IN THE INVESTIGATORY POWERS TRIBUNAL **CASE NOS. IPT/17/86 & 87H**

B E T W E E N : -

(1) PRIVACY INTERNATIONAL
(2) REPRIEVE
(3) COMMITTEE ON THE ADMINISTRATION OF JUSTICE
(4) PAT FINUCANE CENTRE

Claimants

- and -

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS
(4) SECURITY SERVICE
(5) SECRET INTELLIGENCE SERVICE

Respondents

CLAIMANTS' SKELETON ARGUMENT
For the hearing: 4-8 November 2019

References are in the form [Tab/Page].

INTRODUCTION AND SUMMARY

1. The Security Service has a policy that purports to permit its agents to participate in crime. The existence of this policy was kept secret for decades. It has only come to light through these proceedings.

2. If there are limits on the policy, they remain secret today. From the limited information in the public domain, it is clear that the Security Service thinks that its policy may be used to 'authorise' serious criminal offences. Indeed, the Defendants (rather ambitiously) contend that if torture or killing were authorised under the policy, this would not necessarily be in breach of the Convention.

3. The issues raised by this case are not hypothetical. In recent years, it has become apparent that collusion between public officials and agents in terrorist organisations has led to the most grave abuses. Extensive police investigations are ongoing. The police have recently recommended that over 20 people, including senior officials, be prosecuted for offences including murder, kidnap, torture, misconduct in public office and perverting the course of justice.[1] The Respondents have been repeatedly invited to confirm that offences of that

[1] See further, the quotation from a spokesperson for Operation Kenova: "*British spy in IRA and 20 others could be charged with Troubles-era crimes*", published in the Guardian on 2 October 2019.

nature could never be lawfully sanctioned under their policy. They have refused to do so. These submissions therefore proceed on the basis that such conduct is possible.

4. A central feature of the policy is that neither the victim of the crime, nor the prosecuting authorities or the police are notified of the 'authorisation'. There is no mechanism to ensure that a prosecution justified in the public interest is brought, and that improper conduct is not concealed.

5. The practical effect of the policy is therefore for the executive to grant itself the power, in secret, to dispense with the criminal law enacted by Parliament. That constitutional impropriety is exacerbated by the UK-wide application of the policy, which interferes with the distinct constitutional role of the Lord Advocate and the Public Prosecution Service for Northern Ireland ("PPSNI"). Parliament has never granted the Security Service such power. Such powers as have been granted in RIPA 2000 are far more limited and circumscribed. The effect of the hitherto secret policy is to undermine that limited regime.

6. The authorisation of agent participation in crime in this case is very different to the use of participating informants by the police. The sole purpose of the police is to prevent and detect crime. A participating informant may be necessary as part of the process of evidence collection. A participating informant may not encourage or create crime. Once arrests are made, prosecutions will ordinarily follow, often including the participating informant. The judge will be informed, as will the prosecution authorities. The police may not keep the existence or identity of the participating informant secret from the judge or prosecutor. More fundamentally, unlike the Security Service, the police are not an emanation of government. They are independent and act in the prevention and detection of crime alone. In contrast, the Security Service are permitted under the policy to 'authorise' criminal conduct for a variety of purposes including any national security purpose, or maintaining the economic well-being of the United Kingdom.

7. The policy is unlawful on the following seven grounds, summarised below.

Ground 1: not in accordance with law

8. The policy was not and is not in accordance with law for the purposes of the European Convention on Human Rights ("ECHR").

9. The existence of policy was first disclosed on 1 March 2018. Before that time, its existence, operation and oversight were entirely secret. Its limits remain undisclosed.

10. The Respondents contend that this case is 'one step removed' from State interception and that this justifies a dilution of the Convention standards of foreseeability. On the contrary, the fact that the State has 'outsourced' its intelligence gathering functions exacerbates the

Available here: https://www.theguardian.com/uk-news/2019/oct/02/ira-spy-and-20-others-could-be-prosecuted-for-troubles-era-crimes

potential for abuse. The need for the policy to be public and subject to adequate controls is all the greater.

11. Nor is it credible to suggest, as the Respondents do, that the policy was "*widely known and entirely obvious*" (Response, §47a) **[11/78]**. That amounts to an assertion that it was to be expected that the Security Services would have a secret policy permitting it to aid, abet, counsel or procure the commission of criminal conduct proscribed by Parliament. That position cannot be reconciled with the decision to keep the policy secret.

Ground 2: unlawful secret policy

12. The secrecy of the policy is equally unlawful applying ordinarily principles of public law, which require the publication of all such policies. Non-disclosure may be justified in the interests of national security, but that is no answer in this case where the very existence of the policy was secret until the commencement of these proceedings. Nor can that secrecy be reconciled with the Respondents' position that its operation was "*known and obvious*". In any event, to the extent that parts of the policy are now in the public domain, its previous non-disclosure cannot previously be justified on national security grounds.

Ground 3 – no legal basis for the policy / principle of legality

13. There is no lawful basis for the policy, either in statute or common law. The Respondents' position is that the policy only enables the Security Services to offer a view on the 'public interest' element of any potential prosecution and does not "*offer immunity for criminal liability*".

14. That position is unreal. While the Respondents do not purport to grant any immunity as a matter of law, that is nonetheless the practical effect of their policy. The state has therefore sanctioned, or at very least acquiesced, in the relevant criminal conduct. Further, the policy keeps the conduct secret and the criminal conduct is not notified to the police or prosecutors. The practical effect is therefore an immunity.

15. Section 1 of the Security Services Act 1989 does not grant power to authorise criminal conduct, whether under the doctrine of 'necessary implication' or any other principle of construction. Were it otherwise, the actions of the Security Services could never be *ultra vires* insofar as they were deemed necessary for the performance of its functions.

Ground 4 – de facto dispensing power

16. The policy amounts to an unlawful *de facto* power to dispense with the criminal law. The effect of the policy is both to immunise criminal conduct from prosecution and entirely to usurp the constitutional role of independent prosecuting authorities in each of England and Wales, Scotland and Northern Ireland. Given the separate constitutional arrangements for prosecutions in both Scotland and Northern Ireland, the unlawfulness involved in the policy is particularly serious there.

Ground 5, 6 and 7 - ECHR

17. The Claimant's fifth, sixth and seventh grounds concern breaches of the ECHR:

    a. Any deprivation of liberty effected pursuant to a purported authorisation given under the policy violates the procedural rights under Article 5 of the Convention (Ground 5).

    b. Supervision of the operation of the policy by the IS or IP Commissioner does not satisfy the positive investigative duty imposed by Articles 2, 3 and 5 ECHR (Ground 6).

    c. Conduct authorised under the policy in breach of Articles 2, 3, 5 and 6 of the Convention is unlawful and in breach of the negative and preventative obligations of the Convention. The policy itself is unlawful to the extent that it sanctions or acquiesces in such conduct (Ground 7).

18. It appears that Grounds 5 and 6 are conceded. The policy does not satisfy the procedural rights in Article 5 ECHR or the positive investigative duty in Articles 2, 3 and 5 ECHR. Further, the prohibitions on unlawful killing and on torture and inhuman and degrading treatment are absolute and non-derogable rights. Conduct authorising such behaviour can never be excused or justified. There is no defence of necessity to torture.

19. The Respondents contend that the State is "*not the instigator*" of any conduct under the policy, and seek to cast doubt on the test for state responsibility (Response, §§101-102) **[11/97]**. According to the settled Convention case law, however, the test is one of "*acquiescence or connivance*": see, *Al Nashiri v Romania* (2019) 68 EHRR 3 at [594].

20. The Respondents contend that "*whether conduct breaches Article 3 in the first place includes consideration of context, purpose and necessity*" (Response, §104) **[11/99]**. That is a thinly disguised attempt to justify conduct in breach of Article 3. No justification is permissible.

STATUTORY AND FACTUAL BACKGROUND

Oversight of the Agencies

21. The Security Service, MI5, is the United Kingdom's domestic counter-intelligence and security agency. It is part of the UK's intelligence machinery, alongside the Secret Intelligence Service (MI6) and GCHQ (together, the "***Agencies***").

22. The Security Service was put on a statutory footing in the Security Service Act 1989 ("**SSA 1989**"). Its functions are set out in s.1 SSA 1989:

"1. – The Security Service

(1) There shall continue to be Security Service (in this Act, referred to as "*the Service*") under the authority of the Secretary of State.

(2) The function of the Services shall be the **protection of national security** and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow of undermine parliamentary democracy by political, industrial or violent means.

(3) It shall also be the function of the Service to **safeguard the economic well-being** of the United Kingdom against threats posed by the action or intentions of persons outside the British Islands.

(4) It shall also be the function of the Service to act in support of the activities of police forces, the National Crime Agency and other law enforcement agencies in the **prevention and detection of serious crime**…" (emphasis added)

23. Oversight of certain functions of the Agencies was originally conducted by the Intelligence Services Commissioner (the "IS Commissioner"): s59 of the Regulation of Investigatory Powers Act 2000 ("RIPA 2000"). In 2013, a new power was inserted into RIPA 2000, by which the Prime Minister could direct the IS Commissioner to "*keep under review the carrying out of any aspect of the functions of*" the Agencies: s59A(1)(a) RIPA, inserted by the Justice and Security Act 2013. A direction made under s59A RIPA must be published unless "*it appears to the Prime Minister that such publication would be contrary to the public interest or prejudicial to*" national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom, or the discharge of functions reviewed by the IS Commissioner: RIPA 2000, section 59A(5).

24. From 1 September 2017, the IS Commissioner was replaced by the Investigatory Powers Commissioner ("IP Commissioner"): section 227 of the Investigatory Powers Act 2016 ("IPA 2016"). The power to give directions under section 59A(1) was in turn replaced by section 230 IPA 2016.

Challenging the 'Third Direction'

25. Before these proceedings, two directions were in the public domain. The first concerned the "*Consolidated Guidance*" that governs the UK's involvement in detention and interviewing of persons overseas.[2] The second concerned the Agencies' use of Bulk Personal Datasets.[3]

26. In proceedings before the Tribunal (*Privacy International v Secretary of State for Foreign and Commonwealth Affairs* IPT/15/110/CH) the existence of a further, previously secret,

[2] The Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014.
[3] The Intelligence Services Commissioner (Additional Review Functions) (Bulk Personal Datasets) Direction 2015.

direction was disclosed (the "Third Direction"). That disclosure was made in the Confidential Annex to the IS Commissioner's Report for 2014, which stated that the "*the Prime Minister has now issued three such directions…*" (emphasis added).

27. In June 2017, the First and Second Claimants issued proceedings. At that time, the fact of the Third Direction had been disclosed, but nothing else. The subject matter and content of the direction remained secret. The First and Second Claimants therefore challenged the legality of the secret Third Direction, and any oversight conducted pursuant to it.

28. On 20 October 2017, the Respondents filed preliminary submissions, challenging the Claimants' standing to bring the proceedings **[21/181]**. On 9 November 2017, the Tribunal invited submissions on that issue, as well as in respect of whether the complaints were frivolous or vexatious **[22/183]**. Both parties filed submissions in response and, on 18 December 2018, the Tribunal declined to strike out the claim under RIPA s.67(4) **[25/201]**.

29. Having failed in its attempt to strike out the claim, the government disclosed the subject matter of the Third Direction. On 1 March 2018, the Prime Minister, made a written statement to Parliament as follows:

> "… to enable the Investigatory Powers Commissioner to take on additional oversight functions not covered by his statutory responsibilities, I gave two directions to the Commissioner on 22 August 2017. Issuing these directions forms part of our rigorous intelligence oversight system.
>
> One direction instructed the Commissioner to keep under review the compliance with the Consolidated Guidance on Detainees by officers of the security and intelligence agencies… The other direction instructed the Commissioner to keep under review the application of the Security Service guidelines on the use of agents who participate in criminality and the **authorisations** issued in accordance with them. **In accordance with my obligations to publish** such directions under Section 230 of the Investigatory Powers Act 206, I am now depositing in the Libraries a copy of both directions." (emphasis added)

30. It is clear from her written statement that the Prime Minister concluded that she was obliged to publish the direction under s.230. Its publication cannot therefore have been (1) contrary to the public interest or (2) prejudicial to national security.

31. The title of the Third Direction is in fact the "*Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Security Services agent participation in criminality) Direction 2017*". It was made on 22 August 2017 and provides as follows **[54/317]**:

> "The Prime Minister, in exercise of the power conferred by section 230 of the Investigatory Powers Act 2016 ("the Act"), directs the Investigatory Powers Commissioner as follows.
>
> **Citation and Commencement**
>
> 1. This direction may be cited as the Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Security Service agent participation in criminality) Direction 2017.

2. This Direction comes into force on 1st September 2017.

Additional Review Functions

3. The Investigatory Powers Commissioner shall keep under review the application of the Security Service guidelines on the use of agents who participate in criminality and **the authorisation issued** in accordance with them." (emphasis added)

32. During the course of these proceedings, it became clear that the direction given to the IP Commissioner on 20 August 2017 had replaced an earlier direction that was made in 2014 to the IS that was kept secret throughout its life **[52/314]**.[4] That direction is the 'original' Third Direction, as referred to in the Confidential Annex, set out above. The directions are in materially identical form. Before these proceedings were commenced, therefore, there were therefore two secret directions.

The policy

33. The policy that is the subject of the 'Third Direction' concerns Security Service authorisation of agent participation in criminality. During these proceedings, it has become clear the policy now under challenge has been in place since at least the 1990s. Previous iterations of the policy have been consolidated in the "*Guidelines on the use of Agents who participate in Criminality (Official Guidance)*" (the "Guidelines") **[32/215]**.

34. The Guidelines are addressed to "*Agent handlers and their managers*" and their stated purpose is "*to provide guidance to agent-running sections on the use of agents who participate in criminality*". The agents in question are not officers of the Security Service, but they are recruited and given directions by MI5. In RIPA terms, they are Covert Human Intelligence Sources ("CHIS").[5]

35. The Security Service authorise agent participation in crime in order to obtain or maintain access to intelligence. To that end, the Security Service have established "*its own procedure for authorising the use of agents participating in crime*", the purpose of which is to "*secure or maintain access to intelligence*" **[37/244]**.[6]

36. The policy does not purport to grant immunity to its agents. The ostensible purpose of the 'authorisations' under the policy is rather to constitute "*the Service's explanation and justification of its decisions should the criminality activity come under scrutiny by an external body, e.g. the police or prosecuting authorities…*" (Guidelines §9, emphasis added **[32/216]**).

[4] The Intelligence Services Commissioner (Additional Review Functions) (Security service agent participation in criminality) Direction 2014 **[52/314]**.
[5] While the agents are not Security Service officers, those officers may incur accessorial criminal liability: see further, Part 2 of the Serious Crime Act 2007.
[6] *Guidelines for the Security Service: Use of Informants in Terrorist Related Cases,* 1995 **[37/244]**.

37. However, the policy does not require the Security Service personnel to disclose the criminal conduct of their agents to police or prosecutors. Nor is this done in practice.[7] The Respondents go as far as to say that it would be "*absurd*" for them to report crimes committed by their agents to the PPSNI: the Response to RFI, §11(e)(ii) **[19/177]**.

38. The CPS and the other national prosecution authorities were not told of the policy for decades. The DPP in England and Wales was only provided with a copy in September 2012 (Response, §30(c) **[11/71]**). The Respondents' have refused to say when the PPSNI and Lord Advocate for Scotland were informed of the Guidelines, stating only that they are "*aware of [their] existence*", and that they are "*now aware of the existence of the Guidelines*".[8] The Claimants invite the IPT to find as a fact that the PPSNI and Lord Advocate were only recently informed of the Guidelines during the course of this litigation.

39. There has been the usual mission creep in the scope of the Guidelines. Originally aimed at terrorist crime, the policy now extends to all areas of the Security Service's work.[9] The Security Service's functions are much wider than the prevention of terrorism, and include safeguarding the UK's economic well-being. The most recent Guidelines do not just represent a 'consolidation' of the guidance; but a material expansion in scope.

40. Before 2012, there was no oversight of the secret policy. In 2012, the Commissioner was invited to review the authorisation of crime pursuant to a non-statutory and secret request. Even then, however, the scope of oversight was limited. The Commissioner was specifically notified that: "*such oversight would not provide endorsement of the legality of the policy; you would not be asked to provide a view on whether any particular case should be referred to the prosecuting authorities; and your oversight would not relate to any future consideration given by prosecuting authorities to authorisations, should that happen*" (emphasis added): see the letter from the Prime Minister to Sir Mark Waller, 27 November 2012 **[50/311]**.

41. The Commissioner was therefore told not to consider the legality of the policy, or to engage with prosecutors. He accepted those limits **[51/313]**, accepting that "*[he] was not concerned if CHIS go ahead with criminal activity*" **[62/367]**.[10] He did so notwithstanding his apparent concerns with the policy, noting, for example, that "*the Security Service cannot identify precisely how many CHIS authorisations involve participation in criminality*".[11]

42. On 28 November 2014, the first statutory direction was issued **[52/314]**. The oversight by the Commissioners was conducted pursuant to secret directions thereafter, until the

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[7] See, for example, the IS Inspection Report from June 2015 **[65/387]**, which records that "*[t]he Commissioner asked about the suggestion that the CPS should be consulted…*" The Commissioner was told that "*this did not happen at present*" **[65/388]**.
[8] See further, Response §§30-32 **[11/71-72].**
[9] Compare, for example, the "*Guidelines for the Security Service Use of Informants in Terrorism Related Cases*" (1995) **[37/244]** and the subsequent policy "*on Running Agents in Serious Crime*" (1997) **[38/246]**, and thereafter the *Security Service Guidelines on the use of Agents who Participate in Criminality,* 26 September 2003 **[39/250]**.
[10] Composite Report, 2013 **[62/367]**.
[11] Report of the IS Commissioner for 2014, June 2015 **[58/336]**.

publication of the Third Direction in March 2018 **[54/317]**. No explanation has been offered as to why it was not published before this time.

43. The existence and operation of the policy raises issues of great public importance. In the past, authorisation of agent participation in criminality appears to have led to grave breaches of fundamental rights:

    a. In Operation Kenova, 20 individuals (including officers of the Security Service) have now been referred to the PPSNI for potential prosecution for crimes including murder and torture.

    b. As part of the same inquiry, three civilian crown lawyers have been recommended by the police to be charged with perjury in connection with the previous trial of Mr Freddie Scappaticci,[12] who is alleged to have been a former senior member of the IRA and a security service agent working under the codename 'Stakeknife'.[13] Chief Constable (Retd.) Jon Boutcher recommended to the PPSNI that a number of people should be charged with nine murders in respect of 'Stakeknife' alone.

    c. Similar issues are raised by the murder of lawyer, Mr Pat Finucane, after whom the Fourth Claimant is named. On 12 September 2012,[14] the then Prime Minister, David Cameron MP, gave a statement[15] on Sir Desmond de Silva QC's report into the nature and extent of state collusion in the murder of Mr Finucane, who was "*shot 14 times as he sat down to dinner with his wife and three children*". The Prime Minister said that there was "*shocking levels of state collusion in the murder*", noting that undercover agents were involved in "*identifying, targeting, and murdering Mr Finucane, supplying a weapon and facilitating its later disappearance*". The Prime Minister further acknowledged that "*an RUC officer or officers did propose Patrick Finucane as a UDA target*", and that public officials had "*prior notice of a series of planned UDA assassinations, yet nothing was done by the RUC to seek to prevent these attacks*". Agents "*in the pay of the state were involved*" and it could not be said that they were "*rogue agents*".

    d. In February 2019, the Supreme Court held that the government had failed to conduct a lawful investigation into Mr Finucane's murder: *Re Finucane's Application for Judicial Review (Northern Ireland)* [2019] HRLR 7. Mr Finucane's murder was described as "*a shocking and dreadful event*" and one that "*still ranks, almost 30 years later, as one of the most notorious of what are euphemistically called "the Northern Ireland troubles*"": per Lord Kerr, at [1]. It was again recognised that "*there was collusion between Mr Finucane's murderers and members of the security forces*": [2].

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[12] https://www.theguardian.com/uk-news/2019/oct/05/stakeknife-inquiry-recommends-charges-against-sinn-fein-figure

[13] See *Scappaticci's Application for Judicial Review* [2003] NIQB 56.

[14]The Report of the Patrick Finucane Review, Rt Hon Sir Desmond De Silva QC https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/246867/0802.pdf

[15] https://www.gov.uk/government/speeches/prime-minister-david-cameron-statement-on-patrick-finucane--2

THE LAW

Constitutional principles

44. Four principles of constitutional law are relevant to the claim.

45. First, the Executive has no power to dispense with the criminal law made by Parliament. That principle is of considerable pedigree. It was recognised, for example, in the *Case of Proclamations* (1610) 12 Co Rep 74, in which Sir Edward Coke recognised that "*the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm…*" Citing, by way of caution, the example of King James II, the same principle led Lord Denning to conclude as follows: "*[t]o every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: "Be you ever so high, the law is above you"* (*Gouriet v Union of Post Office Workers* [1977] QB 729, at p.761E).

46. The principle was later expressly enshrined in the Bill of Rights, as follows:

> "Suspending power – That pretended power of suspending laws or the execution of laws by regal authority without consent of Parliament is illegal.
>
> Late dispensing power – That pretended power of dispensing with the laws of the section of laws by regal authorities as it hath been assumed and exercised of late is illegal" (archaic spelling updated).

47. In assessing whether the Executive has granted unto itself a dispensing power, the Court must consider the practical effect of any policy or decision, and not simply its stated purpose. In *King v The London County Council* [1931] 2 KB 21, therefore, the local council refused to grant a licence to a cinematographer to show films on a Sunday, but agreed not to take formal action against him. Lord Justice Scutton concluded that "*London County Council [was] in no better position than James II*" [p.228), and that its conduct was unlawful.

48. The local council had not actively granted immunity to the individual. It has simply turned a blind eye to the law as it stood, and knowingly acquiesced in its breach. That was unlawful, notwithstanding that there was no criminal law obligation for the council to report the crime. It will thus suffice that "*an exercise of executive discretion… [is] allowed to prevail over the law enacted by Parliament*": *R (Nicklinson) v Ministry of Justice* [2015] AC 657, at [241]. See further, *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800.

49. A unanimous Supreme Court recently made the same point in *R (Miller) v Prime Minister* [2019] 3 WLR 589 at [50]. The Supreme Court emphasised that what was important was the practical effect of the prorogation on fundamental constitutional principles (there, as here, Parliamentary sovereignty):

> "For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its

constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course."

50. Second, the decision as to whether to prosecute lies solely with the prosecutor and "*no other authority may exercise [the relevant] powers or make the judgments on which such exercise must depend*": *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756, per Lord Bingham at [30]. Under the Shawcross principles, the Executive can offer advice to the prosecutor. But it cannot go further: *Corner House*, per Lord Bingham at [6].

51. Third, the police are not an emanation of government, nor have they ever been under the control of the executive. The principle of a constabulary independent of the executive pre-dates Sir Robert Peel's introduction of a professional police force. It is one that is preserved and which remains important.

52. The implications of the distinction between government and the police were summarised by Lord Denning in *Commissioner of Police of the Metropolis ex parte Blackburn* [1968] 2 QB 118, at p.135F-136C, as follows:

> "… I have no hesitation in holding that, like every constable in the land, he should be, and is independent of the executive… No Minister of the Crown can tell him that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and the law alone".

53. Further, in *R (Mousa) v Secretary of Defence* [2013] HRLR 32, at [74], the court was clear that: "*it is axiomatic that decisions on whether to pursue an investigation and then whether to prosecute must be made independently of the Executive. No civil servant, let alone a Minister can be permitted to have any influence whatsoever*".[16]

54. Fourth, the nations forming the UK have criminal laws, prosecution authorities and procedures that are distinct, often as a result of the separate history and constitutional arrangements of those nations . The prohibition on any arrogation of the functions of the prosecutor or police by the Westminster executive will therefore be particularly important in respect of Scotland and Northern Ireland, each of which is considered in turn below.

55. The Scottish legal system was "*preserved intact*" in the Union Agreement of 1707, as a "*self-contained and independent system*" and with "*criminal laws and rules of procedure [that are] entirely separate from those which exist in England and Wales*": *Montgomery v HM Advocate* [2003] 1 AC 641, at p.645B-E. The distinct legal system in Scotland includes an autonomous prosecution service, led by the Lord Advocate: *Montgomery*, at p.648A-B, whose role is not one and the same as the DPP in England. See further, *R v Manchester Stipendiary Magistrate, Ex p Granada Television* [2001] 1 AC 300.

[16] See further, *Fisher v Oldham Cooperation* [1930] 2 KB 364; *New South Wales v Perpetual Trustee Co Ltd* [1955] AC 457; and *R v Secretary of State for Home Department, Ex p Northumbria Police Authority* [1999] QB 26.

56. The Northern Irish criminal legal system also differs from the system in England and Wales in important respects.

    a. First, the Attorney General for England and Wales has ceased to have a 'superintendence' role for Northern Ireland, cf. the DPP in England: see the Justice (Northern Ireland) Act 2002, section 40. There is therefore a separate Attorney General for Northern Ireland. He has no power to give directions to the DPPNI, who is obliged to exercise his function independently.

    b. Second, Northern Irish law contains offences that go beyond the scope of English criminal law. Section 5 of the Criminal Law Act (Northern Ireland) 1967 obliges every person "*who knows or believes (a) that the offence or some other relevant offence has been committed and (b) that he has information which is likely to secure, or be of material assistance in securing, the apprehension, prosecution or conviction of any person for any offence; to give information, within a reasonable time, to a constable…*" Failure to do so without reasonable excuse is an offence.

    c. Third, in Northern Ireland there was previously a power under which the Secretary of State could issue guidance to the police: see further, section 39 of the Police (Northern Ireland) Act 1998. That provision was repealed and not replaced by the Police (Northern Ireland) Act 2000, on the recommendation of the Patten Commission.[17] The UK is fully committed to the implementation of the findings of the Patten Commission under the 2001 UK-Ireland Weston Park Agreement. Its recommendation in respect of s.39 was specifically premised on its belief that it "*did not believe that the Secretary of State or a future minister in the Northern Ireland Executive should even appear to have the power to direct the police*" (§6.18).

ECHR

57. It is unlawful for a public authority to act in a way which is incompatible with one of the rights set out in Schedule 1 to the Human Rights Act 1998, which incorporates the ECHR (HRA 1998, s.6). A "*victim of the unlawful act*" may bring a claim under section 7(1)(a) HRA in respect of the conduct of the Agencies in the IPT: (RIPA, s 65(2)(a), (3)(a), (b)).

'In accordance with the law'

58. The Convention principle of legality requires that any interference with a Convention right must meet the requisite standards of lawfulness mandated by the Convention. It is expressly recognised in many of the ECHR rights, including Article 2, 5 and 6,[18] but "*legal*

[17] A New Beginning: Policing in Northern Ireland – the Report of the Independent Commission on Policing for Northern Ireland, published in September 1999.

[18] For example: under Article 2, the death penalty must be "*provided by law*"; under Article 5, any deprivation of liberty must be "*in accordance with a procedure prescribed by law*"; under Article 6, an independent tribunal must be "*established by law*"; under Article 8, any interference with privacy must be "*in accordance with law*"; restrictions under Articles 9 to 11 must be "*prescribed by law*"; and interreference with property must under A1P1 must be "*subject to the conditions provided for by law*".

certainty" is in any event "*necessarily inherent*" in each Convention right (*Marckx v Belgium* (1979-80) 2 EHRR 330, [58]).

59. An interference with any Convention right will only be 'in accordance with law' if, and to the extent, that it satisfies three criteria. First, the measure in question must have a basis in domestic law. Second, and in turn, the law itself must be accessible. Third, any interference must be foreseeable. See further, *Sunday Times v UK* (1979) 2 EHRR 345; *Silver v UK*(1983) 5 EHRR 347. A secret direction or policy clearly falls foul of the second and third criteria.

60. The ECHR jurisprudence was summarised by the IPT in *Privacy International v Secretary of State for Foreign & Commonwealth Affairs* [2016] HRLR 21 at [62], as follows[19].

> "(i) There must not be an unfettered discretion for executive action. There must be control on the arbitrariness of that action. We must be satisfied that there exist adequate and effective guarantees against abuse.
>
> (ii) The nature of the rules fettering such discretion and laying down safeguards must be clear and the ambit of them must be in the public domain so far as possible; there must be an adequate indication or signposting, so that the existence of interference with privacy may in general terms be foreseeable.
>
> (iii) Foreseeability is only expected to a degree that is reasonable in the circumstances, being in particular the circumstances of national security, and the foreseeability requirement cannot mean that an individual should be enabled to foresee when the authorities are likely to resort to secret measures, so that he can adapt his conduct accordingly.
>
> (iv) It is not necessary for the detailed procedures and conditions which are to be observed to be incorporated in rules and substantive law.
>
> (v) It is permissible for the Tribunal to consider rules, requirements or arrangements which are "below the waterline" i.e. which are not publicly accessible, provided that what is disclosed sufficiently indicates the scope of the discretion and the manner of its exercise.
>
> (vi) The degree and effectiveness of the supervision or oversight of the executive by independent Commissioners is of great importance, and can, for example, in such a case as Kennedy, be a decisive factor."

Article 2

61. Article 2 provides that "*[e]veryone's right to life shall be protected by law*". There is an absolute prohibition on unlawful killing, and the negative duty requires the state to refrain from taking life other than in the exceptional circumstances set out in Article 2(2). Article 2 also imposes a protective duty that requires it, proactively, to take "*operational measures*" to

[19] The Claimants reserve their position as to the correctness of this analysis in light of any forthcoming Strasbourg jurisprudence or on appeal.

protect the lives of those in its jurisdiction who are at risk from the criminal acts of another individual. See further, *Osman v United Kingdom* (1998) 29 EHRR 245, at [115].

62. The state is also under a positive duty properly and openly to investigate deaths for which the state might be responsible: *Savage v South Essex Partnership NHS Foundation Trust* [2009] 2 WLR 115 (HL). An investigation in such circumstances must be independent, capable of determining whether any interference was justified, reasonably prompt and "*prevent any appearance of collusion in or tolerance of unlawful acts*" *Vo v France* (2005) 40 EHRR 12 at [89]. An Article 2 investigation will ordinarily require the next of kin of the victim to be notified: *Jordan v United Kingdom* (2001) 37 EHRR 2, at [103]-[121]; *R (Amin) v SSHD* [2004] 1 AC 653 (HL) at [25] per Lord Bingham.

Article 3

63. Article 3 ECHR prohibits torture and inhuman or degrading treatment or punishment. Whether treatment is characterized as 'torture' and 'inhuman or degrading treatment' depends on intensity of the suffering: *Ireland v UK*, Application No. 5310/71, at [167]. Torture also has a purposive element and is an intentional act: *Gäfgen v Germany* (2010) 52 EHRR 1 at [90]. Treatment that would previously not have been recognised as torture may now be reclassified as torture, in light of changing standards: *Selmouni v France* (1999) 29 EHRR 403 at [99]-[100] and *Ireland v UK (No. 2)*, Application No. 5310/71 (Revision) (20 March 2018).

64. The prohibition is absolute. The Strasbourg Court summarised the significance of this in *Gafgen*, as follows:

> "The Court is further aware of the different competing rights and interests at stake... the instant case is particularly also in that the impugned real evidence was not in itself aimed at further a criminal investigation, but was applied for preventive purposes, namely in order to save a child's life, and thus in order to safeguard another core right guaranteed by the Convention, namely art. 2…
>
> While having regard to the above interests at stake… the Court cannot but take note of the fact that art. 3 of the Convention enshrines an absolute right. Being absolute, there can be no weighing of other interests against it, such that the seriousness of the offence under investigation or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature. In the Court's view, neither the protection of human life nor the securing of criminal conviction may be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by art.3, as this would sacrifice those values and discredit the administration of justice."

65. In light of the absolute nature of the prohibition, a public authority cannot authorise a breach of Article 2 or Article 3, or purport to do so, under any circumstances.[20] In passing

[20] That position is also recognised in other jurisdictions. See, for example, *Public Committee against Torture in Israel* (1994) 53(4) PD 817, at 835, per Barak P: "*… not all means are permitted… not all methods used by [our] enemies are open. At times democracy fights with one hand tied behind her back. Despite that*

the HRA 1998, Parliament has imposed limits on the conduct of public bodies. In *AKJ v Commissioner of Police of the Metropolis* [2013] 1 WLR 2734, Tugendhat J accurately summarised the law:

> "… it is plain that an authorisation can only be granted for conduct, or for the use of information, which will interfere with one of the qualified Convention rights, such as article 8. **The unqualified rights, namely article 2 (right to life) and article 3, cannot be interfered with for any reason**… There can be no license for torture or for any other inhuman or degrading treatment."

66. The prohibition is also a peremptory norm. There is judicial recognition that there are "*few issues on which international legal opinion is more clear than on the condemnation of torture…*" (*A v Home Secretary (No. 2)* [2006] 2 AC 221, per Lord Bingham of Cornhill at [33]).

67. The common law has turned its back on torture since the landmark decision in *Felton's Case* (1628) 3 How. State Tr. 371, in which judges were clear that the "*[the individual] ought not to be tortured by the rack because no such punishment is known or allowed by our law*". The decision was described by Blackstone as ""*to [the judges'] honour and the honour of the English law*": see further *Blackstone's Commentaries on the Laws of England* (1789) vol IV, ch 25, pp. 320-321. Thereafter, in 1640, Parliament abolished the so-called 'Court of Star Chamber', which had received torture evidence: *Blackstone's Commentaries on the Laws of England*, above, pp. 320-321.

68. Since that time, it has been "*hailed as a distinguishing feature of the common law*" that it has "*set its face firmly against the use of torture*": *A v Home Secretary (No. 2)* [2006] 2 AC 221, per Lord Bingham of Cornhill at [10] - [12]. The absolute prohibition is justified not only in light of the unreliability of confessions obtained via torture, but also in recognition that torture "*degrade[s] all those who lent themselves to the practice*" (*A (No. 2)*, per Lord Bingham at [11]). A further rationale is that ""*[o]nce torture has become acclimatised in a legal system it spreads like an infectious disease… It hardens and brutalizes those who have become accustomed to use it*": Sir William Holdsworth, *A History of English Law*, 3rd Ed (1945), vol 5, p. 194.

69. Like Article 2, Article 3 imposes both a negative duty on the state, prohibiting it from engaging in torture, and a positive obligation to take steps to avoid its use. Again, states are also under a positive obligation to conduct an official investigation capable of leading to the identification and punishment of those responsible: *Labita v Italy* (2008) 46 EHRR 1228 at [131].

70. The negative, or 'protective' obligation', under Article 3 will be breached if the state engage in ill-treatment or acquiesces in the same: *Premininy v Russia* (2011) 31 BHRC 9 at [74]. The State is not permitted to 'contract out' its obligations under the Convention. Article 3 will therefore be engaged, and the investigative duty will arise, where the state

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democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance.".

is complicit in torture or inhuman or degrading treatment: *Al-Saadoon v Secretary of State for Defence* [2017] 2 WLR 219.

71. The same essential ingredients apply to an investigation under Article 3 as under Article 2: *R (AM) v SSHD* [2009] EWCA Civ 219 at [32], [86]. In the context of Article 3, it has been emphasised that any investigation must in particular secure the "*right to truth*": *El Masri v Macedonia* (2013) 57 EHRR 25 [191]-[192]. In that case, Strasbourg denounced the concept of "*state secrets*" in the context of Article 3, noting that it had "*often been invoked to obstruct the search for the truth*". The ECtHR was clear that "*there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory*".

Article 5

72. Article 5 provides for the right to liberty and security of person. Any deprivation of liberty is prohibited except for limited and enumerated purposes. Detention "*for the sole purpose of intelligence exploitation*" is incompatible with Article 5: *Mohammed v Secretary of State for Defence* [2017] 2 WLR 327 (SC), at [80] per Lord Sumption (with whom Lady Hale agreed).

73. A deprivation of liberty must be in accordance with a procedure prescribed by law (Article 5(1)). That requires not only lawfulness as a matter of domestic law, but also sufficiently accessible and precise laws regulating any detention and adequate procedural safeguards: *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19 at 38; *HL v United Kingdom* (2005) 40 EHRR 32; *Shtukaturov v Russia* (2012) 54 EHRR 27. Article 5 also imposes a positive obligation to "*conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since*": *Imakayeva v Russia* (2008) 47 EHRR 4 at [171].

74. Judicial control of detention is "*implied by the rule of law*": *Brogan v United Kingdom* (1988) 11 EHRR 117 at [58]. "*Unacknowledged detention*" is therefore a "*complete negation of these guarantees and discloses a most grave violation of Article 5"*: *Imakayeva v Russia*, at [171].

75. Judicial oversight under Article 5 must be independent and impartial, and the judge must be capable of giving a binding judgment requiring release. Further, the procedures adopted must ensure equal treatment and be adversarial and the individual must be afforded adequate legal assistance, disclosure and time to prepare: *Weeks v United Kingdom* (1987) 10 EHRR 293 at [66], and an oral and/or public hearing will often be required. Those procedural safeguards constitute an essential part of Article 5 and cannot be bypassed for reasons of national security: see, for example, *Al-Nashif v Bulgaria* (2003) 36 EHRR 655 at [94] – "*[n]ational authorities cannot do away with effective control of lawfulness of detention by domestic courts whenever they choose to assert that national security and terrorism are involved*".

76. Judicial oversight in the context of Article 5 serves two essential purposes, by ensuring: (1) that an individual who is detained is promptly brought before a judge or other officer authorised by law (Article 5(3)); and (2) that procedures are available to ensure that the lawfulness of the individual's detention is decided by a court (Article 5(4)). The right must

be practical and effective, not merely theoretical or illusory: e.g. *R (Walker and James) v Secretary of State for Justice* [2008] EWCA Civ 30; *Mohammed* at [101]-[103].

Article 6

77. Article 6 ECHR provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

78. The relevant principles are not in dispute. In particular:

    a. The use of undercover agents, or *agent provocateurs*, may give rise to a breach of the Convention: *Teixeira de Castro v Portugal* (1999) 28 EHRR 101.

    b. The test is whether any conduct of the police or other law enforcement agency was "*so seriously improper as to bring the administration of justice into disrepute*": *R v Looseley, Attorney-General Reference (No.3 of 2000)* [2001] 1 WLR 2060, per Lord Nicholls at [25]. The Courts are therefore clear that there are "*limits of acceptable "pro-active" conduct by the police*" (*Looseley*, Lord Nicholls, at [5]), where, for example, any conduct would "*affront the public conscience*" (*R v Latif and Shahzad* [1996] 2 Cr App R 92, per Lord Steyn).

    c. An undercover agent will ordinarily stand to be prosecuted for his or her participation in crime. An agent may only escape prosecution if the offence was "*already "laid on" solely for the purpose of apprehending the offenders*" and "*it is clear that the assistance given by the undercover officer or informed made no difference to the commission of the offence*" (Archbold, 2019, §18-25, p.2185). In summary, "*[t]he true principle is that the motive for rendering assistance is irrelevant (except to sentence),* ***as is the fact that the agent provocateur did not have the mens rea required of a principal***."

SUBMISSIONS

Ground 1: the policy is not in accordance with law – oversight and the 'secret policy'

79. Until 2012, the policy was secret and subject to no oversight at all. After a brief period of 'non-statutory oversight', the Third Direction was made on 28 November 2014 **[52/314]**. While its existence was disclosed in 2017, both the content of the Third Direction and the existence of the policy remained secret at all times until on or after 1 March 2018.

80. Both the Third Direction and the policy at the heart of these proceedings have therefore been through five separate 'phases' of secrecy:

Phase	**Dates**	**Oversight**	**Was the existence of the Direction secret?**	**Was the content of the Direction secret?**	**Was the policy secret ?**
1	Pre-2012	None	Yes	Yes	Yes
2	2012 – 28 November 2014	Non-statutory direction (IS Comm)	Yes	Yes	Yes
3	28 November 2014 to c.2017	Statutory Direction (IS Comm)	Yes	Yes	Yes
4	c.2017 to 1 March 2018	Statutory Direction (IP Comm)	No	Yes	Yes
5	From 1 March 2018	Statutory Direction (IP Comm)	No	No	Heavily redacted. Non-disclosure of the limits.

81. Until 1 March 2018, neither the oversight of the policy nor the application of the Guidelines were "*in accordance with law*", as required by the Convention.

    a. During Phase 1, the policy was not only secret but also subject to no oversight. There were therefore (1) no safeguards and (2) no sign-posting to use the language of the IPT in *Liberty*.

    b. Thereafter, in Phases 2-4, while the existence of the Direction was disclosed (in passing, in the course of other litigation), its content and subject both remained secret. No explanation has been offered as to why the Direction was not published, particularly in circumstances where it has now been disclosed. Neither the Third Direction, nor the Guidelines, were in the public domain, nor were they foreseeable or adequately signposted.

82. The Respondents contend their secret policy and secret direction were "*in accordance with law*". They assert that "*the circumstances of the present case are even further removed from State interception…"* and seek a more generous application of the Convention principles in their favour (Response, §35) **[11/73]**. There is, however, no basis for any dilution of the Convention principles of foreseeability:

    a. The Respondents are correct that this case is not comparable to State interception. But that is to parade a vice as a virtue. The conduct concerned may be far more serious than an interference with privacy or correspondence. The principal

distinction is that the conduct in the present case is not carried out directly by agents of the state, but rather by third parties recruited to act on its behalf. The potential for abuse in those circumstances is particularly apparent and well-established.

b. The identity of the likely victims – as "*criminals and terrorists*" – is not admitted. As set out above, the "*most notorious*" instance of state participation in criminality involved the murder of a lawyer and the injury of his wife. In any event, the classification of victims – as deserving and undeserving – is impermissible for Convention purposes.

83. In respect of the Guidelines, the Respondents contend that "*the underlying conduct – namely the participation in criminal activities by agents – was* ***widely known and entirely obvious***". Indeed, they go as far as to describe agent criminality as "***a paradigm example*** *of activity that a reasonable person would understand as falling within the basic functions of the Security Service…* " (Response, §47) **[11/78]**.

84. In effect, the submission is that the general public expected the Security Service to break the criminal law as and when they saw fit to do so, under a secret policy with no statutory basis. In fact, the public (rightly) expect high standards of conduct from the Agencies and from all public officials. They expect extraordinary powers granted to secret agencies to dispense with criminal law to be granted by Parliament, subject to limits and oversight, not taken without Parliamentary scrutiny in secret.

85. The Respondents seek to rely on the *Finucane Report* for the proposition that state participation in crime was "*obvious*" (§47(c) **[11/79]**). That is a difficult proposition in circumstances where it was contended for much of this case that even the disclosure of the subject matter of the policy would cause grave and irreparable harm to the public interest.

86. It is of course correct that the criminal courts have experience in dealing with undercover police officers who have participated in crime. See *Loosely*, in which Lord Hoffmann held that the actions of an undercover agent who purchased drugs with a view to inciting the commission of an offence may give rise to his prosecution, but would not amount to an abuse of power (Response, §47(d) **[11/79]**).

87. The position of an undercover police officer is not comparable to an agent acting for and on behalf of the Security Service. The police officer operates under a principle of constabulary independence and the police are not an emanation of government. The police officer is under a duty to report all relevant evidence and facts to the independent prosecuting authority, and thereafter to the Court. It is readily explicable that the participation in crime of an undercover agent and an undercover officer would give rise to different consequences as a matter of public law in those circumstances.

88. Finally, the Guidelines remain heavily redacted and the limits of the policy remain secret **[32/215]**. The nature of the criminal activity authorised under the Guidelines therefore remains entirely undisclosed, which continue to be "*not in accordance with law*".

Ground 2: judicial review – authorising criminal conduct pursuant to a secret policy

89. The nature of the underlying policy was only disclosed on 1 March 2018. Before that time, both its existence and content were entirely secret.

90. It is the antithesis of good government to operate a 'secret policy': *B v Secretary of State for Work and Pensions* [2005] 1 WLR 3796, per Sedley J at [43]. The rule of law instead calls for "*a transparent statement by the executive*" of the circumstances in which it will exercise any discretionary power: R *(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, per Lord Dyson at [34].

91. In limited circumstances, the government may refuse to disclose a policy on the grounds of national security: *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 (Admin). That decision could only be justified, however, by "*compelling reasons*": *Lumba*, at [38].

92. Faced with the prospect of defending these proceedings, the then Prime Minister, Rt Hon Theresa May, published the Third Direction, thereby disclosing the existence of the Guidelines. She did so notwithstanding the fact that she was under no obligation to do so if publication would not be in the interests of national security. It is to be inferred that such publication, and the subsequent disclosure of the Guidelines, did not jeopardise national security. No explanation has been forthcoming as to why the policy and the Guidelines were not disclosed earlier in those circumstances.

93. The Respondents' position in these proceedings, in any event, is that it was at all material times "*entirely obvious*" that agents of the Security Service participated in crime. If so, why was such an effort made to keep the existence and scope of the policy secret for so long?

Ground 3: judicial review – no legal basis for the policy

94. There is in any event no legal basis for the policy.

95. The Security Service are purporting to "authorise" agent participation in criminal conduct. The Tribunal must consider both the purpose and effect of the policy. The Respondents contend that the only purpose of the policy is to provide the Security Service with an "*explanation and justification of its decisions should the criminal activity of the agent ever come under scrutiny of an external body e.g. the police or prosecuting authorities*" (Response, §55 **[11/81]**)[21] and that there is "*no overriding of fundamental rights*" (Response, §57 **[11/82]**).

96. That may well be a purpose of the policy. The Security Service does not, however, in practice notify the police or a prosecutor of its decision to grant an authorisation. The effect of the policy is therefore to prevent any criminal investigation or prosecution, granting *de facto* immunity to the 'authorised' agent. It also ensures that the police, prosecutors and the Courts never become aware of the agent's role in any crime. Indeed, if the only purpose

[21] See further, the Guidelines at **[32/216]**.

of the policy was to provide the Security Service with "*an explanation and justification of its decision*", there is no good reason why it keeps its authorisations secret.

97. The claimed legal basis for the policy is SSA 1989, s.1. That provision puts the Security Service on a statutory footing and sets out its general functions. The Respondents' position is that "*Section 1 simply lists the functions of the Service, implicit within each of which must be vires to do what is necessary to perform those functions*" (Response, §62 **[11/83]**).

98. In the circumstances, the principle of legality requires that these general words be read so as to avoid interference with fundamental or constitutional rights. In *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, Lord Hoffmann stated:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principles of legality means that Parliament must squarely confront what it is doing and accept the political cost. **Fundamental rights cannot be overridden by general or ambiguous words.** Thais is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual**.** In this way the courts of the United Kingdom, through acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

99. S.1 SSA 1989 is silent as to whether the Security Service may authorise participation in crime, less still participation in serious crime including, *inter alia*, torture. There is no express language indicating permitting such conduct. Without such express words, s. 1 SSA 1989 could not provide a legal basis for the policy. The Respondents have (wisely) not suggested they have a prerogative power to commit crimes.

100. S.1 SSA 1989 can be contrasted with the language of s.7 Intelligence Service Act 1994, which permits the SIS and GCHQ (but not MI5) to authorise their agents to carry out crimes abroad and provides as follows: "*If, apart from this section; a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is **authorised** to be done by virtue of an authorisation given by the Secretary of State under this section.*" Where Parliament intends to enable the Agencies to authorise crime, it will therefore clearly do so expressly, in accordance with the principle of legality.

101. Even s. 7 ISA is subject to the principle of legality. For example, the general power to authorise crimes abroad in s. 7 could not permit torture (at least without express words). The importance of express statutory language in respect of torture was noted by Lord Bingham in *A (No. 2)* at [55].

> "… the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention. I am **startled, even a little dismayed, at the suggestion** (and the

> acceptance of the Court of Appeal majority) that this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be **overridden by a statute and a procedural rule which makes no mention of torture at all.**"

The position in respect of s. 1 SSA 1989 and domestic criminality is *a fortiori*.

102. In any event, even if the Respondents are correct that the principle of legality is not applicable in this case, the ordinary principles of construction will not assist them. The Respondents rely on the doctrine of necessary implication, citing *Ward v Commissioner of Police of Metropolis and another* [2006] 1 AC 23, to contend that it is a necessary implication of section 1 SSA 1989 that the Security Service has all the powers that it deems necessary to perform itsfunctions under that provision (Response, §64 **[11/84]**).

103. With respect, that is a bad point. The principle of necessary implication was summarised by Lord Hobhouse in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 as follows.

> "A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 481. A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would if it had thought about it, probably have included and what it is clear that **the express language of the statute shows that the statute must have included.** A necessary implication is a matter of express language and logic not interpretation." (emphasis added)

104. The Courts have therefore set a very high hurdle. See further, *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] 2 AC 15. The express language of the statutory provision itself must be "*compellingly clear*" that this was the intention of Parliament: *B (A Minor) v DPP*, per Lord Nicholls at p.464A. There is no such indication in the SSA. Indeed, on the Respondents' analysis, the powers in SSA 1989 s. 3 to grant warrants (now repealed and re-enacted in s. 5 ISA and IPA 2016) were unnecessary and could equally have been implied from s. 1.

105. The Respondents contend that "*it is essential that the Security Service has the power to "authorise" its agents to participate in crime*" and that this is "*critical*" power, as opposed to one which is "*nice to have*" (Response, §63 **[11/84]**). No doubt this is a genuinely held view of the Security Service. Perhaps the Security Service is correct. But Parliament was willing in 1994 to contemplate such criminal conduct abroad, but not domestically. Whether there should be such a power is not for the Security Service or Ministers (or the IPT) to decide. It is a matter for Parliament. If the Security Service wishes to have the power to commit crimes in the UK in secret, it ought to ask Parliament for an express authority. It is clear from the *Pat Finucane Inquiry* that this was never done because it was thought that Parliament would probably not grant such powers: see further, the Report of the Patrick Finucane Review, Rt Hon Sir Desmond De Silva QC, §§4.72-4.84. That is itself telling, and supports Lord Hoffmann's point that abrogations of fundamental rights are for

Parliament, not the executive, and Parliament needs to squarely confront what it is doing and accept the political cost.

106. Nor does the Respondents' appeal to 'context' assist them. By way of example:

a. It is correct that s.1 SAA 1989 put the Security Service on a statutory footing. The wording of the Maxwell-Fyfe Direction, however, does not suggest that, before this time, the Security Service had the power to authorise agent participation in crime. Prior to 1989, the Security Service was purely a prerogative emanation of the Crown. Since 1989 it has been on a statutory footing and its prerogative powers have been abrogated to the extent they are inconsistent with the statutory regime.

b. Nor does *Attorney General v Observer Ltd* [1988] 2 WLR 805 assist. The judgment of Sir John Donaldson MR, upon which the Respondents rely at §60 of the Response, noted that "*[i]t may be that the time has come when Parliament should regularise the position of the service*" **[11/82]**. S.1 SSA 1989 put the Security Service on a statutory footing. But nothing in *AG v Observer* sheds light on whether the Security Service had the power to authorise its agents to participate in crime, either before or after its enactment of that provision. Indeed, the Master of the Rolls was clear that agents would remain criminally liable for such conduct, absent a statutory provision providing otherwise (at 879H).

107. The Respondents in any event put their case too high. Were they correct, the Security Service would have all powers that they deem necessary to the performance of their functions. That is notwithstanding the breadth of those functions which include, *inter alia*, the protection of national security and its protection from espionage and the safeguarding of the national economy (functions that are notably broader than the police and are not, for example, limited to the prevention and detection of crime). There is no 'carte blanche' for the Security Services, nor can s.1 SSA 1989 sensibly be interpreted as such.

Ground 4: no de facto power to dispense with the criminal law / usurp the proper functions of the prosecution and police throughout the UK

108. It is not in dispute that the Security Service and its agents have no immunity from prosecution, absent express statutory provisions. It is also common ground that the executive cannot grant itself a power to dispense with the criminal law.

109. It is similarly not in dispute that not every offence should be prosecuted. In particular, prosecution is not appropriate where an independent prosecutor decides that prosecution is contrary to the public interest.

110. The decision as to whether to prosecute a crime belongs to the prosecutor alone. It is not a decision for government, still less the Security Service. Similarly, while the police are under no duty to investigate or seek to prosecute every crime, whether they choose to do so is a decision for them alone, as an independent constabulary. The effect of the Respondents' policy is therefore to usurp the function of both police and prosecutor.

While the ostensible purpose of the Guidelines is to provide a mechanism by which the Service can provide an "*explanation and justification of its decisions should the criminal activity of the agent come under scrutiny by an external body, e.g. the police or prosecuting authorities*" (Response, §55) **[11/81]**,[22] the Respondents never in fact notify either the police or the prosecutor of the conduct they have authorised.

111. The Respondents contend that they are under no duty to do so: see further, the Response, §§82-89 **[11/90]**. That is wrong in respect of Northern Ireland, where section 5 of the Criminal Law (Northern Ireland) Act 1967 imposes criminal liability for any failure promptly to disclose the commission of an offence to constable. It is no answer to that to contend, as the Respondents do at §89, that "*the information is not likely to lead to… conviction*" or that there is a "*reasonable excuse for non-disclosure*". Both the likelihood of conviction and the merit of any excuse are matters for the consideration of the prosecutor; they do not absolve the Security Service of its obligations under s.5 CL(NI)A 1967. The PSNI has many constables security cleared to the highest levels. There is no difficulty in identifying an appropriate security cleared senior officer to disclose criminality to, so that he or she may consider whether an investigation and/or prosecution may be merited.

112. As to the rest of the UK, whether there is criminal liability for a failure to disclose a crime is a distinct question to whether a public authority is required to do so. In any event, the extent of any duty to disclose is a red herring. The Tribunal has not been invited to determine whether the Security Service is in breach of a duty to disclose its conduct to the CPS, the police or any other prosecutor. The question is instead whether the Security Service has granted itself a *de facto* power to dispense with the criminal law. That requires the Tribunal to consider the effect of the policy.

113. It is unreal to say that the effect of the policy is to provide the Security Service with an explanation of the conduct of its agents in the event that they are investigated or prosecuted, when the Service itself withholds the authorisations and relevant facts from prosecutors and police. Rather, the Security Service are 'authorising' participation in crime. The Service clearly 'acquiesces' in criminal conduct and encourages it by reassuring its agents as to the position the Service will adopt in the event that the agent's crimes are (somehow) discovered.

114. The Security Service has therefore arrogated to itself the roles of both the independent prosecutor and police. That appears to be the true purpose of the policy and is, in any event, its inevitable effect. The Courts will consider the *de facto* effect of any policy in assessing whether the Executive has dispensed with the criminal law: see, for example, King v The London County Council and Miller 2 above. To similar effect, the Bill of Rights not only prohibits the pretended power of "*suspending laws*", but also the pretended power of suspending the execution of those laws.

115. The above points are *a fortiori* in respect of Scotland and Northern Ireland. The Respondents have refused to say when the Lord Advocate of Scotland and the PPSNI

[22] See further, the Guidelines at **[32/215]**.

became aware of the existence of the Guidelines. It is presumed that this took place a number of years after the CPS was notified (2012), after these proceedings were commenced. For decades, therefore, the Security Service has disregarded entirely the role of the prosecution authorities and police in Northern Ireland and Scotland. In doing so, they have failed to recognise the 300-year old constitutional settlement that exists in respect of the Scottish criminal legal system, or the special constitutional arrangements that exist in respect of Northern Ireland.

Grounds 5, 6 and 7: ECHR

State Responsibility

116. Where the Security Service aids, abets, counsels or procures conduct amounting to a breach of the Convention, it would ordinarily be expected that it would incur the same legal liability as if it had carried out the acts itself.

117. The Respondents contend that this is unconventional case, in which "*[t]he State, in tasking CHIS in relation to that conduct, is not the instigator of that activity and cannot be treated as responsible for it*" (Response, §101 **[11/97]**). On that basis, they seek to limit state responsibility under the Convention to responsibility for conduct which it had "*instigated and decisively caused*" (Response, §102 **[11/97]**).

118. That approach is impermissible. The test for state responsibility under the Convention is one of "*acquiescence*": see, for example, *Burlya v Ukraine* Application No. 3289/10 at [119]. That was confirmed most recently in the decision of *Al Nashiri v Romania* (2019) EHRR 3, in which the Strasbourg Court confirmed, "*in accordance with the Court's* ***settled case-law***", that the test for state responsibility was one of "*acquiescence or connivance*" [594].

119. That test is inherently flexible and has been applies in a variety of cases involving varying degrees of state involvement. *Burlya*, for example, was a case in which the State knew but failed to prevent an anti-Roma pogrom. The State did not instigate the conduct in question; but it had knowledge of the impending riot, and failed to act to protect the minority group. The same test was applied in *Al Nashiri*, for example, notwithstanding that it was a case involving secret CIA black sites.

120. The Respondents cite a single authority in support of the "*decisive causation*" test, i.e. *Reira Blume v Spain* (Application No. 37680/97). Whereas *Al Nashiri* and *Burlya* were decided this year, *Reira Blume* was decided in 1999. In any event, *Reira Blume* appears to involve the application of the "*acquiescence*" test (at [35]), albeit that there are factual findings that the state actively cooperated in the conduct in question.

121. There is therefore no basis for departing from the settled test for state responsibility under the Convention. The state is not required to have instigated the conduct in question; it will be responsible for conduct giving rise to a breach where it acquiesces or connives in the same.

Characterisation of conduct

122. The Respondents also suggest that this case gives rise to novel questions of law in respect of "*the proper characterisation of the conduct*" at the heart of the policy. In particular, they emphasise the importance of purpose and context when ascertaining whether any conduct amounts to ill-treatment for the purpose of Article 3 ECHR (Response, §103 **[11/98]**).

123. It is not in dispute that whether conduct amounts to ill-treatment for the purpose of the Convention is fact-specific. The Claimant cannot comment on the severity or characterisation of the conduct authorised under the policy, which remains secret. The publicly available examples suggest that, in the past, agents of the Security Services participated in grave conduct giving rise to someone of the most serious violations under the Convention. There can be no doubt that the types of conduct that occured in the case of Mr Finucane and alleged in the Operation Kenova investigations involve torture.

124. The Tribunal is in any event cautioned against re-classifying conduct for the purpose of Article 3, if the reasons for doing so are in fact an attempt to justify a breach of Article 3. The prohibition on torture and ill-treatment is absolute and permits no such justification: see, *AKJ*, above. In particular, there is no defence of necessity to torture or inhuman and degrading treatment.

Ground 5: Breaches of procedural rights under the Convention

125. Any deprivation of liberty (including false imprisonment) effected pursuant to an 'authorisation' given by the Security Service, carried out under the supervision of the IS or IP Commissioners under the Third Direction, is in breach of Articles 5(3) and/or (4).

a. Under Articles 5(3), a person arrested for an offence must be brought promptly before a judge.

b. Under Article 5(4), any person detained must have access to judicial procedures to challenge the lawfulness of his detention.

c. Under both provisions, the judicial process must be independent, impartial, adversarial, ensure equal treatment and adequate hearing rights, afford adequate time, disclosure and legal assistance and involve an oral and where appropriate public hearing. In particular, the detained person must have the opportunity to make representations.

d. Any secret deprivation of liberty effected by the Agencies is necessarily incommunicado detention without access to courts.

e. Secret review by the IS or IP Commissioner of an individual's detention does not provide the judicial oversight required by Article 5.

f. Further, before 28 November 2014, when the Third Direction came into force, there was no system of statutory oversight.

Ground 6: Breaches of investigative duties under the Convention

126. The supervision by the IS or IP Commissioner under the Third Direction (or under any "non-statutory direction" made before 28 November 2014) of any purported 'authorisation' given by the Security Service that permits or envisages a breach of Article 2, 3 or 5 of the Convention does not satisfy the positive investigative duty imposed by Articles 2, 3 and/or 5 ECHR:

a. Each of those Articles imposes on Contracting States a positive duty to properly and openly investigate conduct infringing those Articles, namely conduct causing death or serious injury (Article 2), torture or inhuman and degrading treatment (Article 3), or deprivation of liberty (Article 5).

b. The investigative duty is not fulfilled by an investigation by the IS Commissioner, including because:

   i. it is not capable of leading to identification and punishment of those responsible for a breach of Articles 2, 3 or 4;

   ii. it does not involve a sufficient element of public scrutiny, or any public scrutiny at all;

   iii. it does not involve the victim or the next of kin to the extent necessary to safeguard their legitimate interests, or at all.

127. In the premises, in the oversight of the IS and IP Commissioners is in breach of Article 2, 3, and/or 5 to the extent that the conduct 'authorised' might involve arguable instances of breaches of those Articles.

Ground 7: Breaches of the Convention

128. Any purported 'authorisation' of conduct in breach of certain articles of the Convention would be unlawful:

a. Article 2, to the extent that it involves deprivation of life that is not absolutely necessary for the defence from unlawful violence, lawful arrest, prevention of unlawful escape or quelling a riot or insurrection; for example:

   i. targeted killings;
   ii. killing in the course of secret operations or to maintain cover as a CHIS;

b. Article 3, to the extent that it involves torture or inhuman and degrading treatment.

c. Article 5, to the extent that it involves the deprivation of liberty of any person for a purpose other than that enumerated; for example, for the obtaining of intelligence.

d. Article 6, to the extent that there is a real risk of an unfair trial. As set out above, the use of an agent as an *agent provocateur* may give rise to a breach of Article 6 of the Convention: *Teixeira de Castro v Portugal* (1999) 28 EHRR 101. That will be the case if and to the extent that the conduct of any agent authorised to participate in crime by the Security Services was "*so seriously improper as to bring the administration of justice into disrepute*" (*R v Looseley*, at [25]) or is an "*affront to the public conscience*" (*Latif*, per Lord Steyn).

129. Articles 2, 3, 5 and 6 of the Convention enshrine fundamental rights which are not balanced against other interests (cf. Articles 8 and 10 ECHR). To the extent that any conduct purports to be 'authorised' under the guidelines breaches or breached any of those rights, it is or was unlawful. It is not within the state's gift to purport to give 'authority' for violations of such rights. Any policy which seeks to do so is equally unlawful.

CONCLUSION

130. The Claimants therefore seek the following orders:

a. A declaration that the Respondents' conduct in purporting to approve criminal conduct is unlawful;

b. An order quashing the Guidance;

c. An injunction restraining further unlawful conduct; and

d. Such further or other relief as the Tribunal thinks fit.

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18 October 2019