[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

[redacted] **RESPONSE**

INTRODUCTION

1. The functions of the Security Service are set out in s.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 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 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"*

[redacted]

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.

3. 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.*" The importance of acquiring intelligence and of protecting the CHIS who do so is scarcely capable of overstatement.

4. As to the criminal nature of any particular conduct, this will depend on the constituent elements of the offence. Where *mens rea* is an element of the offence, the CHIS may well lack the requisite *mens rea*. [redacted] The CHIS would not commit the offence of [redacted] since they would lack the necessary intention [redacted]

5. However, on occasion the CHIS will, or just as importantly may, be committing a criminal offence. This may be because the CHIS does have the requisite *mens rea* (for example where the CHIS intends to commit the offence in order to maintain cover), or because the offence is one of strict liability [redacted] The ability of CHIS to

[redacted]

participate in such criminality or possible criminality, where necessary for the acquisition of intelligence or the maintenance of cover, is absolutely essential to the work of the Security Service. Without it, the Security Service could not effectively perform its statutory functions, with the most serious consequences for national security.

6. This position was known to Parliament when it enacted the Security Service Act 1989 (see §§58-65 below). Moreover, these are precisely the sorts of public interest considerations which prosecuting authorities may legitimately take into account when considering whether to prosecute for such offences (see §§69-76 and §§79-80 below).

7. The Security Service has accordingly developed detailed policies, practices and procedures in respect of such criminal conduct (which is, of course, subject to the oversight of the Commissioner and the Tribunal). These are addressed in §§37-39 below. In overview, however, four points bear emphasis.

8. Firstly, 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 criticism appears to be that this assessment should not take place in a structured, [redacted] way. [redacted] But this criticism has no foundation in law, since 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 "*interfere with the statutory prosecutorial function*" of the DPP or the roles of the Lord Advocate or Public Prosecution Service

[redacted]

in Northern Ireland ("PPSNI"), contrary to §4 of the Re-Amended Statement of Grounds ("RASG"). Moreover, opting to turn a blind eye to the realities of CHIS reporting would operate to the detriment and uncertainty not only of CHIS but also of all those with whom they interact. In the Respondents' submission, this would not be a proper approach for Government to take, when it is sending people out into the field, [redacted] for the greater public good.

10. Secondly, [redacted]

[redacted]

"The redacted text relates to the Claimant's complaint (§ 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.

[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]

[redacted] The disclosure obligations under the Criminal Procedures and Investigations Act 1996 (and the Criminal Justice and Licensing (Scotland) Act 2010) [redacted]

11. Thirdly, the Security Service does not purport to "authorise" breaches, by it, of the European Convention on Human Rights, as implemented by the Human Rights Act 1998. Indeed, it positively seeks not to breach its obligations under the Convention. The Security Service submits that its policy and practice ensures that this is the case (as is supported by a review of the actual Participation in Criminality ("PiC") forms, considered below). On an allied point, 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 Tribunal is aware of the Respondents' [redacted] national security concerns in so doing. This is not a question of keeping the law secret. [redacted] [redacted] the law is not secret; it is readily ascertainable, and the Security Service is in no privileged position in that regard

12. Fourthly, and finally, for the purposes of this litigation the Security Service has reviewed all available PiC forms since October 2000 [redacted]

[redacted]

[redacted] It has provided the Tribunal with indices of all those PiCs.[2] [redacted] It has disclosed all post-May 2013 PiCs, which have been reviewed by Counsel to the Tribunal ("CTT"). [redacted] The consequence is that the Tribunal has an exceptional degree of familiarity with what the Security Service is actually doing. In the context of the Convention grounds of challenge (Grounds 5-7), the Respondents propose that Counsel to the Tribunal might wish to select a small number of those PiC forms, which could then be the subject of detailed consideration by the Tribunal. This would allow for the case-specific complexities of each individual instance of "authorisation" to be considered, which the Respondents consider will be more useful than reasoning by reference to hypothetical scenarios. Finally, again, the Respondents acknowledge that the Claimants wish to be told in OPEN of limits to the offences which may be "authorised". [redacted]

13. With those four points in mind, and as developed in detail below, the Respondents resist the Claimants' challenge in its entirety. In summary (and in response to §15, RASG):

    a. Ground 1: The Claimants contend that *"a secret policy with oversight pursuant to a secret direction is not in accordance with law for the purposes of Convention rights."* (§15(a)). To the contrary, the underlying conduct is and was widely known and entirely 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.

[redacted]

[redacted]

b. Ground 2: The Claimants contend that the common law "*likewise precludes the adoption of a secret policy*" (§15(b)). In the Respondents' submission, this adds nothing to Ground 1.

c. Ground 3: The Claimants contend that the policy has no legal basis (§15(c)). To the contrary, agent participation in criminality is necessary for the performance of the Security Service's statutory functions. Parliament must have intended 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. In the Respondents' submission, the vires extends to the policy adopted by the Security Service.

d. Ground 4: The Claimants contend that "*the policy is unlawful because it is inconsistent with the statutory and constitutional arrangements governing the reporting, detection and prosecution of crime*" (§15(d)). This is unfounded. In particular, 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. As to concealment, there is no obligation on the Security Service to inform the police or the CPS [redacted] nor is there an obligation to do so after the event. Finally, the policy is not an unlawful interference with the criminal justice systems of Northern Ireland and Scotland.

e. Grounds 5, 6 and 7: The Respondents accept that:

   i. 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): Ground 7.

   ii. 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

[redacted]

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)): Ground 5.

iii. Oversight by the Commissioner would not discharge any investigative obligations which arise under Article 2, 3 and 5 of the Convention: Ground 6.

f. The question is therefore whether, despite not purporting to do so, the Security Service does breach Convention rights in those ways. The Tribunal is invited to consider this question by reference to a number of PiCs selected by Counsel to the Tribunal. The context of the activity will be of paramount importance when determining the proper approach to the responsibility of the State and to the characterisation of the conduct.

THE PARTIES

14. The parties are identified in §§8–13, RASG.

15. 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.[4] 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 being victims of relevant crime.

4 Transcript, p.3G-p.5D

[redacted]

FACTUAL AND STATUTORY BACKGROUND

16. §§17-22 RASG are admitted.

17. §23 is admitted, save that the parallel which the Claimants seek to draw with the Consolidated Guidance[5] is inapposite. [redacted]

18. §§24-26 are admitted.

19. §27 is admitted, save that the Respondents emphasise that the Tribunal's decision of 18 December 2017 related only to whether the claims were frivolous or vexatious (as per s.67(4) RIPA). The Tribunal did not determine standing (contrary to the submissions of counsel for the Claimants at the hearing on 4 October 2018 that Tribunal had already given a "*preliminary, not final, ruling on standing*"[6]).

20. §28 is admitted, save for the comment "*faced with the prospect of defending the proceedings*" to the extent that this implies that, had the proceedings been struck out, the Prime Minister would not have disclosed the direction.

21. §§29-30 are admitted, save that the 2014 Direction replaced an earlier non-statutory direction made on 27 November 2012. It stated 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*

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5 Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (July 2010)

6 Transcript, p.4D

[redacted]

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 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."

22. As to §31, the Respondents accept that, until the publication of the Third Direction on 1 March 2018, the Commissioner's oversight of the policy was not avowed. It pleads further to this issue under Grounds 1 and 2 below.

23. §§32–48 RASG relate to "*the operation of the policy and the oversight under the Third Direction*". It is apparent from these paragraphs that the Claimants are aware of critical aspects of the regime. In particular, they are aware of: (a) the nature of the public interest which is served by the conduct, namely the acquisition of intelligence (and the protection of CHIS) (§38, RASG); (b) the fact that the criminal conduct remains criminal and that no immunity is, or could be, offered (§39, RASG); (c) the fact that there is no requirement on the Security Service to disclose the criminal conduct to the police, CPS, PSNI, Lord Advocate or similar body; [redacted] (§§40 and 41, RASG); and (d) the oversight provided by the Commissioner (§§45-48, RASG).

24. There are various issues in §§32-48 RASG, with regard to the accuracy of those paragraphs, as follows.

[redacted]

[redacted]

[redacted]

[redacted]

27. As to §§35-36, the Tribunal is familiar with the Respondents' national security objection to stating, as the Claimants wish, whether it would be lawful for the Security Service to authorise particular offences. [redacted] For the avoidance of doubt, the Respondents accept that the Security Service is not able to "authorise" activity which would constitute a breach by it of the Convention. The Respondents accordingly confirm that the Guidelines do not authorise conduct which would constitute a breach by the Security Service of Convention rights.

28. As to §40(a), the Respondents' position on the proper application of s.5 Criminal Law Act (Northern Ireland) 1967) is as set out in §§84, 88-89 below).

29. As to §40(b), 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]

30. As to §41:

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

" The redacted text refers to paragraph 25 of the Memorandum of Understanding, which sets out the circumstances where there should be consultation with the CPS "

[redacted]

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

31. As to §42, so far as Northern Ireland is concerned:

a. There is a Protocol with PPSNI. 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]

[redacted]

[redacted]

[redacted]

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

32. As to §43, so far as Scotland is concerned:

a. There is a Memorandum of Understanding with the Crown Office and Procurator Fiscal Service. 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 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.

33. As to §§43-44, it is wrong to characterise the scope of the policies as "*steadily expanding over time*". As a matter of vires, the Security Service has power to "authorise" agent participation in criminality across its statutory functions. As a

[redacted]

matter of policy, there were previously two, essentially contemporaneous, policy documents (one in respect of terrorism cases and one in respect of serious crime), which were replaced with a single set of Guidelines. This is not indicative of an expansion of scope.

34. As to §§45-48, the oversight provided by the Commissioner has been effective. As the Claimants identify, the scope of that oversight was specified in the letter from the Prime Minister to Sir Mark Waller dated 27 November 2012, which is set out in §21 above. As to the scope of that oversight:

    a. As well directing him 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, 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 nature of the particular offence 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.

[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.

35. Accordingly, contrary to §45-47 RASG (and indeed §6 RASG), the oversight as set out in the 2012 letter is effective.[7]

36. Further, as set out in §48 RASG, 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.

37. Turning away from the Claimants' case, 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] [MI5 Witness 1] were the following key documents:

a. the Guidelines.

[redacted]

d. Chapter 5 of the Legal Compliance Manual – Agent Running and Participation in Criminality.

38. As to Security Service practice, this is set out in some detail in §§[redacted] of the Second Witness Statement of [redacted] [MI5 Witness 2] In overview:

[redacted]

[7] So too is 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]

[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 Human Rights Act 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]

39. The Respondents further rely on the PiC forms (both the indices and those PiC forms which have been disclosed) as the best evidence of the Security Service's practice.

[redacted]

GROUNDS

40. The Respondents address each ground of challenge in turn below. The Respondents deal with the various points of law raised by the Claimants (included those pleaded in §§49-114, RASG) as and when they are relevant to the grounds of challenge.

GROUND 1: not in accordance with law – unsupervised conduct, conduct subject to secret oversight and conduct "authorised" in accordance with unpublished guidelines.

41. The Claimants assert that:

a. before 1 March 2018, when the direction to the Commissioner was published, all oversight of the policy and the application of the Guidelines was in secret and accordingly was not "*in accordance with law*" or "*prescribed by law*", as required by the Convention (§116 and §117, RASG);

b. since the Guidelines are redacted and the limits of the policy are undisclosed, the law remains inadequately accessible and unforeseeable today (§118, RASG).

42. The Claimants do not set out any developed legal argument in respect of the requirements of "*in accordance with law*" in the national security context (see §§73-75, RASG). They simply "*reserve their position on the correctness of the test applied by the Tribunal in Liberty 1 and Liberty 2*" (footnote 30, RASG).

Legal principles

43. In *Liberty 1* [2015] 3 All ER 142 and *Liberty 2* [2015] 3 All ER 212, the parties accepted that the ECtHR jurisprudence places special emphasis on interception (§35). This is doubtless because of the potential for abuse by the State. In such cases, strict requirements laid down by the ECtHR in *Weber and Saravia v Germany* (2008) 46 EHRR 5, §95 apply, such 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 set out the test formulated by the Tribunal below. However, they submit that the circumstances of the present case are even

[redacted]

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 undercover). This is very far removed from the potentially significant interference with private life with which the ECtHR has largely been concerned.

44. Turning to *Liberty 1*, the key principles are as follows:

    a. "*It is quite plain... that in the field of national security much less is required to be put in the public domain, and the degree of foreseeability must be reduced, because otherwise the whole purpose of the steps taken to protect national security would be at risk*" (§38; see also §6).

    b. It is therefore lawful for rules or arrangements to be "*below the waterline*". However, there must be "*sufficient signposting of the rules or arrangements insofar as they are not disclosed*" (§41).

    c. The Tribunal held that "*[I]n the field of intelligence sharing it is not to be expected that rules need to be contained in a statute (Weber) or even in a code (as was required by virtue of the court's conclusion in Liberty v the United Kingdom). It is in our judgment sufficient that: (i) appropriate rules or arrangements exist and are publicly known and confirmed to exist, with their content sufficiently signposted, such as to give an adequate indication of it (as per Malone ...); and (ii) they are subject to proper oversight*" (§41).

45. "*Proper oversight*" does not necessarily mean that the direction to the Commissioner must be published. This is obvious, not least, from s.59A(5) RIPA and s.230(5) IPA 2016, pursuant to which the Prime Minister is not obliged to publish any direction to the Commissioner if it appears to him or her that "*such publication would be contrary to the public interest or prejudicial to (a) national security, (b) the prevention or detection of serious crime, (c) the economic well-being of the United Kingdom, or (d)*

[redacted]

the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the [IS/IP] Commissioner."

46. Finally, "*[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*" (§82 *Greennet* [2016] UKIPTrib 14_85-CH, cited with approval at §62 of *Privacy* [2017] All ER 647).

Application to the facts

47. As to the allegation that the non-publication of the directions to the Commissioners had the consequence that the conduct was not "*in accordance with law*", this is denied. In particular:

a. The underlying conduct – namely the participation in 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.

b. 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.

[redacted]

c. 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, with which the fourth Claimant of course will be intimately familiar.

d. 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)

e. For present purposes, the publications above are relied on simply as evidence of the obviousness of agents who are undercover in criminal or terrorist organisations participating in crime.

f. Turning specifically to the publication of the direction(s) to the Commissioner, that oversight is simply one part of the system for preventing arbitrary and unfettered executive decision-making. Its avowal 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.

g. Accordingly, whilst the oversight direction(s) remained secret until 1 March 2018, the conduct itself was sufficiently public and subject to sufficient oversight to be "*in accordance with law*".

48. 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). This is patently sufficient publication to satisfy the requirement of "*in accordance with law*". Moreover, in the Respondents' submission, as in *Greennet* (cited in §46 above), even were the previous position to

[redacted]

have been inadequate, this does not render all previous conduct by the Security Service unlawful.

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

49. In §§ 119- 121 RASG, the Claimants essentially repackage their Ground 1 by reference to the common law. Again, they ignore the national security context of the activity.

50. In particular, they rely on *R(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 (see §114 and §120, RASG) for the statement by Lord Dyson JSC 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*". But they fail to cite Lord Dyson stating, at §38 of that same judgment, that "*it is common ground that...there might be compelling reasons not to publish some policies, for example, where national security issues are in play*".

51. Indeed, the relevance of national security was identified by Stanley Burnton J in *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 (Admin), in which he said "*leaving aside contexts such as national security, it is generally inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute*". This passage was approved by Lord Dyson at §36 of *Lumba*, as set out in *R(Reilly) v Secretary of State for Work and Pensions* [2014] AC 453, §§60-63, per Lord Neuberger PSC and Lord Toulson JSC (with whom Lord Mance, Lord Clarke and Lord Sumption JJSC agreed).

52. It is unclear from the Claimants' RASG exactly what level of publication they say is necessary. At §121, first sentence, they indicate that publication of the mere existence of the Guidelines might be sufficient. However, at §121, second sentence, the indication is that persons affected must have sufficient information to make representations (which, in a context in which the obvious such persons are criminal or terrorist SoIs, is patently out of the question).

[redacted]

53. In any event, in the Respondents' submission, Ground 2 adds nothing to Ground 1. The relevant conduct is obvious and unsurprising, and is adequately signposted, such that there has been no breach of the common law obligation to publish policy documents (where national security so permits).

GROUND 3: judicial review – no legal basis for policy

54. In §§122-128, the Claimants contend that there is no legal basis for the policy. Their case is that any interpretation of s.1 Security Service Act 1989 which allows for the Security Service's policy would need express words. They place particular reliance on the principle of legality, namely that fundamental rights cannot be overridden by general or ambiguous words (as per *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, per Lord Hoffmann). They say that this is particularly true of a statute "authorising" torture (relying on *A (No.2)* [2006] 2 AC 221, per Lord Bingham at §55). They also rely on s.7 Intelligence Service Act 1994 as an instance where Parliament has expressly legislated to allow for the executive to "authorise" crime.

55. In the Respondents' submission, the starting point must be accurately to identify the policy which is said to have no legal basis. In this regard, it is of central importance that 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. Accordingly, and as pleaded to in more detail in Ground 4 below, the policy does not breach fundamental principles (such as the prohibition in the Bill of Rights on the Executive dispensing with the criminal law).

[redacted]

56. Similarly, as pleaded in §§11 and 13(e)-(f) above, the Respondents do not say that "authorisations" immunise conduct which would otherwise be a breach by the Security Service of fundamental rights: see Grounds 5-7 below.

57. Accordingly, the reliance on *Sims*, 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. Accordingly, there is no need for express statutory language. Rather, standard principles of statutory construction apply.

58. The history of the Security Service Act 1989 is that it 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.[8] 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."*

59. In authorising the Security Service to do what was strictly necessary for the purpose of Defence of the Realm, the Maxwell-Fyfe Directive necessarily allowed for the "authorisation" of agent participation in criminality. There is no indication that the intention of the Security Service Act 1989 was to strip away activity which the Service previously could perform.

60. Sir John Donaldson MR in *AG v Observer* in the Court of Appeal [1988] 2 WLR 805, 879H, stated:

> *"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*

[8] 24 September 1952: a Directive from Sir David Maxwell Fyfe, then Home Secretary, to the Director General of the Security Service.

[redacted]

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 "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."

61. Parliament did choose to regularise the position of the Security Service. It did not provide express immunity for agents participating in acts which are otherwise unlawful. However, there is no indication whatever that its intention was to curtail activities plainly necessary for the protection of national security. Its intention, it is

[redacted]

submitted, was to continue (through the definition of functions) to leave the position as it had been prior to the Act.

62. The Security Service Act 1989 is a concise and unelaborate piece of drafting. Vires are not spelt out in it. Section 1 simply lists the functions of the Service, implicit within each of which must be vires to do what is necessary to perform those functions. Further support for this is to be found in 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 (implied) vires to obtain and disclose information where necessary for the proper discharge of its functions. Accordingly, it would have been out of keeping with the drafting of the Act expressly to provide the power for a policy such as that in issue in these proceedings.

63. In the context of the present case, it is essential that the Security Service has the power to "authorise" its agents to participate in crime. As set out in the introduction to this Response, agents are vital to its work, and it is inconceivable that agents could work [redacted] without, on occasion, needing to commit crimes. 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 frustrated.

64. Accordingly, applying the approach of the House of Lords in *Ward v Commissioner of Police of the Metropolis and another* [2006] 1 AC 23, there is the implied power for which the Respondents contend. 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).

[redacted]

65. In conclusion, it is, and was at the time of the 1989 Act, obvious that the Security Service's performance of its statutory functions would involve the use of agents for example to infiltrate and provide intelligence on terrorist organisations; and thus that the agents might well need to become involved in criminality (or possible criminality). In those circumstances, the position is as follows:

    a. The Security Service has the statutory functions set out in s. 1(2)– (4) of the Security Service Act 1989.

    b. It would be practically impossible for it to fulfil those functions without the use of agents.

    c. In order to obtain intelligence, and maintain their cover, those agents necessarily are at serious risk of acting in a way that might later be characterised as criminal.

    d. Whether that action is or is not properly viewed as criminal will depend upon the constituent elements for the relevant offence (in particular, if mens rea is required, it will often be lacking) and whether any available defence is made out.

    e. However, should that action be properly viewed as criminal, the Security Service must, by necessary implication, have the power to consider, and to record, whether (in its view) that action best serves the public interest, [redacted]

66. Finally, at the hearing on 28 February 2019, the Tribunal asked whether the Security Service would say that it had a relevant common law power. It does not, and does not need to.

GROUND 4: No de facto power to dispense with criminal law/usurp the proper functions of the prosecution services in the United Kingdom

67. The Claimants advance three distinct arguments under Ground 4:

[redacted]

a. They say that, absent an express statutory power, the Security Service (as part of the Executive) has no power to dispense with the criminal law (§129);

b. They say that the Security Service has effectively usurped the function of the prosecution services (§130); and

c. They say that the policy amounts to an illegitimate interference with the criminal justice systems of Northern Ireland and Scotland (§131).

68. Each of these is ill-founded, as set out below.

The Security Service does not dispense with the criminal law

69. In §§50-56 RASG, the Claimants address the well-established principle that the Executive has no power to dispense with the criminal law. In particular, 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.[9] The Claimants rely on *R(Pretty) v DPP* [2002] 1 AC 800 in 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 JSC in *R(Nicklinson) v DPP* [2015] AC 657.

70. But the Claimants fail to acknowledge that 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.*""

9 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".*

[redacted]

71. 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.

72. 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 JSC 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.*"

73. 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

[redacted]

another), the Lord Advocate indicated that it would almost always be in the public interest to prosecute.

74. 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.

75. Accordingly, the Claimants' concluding legal principle – "*as a matter of constitutional principle, therefore, no public authority may decide not to execute the provisions of the criminal law*" (§56, RASG) – simply fails to acknowledge the distinction between commission of an offence and prosecution.

76. Turning to the facts, the Security Service does not, and could not, offer any immunity or dispensation from the criminal law. The fact is that, if the crimes become known to the prosecutorial authorities, those authorities will exercise their discretion in the normal way, in light of any Security Service representations: see §79 below. The Respondents accordingly understand that the Claimants' true complaint must be that the Security Service does not inform the prosecutorial authorities of the "authorisations". This is addressed in §§81-90 below.

No usurping of the proper functions of the prosecutorial function

77. The Claimants repeatedly assert that the decision whether to investigate and prosecute offences is solely a matter for the independent prosecutor (§59 and §130(b), RASG). In England and Wales and in Northern Ireland, this is incorrect, since the decision whether to investigate crimes lies with the police[10]. 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

10 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.*"

[redacted]

this; see *R v Commissioner of Police of the Metropolis ex p Blackburn* (CA, 1 January 1980; Times, March 7, 1980).

78. As to the decision to prosecute, of course this is a decision only for the relevant prosecutor.

79. 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. In §§57-61 RASG, the Claimants cite *R(Corner House Research) v Serious Fraud Office* [2009] 1 AC 756 and the "*Shawcross Convention*" in support of their case. But in the Respondents' submission these authorities 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 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."*

80. 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 risk 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*

[redacted]

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.

81. Accordingly, the crux of the Claimants' complaint must again be that, in fact, the prosecutor does not routinely have opportunity to exercise its function. For example, the failure which is alleged at §130 is "*failing to notify the various prosecution services*", at §130(c) is "*concealing from the police and prosecution authorities*", and at §130(d) is "*withholding information from prosecutors*".

82. This complaint rests upon there being an obligation on the Security Service positively to inform the relevant prosecutorial authorities where a crime has been committed. However, as set out below, there is no such obligation. Save for s.5 Criminal Law (Northern Ireland) Act 1967 ("CL(NI)A 1967"), the Claimants identify no authority in support of the assertion that there is such an obligation.

83. 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 at 536).

84. 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).

85. 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.

[redacted]

86. 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.*
>
> ...
>
> *(5) The compounding of an offence other than treason shall not be an offence otherwise than under this section."*

87. 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[11] "authorised" pursuant to the Guidelines. Most notably, the Security Service does not receive any consideration.

88. 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*

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11 "*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)*".