

[REDACTED]

(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 or 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."

89. 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<sup>12</sup> "authorised" pursuant to the Guidelines. In particular:

- 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 an undercover agent 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.
  - 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]
- [REDACTED]

<sup>12</sup> "*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]

[REDACTED]

90. 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.<sup>13</sup>

91. As to other issues raised in §130, RASG:

- a. The assertion in §130(f) 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), as pleaded to in §30-32 above, the Memoranda of Understanding with the CPS, PPSNI and the Crown Office and Procurator Fiscal Service are not directly on point. [REDACTED]
- c. As to §130(h), 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 these “authorisations”. For example, the Respondents do not know

<sup>13</sup> 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]

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.

#### **No interference with the criminal justice systems of Northern Ireland and Scotland**

92. The Security Service does not understand what precise elements of its policy and conduct is said to interfere with the criminal justice systems of Scotland and Northern Ireland.

93. As to Scotland:

- a. §§63-66 are admitted, save that the Respondents emphasise that the Lord Advocate's functions long predate devolution. Accordingly, the reference to the Scotland Act 1998, and also to "*the statutory roles of the various prosecutors in the UK*" (§130(e)), is perhaps inapt.
- b. As to §131(a), it is accepted that the Security Service may authorise agent participation in crime in Scotland without notifying the Lord Advocate or the Police Service of Scotland. It is not understood why this policy is said to impact particularly on the constitutional settlement in Scotland more than (on the Claimants' case) it does in England and Wales.

[REDACTED]

94. As to Northern Ireland, it is unclear in what ways "*the important differences in criminal law and procedure in Northern Ireland*" (§131(b)) are said to be relevant. The Respondents address s.5 CL(NI)A 1967 above. To the extent that, by "*sound historical and constitutional reasons*", the Claimants refer to the conflict in Northern Ireland, to the Respondents' knowledge the principal cause of s.5 in Northern Ireland (as in England and Wales) was the abolition of the distinction between felonies and misdemeanours.

#### **GROUND 5, 6 AND 7: breaches of the Convention**

95. Grounds 5, 6 and 7 allege breaches of the Convention, in particular:

- a. Ground 5 alleges procedural breaches of Article 5(3) and Article 5(4) ECHR (§132). Those provisions require that any person arrested for an offence must be brought promptly before a judge and that any person detained must have access to judicial protection to challenge the lawfulness of his detention. The Claimants say that "*any secret deprivation of liberty effected by the Agencies is necessarily incommunicado detention without access to courts*" (§132(d)). They further say that "*secret review by the IS or IP Commissioner of an individual's detention does not provide the judicial oversight required by Article 5*" (§132(e)).
- b. Ground 6 alleges that "*the supervision by the IS or IP Commissioner under the Third Direction (or under any "non-statutory direction" made before 28 November 2014) of any authorisation that permits or envisages a breach of Article 2, 3 or 5 of the Convention does not satisfy the positive investigative duty imposed by Articles 2, 3 and/or 5 of the Convention*" (§15(f) and §133).
- c. Ground 7 alleges that "*any purported 'authorisation' of conduct in breach of Articles 2, 3, 5 and 6 of the Convention would be unlawful and in breach of the Respondents' negative and preventive obligations under the Convention. It is not within the Security Service's gift to purport to give 'authority' for violations of such rights. Further, any policy that seeks to do so is itself unlawful.*" (§15(g))

[REDACTED]

96. The Respondents address these Grounds together since they have significant commonality.

97. Firstly, 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.

98. The key question therefore is whether, despite not purporting to do so, the Security Service does breach Convention rights in this way.

99. Secondly, the Security Service has provided the Tribunal with all available information about crimes "authorised" since 2000. The Respondents propose that Counsel to the Tribunal might wish to select a small number of the PiC forms for the Tribunal's detailed consideration. More developed submissions could then be lodged in CLOSED in respect of those particular PiCs. It will also 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.

100. Thirdly, the Respondents emphasise that there are novel questions of law which arise in this context. In particular, such questions arise in respect of (i) the responsibility of the State and (ii) the proper characterisation of the conduct.

[REDACTED]

(i) **The responsibility of the State**

101. 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]

[REDACTED] The whole point of the agent involvement is to avoid loss of life and limb. [REDACTED]

[REDACTED] It would be unreal to hold the State responsible [REDACTED]

102. 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<sup>14</sup>, is inapposite. Indeed, to the extent that "*acquiescence*" is linked to creating "*the appearance of official approval for the attackers' actions*" (§132, *Burlyya v Ukraine*), the very opposite is true in this case. Were anyone to know about the involvement of the CHIS, it would not give the appearance that the State approved the terrorist conduct. Rather the ultimate and fundamental objective is to prevent and disrupt such threats. 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*

<sup>14</sup> E.g. *Burlyya v Ukraine* (App. No. 3289/10, judgment 6 February 2019, §119)

[REDACTED]

*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. 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).

**(ii) The characterisation of the conduct**

103. Again, the context of the activity will be of central importance. For example, in respect of Article 3,<sup>15</sup> 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 *Boyd 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,*

---

<sup>15</sup> 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]

§71, ECHR 1999-IX, and *Svinarenko and Slyadnev*, ..., §114). Regard must also be had to the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions (compare, for example, *Selmouni*, §104, and *Egnex*, §78, ...; see also, among other authorities, *Gafgen*, ..., §88).

c. By way of example:

- ii. 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);
- iii. 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);
- iv. 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”.

104. Accordingly, although of course the Respondents agree with the elementary proposition that a breach of Article 3 cannot be justified (§135(d) RASG), 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]

105. Fourthly, as to the alleged breach of Article 6, in §135(d), 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 *Teixeira de Castro v Portugal* (1999) 28 EHRR 101 and *R v Looseley* [2001] 1 WLR 2060.



[REDACTED]

106. The Respondents agree that *Teixeira de Castro* and *Looseley* are the two most important authorities in respect of entrapment and a consequential unfair trial. However:

- 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*).

<sup>16</sup> See further the Memoranda of Understanding with the various prosecuting authorities.

[REDACTED]

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

#### REMEDY

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

109. 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]

[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

7 MAY 2019