around the world by the United States. Since 2006 he has been detained at the ultra-high security US military camp at Guantánamo Bay. Since his arrival there 15 years ago, Mr Al-Hawsawi has been detained in conditions which have left him largely isolated from the outside world and which involve very stringent restrictions on his ability to communicate with lawyers. Those restrictions include a prohibition

> under US law against providing instructions on specific factual matters to his UK legal representatives. US law also restricts Mr al-Hawsawi's US legal representatives from sharing information or instructions with his UK legal representatives. Consequently, although Mr al-Hawsawi has been able to instruct his UK legal representatives to pursue this complaint, he has been unable to provide any instructions relating to the facts on which it is based (and for the same reasons has not been able to sign the Complaint Form). Accordingly, the factual basis of this complaint is necessarily drawn exclusively from open-source material."

9. At para. 2 the nature of the conduct complained of is summarised as follows:

> "Mr al-Hawsawi complains of conduct he believes to have been carried out against him by or on behalf of the UK Agencies, which involved the UK Agencies knowingly aiding, abetting, encouraging, facilitating, procuring and/or conspiring with US officials to inflict torture and severe mistreatment on Mr al-Hawsawi at a range of secret detention facilities to which he was forcibly rendered between 2003 and 2006."

10. An overview of the complaint is set out as follows at para. 3:

> "In overview, Mr al-Hawsawi's complaint is as follows:
>
> (1) Over a period of years Mr al-Hawsawi was subjected to torture and inhuman and degrading treatment and punishment while he was detained in a variety of locations around the world pursuant to a secret detention, torture and interrogation programme of the United States Central Intelligence Agency ('CIA'). That secret programme was created and deployed against so-called 'High Value Detainees' ('HVD') such as Mr al-Hawsawi. It involved the use of secret detention facilities ('black sites') operated by the CIA in various countries around the world. Those black sites were deliberately designed to operate outside the legal systems of the United States and the countries in which they were situated. HVDs such as Mr al-Hawsawi were forcibly rendered by the CIA between those black sites, where they were held in prolonged incommunicado arbitrary detention and were subject to a wide array of ill-treatment and torture by their CIA captors. This included the application of so-called '*Enhanced Interrogation Techniques'* ('EIT') which included waterboarding, extreme sleep deprivation, stress positions, confinement in tiny, closed spaces and various forms of physical violence.
>
> (2) There is credible evidence in the public domain that the UK Agencies and/or their employees, servants and/or agents aided, abetted, encouraged, facilitated, procured and/or conspired with the

> US authorities in the torture and ill-treatment of Mr al-Hawsawi, including by providing questions and/or information to US officials to be put to Mr al-Hawsawi during interrogations and/or by receiving information obtained from Mr al-Hawsawi during interrogations, while being aware/the circumstances being such that they ought to have been aware, that Mr al-Hawsawi was being subjected or was likely to be subjected to torture and/or ill-treatment. This complaint concerns that apparent aiding, abetting, encouragement, facilitation, procuring and/or conspiring by the UK Agencies."

11. At para. 4 it is submitted that:

> "The complaint is one for which the Tribunal is the appropriate forum under s. 65(2)(b) of the Regulation of Investigatory Powers Act 2000 ('RIPA'). In particular, Mr al-Hawsawi is a person aggrieved by conduct which he believes (a) to have taken place in relation to him; and (b) to have been carried out by or on behalf of the intelligence services."

12. At para. 5, the complaint states the following:

> "Mr al-Hawsawi avers that the acts of the UK Agencies were unlawful as a matter of public law, including on the basis that:
>
> (1) Any acts or omissions done for the purpose of aiding, abetting, encouraging, facilitating or conspiring in the infliction of torture or cruel, inhuman or degrading treatment against Mr al-Hawsawi would ipso facto:
>
> (a) have been committed for an improper/unlawful purpose;
>
> (b) be ultra vires any purported statutory basis; and/or
>
> (c) have involved a failure to take into account a relevant consideration, namely Mr al-Hawsawi's right not to be subjected torture or cruel, inhuman or degrading treatment.
>
> (2) At all material times, the UK Agencies were under a common law duty not to knowingly aid, abet, encourage or facilitate or conspire on the commission of any treatment by the United States against Mr al-Hawsawi which constituted torture and/or cruel, inhuman or degrading treatment. Accordingly, any act or omission done by or on behalf of the UK Agencies for the purpose of aiding, abetting, encouraging, facilitating or conspiring in the infliction of such torture and/or cruel, inhuman and degrading treatment would therefore constitute an unlawful breach of that duty;"

13. Para. 5(3) has now been deleted from the pleading. As originally formulated, it alleged that the Complainant's treatment by the United States involved the commission of the torts of false imprisonment, assault and battery; and that any acts or omissions by the UK Agencies done for the purpose of aiding, abetting, encouraging, facilitating, procuring or conspiring in the commission of such tortious acts would be unlawful as a matter of public law.

14. Para. 6, in so far as it remains in the amended pleading, states as follows:

> "Pursuant to s. 67(7) of RIPA, the Tribunal has power to award compensation. As to this:
>
> (1) Mr al-Hawsawi seeks an order under s. 67(7) RIPA requiring the UK Agencies to pay compensation for the commission of any acts and omissions by the UK Agencies in relation to him which were unlawful as a matter of public law."

15. As originally formulated, para. 6(2) stated that the Complainant seeks an order under section 67(7) of RIPA requiring the UK Agencies to pay compensation for the commission of any acts and omissions in relation to him for which those Agencies are liable in tort. This has now been deleted.

16. In the original pleading there then followed a lengthy set of allegations that there was liability on the part of the Respondents for the torts of misfeasance in public office; conspiracy; trespass to the person; false imprisonment; and negligence. Those paragraphs in the pleading have all now been deleted.

17. At para. 83, the pleading addresses the issue of remedies in the following way:

> "In the event that the Tribunal upholds Mr al-Hawsawi's complaint/claim, he seeks the following remedies:
>
> (1) An order under section 68(6) of RIPA 2000 requiring the UK Agencies to provide all documents and information in their custody or control relating to Mr al-Hawsawi's detention, treatment and complaint/claim.
>
> (2) Determination of the complaint and associated claim in favour of Mr al-Hawsawi under section 67(2) and (3) of RIPA 2000, including by making a declaration to the following effect:
>
> (a) that the conduct against Mr al-Hawsawi by the UK Agencies was unlawful;
>
> (b) that Mr al-Hawsawi was subjected to torture and inhuman and degrading treatment or punishment while he was detained; and
>
> (c) that the UK Agencies and/or their employees, officers, servants and/or agents were complicit in the torture and ill-treatment of Mr

> al-Hawsawi, including by providing questions to US officials to be put to Mr al-Hawsawi during interrogation and/or receiving information obtained from Mr al-Hawsawi during interrogation, while being aware that Mr al-Hawsawi was being subjected or was likely to be subjected to torture and / or ill-treatment.
>
> (3) An award under section 67(7) of RIPA 2000 of compensation for the conduct of the UK Agencies, including their role in Mr al-Hawsawi's torture and ill-treatment, subject to representations under rule 12(2) as to the amount of the award; and
>
> (4) Costs."

18. At para. 84, it is submitted as follows:

> "Pursuant to s. 67(3) of RIPA, the Tribunal is required to investigate whether the UK Agencies have engaged in any conduct falling within s. 65(5) in relation to Mr al-Hawsawi and to determine Mr al-Hawsawi's complaint on the basis of the findings resulting from that investigation. To this end, Mr al-Hawsawi respectfully requests the Tribunal to appoint Counsel to the Tribunal to assist the Tribunal in discharging those functions. If Counsel to the Tribunal is appointed, then Mr al-Hawsawi will invite them to reformulate the content of this complaint in light of the contents of any relevant CLOSED material made available to them."

19. Counsel to the Tribunal (Ms Samantha Broadfoot KC) was appointed to assist the Tribunal.

Procedural history

20. By a letter dated 9 December 2022 the Respondents' solicitor wrote to the Tribunal to raise an issue regarding the Tribunal's jurisdiction. The Respondents' primary position was that the Tribunal does not have jurisdiction to determine the complaint under sections 65 and 67 of RIPA. Their alternative position was that, even if the Tribunal does have jurisdiction, these claims are much better suited for determination in the High Court. The essential basis for both submissions was that, in form and in substance, the complaint was effectively one in tort.

21. In a letter dated 13 January 2023 the Complainant's representatives (Redress) wrote to say that the Respondents had mischaracterised the nature of the complaint. They submitted that the Tribunal does have jurisdiction to determine the complaint; and that it must exercise that jurisdiction since the Tribunal has no discretion to decline to consider a complaint which is within its jurisdiction.

22. By a letter dated 27 January 2023 the Respondents' solicitor said that the issue, and the question of the extent of the Tribunal's jurisdiction, were obviously of considerable importance and, for that reason, asked the Tribunal to list the matter for an oral hearing to determine these points.

23. A hearing to consider the preliminary issues was listed for 16 May 2023. In directions made by the President on 13 March 2023, the parties were notified that the Tribunal would also be considering the question of timing under section 67(5) of RIPA.

24. Shortly before the hearing was due to take place, the Complainant's representatives lodged a draft amended version of the pleading. This had removed passages referring to various torts said to have been committed by the Respondents. It was stated that:

> "The core factual premise of the complaint remains, (i.e. were the Respondents complicit in torture) but the Tribunal is no longer asked to determine findings from its investigations by applying, *inter alia*, the law of tort."

For the avoidance of doubt, the letter continued:

> "We wish to make plain that the Complainant will only seek to rely upon the proposed Amended Complaint – in other words, our arguments will be confined to the version of Form T2 shorn of allegations/particularisation of tortious conduct, as per the attached document, irrespective of the stance of the Respondent."

The draft amended pleading was sent to the Respondents under cover of letter dated 10 May 2023 and their response was invited by 12 May 2023.

25. In a letter dated 12 May 2023, the Respondents' solicitor welcomed the decision significantly to narrow the scope of the complaint by withdrawing the claims brought in tort but maintained the Respondents' objection to the amended complaint. Their position remained that the Complainant in effect seeks to bring a tort claim and this was not altered by the deletion of certain paragraphs from the pleading.

Material legislation

26. The Investigatory Powers Tribunal ("the Tribunal") was established by RIPA.

27. Section 65(2) of RIPA, so far as material, provides:

> "The jurisdiction of the Tribunal shall be –
>
> …
>
> (b) to consider and determine any complaints made to them which, in accordance with section (4) … are complaints for which the Tribunal is the appropriate forum;

…"

28. Subsection (4) provides that:

> "The Tribunal is the appropriate forum for any complaint if it is a complaint by a person who is aggrieved by any conduct falling within subsection (5) which he believes –
>
> (a) to have taken place in relation to him, … and
>
> (b) … to have been carried out by or on behalf of any of the intelligence services."

29. Although there may be an issue as to whether the Fourth Respondent, the Ministry of Defence, comes within that provision, there can be no doubt that the first three Respondents do: they *are* the three intelligence services of the United Kingdom. We did not hear argument as to whether the Fourth Respondent is properly named as a respondent to this complaint, so we will say no more about it here.

30. Subsection (5) provides that conduct falls within that subsection if (whenever it occurred) it is "(a) conduct by or on behalf of any of the intelligence services".

31. Section 67 of RIPA governs the exercise of the Tribunal's jurisdiction. Subsection (1) provides that, subject to subsections (4) and (5), "it shall be the duty of the Tribunal – … (b) to consider and determine any complaint … made to them by virtue of section 65(2)(b) …"

32. Subsection (3) provides that, where the Tribunal consider a complaint made to them by virtue of section 65(2)(b), it shall be the duty of the Tribunal –

> "(a) to investigate whether the persons against whom any allegations are made in the complaint have engaged in relation to –
>
> (i) the complainant,
>
> …
>
> in any conduct falling within section 65(5);
>
> (b) to investigate the authority (if any) for any conduct falling within section 65(5); and
>
> (c) in relation to the Tribunal's findings from their investigations, to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review."

33. Section 67(4) provides that the Tribunal shall not be under any duty to consider a complaint if it appears to them that the making of it is "frivolous or vexatious". No suggestion has been, or could be, made that the present complaint falls into that category.

34. Section 67(5) provides:

> "Except where the Tribunal, having regard to all the circumstances, are satisfied that it is equitable to do so, they shall not consider or determine any complaint made by virtue of section 65(2)(b) if it is made more than one year after the taking place of the conduct to which it relates."

35. In the present case, it is accepted on behalf of the Complainant that the complaint was lodged more than one year after the conduct to which it relates; but it is submitted that this Tribunal should entertain the complaint because it would be "equitable" to do so in all the circumstances. The Respondents are neutral on this issue and are content to leave it to the Tribunal.

The jurisdiction issue

36. The Tribunal is the creature of statute. It does not have a general jurisdiction, for example to consider or determine civil proceedings. The extent of its jurisdiction is as set out by Parliament in RIPA, no more and no less.

37. Under the provisions of RIPA which are currently in force, the Tribunal has jurisdiction to consider two types of case. The first is a claim under section 7(1)(a) of the Human Rights Act 1998 ("HRA") in relation to any proceedings which fall within section 65(3) of RIPA: see section 65(2)(a) of RIPA. For some such proceedings the Tribunal has exclusive jurisdiction, in particular a claim under the HRA against one of the intelligence services: see *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12; [2010] 2 AC 1. The present case, however, is not a claim under the HRA.

38. The second type of case which falls within this Tribunal's jurisdiction is a "complaint" made under section 65(2)(b) of RIPA. For such a complaint the Tribunal is "the appropriate forum": see section 65(4).

39. A complaint in this context is not "proceedings". In part at least the Tribunal has an investigatory role: see section 67(3)(a) and (b). This is why the Tribunal's procedure is not only a conventional adversarial one but includes an inquisitorial element.

40. Once the Tribunal has conducted the "investigations" referred to in section 67(3)(a) and (b), it then has the duty "to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review": see section 67(3)(c) of RIPA.

41. We agree with the Respondents that that makes it clear that the sort of complaint which can be considered and determined by this Tribunal is one which raises grounds of public law.

42. This is supported by the statutory context, in particular section 67(3)(b), which requires the Tribunal to investigate "the authority (if any) for any conduct …". This again is the language of public law, which is concerned with what legal power ("authority") a public body has to act as it did.

43. This interpretation is also supported by the use of the phrase "a person who is aggrieved" in section 65(4). The phrase "person aggrieved" has long been used to describe the person who has standing to bring proceedings to challenge an administrative act: see de Smith's Judicial Review (8th ed., 2018), para. 2-064. An example is to be found in section 288 of the Town and Country Planning Act 1990. A "person aggrieved" does not necessarily have to have legal rights which are affected by the administrative decision they seek to challenge. They may, for example, have been a person who made objections or representations in the process which preceded the decision under challenge: see *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51. But the important point for present purposes is that the term "person aggrieved" supports the interpretation that a complaint under RIPA has to be based on grounds of public law.

44. The language used in RIPA does not appear to us to be apt to embrace common law causes of action, in particular claims in tort.

45. Furthermore, it is instructive to see what provisions of RIPA have *not* been brought into force. In particular, section 65(2)(d) provides that the Tribunal may hear and determine any other such proceedings as may be allocated to it by order. Such an order can make the Tribunal's jurisdiction an exclusive one: see section 66. But the important point is that these provisions have never been brought into force. Accordingly, the position is as set out by Rix LJ in *R (A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24; [2010] 2 AC 1, at para. 39. He explained that there is a distinction to be made between "proceedings", which are based on common law or statutory causes of action, and "complaints". He also explained that the only proceedings against the intelligence services which are currently allocated to the Tribunal are those under section 7 of the HRA, and that no other proceedings have been allocated to it, as they might be under section 65(2)(d).

46. Our interpretation is also consistent with the purpose of the legislation. If the language of RIPA were read literally, it would appear that *any* "conduct" by or on behalf of the intelligence services could be the subject of a complaint, for example an allegation by a business which deals with the Security Service that it has committed a breach of contract. At the hearing before us, Mr Richard Hermer KC accepted that that would not fall within the scope of this Tribunal's jurisdiction but submitted that that was because the legislation must be read so that it refers to the intelligence services acting as such. But, in our view, there is no restriction to that effect as a matter of language; and it would not be a straightforward distinction to apply in practice.

47. Furthermore, as Mr Hermer not only accepts but positively asserts, it would be open to a person who wishes to bring a claim for torts in the High Court making allegations of

the kind which are made in the present case to do so. He referred us to a number of well-known authorities, in which precisely such claims in tort have been brought, e.g. *Hussayn v Foreign and Commonwealth Office* [2022] EWCA Civ 334; [2022] 4 WLR 40. Accordingly, there would at the very least be a parallel jurisdiction in the High Court to consider the sort of complaint which is made in this case. Yet Mr Hermer submits that this Tribunal has no discretion to decline to exercise its jurisdiction once a complaint is made to it. It cannot, for example, take the view that the procedural and other features of ordinary litigation would make the litigation better suited to be considered in the High Court. But we can see no good reason why Parliament should have intended this Tribunal to be under a duty to consider and determine claims which are in substance ordinary civil claims and would be better suited to determination by the High Court.

48. Mr Hermer was not able to cite any authority which supports his broad submissions. In a textbook on National Security: Law, Procedure and Practice, edited by Robert Ward and Rupert Jones (2021), at para. 5.87, it is stated that:

> "In relation to complaints, the IPT has concurrent jurisdiction with the High Court in the sense that the conduct may also be the subject of civil proceedings (e.g. for trespass or harassment)."

No authority is cited for that proposition. If it means simply that the same facts may give rise to a cause of action which may be the subject of civil proceedings in the High Court and a complaint before this Tribunal, it is correct. If it means something more and suggests that this Tribunal has a "concurrent jurisdiction" to consider and determine causes of action such as trespass, we respectfully disagree.

49. Our view is supported by authority. In *AKJ v Commissioner of Police of the Metropolis* [2013] EWHC 32 (QB); [2013] 1 WLR 2734, at para. 196, Tugendhat J said:

> "Insofar as the claims are in tort or under a statute other than the HRA, in my judgment the Tribunal has no jurisdiction to entertain such claims. The provisions of section 65 do not apply to proceedings in respect of such claims. Proceedings at common law are not a 'complaint' within section 65(2)(b) and (4). That subsection shows that Parliament plainly did not overlook that there might be factual situations where a person might pursue both a claim under the HRA and a claim other than one under the HRA, which must include a claim in respect of a common law or statutory tort."

50. There was an appeal in that case but not on this point. Although this Tribunal is not bound by decisions of the High Court, we accept Mr Rory Phillips KC's submission that, as a matter of judicial comity, this Tribunal should normally follow decisions of the High Court unless we take the view that they are wrong. In this context we agree with Tugendhat J.

51. If matters had stood as they were until shortly before the hearing, we would have been sympathetic to Mr Phillips' submission that the complaint fell outside the jurisdiction

of this Tribunal in so far as it made allegations in tort. But we must consider the position as it now is. Mr Hermer has deleted the claims based in tort from the pleading. It is, as pleaded, a claim which alleges breaches of public law. We do not accept Mr Phillips' submission that what remains is still in substance a complaint in tort.

52. There is an important distinction to be drawn between the question whether this Tribunal has jurisdiction to consider the complaint and the distinct question whether the complaint in due course turns out to be well-founded. We say nothing about the substantive merits of the complaint because we have not heard any evidence or submissions about that. At this stage we are only addressing the first question, which is a preliminary issue about this Tribunal's jurisdiction to consider the complaint at all.

53. Secondly, it is important not to introduce an excessive degree of formality in this context. The procedure for making a complaint is intended to be a relatively simple one. Very often complainants to this Tribunal are not legally represented. They fill in the prescribed form to the best of their ability and then leave it to this Tribunal to decide whether to investigate their complaint. This is consistent with what the Rules require in the making of a complaint in rule 9:

> "(1) A complaint is to be made by a complainant sending to the Tribunal a form in accordance with this rule.
>
> (2) The form must be signed by the complainant and must –
>
> (a) state the name, address and date of birth of the complainant;
>
> (b) state the person who, to the best of the complainant's knowledge or belief, is the respondent; and
>
> (c) describe, to the best of the complainant's knowledge or belief, the conduct to which the complaint relates.
>
> (3) The complainant must also supply, either in or with the form, a summary of the information on which the complaint is based.
>
> …"

54. The jurisdiction issue can be tested in this way. Suppose the Complainant had managed, despite all the constraints imposed on him, to fill in a Form T2 and send it to the Tribunal directly, without legal representation; and his complaint set out the facts which are in paras. 2-3 of the pleading that is before us (quoted above). And suppose it made no assertions of what legal labels should be attached to those facts at all, such as are to be found in para. 5 (e.g. that there has been a breach of public law). We have no doubt that this Tribunal would have jurisdiction to consider the complaint. Indeed it would be under a duty to investigate it (subject to the timing issue, which we address below).

55. The way in which the complaint is pleaded, even after amendment, is not entirely satisfactory. For example, it still refers to "a common law duty" not to knowingly aid, abet, encourage or facilitate or conspire in the commission of any treatment by the US which constituted torture and/or cruel, inhuman or degrading treatment: see para. 5(2).

This is still redolent of a common law cause of action for torts. We also note that the detailed allegations which then follow in the pleading are not confined to complicity in torture or other similar ill-treatment. It is alleged that there was complicity in the Complainant's arbitrary detention and rendition: see the heading above the section of the pleading which begins at para. 34.

56. Nevertheless, we consider that the pleading is now tolerably clear in that, in essence, it alleges that the Respondents behaved in a way that they had no power to behave, that is to be complicit in the Complainant's torture or other similar ill-treatment. If one formulates the question in public law terms ("did the Respondents have power to behave in that way?"), the answer would clearly be "No". Accordingly, we have reached the conclusion that the pleading, as amended, does raise public law grounds which are properly within the jurisdiction of this Tribunal.

57. What is clear from the language of RIPA, in particular section 67(3)(c) is that, when the Tribunal reaches the stage of having established the facts arising from its "investigations" and is then seeking to "determine the complaint", it must do so by applying the same principles as would be applied on an application for judicial review. In other words, once the Tribunal has considered a complaint and has conducted its investigations, its only jurisdiction is to assess the results of those investigations through the lens of public law. It cannot, for example, hold that the facts amount to a tort (see our analysis above). But it does not follow that the Tribunal lacks jurisdiction even to embark upon the consideration and investigation of the complaint in the first place.

58. It is also important to keep in mind a distinction between the *substantive* issues which this Tribunal has to consider on a complaint and the distinct question of what, if any, *remedies* it would be appropriate to grant at the end of the day if it finds that a complaint is well-founded. We bear in mind that the pleading asserts that compensation should be ordered by the Tribunal under section 67(7) of RIPA for breaches of public law. The general principle is that a breach of public law "by itself" does not give rise to a claim for damages. A claim for damages must be based on "a private law cause of action": see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, at 730 (Lord Browne-Wilkinson). What is required is a distinct cause of action such as trespass to the person: see *R (Fayad) v Secretary of State for the Home Department* [2018] EWCA Civ 54, at paras. 47-48 (Singh LJ). It is precisely those causes of action which have now been deleted from the pleading.

59. But the question of remedies, if any, is not before this Tribunal at this stage and will be addressed if it ever arises in the future. Furthermore, the remedies sought at para. 83 of the pleading include a declaration: see sub-paragraph (2). Such declaratory relief is entirely appropriate in judicial review proceedings, so, even if this Tribunal ultimately concludes that compensation should not be awarded (assuming for now that the complaint succeeds at all), then this Tribunal could grant an appropriate declaration.

60. For the reasons we have given we have concluded that this complaint as set out in the amended pleading does fall within the jurisdiction of this Tribunal.

The timing issue

61. Although Mr Phillips had no positive submissions to make on the timing issue, both he and Mr Hermer acknowledge that the question whether this Tribunal should extend time beyond the normal one year under section 67(5) of RIPA is a matter for this Tribunal and not for the parties.

62. The first point to note is that section 67(5) is closely modelled on section 7(5)(b) of the HRA. RIPA was brought into force on the same date as the HRA (2 October 2000) since they are properly to be regarded as part of a package which was designed to secure compatibility with the Convention rights in the context of the activities governed by RIPA: see *R (A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24; [2010] 2 AC 1, at paras. 46-47 (Dyson LJ). It is therefore appropriate to have regard to the principles which apply when a court is considering the power to extend time in section 7(5)(b) of the HRA.

63. When considering that provision the courts have held that it confers "a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case": see *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, at para. 75 (Lord Dyson JSC). As Lord Dyson also said in the same paragraph, it will often be appropriate to take into account factors of the type listed in section 33(3) of the Limitation Act 1980 as being relevant when deciding whether to extend time for a domestic law action in respect of personal injury or death. These may include (1) the length of the delay; (2) the reasons for the delay; (3) the extent to which, having regard to the delay, the evidence in the case is or is likely to be less cogent than it would have been; and (4) the conduct of the public authority after the right of claim arose.

64. In the exercise of our discretion we bear in mind in particular the following features of this case.

65. First, the length of the delay in this case is very considerable. The allegations relate to the period between March 2003 and September 2006. The complaint was not lodged until February 2021.

66. Secondly, at all material times the Complainant has been in detention and has been subject to very stringent restrictions on his ability to communicate with others, including his lawyers.

67. Thirdly, although Redress has known of the Complainant since 2012 and his solicitor (Mr Christopher Esdaile) has acted for him since 2017, the Complainant's representatives could not have known about the Respondents' alleged involvement in his mistreatment until after 28 June 2018, which is when the report of the Intelligence and Security Committee ("ISC") of the UK Parliament was published.

68. Mr Hermer submits that, following that date, the Complainant's representatives acted reasonably and proportionately. In particular they rightly did not wish to lodge a complaint with this Tribunal until they had obtained further information, for example by making a request under the Data Protection Act 2018, which was refused. In both the witness statement by Mr Esdaile and the Complainant's skeleton argument there is set out a chronology of the steps which the Complainant's representatives took from

November 2019 until the complaint was lodged in February 2021. We are satisfied that they acted reasonably and diligently during that period.

69. What has given us more pause for thought is whether they could reasonably have been expected to do more in the period between June 2018 and November 2019. That is when they first learnt of a similar complaint brought on behalf of a Mr al-Nashiri and appreciated that it might be possible to bring a complaint in this case before the Tribunal.

70. Although, in a perfect world, steps could and perhaps should have been taken earlier than November 2019, we bear in mind that Redress is a charity with a small legal team acting *pro bono*. We also bear in mind that, in the exercise of the court's discretion under section 33 of the Limitation Act 1980, it has been held that delay caused by the conduct of a person's advisors rather than by that person himself may be excusable in this context: see *Carroll v Chief Constable of Greater Manchester Police* [2017] EWCA Civ 1992; [2018] 4 WLR 32, at para. 42(10) (Sir Terence Etherton MR).

71. Fourthly, it has not been suggested that there will be any prejudice to the Respondents if time is extended in this case. Although the events complained of took place a long time ago (2003-2006), it has not been submitted to us that it would not be possible for the issues of fact to be determined fairly, for example because documents have been destroyed or witnesses are no longer alive. In this context, Mr Hermer submits that a large amount of evidence must be available because it was considered by the ISC before it issued its report in 2018. He accepts that, where it is necessary to do so, this Tribunal will look at that evidence in CLOSED, with the assistance of Counsel to the Tribunal but, he submits, there is no reason not to embark on the investigation at all.

72. Last but not least, we consider that the underlying issues raised by this complaint are of the gravest possible kind: in brief, it is alleged that the intelligence services of the UK were complicit in torture by agents of the US. If the allegations are true, it is imperative that that should be established. If they are not true, it is just as important that that should be made clear, so as to maintain public confidence. We conclude that it would be in the public interest for these issues to be considered by this Tribunal, which is a fair, independent and impartial court.

Conclusions

73. For the reasons we have given (1) we hold that this Tribunal does have jurisdiction to consider this complaint as set out in the amended pleading; and (2) we extend time to bring this complaint under section 67(5) of RIPA.

74. Our decision on the jurisdiction issue is a final decision on a preliminary issue within the meaning of section 68(4C)(a) of RIPA. Under section 67A(2) we specify that the relevant appellate court is the Court of Appeal of England and Wales.