

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

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Respondents' OPEN Note: criminal law principles

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### Introduction

1. For the assistance of the Tribunal and the Parties this Note seeks to identify some basic and uncontroversial principles of criminal law which may be of relevance to the criminal law issues arising in this case.

### Mens Rea

2. The general rule, expressed in the maxim *actus non facit reum mens sit rea*, is that an offence can only be committed where criminal conduct is accompanied by some element of fault, the precise fault element required depending upon the particular offence involved. Thus, certain offences will not be committed if the relevant fault element is absent.

### Secondary Participation

3. The law recognises two main varieties of participation in crime:

- (i) As principal (the person who carries out the offence<sup>1</sup>); or
  - (ii) As secondary party, who assists or encourages the offence; that is by aiding, abetting, counselling or procuring the commission of that offence.
4. Section 8 of the Accessories and Abettors Act 1861 provides:
- “Whosoever shall aid, abet, counsel or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender.”*
5. A secondary party should be distinguished from those who commit inchoate offences by assisting or encouraging crime under the Serious Crime Act 2007 (“**the 2007 Act**”) (see paragraphs 10 – 11 below). Under the 2007 Act the inchoate offence is committed by D as a principal, and whether or not the encouraged crime in fact occurs. By way of contrast, the conviction of a secondary party under common law doctrines is for the principal’s crime; in other words it is a form of derivative liability in the sense that it is derived from one person’s participation in a crime committed by another.
6. The conduct element of secondary participation (aiding, abetting, counselling or procuring) generally requires assistance or encouragement: aiding connotes the giving of material support to the principal in the commission of a crime; abetting involves giving encouragement, intending to encourage the commission of an offence. Mere presence, which does not by itself encourage, is insufficient. There must be an intention to encourage and there must also be encouragement in fact. In *Robinson* [2011] UKPC 3, at paragraph 14, the Judicial Committee of the Privy Council emphasised that “*mere approval of (ie. ‘assent’ to or ‘concurrence’ in) the offence by a bystander who gives no assistance, does not without more amount to aiding*”. It follows that there can be no encouragement in fact unless the principal is aware of the encouragement. Counselling overlaps with aiding or abetting in that it covers urging someone to commit an offence. Procuring involves the deliberate inducement of the principal to commit the offence, usually in the form of persuasion, inducement or threats. In every case there must be a sufficient connection (though not necessarily causation) between the conduct of the secondary party and the commission of the offence by the principal.

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<sup>1</sup> On the basis he has engaged in prohibited conduct with the relevant mens rea or fault element associated with the particular offence.

7. The *mens rea* or fault element for secondary participation is complicated by the fact that it must relate to two separate matters. First, the secondary party's own conduct and, second, the principal's conduct. Thus, the secondary party:
  - (i) Must intend his own actions to assist, encourage or procure the principal; and
  - (ii) Must intend to assist, encourage or procure the principal to commit the offence, or at least know of the essential matters relating to the principal's actions which make those actions an offence.
8. In *Johnson v Youden* [1950] 1 KB 544, Lord Goddard CJ made clear:

*"Before a person can be convicted of aiding or abetting the commission of an offence he must at least know the essential matters which constitute that offence."*
9. In other words, the secondary party must intend to assist the principal knowing or believing that the principal is committing or will commit the conduct element of the offence and the principal will do so in the circumstances and with the consequences, proof of which is required for conviction of the offence. This was confirmed by the Supreme Court in *Jogee* [2016] UKSC 8; [2017] AC 381. The secondary party must intend to encourage or assist the principal to commit the offence and intend that the principal will have the *mens rea* required for that offence.

### **Law Enforcement**

10. One possible exception to secondary liability is law enforcement. That is where the secondary party is, say, a police officer who assists the principal to commit a crime in order to gather evidence against a principal. Whether the secondary party is guilty will depend on the nature of his participation. In *Birtles* (1969) 53 Cr App R 469, Lord Parker said: *"it was one thing for the police to make use of information concerning an offence that was already laid on. In such a case the police are entitled and indeed it is their duty to mitigate the consequences of the proposed offence, for example to protect the proposed victim, and to that end it is may be perfectly proper for them to encourage the informer to take part in the offence or for the police officer himself to do so. But it is quite another thing, and something of which this Court thoroughly disapproves, to use an informer to encourage another to commit an offence or indeed an offence or a more serious character which he would not otherwise commit."* However, in *Yip Chiu-Cheung v R* [1995] 1 AC 111, an undercover police officer was held by the Privy Council to be a co-conspirator to the importation of heroin, even though he was acting to infiltrate and bring to justice a gang of criminal drug dealers.

11. In relation to certain statutory offences, a law enforcement officer who engaged in conduct apparently caught by an offence-creating provision may not be guilty of that offence provided his purpose was to prevent or frustrate criminal conduct.

### **Assisting / Encouraging Crime: the Serious Crime Act 2007**

12. Part 2 of the 2007 Act created new inchoate offences of assisting and encouraging a crime. They are to be distinguished from common law secondary liability in that they do not depend on the commission of a substantive offence by a principal. Put another way, liability is not derivative. The offences are committed where a person does an act capable of encouraging or assisting the commission of an offence and he intends to encourage its commission (section 44) or believes that the offence will be committed and that his act will encourage or assist its commission (section 45), or believes that one or more offences will be committed and that his act will encourage or assist the commission of one or more of them (section 46). Section 50 contains a defence of acting reasonably: it will be a defence if a person charged with any of the offences acted reasonably, that is, that in the circumstances he reasonably believed existed, it was reasonable for him to act as he did.
13. The section 50 reasonableness defence was based on a Law Commission proposal that it should be a defence to act in order to prevent the commission of an offence or in order to prevent or limit harm: Law Commission No. 305 Participating in Crime, Cm. 7084. The rationale for this approach was that it is in the public interest that acts be done in order to prevent crime or to prevent or limit the occurrence of harm and that an act done with the overall purpose of preventing crime is justified because of its value to society.

### **Conspiracy**

14. Conspiracy is predominantly a statutory offence, defined by section 1 of the Criminal Law Act 1977. Section 1 provides that a conspiracy is an agreement between two or more persons that a course of conduct will be pursued which, if the agreement is carried out in accordance with their intentions, will necessarily amount to or involve the commission of an offence. The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with an intention of carrying it out.

### **Attempt**

15. The inchoate offence of attempt, contained in section 1 of the Criminal Attempts Act 1981, penalises conduct which is sufficiently proximate to the commission of an indictable offence when done with intent to commit that offence.

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