TSol
LAW AT THE HEART OF GOVERNMENT

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28 July 2010

Dear Sir

Re: Torture Inquiry - recusal

1. Thank you for your letter dated 19 July 2010, which, we note, you have chosen to follow up with media interviews making essentially similar points. We act on behalf of The Right Honourable Sir Peter Gibson. Please note our interest and direct any future correspondence to us.

2. We reject the allegations and insinuations made in your letter. The highly publicised attack that has been mounted is both unwarranted and baseless. In the circumstances, neither any ongoing publicity nor any controversy that is whipped up can be taken as in any sense indicative of legitimate public concern about Sir Peter's appointment. This response should also not be taken as indicating any acceptance that you would have standing to bring any claim in court proceedings.

Three important points

3. It is necessary, given the content of your letter, to start by making a point about which we imagine there is no dispute. Sir Peter is a person of particular eminence. He served as a judge for 24 years, having been appointed to the High Court Bench in 1981; and having then been appointed to the Court of Appeal, in which he served for 12 years before his retirement in 2005. He is a Privy Councillor. He will therefore bring to the inquiry all his undoubted judicial experience, expertise and integrity. Any fair-minded and informed observer would regard these attributes as of central importance in considering whether Sir Peter would bring to the inquiry both the investigative and intellectual rigour and the open mindedness required. It is clear that he would do so.

4. It is also clear that he is particularly well-suited to the task of chairing this inquiry given that he has considerable background knowledge in the area. No-one has ever questioned his role as Intelligence Services Commissioner (ISC). That is a role he has performed for some 4 years now. As a general proposition (we deal below with the specific points you make), it is difficult indeed to see how he could be able independently,

impartially and unimpeachably to fulfil that role, as he has done, and yet unable to chair the inquiry now to be conducted.

5. Two further, important points are to be made at the outset.

6. **First**, it is necessary to be clear about the powers Sir Peter has, and has not, exercised as the ISC. His powers and functions are set out in s59 of the Regulation of Investigatory Powers Act 2000 (RIPA). They cover, and require him to keep under review, specific areas identified in sub-sections (2) and (2A) of that section – in summary, the exercise by the Secretary of State of specific statutory powers and compliance by the Intelligence Agencies with authorisations and warrants issues under those powers to ensure that those activities were carried out in accordance with domestic law (contained in RIPA and the Intelligence Services Act 1994). His functions are clearly described in his reports – see for example [3]-[9] of his Annual Report for 2008 of July 2009. It has been no part of Sir Peter's functions since he was appointed in 2006 to look into the actions of the Intelligence Agencies in relation to detainees held by other states or, specifically, into issues of alleged complicity in torture. To be quite clear, he has not examined individual cases in that respect. And he has not examined the legal issues as to what may or may not amount to 'complicity'. Nor did those matters form any part of the functions or reports of the previous Commissioner, Lord Brown SCJ, at the time the detentions were taking place or in the following years until Sir Peter took over.

7. **Secondly**, it is necessary to be clear about the nature of the inquiry announced by the Prime Minister in the House of Commons on 6 July 2010. The inquiry is not an inquiry under the Inquiries Act 2005 or indeed any other statutory scheme. It has not been set up in order to comply with any alleged investigative duty under the ECHR (which is of course not to say or accept that it could not be relied on for that purpose). It is rather an inquiry by three members of the Privy Council that the Government has concluded would be desirable for the purposes set out in the Prime Minister's announcement having regard to the highly sensitive security context involved.

8. Against this background, we turn to the questions you have posed.

Disqualification principles and the true nature of the inquiry

9. Questions 1, 2 and 7 ask about the role of the chair of an inquiry such as this. There is of course no question but that, as a senior retired judge, Sir Peter is independent. Although you appear to make a tentative assertion of actual bias (which is not accepted) the main point you appear to be making is that, in your view, the chair should in effect treat himself for disqualification purposes as a judge would do in trying litigation – indeed, should apply a higher standard in relation to apparent bias than would apply in such circumstances.

10. Sir Peter is not sitting as a judge trying litigation. Nor is he conducting any form of statutory inquiry. There is nothing unlawful about the Government setting up an inquiry and appointing anyone they consider appropriate to chair it, or to be a member of it. Such persons may or may not satisfy tests, whether derived from the common law or from the ECHR, of independence and impartiality. Unlawfulness would only arise in the event of a duty to conform to those tests. There is no such duty in the present context. That is a complete answer to the core point made in these questions.

11. We should make it clear however, lest there be any misunderstanding and in order to avert any attempt to make presentational capital from this complete legal answer, that Sir Peter's view is that he is both independent and impartial, and there is no proper basis for seeking to impugn either characteristic on the basis of appearances. We return to aspects of this below in answering the questions you have posed.

12. The principles applicable to a Court against which an allegation of apparent bias is made were summarised by Lord Rodger in *Helow v Advocate General* [2008] 1 WLR 2416 at [14]

> "The legal test to be applied in cases of apparent bias is to be found in the speech of my noble and learned friend, Lord Hope of Craighead, in *Porter v Magill* [2002] 2 AC 357 , 494 H : "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." It is equally well established that the fair-minded observer is not unduly sensitive or suspicious: *Johnson v Johnson* (2000) 201 CLR 488 , 509, para 53, per Kirby J."

13. The fair minded observer has been held by the Courts to have other characteristics also – see eg Burnett J in *R (on the application of) Carol Pounder (2) v HM Coroner for the North and South Districts of Durhamand Darlington [2010] EWHC 328 (Admin)*:

> "He is assumed to have taken the trouble to acquire knowledge of all relevant information before coming to a conclusion: see *Helow v. Secretary of State for the Home Department* [2008] 1 WLR 2416 per Lord Hope of Craighead between [1] and [3]. The fair-minded and informed observer is also expected to be aware of the law and the functions of those who play a part in its administration: see *Lawal v. Northern Spirit* [2003] UKHL 35 at [21] and [22]. When applying the test, any Court will take account of an explanation given by the tribunal and assume that the hypothetical observer is also aware of that explanation: see *In re Medicaments* [67]"

In short, the fair-minded observer has the attributes of the Court. Lord Radcliffe said of the reasonable man, in a different context, in *Fareham UDC v Davis Contractors Ltd* [1956] AC 696, [1956] UKHL 3 that "...the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the Court itself." Similarly, in *Locabail v Bayfield Properties Ltd* [2000] QB 451, 477 the Court of Appeal referred to the court "personifying the reasonable man".

14. The Courts have also noted that at the heart of impartiality lies open-mindedness. Thus, for example

    14.1. In *Helow* at [57], Lord Mance cited with approval this statement from the Canadian Supreme Court in *R v S (RD)* [1997] 3 SCR 484 at [119]: "...True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind".

    14.2. In *Sengupta v Holmes* [2002] EWCA Civ 1104, Laws LJ stated at [36]:

> "Absent special circumstances a readiness to change one's mind upon some issue, whether upon new information or simply on further reflection, and to

change it from a previously declared position, is a capacity possessed by anyone prepared and able to engage with the issue on a reasonable and intelligent basis. It is surely a commonplace of all the professions, indeed of the experience of all thinking men and women."

In that case the Court of Appeal rejected an allegation of apparent bias even in a context in which a judge had himself considered and opined (at the permission stage) on the very issue to be determined in the appeal – indicating the height of the test to be surmounted by anyone asserting that the fair-minded and informed observer would conclude that a judge could not conscientiously come to an issue with an open mind.

15. We note finally that R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119 was dealing with a different issue. As Lord Mance pointed out in *Helow*, it was there held that a judge was automatically disqualified not merely if he or she had a pecuniary interest in the outcome of the case, but also if his or her decision would lead to the promotion of a cause in which he or she was involved together with one of the parties. Again, there is no question of that in the present context.

16. It follows that we do not agree with your analysis of the applicable legal principles as it appears from your Questions 1, 2 and 7. The answers given to your other questions are without prejudice to the points made above.

17. Your other questions make three principal claims. We address them in turn.

The first principal claim: matters already investigated in fact

18. The **first** claim (see Questions 3 and 6(b)) is that Sir Peter has already investigated matters that will be the subject of the inquiry. Question 3 asserts that he conducted a "secret internal review" of some of the matters that would fall within the scope of the inquiry. This is said to be based on statements made by David Miliband MP. It is simply inaccurate. The position is as follows:

    18.1. Sir Peter, in his properly fulfilling his functions as ISC, has not considered (or been asked to consider) whether there was in any individual case involvement in torture or, more generally, whether UK personnel have been involved in complicity in torture or mistreatment.

    18.2. In early 2009 SIS and the Security Service began reviewing material on their files relating to their past involvement with detainees, Sir Peter agreed to a request from the then Prime Minister to oversee their review processes to provide assurance that these reviews were being conducted rigorously. In early 2010 he was able to give that assurance. However, this matter related to the process of document discovery and review, and did not require Sir Peter to consider the substance of any underlying substantive allegation.

19. In these circumstances, much of Question 5 simply drops away as based on a misunderstanding of the facts and the ISC's functions.

20. Question 6(c) asserts that Sir Peter was charged in March 2009 with reviewing compliance with the Government's torture policy. Again, you are misinformed. The then

Prime Minister asked Sir Peter to examine compliance with the new consolidated guidance when published. As you will be aware from your earlier judicial review on this topic, dismissed by Collins J at the permission stage some weeks ago, that guidance was delayed and was only published in July 2010. Thus, Sir Peter has not yet commenced any such task. For completeness, Sir Peter was not consulted about the contents of this guidance.

The second principal claim: ISC role and the inquiry

21. The **second** claim (see Question 4 and Question 6(b))) is that Sir Peter will be, or should be, a witness before any inquiry. This appears to be based on an allegation that, because allegations of complicity in torture were made during his tenure, he should have investigated them; and, if he did not, he was derelict in his duty (or as it is put in your letter "either asleep on [his] watch or ... hoodwinked"). That is based on a fundamental misunderstanding of his role and statutory functions as ISC. Not merely did he not investigate any such allegations. It would have been outside his statutorily defined remit as ISC, and thus *ultra vires*, for him to have done so.

22. As part of this claim it is asserted that authorisations under s7 of the Intelligence Services Act 1994 relating to detainees abroad either were or should have been issued by the Secretary of State and reviewed by the ISC. As you are aware, the question of whether or not S7 authorisations have in fact been issued is something that can neither be confirmed nor denied. However Sir Peter has considered the records of material brought to his attention as ISC and he is confident that no difficulty is raised by that material with his continuing to act as chair of the inquiry.

Third principal claim: closed mind

23. The **third** claim (see Questions 5(d) and (e)) is that apparent bias is demonstrated by the opinions expressed by Sir Peter in his reports either on their own or when set alongside remarks by Lord Neuberger in *Binyam Mohamed.* As to that:

    23.1. The views expressed in Sir Peter's reports were properly reached on the basis of the functions he undertook and the material he saw in the course of doing so. They are overall views and do not imply that his functions were performed uncritically or indeed that his views (some of which must for good reason remain confidential) were uncritical. His predecessor reached the same views, expressed in similar language, in his reports.

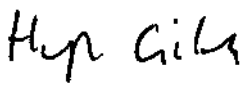
    23.2. It is, with respect, wholly untenable to assert that such views might give the fair-minded and informed observer concern that a former Court of Appeal judge of Sir Peter's eminence could not or would not conscientiously bring an entirely open mind to the different issues that will need to be examined as part of the inquiry. When the inquiry is undertaken it may confirm those views, or it may undermine them to a greater or lesser degree. That will depend on what the inquiry uncovers and the views of it taken by the inquiry panel.

    23.3. We fail to see how Lord Neuberger's remarks take this point any further forward. His views were his own and reached on the material before him. They do not, if this is what you assert, amount to a disagreement with Sir Peter's views or a

conclusion that he was not properly entitled to reach those views on the material that he (Sir Peter) saw.

24. Sir Peter therefore rejects the suggestion that there is any warrant for a fair-minded and informed observer to have any concerns as to his impartiality in acting as chair of this inquiry.

Yours faithfully



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