[redacted]

IN THE INVESTIGATORY POWERS TRIBUNAL **Case Nos. IPT/17/86 & 87H**

BETWEEN:

(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

RESPONDENTS' [redacted] SKELETON ARGUMENT

This skeleton argument is a standalone document, which incorporates the Respondents' Response of 7 May 2019. Where possible, the only CLOSED parts of this skeleton mirror those CLOSED parts of the Response. There is a further entirely CLOSED skeleton, which addresses the PiCs selected by CTT for the purposes of Grounds 5-7.

References are in the form [CBvol/tab] for the Closed Bundles and [OB/tab] for the Open Bundle.

I. INTRODUCTION

1. The functions of the Security Service are set out in ss.1(2)-(4) of the Security Service Act 1989, namely:

> "*(2) The function of the Service 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*

[redacted]

intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.
(3) It shall also be the function of the Service to safeguard the economic wellbeing of the United Kingdom against threats posed by the actions 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"

2. It would be impossible to fulfil these functions effectively without Covert Human Intelligence Sources ("CHIS"), also known as agents. They are indispensable to the work of the Security Service, and thus to its ability to protect the public from the range of current threats, notably from terrorist attackers. The importance of acquiring intelligence and of protecting the CHIS who do so is scarcely capable of overstatement.

3. That is the position now; and it was the position at the time the Security Service Act was passed. That Act put the activities of the Security Service (across its range of activities) – including, it must be assumed, running CHIS – onto a statutory footing. It did so through the broad functional provisions set out above.

4. Given the covert nature of CHIS, and given the types of person with whom and entities with which they have relationships, they need to behave in certain ways and participate in certain activities. In particular, they may need to behave in a certain way either to obtain intelligence in respect of a particular threat [redacted] or to maintain cover [redacted]. These purposes are reflected in §5 of the Guidelines on the use of Agents who participate in Criminality ("the Guidelines"), in which it is stated that participation in criminality may be necessary "*in order to secure or maintain access to intelligence that can be used to save life or disrupt more serious criminality, or to ensure the agent's continued safety, security and ability to pass such intelligence.*" This behaviour by CHIS is an inevitable and necessary part of their ability to function as providers of vital life-saving intelligence; and in order to seek to protect their own lives and safety from the hostile, dangerous actors on whom they are providing intelligence.

[redacted]

5. The conduct which is the subject of the Security Service's processes under challenge in these proceedings may or may not be criminal. Indeed, there may well and often be doubt about that question. It is of obvious and particular importance to note the fundamental point that the whole purpose of CHIS, their *raison d'etre,* is to act so as to enable plans for and acts of terrorism and serious crime to be detected and prevented. If criminality is or may be committed by the CHIS, whilst putting his life and safety in jeopardy, that is done for the greater good. Thus, for example:

   a. Where *mens rea* is an element of the offence, the CHIS may (and very often will) lack the requisite *mens rea.* [redacted] The CHIS would not commit the offence of [redacted], since they would lack the necessary intention [redacted]

   b. Sometimes the offence is one of strict liability [redacted]. Even in that situation the position as to criminality may be far from clear if the CHIS is acting so as to frustrate say the actions of terrorists and the offence in question is under the terrorism legislation.

   c. However, on occasion the CHIS will, or just as importantly may, be committing a criminal offence. That may be so for example where the CHIS could be said to have the requisite *mens rea* but is acting to maintain cover.

6. The Security Service has accordingly developed detailed policies, practices and procedures in relation to such CHIS conduct. That is a virtue, not a vice. It would not have been responsible simply to encourage a CHIS run by the Service to infiltrate and provide intelligence on say a terrorist organisation without seeking to address and provide some assistance in relation to lines that should govern likely real life scenarios that might arise, involving the CHIS having to show support for and participate to some extent in the activities of that organisation. On the contrary, it is responsible and proper for the State not to turn a blind eye to the realities of CHIS reporting. A decision to abandon the CHIS in that way would operate to the detriment and uncertainty not only

[redacted]

of CHIS but also of all those with whom they interact. At this stage, the following points are to be emphasised in relation to the nature of those procedures.

7. **First**, the procedures reflect, and responsibly support, the basic ability and power in the Security Service to run CHIS as an essential, vital part of its core protective functions. As already noted, it is inconceivable that Parliament could possibly have intended, when it enacted the Security Service Act, to undermine the Security Service's ability to protect the public in that way.

8. **Secondly**, the Security Service does not, and does not purport to, confer immunity from criminal liability. This is in contradistinction to the power conferred by Parliament under s.7 of the Intelligence Services Act 1994 (and of course any such power to grant immunity could only be conferred by Parliament). As is set out in §9 of the Guidelines, an "authorisation":

> *"has no legal effect and does not confer on either the agent or those involved in the authorisation process any immunity from prosecution. Rather, the authorisation will be the Service's 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 a prosecuting authorities. In particular, the authorisation process and associated records may form the basis of representations by the Service to the prosecuting authorities that prosecution is not in the public interest."*

9. The "authorisation" is not, and cannot be equated to, a forbidden *"proleptic grant of immunity"* (as per Lord Bingham, *R(Pretty) v DPP* [2002] 1 AC 800, §39). It does not "*usurp the constitutional role of independent prosecuting authorities in each of England and Wales, Scotland and Northern Ireland,* contrary to §16 of the Claimants' skeleton. It is closer to a private individual legitimately considering the public interest in a proposed course of action, whilst knowing that this does not mean that the relevant prosecuting authorities are bound to reach the same conclusion. This is not *de facto* immunity for the reasons developed below.

10. **Thirdly**, [redacted]

[redacted]

The redacted text relates to the Claimants' complaint (para 3 RASG) that the victim is not notified of an "authorisation".

a. The criminal conduct will invariably be known to the SoI or victim. [redacted]

Similarly, in the case, posited by the Claimants, of crime being perpetrated against an innocent victim, that victim would know about it.

b. [redacted]

[1] Moreover, the Security Service works very closely with the police in its counter-terrorism operations. This is reflected in §19 of the Memorandum of Understanding for England and Wales, which provides that "*in most Security Service-led intelligence investigations, whether it is intended or anticipated that the operation will result in prosecution or disruption by some other means, a police Senior Investigating Officer (SIO) is appointed at an early stage.*"

[redacted]

11. **Fourthly**, the Security Service does not purport to "authorise" breaches, by it, of the ECHR, as implemented by the Human Rights Act 1998. Indeed, it positively seeks not to breach its obligations under the ECHR. The Security Service submits that its policy and practice ensures that this is the case (as is supported by consideration of the actual Participation in Criminality ("PiC") forms, which is addressed in the entirely CLOSED annex to this skeleton). It is important to note that running CHIS, with the necessary concomitants of doing so in the hostile environment in which they operate, is integral to the protective functions of the Security Service. If that is right, and whatever the precise triggers for the protective, operational obligations on the state, these procedures are a necessary part of fulfilling any such protective obligations under for example Articles 2 and 3 ECHR. There is all the difference in the world between this situation, with its core aim of avoiding harm or worse harm, and the situation prohibited by those Articles.

12. One related point needs to be mentioned. The Claimants have repeatedly sought to require the Security Service to state, in open court, the precise limits of the sort of criminal conduct which could be "authorised". The Respondents are, as the Tribunal knows and has upheld, unable to respond in OPEN to such assertions by the Claimants. For the avoidance of doubt, this is not a question of keeping the law secret. [redacted] This has now been the subject of a Tribunal ruling in favour of the Respondents' [redacted] national security concerns against so doing. Despite that ruling, the Claimants persist in asserting that "*it is clear that the Security Service thinks that it 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.*" (§2, C Skel).

13. In those circumstances and as developed in detail below, the Respondents resist the Claimants' challenge in its entirety. In summary (and in response to §§8-20, C Skel):

[redacted]

a. Grounds 1 & 2: The Claimants contend that the policy is not in accordance with the law and involves the adoption of a secret policy (§§8-12, C Skel). However, the underlying conduct is and was widely known and obvious. It is a paradigm example of an activity which a reasonable person would understand as falling within the basic functions of the Security Service. Further, there are references to it in the public domain. There was and is no need for any more specific signposting.

b. Ground 3: The Claimants contend that the policy has no legal basis (§§13-15 C Skel). To the contrary, agent participation in criminality is necessary for the performance of the Security Service's statutory functions. Parliament must have intended, and plainly did intend, to confer *vires* for that activity. Since there are no express statutory words allowing for immunity to be granted, or otherwise to change the legal characterisation of the conduct, or otherwise to override fundamental rights or principles, the implied vires must necessarily be limited to conduct which does not do those things. The *vires* extends to the policy adopted by the Security Service.

c. Ground 4: The Claimants contend that "*the policy amounts to an unlawful de facto power to dispense with the criminal law.*" (§16 C Skel). The Security Service does not "*dispense*" with the criminal law. It does not confer any kind of immunity nor does it purport to make prosecutorial decisions, nor does its conduct have those effects. The policy is not an unlawful interference with the criminal justice systems of Northern Ireland and Scotland.

d. Grounds 5, 6 and 7: The Security Service is not able to "authorise" activity which would constitute a breach, by it, of Articles 2, 3, 5 or 6 ECHR (nor indeed of any other Articles). The case is that they do not do so. There has been and is no concession to the contrary.

14. The Respondents structure their submissions below in a different order to the numbered Grounds. They address first the issues relating to *vires* encompassing Grounds 3 and 4; then the basic compatibility of the procedures with the ECHR is dealt with next (Grounds 5-7); then issues relating to 'in accordance with law' (as an aspect of the ECHR issues) and secret policy are dealt with (Grounds 1 and 2).

15. Two points of a procedural nature should be dealt with:

    a. The Security Service has reviewed all available PiC forms since October 2000. Counsel to the Tribunal has selected PiCs which they consider may usefully be the subject of more detailed consideration by the Tribunal. Evidence has been filed in that connection by the Security Service. This is considered in detail in the entirely CLOSED skeleton.
    b. The Claimants rely on (i) recent articles in the Guardian newspaper in respect of Op Kenova/Stakeknife and (ii) the murder of Pat Finucane (§3 and §43, C Skel) to support the proposition that agent participation in criminality has led, in the past, to grave breaches of fundamental rights. The Respondents suggest that it is not helpful, or even appropriate, to expand the scope of the present litigation to include those two cases, both of which have been and/or are the subject of consideration by others. For the avoidance of doubt, the Respondents do not accept that the Security Service's "authorisation" of agent participation in criminality, as set out in the Guidelines and as evidenced by the entire body of PiCs since October 2000, has involved breaches of fundamental rights, grave or otherwise.

16. Finally, in relation to standing, at the hearing on 4 October 2018, the President of the Tribunal indicated (and the parties agreed) that this is a case in which the question of standing is intimately linked with the merits and so should not properly be determined as a threshold issue.[2] The Respondents submit that the Claimants lack standing in respect of their Human Rights claims. The Claimants (or each of them) are not "*victims*". They cannot show that, due to their personal situations, they are potentially at risk of being subject to the challenged measures (applying the test in *Zakharov v Russia* (2016) 63 EHRR 17, §171, as adopted by the Tribunal in *Human Rights Watch v Foreign and Commonwealth Office* [2016] UKIPTrib15 165-CH, §46). Put shortly, the Claimants are four NGOs, whose personal situations are not such that they will be subject to any agent's participation in criminality. They are neither co-conspirators or criminal actors themselves, nor are they, by virtue of their personal situations, at risk of

2 Transcript, p.3G-p.5D, **[OB/71]**

[redacted]

being victims of relevant crime. The Respondents further rely on the CLOSED submissions at [redacted].

II. FACTUAL AND STATUTORY BACKGROUND

Oversight

17. The statutory framework relating to the IS Commissioner and the IP Commissioner, and directions by the Prime Minister to those Commissioners, is uncontentious and is accurately set out in §23-24 C Skel.

18. There have been three successive directions to the Commissioner:

    a. The Prime Minister made such a direction on 22 August 2017, coming into effect on 1 September 2017 (the "2017 Direction"). It remains in force. It provides that "*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 authorisations issued in accordance with them.*" The 2017 Direction was published on 1 March 2018.[3]
    b. The 2017 Direction replaced a materially identical direction made on 27 November 2014 **[OB/52]** ("the 2014 Direction").
    c. The 2014 Direction replaced an earlier non-statutory direction made on 27 November 2012 ("the 2012 Direction"). It is in the bundles at **[OB/50]** and stated, so far as material, that:

> *"In the discharge of their function to protect national security, the Security Service has a long-standing policy for their agent handlers to agree to agents participating in crime, in circumstances where it is considered such involvement is necessary and proportionate in providing or maintaining access to intelligence that would allow the disruption of more serious crimes or threats to national security. ... I would like you to keep the application of this policy under review with respect to the necessity and proportionality of authorisations and to consider such related issues as you find appropriate. ... I would be grateful if you could include such matters in your annual report or*

[3] As to the publication of the 2017 Direction by the Prime Minister, this is accurately set out in §29 C Skel, save for the comment "*having failed in its attempt to strike out the claim*" to the extent that this implies that, had the proceedings been struck out, the Prime Minister would not have disclosed the direction.

[redacted]

otherwise bring issues to my attention. For the avoidance of doubt I should be clear 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."

19. It is submitted that (contrary to the contention at §§40-41, C Skel) that language in the 2012 Direction did not undermine the effectiveness of the oversight[4]:

    a. As well directing the Commissioner to consider the necessity and proportionality of authorisations, the Prime Minister specifically directed him to consider "*such related issues as you find appropriate*" and to "*include such matters in your annual report or otherwise bring issues to my attention*". Accordingly, the Commissioner was able to indicate, and would have indicated, if there were systemic issues which concerned him
    b. The review of the necessity and proportionality of individual authorisations would of course allow for the Commissioner to raise any concerns in respect of, for example, the particular conduct which had been authorised.
    c. As to the direction that the oversight "*would not provide endorsement of the legality of the policy*", this means that the Security Service cannot rely on the fact of oversight as indicating that the Commissioner's view is that the policy is lawful. It does not mean that the Commissioner is precluded from raising any concerns as to lawfulness which he might have.
    d. As to the direction that the Commissioner "*would not be asked to provide a view on whether any particular case should be referred to the prosecuting authorities*", the Commissioner would not be precluded from an offering such a view. He was merely not asked to provide one. In any event, the premise here is that authorisation has been given. In those circumstances, the appropriate course would be to deal with any concerns about it with those who granted it, not those who may have acted in reliance on it.

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[4] The same applies to the oversight following the statutory direction in 2014, to the extent that the scope of such oversight is properly to be construed by reference to the 2012 letter.

[redacted]

e. As to the direction that "*your oversight would not relate to any future consideration given by prosecuting authorities should that happen*", this is a correct indication of the proper scope of the Commissioner's oversight, namely that he could not oversee the decision-making of the prosecuting authorities.

f. It is submitted that, if the Commissioner formed the view that an "authorisation" should not have been granted, he should have (and would have) raised this with the Security Service. It does not follow that, in such a case, the CHIS must be prosecuted. The error, on this hypothesis, is the Security Service's and the CHIS should not be expected to bear the burden of that error.

20. Further, where the Commissioner has had concerns with the operation and application of the policy, he has made such concerns known to the Security Service and corrective action has been taken. This demonstrates the effectiveness of his oversight function.

The policy, practice and procedure

21. The Security Service relies on its detailed policy, practice and procedure. In terms of written policy and procedure, exhibited to the First Witness Statement of [redacted] were the following key documents:

MI5 Witness 1

a. the Guidelines **[OB/32]** [redacted]

d. Chapter 5 of the Legal Compliance Manual – Agent Running and Participation in Criminality **[OB/33]** [redacted]

22. As to Security Service practice, this is set out in some detail in §§21-35 of the Second Witness Statement of MI5 Witness 2 [redacted]; and appears from the PiC forms (both the indices and those PiC forms which have been disclosed). In overview:

[redacted]

[redacted]

[redacted]

d. Great importance is attached to providing appropriate training for all those involved with agent running and agent participation. [redacted] That course includes legal training on the HRA 1998 as well as a detailed briefing on how the Security Service approaches agent participation in criminality. [redacted], there are top-up courses every year, as well as access to legal and policy guidance [redacted].

[redacted] Four specific areas in the Claimants' Skeleton need to be responded to. **First,** [redacted]

[redacted]

24. **Secondly,** [redacted]

25. **Thirdly,** the Claimants rely on the fact that there is no requirement on the Security Service to disclose the criminal conduct to the police, CPS, PPSNI, Lord Advocate or similar body, [redacted]. The Claimants know that this is the position (§37, C Skel), albeit that the footnote they rely upon is inapt.[5] The Respondents have filed witness evidence on this issue from [redacted].

26. As to the position in England and Wales:

    a. The Memorandum of Understanding with the CPS for England and Wales **[OB/44]** [redacted] does not specifically concern agent participation in criminality. [redacted]

[5] The citations set out by the Claimants are by necessity incomplete, due to redaction of words in the OPEN version of the report. The complete text is: [redacted]

[redacted]

c. The CPS are aware of the Guidelines. The DPP was provided with a copy on 3rd September 2012.

27. So far as Northern Ireland is concerned:

a. There is a Protocol with PPSNI **[OB/74]** [redacted]. Again, it does not specifically concern agent participation in criminality. Unlike the MoU in England and Wales, it does not contain any express reference to "authorised" criminality. [redacted], the Security Service would adopt a similar approach in comparable situations in Northern Ireland to that set out in §25 of the MoU for England and Wales.

[redacted]

c. The PPSNI is aware of the existence of the Guidelines.

28. So far as Scotland is concerned:

a. There is a Memorandum of Understanding with the Crown Office and Procurator Fiscal Office **[OB/75]** [redacted]. Again, it does not specifically concern agent participation in criminality. Unlike the MoU in England and Wales, it does not contain any express reference to "authorised" criminality.

[redacted]

[redacted], the Security Service would adopt a similar approach in comparable situations in Scotland to that set out in §25 of the MoU for England and Wales.

[redacted]

c. The Lord Advocate is now aware of the existence of the Guidelines.

29. **Fourthly,** the Claimants are wrong to describe the scope of the Guidelines as having been subject to the "*usual mission creep*" (§39, C Skel). The Security Service has power to "authorise" agent participation in criminality across its statutory functions. As a matter of policy, there were previously two, essentially contemporaneous, policy documents (one in respect of terrorism cases **[OB/37]** and one in respect of serious crime **[OB/38]**), which were replaced with a single set of Guidelines. This is not indicative of an expansion of scope.

III. LEGAL BASIS FOR THE POLICY (Grounds 3 and 4)

30. The Security Service Act 1989 placed on a statutory footing an organisation which had formerly existed by virtue of the prerogative. From 1952 until 1989, its powers had been as set out in the Maxwell-Fyfe Directive.[6] The Directive provided, so far as material, as follows:

> *"The Security Service is part of the Defence Forces of the country. Its task is the Defence of the Realm as a whole, from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organisations whether directed from within or without the country, which may be judged to be subversive to the State.*
>
> *You will take special care to see that the work of the Security Service is strictly limited to what is necessary for the purposes of this task."*

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6 24 September 1952: a Directive from Sir David Maxwell Fyfe, then Home Secretary, to the Director General of the Security Service.

[redacted]

31. In authorising the Security Service to do what was necessary for the purpose of Defence of the Realm, the Maxwell-Fyfe Directive necessarily allowed for agents to operate, and for them to maintain their cover as an integral part of that. The Security Service has since its inception run agents; and agents have had to participate in conduct that might be or would be criminal as an integral part of their ability to operate. It cannot sensibly be said that there has never been any ability for agents to do so; or for the state (or Security Service in whatever incarnation over history) to operate a system in which agents do so. On the contrary, such a possibility has been a necessary part of agent cover for as long as agents have been operating. Agent running, and its necessary concomitants, have thus plainly been within the scope of the Maxwell-Fyfe directive since its promulgation and have been a necessary part of the Security Service's protective functions before that. The scope of the prerogative powers under which the Security Service used to operate thus must have, and did, encompass those powers/abilities.

32. The realism of Sir John Donaldson MR in *AG v Observer* in the Court of Appeal [1988] 2 WLR 805, 879H, is apposite:

> *"It would be a sad day for democracy and the rule of law if the service were ever to be considered to be above or exempt from the law of the land. And it is not. At any time any member of the service who breaks the law is liable to be prosecuted. But there is a need for some discretion and common sense. Let us suppose that the service has information which suggests that a spy may be operating from particular premises. It needs to have confirmation. It may well consider that, if he proves to be a spy, the interests of the nation are better served by letting him continue with his activities under surveillance and in ignorance that he has been detected than by arresting him. What is the service expected to do? A secret search of the premises is the obvious answer. Is this really "wrongdoing"?*
>
> ...
>
> *It may be that the time has come when Parliament should regularise the position of the service. It is certainly a tenable view. The alternative view, which is equally tenable, is that the public interest is better served by leaving the members of the service liable to prosecution for any breach of the law at the instance of a private individual or of a prosecuting authority, but may expect that prosecuting authorities will exercise a wise discretion and that in an appropriate case the Attorney-General would enter a nolle prosequi, justifying his action to Parliament if necessary. In so acting, the Attorney-General is not acting as a political minister or as a colleague of ministers. He acts personally and in a quasi-judicial capacity as representing the Crown (see article entitled "How the security services are bound by the rule of law" by Lord Hailsham in*

[redacted]

"The Independent", 3 February 1988). It is not for me to form or express any view on which is the most appropriate course to adopt in the interests of the security of the nation and the maintenance of the rule of law. However that problem is resolved, it is absurd to contend that any breach of the law, whatever its character, will constitute such "wrongdoing" as to deprive the service of the secrecy without which it could not possible function."

33. Parliament did choose to regularise the position of the Security Service. There is no indication that the intention of the Security Service Act 1989 was to strip away activity which the Service previously could perform. Indeed, especially given the plain and extremely serious national security consequences that would have flowed from a removal of the ability to participate in such conduct, and thus to operate safely or at all, it is inconceivable that that was Parliament's intention. Its intention was quite the reverse – to preserve the Security Service's ability to perform essentially the same functions (considered necessary for the protection of national security) but to place the legal basis for those functions on a statutory footing.

34. How did Parliament do so? The short answer is that it did so by creating the functions of the Service set out and controlled by the terms of s.1. They allowed the Security Service to continue to undertake its functions – plainly including running agents and doing things integral to doing so effectively and as safely as possible. The legislative technique, for obvious reason, is not to spell out each or even categories of Security Service activity and provide *vires* for them. Section 1 simply lists the functions of the Service, embedded within each of which must be *vires* to do what is necessary to perform those functions. But the core point is that there can be no proper basis for imputing an intention to Parliament, by this technique, to restrict the activities with which this case is concerned.

35. The technique is also evident from s.2, which obliges the Director General to ensure that there are "*arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by except so far as necessary for that purpose*". This presupposes that the Service has *vires* to obtain and disclose information where necessary for the proper discharge of its functions.

[redacted]

36. This is not a "nice to have" power, which would be sensible or desirable. Rather, it is critical. Without it, the statutory functions of the Security Service would be positively and seriously frustrated.

37. The approach of the House of Lords in *Ward v Commissioner of Police of the Metropolis and another* [2006] 1 AC 23 can be applied. In *Ward,* the House of Lords considered whether a magistrate had implied statutory power to impose conditions on a warrant, specifically to require that certain named individuals were present at its execution. Baroness Hale (with whom Lords Steyn, Hutton and Carswell agreed) held that several factors pointed strongly to the conclusion that there was no such implied power, in particular: statutory history; the drafting of the statute; and whether the power was necessary, rather than merely sensible or desirable (§20-24).

38. The Claimants rely on *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563 for the proposition that "necessary implication" means that it must be clear from the express language of the statute (§§103-104, C Skel). In response:

    a. In principle, that case concerned the implied overriding of the fundamental right of legal privilege, and was thus an application of the principle of legality and *ex p Simms* (see eg §§7-8 per Lord Hoffmann and §§44-45 per Lord Hobhouse), and so is not directly on point. Indeed, in *R (CPAG) v Secretary of State for Work and Pensions* [2011] 2 AC 15, Lord Dyson expressly held that, where the question does not engage fundamental rights or the principle of legality, the "high hurdle" set by Lord Hobhouse in *Morgan Grenfell* does not apply (§31). In any event, in considering the effect and meaning of the phrase "necessary implication", it is necessary also to consider the statement of principles set out by the Supreme Court in *R (Black) v Secretary of State for Justice* [2018] AC 215 esp at para 36.

    b. Whatever the precise nature of the test, it is met here. The express language of s.1 makes it clear that the Security Service has the functions it has, which – in a statute which contained only one express *vires*, namely the s.3 power for the Secretary of State to grant warrants – must mean that it has the powers necessary to perform those functions. Otherwise, the Security Service would have no *vires* at all.

[redacted]

39. The Security Service Act 1989 did not provide express immunity for agents participating in acts which are otherwise unlawful. However, nothing can be inferred from that. An attempt to suggest that it was to be inferred that Parliament intended to restrict agents' activities so that they could under no circumstances participate in possible criminal conduct would run straight into the sheer improbability of that. Parliament can be taken to have well appreciated the importance of agents to the Security Service's work.

40. The Security Service does not purport to, and could not, offer immunity from criminal liability. They are not purporting to exercise a s.7-type power in respect of acts within the British Islands. Rather, as set out in §9 of the Guidelines, the "authorisation" will be the Service's 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. In particular, the authorisation process and associated records may form the basis of representations by the Service to the prosecuting authorities that prosecution is not in the public interest.

41. It is submitted that the policy of seeking to consider and engage with the very real possibility that an agent may need to participate in conduct that might be criminal cannot be viewed in isolation. It is, as already noted, plainly both appropriate and responsible for that process to be undertaken in the context of the performance of the Security Service's functions. That is because they have to run agents in order to perform those functions effectively in the protection of national security (as is required by the Act); and agents [redacted] reporting on serious terrorist organisations will inevitably be drawn into criminal activities of those organisations and their members.

42. This consideration and its outcome is not the same as granting *de facto* immunity. Immunity is not granted *de jure* or *de facto.* A prosecution remains possible. That it is likely that a prosecution would not in fact be mounted in very many of the cases in which authorisation is granted does not create immunity of any kind. The likelihood is a reflection of the fact that there is nothing objectionable in the present context with the risks of criminality being properly considered or with the various public interest factors being recorded and rendering a prosecution inappropriate in many such cases. The

argument that the prosecutor does not have opportunity to exercise his or her discretion is addressed in more detail in the specific context of Ground 4 below.

43. Similarly, the Respondents do not say that "authorisations" immunise, or otherwise encompass, conduct which would otherwise be a breach by the Security Service of fundamental rights: see Grounds 5-7 below (and the CLOSED submissions on the facts). Accordingly, the reliance on *Simms*, and in particular on *A (No.2),* is inapposite. The principle of legality is not engaged, since there is no overriding of fundamental rights or principles.

44. Under Ground 4, the Claimants contend **first** that the Security Service dispenses with the criminal law.

45. The Executive has no power to dispense with the criminal law. Article 1 of the Bill of Rights of 1689 abolished (or alternatively confirmed the non-existence of) the power that King James II had purported to exercise when suspending penal law in religious matters.[7] In *R(Pretty) v DPP* [2002] 1 AC 800, which Lord Bingham said that the DPP had no power to give a "*proleptic grant of immunity from prosecution*" (§39). This was cited with approval by Lord Sumption in *R(Nicklinson) v DPP* [2015] AC 657.

46. Further, as the Claimants now acknowledge (§109 C Skel), a prosecution does not always follow acts which amount to a criminal offence. There is ample authority for this. See eg *Smedleys Lt v Breed* [1974] AC 839, 856, in which Viscount Dilhorne held that:

> "*In 1951 the question was raised whether it was not a basic principle of the rule of law that the operation of the law is automatic where an offence is known or suspected. The then Attorney general, Sir Hartley Shawcross, said: "It has never been the rule of this country – I hope it never will be – that criminal offences must automatically be the subject of a prosecution.""*

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[7] As to the position in Scotland, as per §44 of the judgment of the majority of the Supreme Court in *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5: "*In Scotland, the Claim of Right 1689 was to the same effect, providing that "all Proclamationes asserting ane absolute power to Cass [ie to quash] annulle and Dissable lawes...are Contrair to Law".*

47. Thus, the CPS code has two stages: first, the evidential test; second, the public interest test. It is unobjectionable that there will not be prosecution of crimes where this is contrary to the public interest. This is not an Executive dispensation from the criminal law. Indeed, Parliament should be taken to legislate against the background of that well-established principle, i.e. that although an offence is on the statute book, it will only prosecuted where it is in the public interest to do so.

48. Whilst of course the CPS cannot reassure any particular individual, before the commission of a crime, that they will not be prosecuted (i.e. offer a "*proleptic grant of immunity*"), nevertheless the CPS can publish a detailed policy document setting out how their discretion will be exercised. Indeed, such a document may be mandatory: see *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345 and *Nicklinson.* Drawing the line between the two may be difficult. As Lord Sumption said in *Nicklinson* (§241):

> "*There is a fine line between, on the one hand, explaining how the discretion is exercised by reference to factors what would tend for or against prosecution; and, on the other hand, writing a charter of exemptions to guide those who are contemplating breaking the law and wish to know how far they can count on impunity in doing so.*"

49. In Scotland, the Lord Advocate (or prosecutors acting on his behalf) will apply the Scottish Prosecutorial Code. As summarised by the Lord President in *Ross v Lord Advocate* 2016 SC 502, under that Code: "*There is a two stage test. The first is the evidential stage. This concerns itself with the legal sufficiency of the evidence. The second is the public interest stage. This addresses whether, even if there is sufficiency, it is in the public interest to prosecute. This involves the exercise of a discretion. The Code lists thirteen factors to take into account. These include ... the motive for the crime.*" (§7) In *Ross v Lord Advocate,* the Lord Advocate had supplemented the Code with public statements specifically concerning prosecution of those who assist another to commit suicide. In particular, given the Scots law position that it is not a crime to assist a person to commit suicide (for example, by helping a person to travel to a place at which he or she will commit suicide), and rather that assistance will only be prosecuted where it constitutes homicide (i.e. the individual causes the death of another), the Lord Advocate indicated that it would almost always be in the public interest to prosecute.

50. So too in Northern Ireland, the DPPNI applies a two stage test: first, is the evidential threshold met, namely whether there is a reasonable prospect of conviction; secondly, is it in the public interest to prosecute.

51. Where the Tribunal is considering what the Security Service's policy and practice is, its inquiry no doubt would not end with the stated purpose of the policy. However, the Claimants are wrong to contend (if this is indeed their argument) that this is a particular principle which applies to the "dispensing power" prohibition. In particular, the Claimants' reliance on *King v the London County Council* [1931] 2 KB 21 is misplaced (§§47-48 C Skel). The Claimants say that, in that case, the Council had not actively granted immunity to the individual, but rather had simply turned a blind eye and acquiesced in the breach. But that does not marry with the summary of the facts recorded in the judgment of Scrutton LJ. He said

> *"They grant to the owner of a cinematograph theatre a licence on the terms that he shall not open on Sunday, and they then frame an elaborate series of rules providing for his applying for permission to open on Sundays... but they make it a condition of anything being done in his favour under the application for permission to open on Sunday, that he shall pay money to a charitable institution; and when he has applied and is ready to pay that money, then they do not grant him in form the permission he asks for, but they say: " we will not at present prosecute, provided you pay money".... According to the view of the County Council, they are not granting, and never do grant, permission to open on Sunday; they simply say. "We will not at present prosecute you if you will pay money". "*

London County Council was thereby purporting to grant immunity. If the Council had subsequently sought to prosecute the cinema, it would be expected that the cinema could point to the undertaking not to prosecute and the payment of money in support.

52. The Claimants also seek to rely on the statement in *R (Nicklinson) v Ministry of Justice* [2015] AC 657, §241, that an executive discretion must not be allowed to "*prevail over*" the law enacted by Parliament (§48, C Skel). Of course that is correct, but it does not assist in determining what constitutes "*prevailing over*".

53. The Claimants rely on *R(Miller) v Prime Minister* [2019] 3 WLR 589 at §50 (§49 C Skel). In that paragraph, the Supreme Court held that the relevant limit upon the power

to prorogue was whether the prorogation had the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions. That principle has no relevance to the present case.

54. Finally, the Claimants rely on the fact that "*the Bill of Rights not only prohibits the pretended power of "suspending laws", but also the pretended power of suspending the "execution of laws"*"" (§114, C Skel). But this distinction is between saying that a law is not a law any more (so that a person doing the relevant thing will not be in breach of the law) and saying that a person may breach the law but will not be prosecuted, or otherwise enforced against, for doing so. It does not mean that something less than immunity will do.

55. To revert to the facts, the Security Service does not, and could not, offer any immunity or dispensation from the criminal law. If the crimes become known to the prosecutorial authorities, those authorities will exercise their discretion in the normal way. The complaint that the Security Service does not inform the prosecutorial authorities of the "authorisations" is addressed in §§59-67 below

56. Under Ground 4, the Claimants contend **secondly** that the Security Service usurps the proper functions of the prosecution and/or the police.

57. Decisions to prosecute are of course only for the relevant prosecutor. However, the Security Service's "authorisations" are not prosecutorial decisions. Instead, they are material which could, and should, be taken into account by the relevant prosecutor. *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756 and the "*Shawcross Convention*" fully support the prosecutor having regard to the Security Service's "authorisations". As Lord Bingham held in *Corner House* (§6):

> "*On 2 December 2005 the Attorney General and the Director decided that it would be appropriate to invite the views of other Government ministers, in order to acquaint themselves with all the relevant considerations, so as to enable them to assess whether it was contrary to the public interest for the investigation to proceed. This practice is familiarly known as a "Shawcross exercise", since it is based on a statement made by Sir Hartley Shawcross QC, then the Attorney General, in the House of Commons on 29 January 1951. The effect of the statement was that when deciding whether or not it is in the public interest to*

[redacted]

prosecute in a case where there is sufficient evidence to do so the Attorney General may, if he chooses, sound opinion among his ministerial colleagues, but that the ultimate decision rests with him alone and he is not to be put under pressure in the matter by his colleagues."

58. The function of the "authorisations" in prosecutorial decision-making is entirely in harmony with this approach. For example, where the Security Service takes a view on what intelligence might be acquired from a particular source and how valuable to the public interest it might be, or indeed what threat to national security would be posed by not acquiring that intelligence, it is entirely proper for a prosecutor to rely upon the Security Service's judgment. Baroness Hale in *Corner House,* §54, held that "*the Director was entitled to rely upon the judgment of others as to the existence of such a risk [to "British lives on British streets"]. There are many other factors in a prosecutor's exercise of discretion as to which he may have to rely on the advice of others. ...in the end, there are some things upon which others are more expert than he could ever be.*" In respect of other issues which arise in the prosecutor's polycentric decision-making, of course he will be far better placed to take a view.

59. As to the police, in England and Wales and in Northern Ireland, the decision whether to investigate crimes lies with the police[8]. The courts recognise that the police are not under a duty to investigate all crimes that come to their attention. The police might take decisions to prioritise investigation of certain crimes over others (for example burglary over obscene publications), and the court will not interfere in this: see *R v Commissioner of Police of the Metropolis ex p Blackburn* [1968] 2 QB 118. The Claimants say that the police are independent from the Executive (§§51-53, C Skel). This is uncontentious. But again, in "authorising" participation in criminality which is not disclosed to the police[9] the Security Service do not usurp the functions of the police.

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8 In Northern Ireland, this is subject to s.35(5) of the Justice Act (Northern Ireland) 2002, which provides that "*The Chief Constable of the Police Service of Northern Ireland must, at the request of the Director [of Public Prosecutions], ascertain and give to the Director: (a) information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland; and (b) information appearing to the Director to be necessary for the exercise of his functions.*"

9 [redacted]

60. The crux of the Claimants' complaint is based on the proposition that (in the Claimants' words) "*the Respondents never in fact notify either the police or the prosecutor of the conduct that they have authorised*" (§110, C Skel).

61. The Security Service has no obligation to inform the relevant prosecutorial authorities or police where a crime has been committed. Save for s.5 Criminal Law (Northern Ireland) Act 1967 ("CL(NI)A 1967"), the Claimants identify no authority to suggest that there is such an obligation.

62. As a matter of Scots Law, there has never been any common law or statutory obligation to inform the police or a prosecutor of a crime (see *Sykes v DPP* [1962] AC 528 – see especially the citation of the Scots cases in the argument at 536).

63. As a matter of the law of England and Wales, the House of Lords in *Sykes* confirmed the existence of a common law offence of "*misprision of felony*" (see in particular Lord Denning at 555 and 563-564). It comprised (i) knowledge that a felony had been committed by someone else and (ii) concealment of that knowledge from the proper authorities. So too did the common law recognise the offence of "*compounding a felony*", which was an agreement not to disclose the felony in return for some benefit (561).

64. By the Criminal Law Act 1967 ("CLA 1967") in England and Wales and the CL(NI)A 1967 in Northern Ireland, the distinction between felonies and misdemeanours was abolished.

65. Section 5 of the CLA 1967, entitled "*penalties for concealing offences or giving false information*", provides as follows:

> "*(1) Where a person has committed a relevant offence, any other person who, knowing or believing that the offence, or some other relevant offence, has been committed, and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury, shall be liable on conviction on indictment to imprisonment for not more than two years.*
> ...

[redacted]

(5) The compounding of an offence other than treason shall not be an offence otherwise than under this section."

66. Accordingly, in England and Wales, there is no longer any offence at common law in respect of misprision or compounding of a felony, and the only available offence (save in respect of compounding treason) is that set out in s.5 CLA 1967. Even were s.5 to apply to the Crown, its constituent elements are not made out in respect of relevant offences[10] "authorised" pursuant to the Guidelines. Most notably, the Security Service does not receive any consideration.

67. Turning to Northern Ireland, section 5 CL(NI)A 1967 is entitled "*penalties for concealing offences etc*". It provides as follows:

> *"(1) Subject to the succeeding provisions of this section, where a person has committed a relevant offence, it shall be the duty of every other 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 that offence;*
>
> *to give that information, within a reasonable time, to a constable and if, without reasonable excuse, he fails to do so he shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment according to the gravity of the offence about which he does not give information...*
>
> *...*
>
> *(5) The compounding of an offence other than treason shall not be an offence otherwise than under this section."*

68. Accordingly, in Northern Ireland, there is no offence at common law in respect of misprision or compounding of a felony, and the only available offence (save in respect of compounding treason) is that set out in s.5 CL(NI)A 1967. Even were s.5 to apply to the Crown, its constituent elements are not made out in respect of relevant offences[11] "authorised" pursuant to the Guidelines. In particular:

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10 "*Relevant offences*" are defined in s.4(1A) CLA 1967 as "(a*) an offence for which the sentence is fixed by law, (b) an offence for which a person of 18 years or over (not previously convicted) may be sentenced to imprisonment for a term of five years (or might be so sentenced but for the restrictions imposed by Section 33 of the Magistrates' Courts Act 1980)".*

11 "*Relevant offences*" are defined identically in the CL(NI)A 1967 as in the CLA 1967, save that the reference to s.33 Magistrates Courts Act 1980 is to Article 46(4) of the Magistrates' Courts (Northern Ireland) Order 1981.

[redacted]

a. The information which is known by the Security Service is not "*likely to secure, or be of material assistance in securing, the apprehension, prosecution or conviction of any person for that offence*". Indeed, whilst the fact of the crime (if otherwise unknown to the police) will assist in its detection, the information that a CHIS participated in that crime in the public interest is not likely to lead to that person's prosecution or conviction. The very contrary is true.[12]

b. There is "*reasonable excuse*" for non-disclosure. The conduct involves agents reporting covertly on individuals and organisations which pose a threat to national security. Their work is [redacted] vitally important [redacted]

c. The Claimants say that both whether the information is likely to lead to a conviction and whether there is reasonable excuse for non-disclosure are "*matters for the consideration of the prosecutor*" (§111, C Skel). The premise appears to be that the Security Service could decide not to inform the police of the relevant crime, but then self-report to the prosecutor for potential breach of s.5, with sufficient information about the relevant unreported crime to allow the prosecutor to form a view on those questions. This is unreal. Just as when any statutory defence arises, or where any offence has constituent elements, a person is entitled to regulate their conduct accordingly, without self-reporting to the prosecutor.

69. Accordingly, there is no obligation – under the laws of England and Wales, Northern Ireland and Scotland – on the Security Service to inform the police or the prosecuting authorities of "authorised" criminal conduct by agents.[13]

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12 [redacted]

13 There may of course be different professional and policy obligations which apply to civil servants who become aware of crimes in other contexts. See, in this regard, the reference to "*Information about suspected crimes*" in Directory of Civil Service Guidance Volume 1: Guidance Summaries 33.

[redacted]

70. Turning to the way the Claimants now put their case, they say the question whether the Security Service is obliged to disclose "authorised" criminal conduct is a "red herring" (§112, C Skel). They say that "*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*" (§113, C Skel). They conclude that the effect of the policy is that the Security Service has "*arrogated to itself the roles of both the independent prosecutor and the police. That appears to be the true purpose of the policy and is, in any event, its inevitable effect*" (§114, C Skel).

71. In the Respondents' submission, that is simply wrong. So far as prosecution is concerned, there is no de facto immunity offered by the Security Service and, while the Security service may make representations [in accordance with paragraph 9 – see paragraph 40 above] that prosecution is not in the public interest, this is entirely proper (and does not have the effect of improperly influencing prosecutorial decision making). So far as the police is concerned, there is no impediment posed by the Security Service to the proper exercise by the police of their functions. Accordingly, the Claimants' complaints are misplaced.

72. Finally, lest these issues raise their heads again, the Respondents address four arguments which were made on the Claimants' pleaded case but which do not feature in the Claimants' skeleton argument:

    a. The assertion in §130(f) RASG that the Security Service is circumventing s.71 of the Serious Organised Crime and Police Act 2005 is wrong. Firstly, the Security Service does not, and could not, offer immunity. Secondly, s.71 SOCPA does not empower "specified prosecutors" to provide immunity in respect of future crimes. Rather, its function is limited to offering an offender, who has already committed a crime, immunity in return for assistance. The prosecutorial authorities of course had power at common law to grant this sort of *post hoc* immunity in any event.
    b. As to §130(g) RASG, the Memoranda of Understanding with the CPS, PPSNI and the Crown Office and Procurator Fiscal Office are not directly on point. [redacted]

c. As to §130(h) RASG, the Respondents do not say that the oversight of the Commissioner constitutes a prosecutorial decision. The Respondents do not know whether the Claimants positively assert, or deny, that there is a legal obligation on the Commissioner to inform the police or prosecutor of crimes covered by those "authorisations". For example, the Respondents do not know whether the Claimants assert that the Commissioner commits an offence under s.5 CL(NI)A 1967 or s.5 CLA 1967 in not doing so.

d. As to §130(i), *R v Incedal* [2016] 1 WLR 1767, §61, is not relevant. It concerns the DPP having decided to proceed with a prosecution, in circumstances in which a court has rejected national security concerns and has held that certain information or evidence be heard in public. In such a case, the Security Service is obliged to provide the evidence required to the DPP. The Security Service must abide by the decision of the DPP to continue the prosecution, even if it disagrees with it. Those circumstances are entirely unlike those in the present case. There is no suggestion in the present case that, were the DPP to require information about a crime that has been "authorised", the Security Service would refuse to provide it.

73. The Claimants contend **thirdly** that the policy is an interference with the criminal justice systems of Northern Ireland and Scotland. They say that their complaints above are "*a fortiori in respect of Scotland and Northern Ireland*" (§115, C Skel). The Security Service does not understand why that is said to be so. In particular:

a. It appears to be common ground that the Scottish criminal justice system is entirely separate from that which applies in England and Wales and Northern Ireland (see *Montgomery v HM Advocate* [2003] 1 AC 641 and *R v Manchester Stipendiary Magistrate Ex p Granada Television* [2001] 1 AC 300: §54, C Skeleton). However, the Respondents do not understand why this means that the Security Service's policy is said to impact particularly on the Lord Advocate. For the avoidance of doubt, the Security Service is UK-wide (and so the words "Westminster executive" in §54 C Skel are perhaps inaccurate).

b. It is also common ground that there are some differences between the criminal legal system in England and Wales and that in Northern Ireland (§56, C Skel).

[redacted]

Again, the Respondents do not understand why the Security Service's policy is said to impact particularly on the PPSNI as a consequence.

74. The Claimants, in their Skeleton, only rely on the fact that the Security Service does not identify (and in fact is unable to identify) the precise date on which the Lord Advocate and the PPSNI became aware of the Guidelines (§115, C Skel). If that is the totality of their complaint, the Security Service response is that this does not render the policy unlawful.

IV. THE ECHR (Grounds 5, 6 and 7)

75. The Respondents accept the following:

a. The Security Service is not able to "authorise" activity which would constitute a breach by it of Articles 2, 3, 5 or 6 of the Convention (nor indeed of any other Articles of the Convention).
b. Oversight by the Commissioner would not discharge any obligation for a person arrested or detained to be brought promptly before a judge or other officer authorised by law to exercise judicial power (as per Article 5(3)) nor would it constitute the taking of proceedings by a person in order to have the lawfulness of his detention decided speedily by a court (as per Article 5(4)).
c. Oversight by the Commissioner would not discharge any investigative obligations which arise under Articles 2, 3 and 5 of the Convention.

76. The key question therefore is whether, despite not purporting to do so, the Security Service does breach Convention rights in this way[14]. That raises novel questions of law. As to the facts, the Security Service has provided the Tribunal with information about all crimes "authorised" since 2000. As suggested in §99 Response, Counsel to

[14] The Claimants now say that "*It appears that Ground 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*" (§18 C Skel). This is wrong. The Respondents make no such concession. This is because the Respondents do not place the suggested reliance on the role of the Commissioner (i.e. they do not say that there are deprivations of liberty in respect of which the Commissioner's oversight constitutes the relevant procedural safeguards, nor do they say that investigative obligations arise in respect of which the Commissioner's oversight discharges those obligations).

[redacted]

the Tribunal has selected some PiCs to focus upon, in respect of which the Respondents have filed further evidence. The CLOSED skeleton argument addresses the facts of those PiCs. It is hoped that this will allow for the case-specific complexities for each individual instance of "authorisation" to be considered, which the Respondents anticipate will be more useful than reasoning by reference to abstract hypothetical scenarios.

The principled approach

77. The first set of points relates to the question of state responsibility. There is a world of difference between the present case and conventional cases which involve State conduct. The present case concerns a context in which there are serious wrongdoers, in particular terrorists, who may contemplate a range of conduct which includes loss of life and limb. The State, in tasking CHIS in relation to that conduct, is not the instigator of that activity and cannot be treated as somehow responsible for it. [redacted] The whole point of the agent involvement is to avoid loss of life and limb. [redacted] It would be unreal to hold the State responsible [redacted]

78. There is no ECtHR case which considers the issues raised by the present challenge. A test of "*acquiescence*" in a breach, as is sometimes present in the cases[15], is inapposite. Indeed, to the extent that "*acquiescence*" is linked to creating "*the appearance of official approval for the attackers' actions*" (§132, *Burlya v Ukraine*) or a "*climate of impunity*" (§145, *Begheluri v Georgia,* 28490/02), the very opposite is true in this case.

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15 E.g. *Burlya v Ukraine* (App. No. 3289/10, judgment 6 February 2019, §119). The Claimants rely on *Al Nashiri v Romania* (2019) EHRR 3 for the proposition that test of acquiescence is part of the Court's "settled case-law" (§118 C Skel). But the full citation from *Al Nashiri* is: "*The Court reiterates that, in accordance with its settled case-law, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities*" (emphasis added). In contrast, in *Burlya,* the Court held that acquiescence by the police in acts of private individuals "*may*" engage the State's responsibility.

[redacted]

Were anyone to know about the involvement of the CHIS, it would not give the appearance that the State approved the terrorist conduct or that terrorists could act with impunity. Rather the ultimate and fundamental objective is to prevent and disrupt such threats.

79. The test formulated in *Reira Blume v Spain* (App No. 37680/97) may be more apposite, namely a test of decisive causal link. In that case, the ECtHR said "*It is therefore necessary to consider the part played by the Catalan authorities in the deprivation of liberty complained of by the applicants and to determine its extent. In other words, it must be ascertained whether, as the applicants maintained, the contribution of the Catalan police had been so decisive that without it the deprivation of liberty would not have occurred.*" (§32, emphasis added). The ECtHR concluded that "*...the national authorities at all times acquiesced in the applicants' loss of liberty. While it is true that it was the applicants' families and the Pro Juventud association that bore the direct and immediate responsibility for the supervision of the applicants during their ten days' loss of liberty, it is equally true that without the active cooperation of the Catalan authorities the deprivation of liberty could not have taken place.*" (§35, emphasis added). Such a test would mean that the Security Service would be held responsible for conduct which it had instigated and decisively caused.[16] But in any event, it is critical to recognise the unusual nature of the limited State control over the activity with which its agents may become linked (and even that link may be peripheral).

80. The second set of points relates to negative v positive obligations. *Osman v the UK* 29 EHRR 245 is important in this context. The ECtHR held that the State would breach Article 2 where "*the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*" (§115). In *Re Scappaticci's application for judicial review* (2003) NIQB 56, Carswell LCJ held that the State might legitimately take into account national security concerns

[16] See similarly §111 of *Begheluri*: "*Even if the Court accepts in part the Government's claim that the Orthodox extremist group that led the attack of 8 September 2000 was made up of private individuals, it is still of the opinion ... that the attack concerned would have been impossible without the involvement, connivance, or at least acquiescence of the competent authorities.*"

[redacted]

and risk to others when determining what would be a proportionate response to such a risk (§12). This is an example of the Convention jurisprudence responding to the realities of criminal acts of third persons and determining the appropriate (and limited) extent of State responsibility in that regard. More importantly, it specifically acknowledges the existence of the substantive Article 2 (and Article 3) obligations in certain circumstances on the state to take positive operational steps to protect life (or protect against Article 3 wrongdoing). [redacted]

81. The context of the activity will be of central importance. For example, in respect of Article 3,[17] it is of course well-established that ill-treatment for which the State is responsible must attain a minimum level of severity if it is to fall within the scope of Article 3. When assessing whether that level has been reached:

a. as the ECtHR held in *Soering v United Kingdom* (1989) 11 EHRR 439, it is

> "*in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.*" (§100)

b. as the Grand Chamber held in *Bouyid v Belgium* (App No 23380/09):

> "*Further factors include the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it (compare, inter alia, Aksoy v Turkey, 18 December 1996, §64, Reports 1996-VI; Egmez v Cyprus, no. 30873/96, §78, ECHR 2000-XII; and Krastanov v Bulgaria, no.50222/99, §53, 30 September 2004; see also, among other authorities, Gafgen, §88, and El-Masri, §196, ...) although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3 (see, among other authorities, V v the United Kingdom [GC] no.24888/94, §71, ECHR 19999-IX, and Svinarenko and Slyadnev, ..., §114). Regard must also be had to the context in which the ill-treatment was inflicted, such as an*

[17] So too must context be relevant to, for example, the making of a threat to life from one member of a terrorist cell to another, and to the definition of what constitutes a deprivation of liberty (see the kettling case of *Austin v UK* (App No 39692/09, §§58-59)).

[redacted]

atmosphere of heightened tension and emotions (compare, for example, Selmouni, §104, and Egmex, §78,...; see also, among other authorities, Gafgen,..., §88).

c. By way of example:

i. In *Bouyid*, the assault by police officers was in breach of Article 3 since it "*did not correspond to recourse to physical force that had been made strictly necessary by [the applicants'] conduct*" (§111);

ii. In *Wainwright v United Kingdom* App No. 12350/04, (2007) 44 EHRR 40, the Court held that a strip or intimate body search "*carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose*" may be compatible with Article 3 (§42).

iii. In *Henaf v France* 65436/01, 40 EHRR 44 (§48), the Court noted that "*handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary*".

iv. In *Ramirez Sanchez v France* 59450/00, (2007) EHRR 49the Grand Chamber held that the solitary confinement of the applicant ("Carlos the Jackal") for a period of 8 years and 2 months did not reach the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3, not least given "his character and the danger he poses" (§150).

82. Accordingly, whilst a breach of Article 3 cannot be justified, the assessment of whether conduct breaches Article 3 in the first place includes consideration of context, purpose and necessity. Thus, activity which carries with it an implicit threat of violence, which might constitute the infliction of degrading treatment if conducted by a police officer towards a person in custody for the purposes of intimidation, might constitute nothing of the sort in the context of CHIS conduct [redacted].

83. In relation to investigative obligations under for example Articles 2 and 3, such obligations are not triggered unless there is at least an arguable violation of the substantive obligations imposed by those Articles. In normal cases, in which this debate occurs, the substantive obligations in question are the state's own protective obligations

[redacted]

under *Osman*. As already indicated, in the present context, there can be no question of any such breach – indeed, quite the reverse: [redacted].

84. In relation to Article 5, it is submitted that there would be no deprivation of liberty for which the state is responsible. Indeed, the *Austin* case provides positive support for the importance of context in assessing even apparently unqualified rights.

85. As to the alleged breach of Article 6, in §128(d) C Skel, the Claimants allege that there will be a breach of Article 6, to the extent that there is a risk of an unfair trial. They rely, in particular, on *Texeira de Castro v Portugal* (1999) 28 EHRR 101 and *R v Looseley* [2001] 1 WLR 2060. In response:

a. The "authorisation" of agent participation in criminality does not, in itself, give rise to a risk of an unfair trial.
b. Whether there is such a risk depends on other events and other decisions, not least (i) whether anyone else commits a crime, (ii) what the circumstances of that crime were (in particular whether and how the agent contributed to that crime occurring), (iii) whether there will be any prosecution; and (iv) the decision of the Crown Court judge (or other judge) presiding over any trial.
c. In particular, once a prosecution is underway the full rigours of disclosure would apply, as per the Criminal Procedures and Investigations Act 1996 in England and Wales and Northern Ireland and the Criminal Justice and Licensing (Scotland) Act 2010 in Scotland. [redacted].
d. Further, any risk of unfairness can ultimately be prevented by the Crown Court (or other) Judge staying the proceedings (as per *Looseley*).
e. [redacted]

18 [redacted]

[redacted]

86. Accordingly, in the Respondents' submission, the Guidelines and the "authorisations" do not risk breaching Article 6.

The PiCs

[There is here a section of about [redacted] analysing the detail of the PiCs together with an index. This is in a separate document for ease of circulation and storage.]

Conclusion

87. In conclusion, in none of these PiCs has the Security Service breached any ECHR rights. Rather than the State causing or being responsible for threats to life (for example), [redacted]. Any such result would be an entire failure to meet the Security Service's statutory functions, including the protection of national security, in particular against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means. It would further be a failure to safeguard the rights of the very people within the UK which, under Article 1 ECHR, the UK has undertaken to protect.

V. IN ACCORDANCE WITH LAW – PUBLISHING THE POLICY (Grounds 1 and 2)

88. The Claimants posit five factual phases, as set out in the table under §80 C Skel. Essentially, the first phase ends in 2012 with the establishment of the Commissioner's oversight. The second phase concerns the period in which that oversight was pursuant to the 2012 Direction. The third phase concerns the period in which the oversight was pursuant to the 2014 Direction. The fourth phase concerns the period in which the oversight was pursuant to the 2017 Direction, before it was published. The fifth phase concerns the period from publication of the 2017 Direction to the present, and includes the publication of the redacted Guidelines (and other aspects of the policy). The Claimants say that, in each phase, the policy has not been in accordance with the law. This includes the present position (§88 C Skel), despite the fact that the Guidelines have now been through the opening up process and (where necessary) this Tribunal has considered the national security reasons for continued non-publication.

Legal principles

89. §62 of *Privacy International v Secretary of State for Foreign & Commonwealth Affairs* [2017] All ER 647 is a useful summary of the requirements of "*in accordance with law*" as it applied to that case. It summarises earlier judgments, in particular *Liberty 1* [2015] 3 All ER 142 (which the Respondents relied upon in their Response, in particular §§38 and 41) and *Greennet* [2016] UKIP Trib 14_85-CH (which the Respondents also relied upon in their Response, in particular §82).

90. There are, it appears, two points of contention between the parties as to the applicable principles.

91. **First**, although it is uncontroversial that the requirements of "*in accordance with law*" vary depending on the circumstances of the case, the parties disagree as to the direction of that variation in the present case.

    a. In *Liberty 1* [2015] 3 All ER, the parties accepted that the ECtHR jurisprudence places special emphasis on and has developed bespoke principles for a context involving interception (§35). In such cases, strict requirements laid down by the ECtHR in *Weber and Saravia v Germany* (2008) 46 EHRR 5, §95 apply, such

[redacted]

as the publication of the categories of people liable to have their phone tapped (§33). In *Liberty 1* the Tribunal held that, where the State obtained information (including intercept information) from another State, a lesser standard would apply (§§36-37). The Respondents submit that the circumstances of the present case are even further removed from State interception. In particular, the agent's conduct is, by its very nature, highly targeted and characterised by a close nexus with high value intelligence. Indeed, it is frequently responsive to the position on the ground (and indeed the most obvious individuals who will be affected by the conduct are the criminals and terrorists with whom the agent is maintaining a covert relationship). There is no necessary or appropriate transfer between the bespoke interception principles and the present context.

b. The Claimants say that there is a greater potential for abuse in the present case (§82, C Skel). This is said to arise because the relevant conduct is undertaken by third parties rather than agents of the state (which appears also to be reflected in the use of the word "outsourced" in §10, C Skel).[19] The Respondents dispute this. The principle is not supported by any authority. There is no greater potential for abuse given the points made in the previous sub-paragraph.

c. The Claimants also say (§82(b) C Skel) that in advancing this argument the Respondents impermissibly seek to distinguish between deserving and undeserving victims for Convention purposes. A criminal or terrorist could not bring a claim for breach of his Article 8 rights on the basis that there was inadequate publication of the policies concerning CHIS. However, the point is that the present case concerns activity which is by its very nature targeted, and where (applying a *Weber*-style approach of identifying the affected categories of person) the most obviously affected category is the criminals and terrorists with whom the CHIS is maintaining a covert relationship. There is no need to further sign-post to such individuals that they are most likely to be affected by CHIS activity.

19 [redacted]

92. **Secondly**, the Respondents expressly relied, in §46 Response, on §82 of *Greennet*:

> *"[a] conclusion that procedural requirements, or the publication of them, can be improved (i) does not have the necessary consequence that there has prior thereto been insufficient compliance with Weber... and (ii) does not constitute such a material non-compliance as to create a contravention of art.8. This Tribunal sees it as an important by-product of the exercise of its statutory functions to encourage continuing improvement in the procedures adopted by the Intelligence Agencies, and their publication (and indeed such improvements took place as a consequence of our judgments in Liberty/Privacy No 1, Liberty/Privacy No 2 and Belhadj v Security Service [2014] UKIPTrib 13_132-9H), but it does not conclude that it is necessary, every time an inadequacy, particularly an inadequate publication, is identified, to conclude that that renders all previous conduct by the Respondents unlawful"*

The IPT in *Privacy* expressly endorsed this paragraph of *Greennet* (and set it out again) in §62.

Application to the facts

93. The Claimants essentially say that the earlier non-publication of the Prime Minister's directions to the Commissioners and of the policy means that the policy was not in accordance with law (and indeed that this remains the case due to the redactions to the Guidelines). The Claimants also rely on the lack of Commissioner oversight until 2012 and, it is understood, on a posited distinction between oversight under the 2012, 2014 and 2017 Directions. The Respondents disagree.

94. The underlying conduct – namely the participation in possible criminal activities by agents – was widely known and entirely obvious. It was and is to be expected, as obvious, that the Security Service uses agents and plain that on occasion they will have to participate in activities that are or may be criminal. This is an unavoidable part of their maintaining their cover and acquiring vital intelligence. There is no need in this context for more specific 'signposting' of the activity. The activity is a paradigm example of activity that a reasonable person would understand as falling squarely within the basic functions of the Security Service – as a necessary component of protecting the public from threats to national security and to the public posed by terrorist organisations.

95. The Claimants respond (§84, C Skel) that the general public would expect such conduct to take place pursuant to express statutory authority and a published policy. But (even if the general public can be taken to have firm views on legal questions) this does not answer the central contention, namely that the activity itself is self-evidently necessary and unsurprising.

96. Moreover, there are references in the public domain to such activity, including in the *Report of the Pat Finucane Review* by Sir Desmond de Silva.

97. Similarly, the criminal courts frequently deal with undercover officers who have participated in the relevant offence, in particular when the issue of entrapment is raised (see e.g. the House of Lords decision in *R v Looseley* [2001] 1 WLR 2060, per Lord Hoffmann: "*No doubt a test purchaser who asks someone to sell him a drug is counselling and procuring, perhaps inciting, the commission of an offence. Furthermore, he has no statutory defence to a prosecution. But the fact that his actions are technically unlawful is not regarded in English Law as a ground for treating them as an abuse of power*" 2080 F). The Claimants say that the position of the police is different from the position of a CHIS acting for the Security Service (§§86-87, C Skel). The examples given relate essentially to (alleged) public law differences. But the key point remains: it is obvious and well-known that CHIS who are operating in criminal or terrorist organisations may participate in crime.

98. The publication of the direction(s) to the Commissioner is not to be viewed as if it amounts to the first avowal of the underlying activity. Nor is its avowal critical to the effectiveness of the oversight. The oversight by the Tribunal remained. Accordingly:
    a. whilst the oversight direction(s) and the Guidelines remained secret until 1 March 2018, the conduct itself was sufficiently public and subject to sufficient oversight to be "*in accordance with law*".
    b. As per in *Greennet*, even were the previous position to have been inadequate, this does not render all previous conduct by the Security Service unlawful.

99. The most significant fact is that the position at present is that the direction(s) to the Commissioner have been published, together with the Guidelines and other documents (redacted only so far as required by national security concerns, now (where appropriate)

considered and endorsed by the Tribunal). This is patently sufficient publication to satisfy the requirement of "*in accordance with law*".

100. In §§89-93 C Skel, the Claimants essentially repackage their Ground 1 by reference to the common law. It adds little or nothing to the in accordance with law arguments.

101. Both parties cite *R(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 (see §§-91 C Skel) for the statement by Lord Dyson at §34 that "*the rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised*".

102. It is to be noted that Lord Dyson identifies this as a "*correlative right*" to the right to have the policy applied to his or her case, since knowledge of the policy means that "*the individual can make relevant representations in relation to it*" (§35). When considering the scope of the obligation to publish, Lord Dyson held that "*What must...be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made.*" (§38) This description was endorsed in *R(Reilly) v Secretary of State for Work and Pensions* [2014] AC 453, §§60-63, per Lord Neuberger and Lord Toulson (with whom Lord Mance, Lord Clarke and Lord Sumption agreed). This core rationale of the obligation to publish a policy has no application in this case. There is obviously no prospect of representations being made by terrorists, criminals or (if different) others affected by the proposed criminality before the decision to "authorise" is taken.

103. The Claimants now accept that the government may refuse to disclose a policy, or parts of a policy, on the grounds of national security (§91, C Skel). However, the Claimants wrongly say that this is subject to a further test of "*compelling reasons*". (In fact, Lord Dyson had those words in the opposite order: "*there might be compelling reasons not to publish some policies, for example where national security issues are in play*" §38, *Lumba*). It is also to be noted that the Security Service is entitled to consider and reconsider the possible opening up of matters that are sensitive in the context of proceedings of this kind.

[redacted]

REMEDY

104. The Claimants seek declaratory relief, together with an order quashing the Guidelines and an injunction restraining further conduct.

105. Given the critical nature of the work performed by CHIS, on which the security of the nation depends, the Respondents ask that the Tribunal allows them opportunity to cure any defects. If the relevant activity were to come to an immediate end, this would not only cause significant damage to the flow of intelligence, [redacted]. These are legitimate considerations when considering relief. In *R (National Council for Civil Liberties) v Secretary of State for the Home Department* [2018] 3 W.L.R. 1435, the Home Secretary conceded that Part 4 of the Investigatory Powers Act 2016 was inconsistent with EU law in two respects (§9). The Claimants sought an "*order of disapplication*" in consequence (§10). The Divisional Court (Singh LJ and Holgate J) declined to make such an order "*with the resultant chaos and damage to the public interest which that would undoubtedly cause in this country*" (§46). "*...[W]e are not prepared to contemplate the grant of any remedy which would have the effect, whether expressly or implicitly, of causing chaos and which would damage the public interest.*" (§92). Instead, the Court granted declaratory relief, and allowed Parliament a reasonable time to amend the legislation accordingly. In the present case, should the Claimants succeed, the Respondents similarly ask that the Tribunal limit itself to declaratory relief, with a reasonable time for the relevant unlawfulness to be cured.

SIR JAMES EADIE QC
DAVID PERRY QC
VICTORIA WAKEFIELD QC

25 October 2019