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

B E T W E E N : -

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

Claimants

- and -

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

Respondents

RE-RE-AMENDED STATEMENT OF GROUNDS

INTRODUCTION AND SUMMARY

The policy

1. These proceedings concern criminal conduct carried out in the UK by covert agents recruited by the Security Service. Under a hitherto secret policy the Security Service purports to "*authorise*" its agents to carry out crimes.[1]

2. The policy has no legal basis and no meaningful limits on its exercise have been disclosed. The Respondents have refused to indicate whether, in principle, the policy could be used to purport to authorise murder, torture, inhuman and degrading treatment, rape, kidnap or false imprisonment. In the absence of any disclosed limit, these Grounds proceed on the basis that the Respondents consider that such crimes could lawfully purport to be authorised.

3. Neither the victim of the crime, the police nor the Crown Prosecution Service ("CPS") are notified of any authorisation. The effect is that the Security Services has in essence granted itself a *de facto* power to dispense with the criminal law made by Parliament.

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[1] "Agents" is the term used in the policy under challenge. Such agents are not officers of the Security Service, but individuals recruited to provide intelligence. However, where officers of the Security Service aid, abet, counsel or procure criminal conduct, they themselves will also commit crimes.

4. Since the policy is applied throughout the UK, its effect is not only to interfere with the statutory prosecutorial functions exercised by the Director of Public Prosecutions of England and Wales ("the DPP"), but also to usurp entirely the distinct constitutional role of the Lord Advocate for Scotland and Public Prosecution Service for Northern Ireland ("PPSNI").

5. Prior to 2012, there was no oversight of the policy at all. Since then, the only oversight to date has been provided by Intelligence Services Commissioner (the "IS Commissioner") and the Investigatory Powers Commissioner (the "IP Commissioner"). The oversight is conducted under two directions issued by the Prime Minister. The existence of those directions was only disclosed in the course of these proceedings, before which both the policy and the oversight were secret.

6. That oversight is in any event ineffective, since the Commissioner has been expressly required not to comment on:

    a. the legality of the policy; or

    b. "*whether any particular case should be referred to the prosecuting authorities*".[2]

7. These proceedings involve issues of considerable public importance. The limited information currently in the public domain indicates that agent participation in criminality in the past has led to grave breaches of fundamental rights. For example, the police are currently investigating[3] the conduct of Mr Freddie Scappaticci – an alleged Security Service agent who is believed to have been a member of the 'Internal Security Unit' of the IRA. Mr Scappaticci, who operated under the codename 'Stakeknife' is alleged to have participated in "*kidnap, torture and murder*", along with other "*members of… the Security Services or other government personnel*".[4]

The parties

8. The Secretary of State for Foreign and Commonwealth Affairs is the minister responsible for Government Communication Headquarters ("GCHQ") and the Secret Intelligence Service ("SIS"). The Secretary of State for the Home Department is the minister responsible for the Security Service (which, together with GCHQ and the SIS, are referred to below as the "Agencies").

9. Privacy International is a UK charity. It seeks to ensure the right to privacy is properly protected by law. Privacy International has a long-standing interest in the proper governance and oversight of the Agencies' activities.

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[2] Letter from the Prime Minister to Sir Mark Waller, Investigatory Powers Commissioner, dated 27 November 2012.
[3] The investigation is known as "*Operation Kenova*" and includes investigations into former members of the IRA and UK security forces. See further: www.opkenova.co.uk.
[4] See further, *Scappaticci's Application for Judicial Review* [2003] NIQB 56.

10. Reprieve is a UK charity. It seeks to secure human rights throughout the world, with a focus on the right to life, liberty and freedom from torture, cruel, inhuman and degrading treatment or punishment. It has a long-standing interest in the Agencies' compliance with the ECHR in the context of counter-terrorism operations.

11. The Committee on the Administration of Justice (the "CAJ") is a not for profit non-governmental human rights organisation and public watchdog, based in Northern Ireland. It has cross-community membership and seeks to promote high standards in the administration of justice in Northern Ireland by ensuring government complies with obligations under human rights law. CAJ has a long history of work in Northern Ireland on the use of covert human intelligence sources in intelligence operations and works closely with persons affected by such issues in Northern Ireland.

12. The Pat Finucane Centre (the "PFC") is a non-party political, anti-sectarian human rights group advocating a non-violent resolution of the conflict on the island of Ireland. PFC believes that all participants to the conflict have violated human rights. The PFC is a registered charity and receives statutory and EU PEACE IV funding to provide advocacy support to victims and survivors of the conflict in Ireland. The PFC currently support over 230 families involving 1,000 individuals directly bereaved in the conflict. Many of the families whom the PFC support have alleged official state collusion in the murder of their loved ones and number of these cases are currently being investigated by the Office of the Police Ombudsman.

13. The PFC is named in memory of Pat Finucane. Mr Finucane, a solicitor, was shot 14 times after gunmen burst into his home while he was having supper with his wife and three children. The recent decision of the Supreme Court in *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7 described Mr Finucane's murder as a "*shocking and dreadful event*",which "*still ranks, almost 30 years later, as one of the most notorious of what are euphemistically called "the Northern Ireland troubles*" (Lord Kerr at [1]). The report of Sir Desmond Da Silva QC into the matter concluded that there had been state "*collusion in the murder of Patrick Finucane*" and that "*agents of the State were involved in carrying out serious violations of human rights up to and including murder*" (Executive Summary, para. 114-116).

14. These re-amended grounds have been redrafted, in light of the significant new factual information disclosed since the claim was issued. Given the extent of the redrafting, a tracked changes version does not assist clarity and has therefore not been provided.

15. In summary:

    a. Ground 1: a secret policy with oversight pursuant to a secret direction is not in accordance with law for the purposes of Convention rights. All conduct authorised under the policy and overseen by the Commissioner before the avowal of the policy on 1 March 2018 was unlawful. Since then, the Guidelines remain redacted and the limits of the policy remain undisclosed, which continues to be unlawful on the same basis. There was no good reason for the policy to be secret.

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b. Ground 2: the common law likewise precludes the adoption of a secret policy in the circumstances set out above. In particular, in circumstances where the Respondents have refused to disclose the limits of the policy, it is was at all material times unlawful.

c. Ground 3: The policy is unlawful and has no legal basis. Any power given to the Security Service to authorise criminal conduct and conceal it would require express statutory words. There is no statutory provision. Section 1 of the Security Service Act 1989 cannot provide such a basis (cf. section 7 of the Intelligence Services Act 1994 in respect of criminal conduct outside the British Islands, considered below).

d. Ground 4: In any event, the policy is unlawful because it is inconsistent with the statutory and constitutional arrangements governing the reporting, detection, investigation and prosecution of crime. The Security Service has no *de facto* power to dispense with the criminal law and in some circumstances its officers are under a duty to report such crimes to the police. By purporting to authorise criminal conduct, and failing to notify the various police and prosecution services in the UK, they have acted unlawfully. The policy also fails to recognise the distinct criminal legal systems in the Northern Ireland and Scotland and, in particular, is an unlawful interference with those systems of criminal justice.

e. Ground 5: the authorisation of any deprivation of liberty (including any false imprisonment) is in breach of the procedural rights under Article 5 of the Convention.

f. Ground 6: the supervision by the IS or IP Commissioner under the Third Direction (or under any "non-statutory direction" made before 28 November 2014) of any purported 'authorisation' given by the Security Service that permits or envisages a breach of Article 2, 3 or 5 of the Convention does not satisfy the investigative duty imposed by Articles 2, 3 and/or 5 ECHR.

g. Ground 7: 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.

16. The Claimants invite the Tribunal to grant a declaration that the Respondents' conduct is unlawful, quash the policy and grant injunctive relief restraining any further unlawful conduct.

FACTUAL AND STATUTORY BACKGROUND

The Agencies

17. The Agencies' statutory functions are, in summary:

    a. The **SIS** (Intelligence Services Act 1994 ("ISA"), s 1):

        i. To obtain and provide information relating to the actions or intentions of persons outside the British Islands; and

        ii. to perform other tasks relating to the actions or intentions of such persons;

    b. **GCHQ** (ISA, s 3):

        i. to monitor, make use of or interfere with electromagnetic, acoustic and other emissions;

        ii. provide information derived from or related to such emissions or equipment and from encrypted material; and

        iii. to provide advice and assistance about languages, including technical terminology, and cryptography; and

    c. The **Security Service** (Security Service Act 1989 ("SSA"), s 1):

        i. to protect national security including against espionage, terrorism and sabotage, the activities of agents of foreign powers and actions intended to overthrow or undermine parliamentary democracy;

        ii. to safeguard the economic well-being of the United Kingdom; and

        iii. to act in support of law enforcement agencies in the prevention and detection of serious crime.

The IS Commissioner

18. The IS Commissioner was appointed under s 59 of the Regulation of Investigatory Powers Act 2000 ("RIPA"). His duty was to keep certain activities of the Agencies under review. He or she must be or have been a member of the senior judiciary: s 59(4) RIPA and Constitutional Reform Act 2005, s 60(2).

19. The Prime Minister has a relatively new power under s 59A(1)(a) of RIPA (inserted by the Justice and Security Act 2013 with effect from 25 June 2013) to direct the IS Commissioner to *"keep under review the carrying out of any aspect of the functions of"* the Agencies. Such a

direction may relate to any function other than those reviewed by the IC Commissioner under s 57 or the IS Commissioner under s 59 (s 59A(2)). It may, for example, require the IS Commissioner to keep under review "*policies of the head of an* [Agency] *regarding the carrying out of any of the functions of the* [Agency]" (s 59A(4)). Prior to this provision coming into force, it appears that such directions were given informally on an non-statutory basis.

20. The Prime Minister is required to publish, in a manner which she considers appropriate, any direction given under s 59A unless (s 59A(5)):

> *it appears to the Prime Minister 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) the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the* [IS] *Commissioner.*

The IP Commissioner

21. The IP Commissioner was created by section 227 of the Investigatory Powers Act 2016 and replaced the IS Commissioner. The power to give directions under s 59A of RIPA has been replaced by the very similar power in section 230 of the 2016 Act.

22. The IP Commissioner took over oversight responsibility on 1 September 2017 pursuant to the Investigatory Powers Act 2016 (Commencement No. 3 and Transitory, Transitional and Saving Provisions) Regulations 2017.

The "Third Direction"

23. Before 1 March 2018, two s 59A directions had been published:

    a. The Intelligence Services Commissioner (Additional Review Functions) (**Consolidated Guidance**) Direction 2014 came into force on 28 November 2014. It requires the IS Commissioner to review compliance with the "Consolidated Guidance" that governs UK involvement the detention and interviewing of persons overseas, and the passing and receipt of intelligence relating to detainees.[5] It is notable that the (public) Consolidated Guidance contains an absolute prohibition on UK involvement in torture or inhuman and degrading treatment

[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).

("*The United Kingdom Government's policy on such conduct is clear – we do not participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment for any purpose. In no circumstances will UK personnel ever take action amounting to torture or CIDT*"). It has never been claimed that such a limitation on the conduct and authority of the Agencies is properly secret.

b. The Intelligence Services Commissioner (Additional Review Functions) (**Bulk Personal Datasets**) Direction 2015 came into force on 13 March 2015, at the same time as it was avowed that the Agencies were engaged in the collection and retention of Bulk Personal Datasets ("BPDs"). That Direction requires the Commissioner to review the use of BPDs by the Agencies and the adequacy of safeguards against their misuse.

24. In the course of the proceedings in the Tribunal in *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* (IPT/15/110/CH), the Agencies disclosed that the Prime Minister had issued a further, hitherto secret, direction (the "**Third Direction**"). That disclosure was made by an extract from the Confidential Annex to the IS Commissioner's Report for 2014, which stated at p 4:

> *Under paragraph 59A of RIPA, inserted by the Justice and Security Act, the Prime Minister may direct me to keep under review the carrying out of any aspect of the functions of the intelligence services. The Prime Minister has now issued **three** such directions placing all of my oversight on a statutory footing. Two of the directions are set out in my open report:*
>
> - *The acquisition, use, retention, disclosure, storage and deletion of bulk personal datasets including the misuse of data and how this is prevented*
> - *Compliance with the Consolidated Guidance.*
>
> ***[redacted]*** (emphasis added)

25. The Prime Minister had therefore made three oversight directions under s. 59A of RIPA at the time these proceedings were issued. However, the subject matter and content of only two of those directions was public.

26. On June 2017, the First and Second Claimants issued proceedings alleging that conduct overseen by the IS Commissioner under the secret Third Direction was in breach of the ECHR and/or public law, and thus unlawful. At the time, the First and Second Claimants did not know anything about the (entirely secret) content of the Third Direction.

27. On 9 November 2017, the Tribunal invited submissions from the parties as to the Claimants' standing under the Convention and in respect of whether its claims were frivolous and/or vexatious. On 18 December 2017, the Tribunal declined to strike out the claim under RIPA, s.67(4).

28. Faced with the prospect of defending the proceedings, the government decided to publish the Third Direction. On 1 March 2018, the Prime Minister gave the following written statement to the House of Commons.

> *On 1 September, the Investigatory Powers Commissioner, Lord Justice Fulford, took on responsibility for overseeing the use of investigatory powers by public authorities. This was a significant milestone in the transition to new oversight arrangements under the Investigatory Powers Act 2016. To enable the Investigatory Powers Commissioner to take on additional oversight functions not covered by his statutory responsibilities, I gave two directions to the Commissioner on 22 August 2017. Issuing these directions forms part of our rigorous intelligence oversight system.*
>
> *One direction instructed the Commissioner to keep under review the compliance with the Consolidated Guidance on Detainees by officers of the security and intelligence agencies, and members of the Armed Forces and employees of MOD so far as they are engaged in intelligence activities. The Consolidated Guidance sets out the standards that personnel must apply during the detention and interviewing of detainees held by others overseas.* ***The other direction instructed the Commissioner to keep under review the application of the Security Service guidelines on the use of agents who participate in criminality and the authorisations issued in accordance with them.*** *In accordance with my obligation to publish such directions under Section 230 of the Investigatory Powers Act 2016, I am now depositing in the Libraries a copy of both directions.*

29. The full title of the Direction is the "*Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Security Services agent participation in criminality) Direction 2017*". It was signed by the Prime Minister and dated 22 August 2017.[6] It provides as follows:

> *The Prime Minister, in exercise of the power conferred by section 230 of the Investigatory Powers Act 2016 ("the Act"), directs the Investigatory Powers Commissioner as follows.*
>
> ***Citation and Commencement***
>
> *1. This direction may be cited as the Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Security Service agent participation in criminality) Direction 2017.*
>
> *2. This Direction comes into force on 1st September 2017.*
>
> ***Additional Review Functions***
>
> *3. The Investigatory Powers Commissioner shall keep under review the application of the Security Service guidelines on the use of agents who participate in criminality and the authorisations issued in accordance with them."*

30. Prior to the coming into force of the 2017 Direction, set out above, the IS Commissioner was given the same oversight function by the (formerly secret) Intelligence Services

[6] Prime Minister Direction to Commissioner, 22 August 2017.

Commissioner (Additional Review Functions) (Security service agent participation in criminality) Direction 2014.[7] This is the original 'Third Direction' referred to in the confidential report of the IS Commissioner above. The direction first came into force on 28 November 2014 - before which, there was no statutory oversight at all. The Third Direction was not published.

31. Accordingly, the Prime Minister has by two hitherto secret legal instruments conferred on the IS and IP Commissioner a secret statutory function to oversee the application of Security Service guidelines which purport to 'authorise' conduct which amount to a criminal offence in domestic law. Despite the seriousness of their subject matter, those directions were made in secret.

The operation of the policy and the oversight under the Third Direction

32. Like the directions themselves, the underlying policy being overseen was secret. Parts of the policy, as in force on various dates, have now been disclosed.

33. It is now known that since at least the 1990s, the Security Service has purported to "*authorise*" its agents to carry out crimes pursuant to various guidelines. The various policies are now consolidated in the "*Guidelines on the use of Agents who participate in Criminality (Official Guidance)*" (the "Guidelines").[8]

34. The intended audience of the Guidelines is stated to be "*Agent handlers and their managers*". The policy's aim is "*to provide guidance to agent-running sections on the use of agents who participate in criminality*". Those agents are not themselves officers of the Security Service. They are nonetheless recruited and given directions by officers of the Security Service.[9]

35. On 18 June 2018, the Claimants served a Request for Information ("RFI"), by which they sought additional information and disclosure in respect of the Respondents' position in these proceedings and their heavily redacted copy of the Guidelines.[10] The Claimants sought to ascertain the limits of the policy, in particular, whether, on the Respondents' case, they could authorise the following conduct: murder; torture; inhuman and degrading treatment; rape or any other offences under the Sexual Offences Act 2003; battery, assault, wounding, poisoning, assault occasioning actual bodily harm and/or grievous bodily harm; kidnapping; and/or false imprisonment.

36. In their CLOSED Response to the Tribunal, dated 8 June 2018, the Respondents stated that it is "*unassailable that, if it were right that there was a breach of certain articles of the Convention,*

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[7] Prime Minister Direction to Commissioner, 27 November 2014.
[8] See further "*Agent Running and Participation in Criminality*".
[9] Where an officer in the Security Service purports to "authorise" criminal conduct, he or she will also be guilty of an inchoate offence under the national criminal laws of the UK (see for example Part 2 of the Serious Crime Act 2007).
[10] Claimant's RFI, dated 18 June 2018.

this would be unlawful".[11] A further passage is then redacted. As is readily apparent, no answer to the question has been provided. The Respondents have failed to confirm that the Guidance does not authorise agents to participate in some of the most serious offences prohibited by criminal law, the state-sanctioned commission of which would involve a grave breach of fundamental rights.

37. Nevertheless, from the limited disclosure provided by the Respondents to date, various features of the policy can be deduced, as set out below.

38. First, the Guidelines disclose that the Security Service has "*established its own procedure for authorising the use of agents participating in crime*", which it believes may be "*necessary and proportionate... in order to* ***secure or maintain access to intelligence***...". An earlier iteration of the Guidelines indicates that MI5 purports to authorise the conduct of an informant "*notwithstanding the criminal activities in which he may be engaged*" where there is a perceived need for the information in question.[12]

39. Second, the authorisation of criminal conduct may give rise to criminal liability. The Guidelines state that the purported effect of an authorisation is not to render any such conduct lawful, but rather to constitute "*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...*".

40. Third, despite that stated purpose, the Guidelines and earlier iterations of the policy contain no obligation for the Security Service to disclose the criminal conduct to the police, the CPS, the PPSNI, the Lord Advocate in Scotland or any similar body in order for an independent assessment to be made as to the public interest in a prosecution. It is now clear that no such notification occurs in practice. Specifically:

    a. In their Response to the RFI, the Respondents confirmed that they do not notify the PPSNI of the commission of serious crimes by Security Service agents. Indeed, the Respondents' described the suggestion that they should do so as "*absurd*".[13] Far from being absurd, such disclosure is required by Northern Irish law and is a fundamental flaw in the lawfulness of the policy.

    b. An IS Inspection Report from 2015 records that "*[t]he Commissioner asked about his suggestion that the CPS should be consulted...*" The Commissioner was told that "*this did not happen at present*".[14]

41. Fourth, the Security Service has a "*memorandum of understanding with the CPS which outline[s] when consultation on CHIS matters is desirable*".[15] That document remains

[11] Open version of the Respondents' CLOSED Response, dated 8 June 2018.
[12] *Guidelines for the Security Service: Use of Informants in Terrorist Related Cases*, 1995.
[13] See further, the Respondents' outline response to the RFI which was appended to their skeleton argument, dated 4 July 2018.
[14] Report of the IS Commissioner, dated June 2015.
[15] Report of the IS Commissioner, dated 24 November 2015.

undisclosed in these proceedings. It is nonetheless common ground that such consultation does not involve disclosure of authorisations under the Guidelines. It is unclear whether the CPS was (until these proceedings) even aware of the Guidelines or the directions.

42. Further, although the Guidance is a UK-wide policy, no memorandum appears to have been agreed with the PPSNI or the Lord Advocate in Scotland. It is doubtful if the PPSNI and the Lord Advocate were aware of the Guidelines or the directions.

43. Fifth, the scope of the policy has steadily expanded over time. In its earliest form, the policy appears to have been targeted at cases involving terrorism: see further, the "*Guidelines for the Security Service Use of Informants in Terrorist Related Cases*" (1995).[16] A further policy was then drafted "*on Running Agents in Serious Crime*" (1997).[17]

44. More recent iterations of the Guidelines suggest that the policy has been extended outwards from those cases to all areas of the Security Service's work.[18] That may include, for example, safeguarding the economic well-being of the United Kingdom (Security Service Act 1989, s.1(3)).

45. Finally, there has never been effective oversight of the policy. The Commissioner was initially invited to review the application of the policy in 2012, on a non-statutory and secret basis. The letter from the then Prime Minister, Mr David Cameron MP, to the then Investigatory Powers Commissioner, Sir Mark Waller, dated 27 November 2012, provides as follows:[19]

> *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.*
>
> *In addition to your statutory functions under section 59 of the Regulation of Investigatory Powers Act 2000, and your current non-statutory functions, I would like you to keep the application of this policy under review in respect to the necessity and proportionality of authorisations and to consider such related issues as you find appropriate. I envisage that you would* ***retrospectively review a sample*** *of these authorisations…*
>
> *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***

[16] *Guidelines for the Security Service: Use of Informants in Terrorist Related Cases*, 1995.
[17] *Security Service Policy on Running Agents in Serious Crime, 1997.*
[18] See further, the *Security Service Guidelines on the use of Agents who Participate in Criminality*, 26 September 2003.
[19] Letter from the Prime Minister to Sir Mark Waller, dated 27 November 2012.

your oversight would not relate to any future consideration given by prosecuting authorities to authorisations, should that happen. (emphasis added)

46. The Commissioner has therefore been expressly told not to provide any comment on the legality of the secret policy, nor to express a view whether a case should be disclosed to prosecuting authorities, nor to engage with the various prosecution authorities throughout the UK in any way. Indeed, while the Commissioner has been asked to say whether - retrospectively, and in a limited sample of cases - a public interest test would have been met, he is clearly not to notify the relevant prosecutor if he is dissatisfied. Such oversight does not ensure that an independent prosecutor is made aware of the commission of potentially grave crimes and takes a decision as to whether the public interest favours prosecution.

47. Perhaps surprisingly, the Commissioner appears to have accepted these limits to his remit. He agreed, prior to commencing oversight, not to comment on the legality of the policy he was being asked to oversee the operation of, or express any view on whether the police or independent prosecutors should be informed. The IP Commissioner's Report in 2013 thus provides that "*[a]s part of my oversight, I am not concerned if CHIS go ahead with criminal activity. Instead, I am looking at the public interest...*"[20] Those limitations are further reflected in the various (redacted) oversight reports provided to date.[21]

48. It is clear that the Commissioner had concerns with the operation and application of the policy. The inspection reports, for example, variously record that:

    a. "*The Security Service cannot currently identify precisely how many CHIS authorisations involve participation in criminality. In future they will keep a record of this*";[22]

    b. "*... I was concerned that MI5 should not have approved [redacted] MI5 wrote to me... explaining that [redacted] I accepted that the public interest would be satisfied...*";[23]

    c. "*The Commissioner raised his concern that MI5 had failed to accurately reflect the CHIS's participation in criminal activity [redacted];*"[24] and

    d. "*MI5 had failed to accurately reflect the CHIS's participation in criminal activity*".[25]

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[20] IPCO Composite Report, 2013.
[21] See, for example, the IS Commissioner Annual Report Confidential Annex OPEN Version, 2015 Report ("*No authority can make criminal conduct non-criminal... In my oversight I am prepared to make an assessment of whether participation would be likely to satisfy the public interest test*").
[22] Report of the IS Commissioner for 2014, July 2015, p.51.
[23] Report of the IS Commissioner for 2015, dated July 2016, pg. 14.
[24] IS Commissioner Inspection Report, dated December 2016, p.5.
[25] Report of the IS Commissioner for 2016, July 2017, p.20.

LEGAL FRAMEWORK

The constitutional framework: criminal law in the UK

49. Three features of the UK's constitutional settlement are relevant to the determination of this case.

(1) No power to dispense with the criminal law

50. The UK constitution reflects the separation of powers. Parliament makes the law, which the executive has no power or discretion to disregard.

51. The earliest recognition of that principle appears to have been in the *Case of Proclamations* (1610) 12 Co Rep 74. Recording his own view and the considered view of the judges, Sir Edward Coke stated "*the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm... the King has no prerogative, but that which the law of the land allows him*".

52. After the Restoration, and re-adopting the past practices of Charles II, King James II sought to dispense with the execution of certain penal laws. The events thereafter were recorded by Lord Denning in *Gouriet v Union of Post Office Workers* [1977] QB 729 at p.761E.

> *Take warning from history. Not from a previous Attorney-General. But from a King himself. James II claimed that, by virtue of his prerogative, he could suspend or dispense with the execution of all penal laws in matters ecclesiastical. He had his reasons which, to him at least, were most compelling. He desired religious toleration and civic equity. But the people of England would have none of this prerogative. The jury showed this at the trial of the Seven Bishops: Seven Bishops' Case (1688) 12 State Tr 183, and at the very first opportunity Parliament enacted the Bill of Rights... To every subject in this land, no matter how powerful I would use Thomas Fuller's words over 300 years ago: "Be you ever so high, the law is above you."*

53. The Bill of Rights was enacted in 1689. Article 1 is expressly clear that the executive branch of government has no power to suspend, dispense with, or suspend *the execution of law* the criminal law. It provides as follows.

> *Suspending power – That pretended power of suspending of laws* ***or the execution of laws*** *by regail authority without consent of Parliament is illegal.*
>
> *Late dispensing power – That* ***pretended power of dispensing with the laws*** *or the section of laws by regail authorities as it hath beene assumed and exercised of late* ***is illegal.***

54. The significance of those provisions in respect of the modern executive branch of government was recognised in *King v The London County Council* [1931] 2 KB 21. A cinematographer applied for a licence to open and screen films on a Sunday. The council

refused to grant the licence, but agreed not to take any action against the business on certain conditions. The Court held that the council had no jurisdiction to dispense with the provisions of the Sunday Observance Act 1780, which remained in force at that time. Lord Justice Scrutton noted that:

> *... the London County Council is in no better position than James II and that laws cannot be dispensed with by the authority of the London County Council, when they cannot by royal authority*" (p.228).

His Lordship went on to state as follows:

> "*... the County Council, like any other body in this Kingdom, however important, must obey the law as laid down by Parliament, and until Parliament alters the law, neither the London County Council, nor any other body, has the authority to dispense with the observance of the law on the statute book*" (p.234).

55. As a matter of constitutional principle, therefore, no public authority may decide not to execute the provisions of the criminal law.

56. Similarly, in R (Pretty) v Director of Public Prosecutions [2002] 1 AC 800 Lord Bingham held that the Director of Public Prosecutions ("DPP") had no power to give a "*proleptic grant of immunity from prosecution*" [39]. The dictum in that case was cited with approval by Lord Sumption in R (Nicklinson) v Ministry of Justice [2015] AC 657, at [241], who stated expressly that "*... an exercise of executive discretion... cannot be allowed to prevail over the law enacted by Parliament*".

(2) The Shawcross Convention and the operational independence of the police

57. The DPP and his counterparts in Scotland and Northern Ireland are public officials. They are strictly independent of the executive branch of government and entrusted by Parliament with discretionary powers as the head of independent, professional prosecuting services.

58. In England and Wales, the DPP is subject only to the superintendence of the Attorney General. Under the Prosecution of Offences Act 1985 the DPP as the head of the CPS has a duty to institute and conduct the prosecution of offences.

59. The decision as to whether to investigate and prosecute is solely a matter for the independent prosecutor. It is for this reason that the courts will only interfere with a decision of a prosecutor in exceptional circumstances. See R (Corner House Research) v Serious Fraud Office [2009] 1 AC 756, per Lord Bingham at [30]:

> *... the powers in question are entrusted to the officers identified, and no one else.* ***No other authority may exercise these powers or make the judgments on which such exercise must depend...***

Z8

60. The role of ministers and the executive branch of government in respect of the exercise of prosecutorial discretion is therefore narrow and confined to informing the prosecutor of the considerations which may affect his or her decision. That important constitutional principle, which was authoritatively stated by Sir Hartley Shawcross on 29 January 1951,[26] is part of the "Shawcross Rules" and amounts to a constitutional convention.

61. The effect of that convention, and its importance to the law, was summarised by Lord Bingham in *Corner House*, at [6], as follows.

> *... 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.*

61A. Further, there is a similar separation of powers in respect of the police and the Executive. The police are under an obligation to enforce the law. See further: *Commissioner of Police of the Metropolis v DSD* [2019] AC 196, at [130]; *R (Pretty) v DPP*, above, at [27].

61B. In *Commissioner of Police of the Metropolis ex parte Blackburn* [1968] 2 QB 118, at p135F-136C Lord Denning MR summarised the significance and implications of that obligation as follows (emphasis added).

> *The office of Commissioner of Police within the Metropolis dates back to 1829 when Sir Robert Peel introduced his disciplined force. The commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts... But* ***I have no hesitation in holding that, like every constable in the land, he should be, and is independent of the executive****... I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if needs be, bring the prosecution or see that it is brought. But in all these things he is not a servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him.* ***He is answerable to the law and the law alone****...*

61C. Similarly, in *Blackburn*, Lord Justice Salmon recognised that "*[c]onstitutionally it is clearly impermissible for the Secretary of State for Home Affairs to issue any order to the police in respect of law enforcement*" (p.138F).

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[26] See further, *Statement of Sir Hartley to the House of Commons* (HC Debates), 29 January 1951, cols 683-684.

61D. The Executive is therefore constitutionally obliged to respect the operational independence of the police and not to frustrate the discharge of its duty to make inquiries into and investigate crime. That constitutional arrangement, and its effect, was thus summarised by Sir John Thomas, President of the Queen's Bench Division, in *R (on the application of Mousa) v Secretary of State for Defence* [2013] HRLR 32, at [74], as follows.

> ***It is axiomatic that decisions on whether to pursue an investigation and then whether to prosecute must be made independently of the Executive. No civil servant, let alone a Minister can be permitted to have any influence whatsoever.*** *It is clear that in making such a decision* ***the police are constitutionally independent of the Executive*** *and of any local authority or official to which they are accountable in other matters.* (emphasis added)

(3) The nations of the UK

62. In matters of criminal law, the third important feature of the UK's constitutional framework is the separate laws applicable in the devolved nations.

63. Scots criminal law and procedure is separate from the rest of the UK.

64. As Lord Hope explained in *Montgomery v HM Advocate* [2003] 1 AC 641, at p.654B-E.

> *For almost three hundred years since the Union Agreement of 1707, known as the Treaty of Union, which preserved intact the Scottish legal system and the courts which administered it, the system of criminal justice in Scotland has survived as a self-contained and independent system. Its criminal laws and rules of procedure are entirely separate from those which exist in England and Wales and, based on the English model, Northern Ireland…*
>
> *… Its separate existence is due in large measure to the fact that, as I have already mentioned, no appeal lies to the House of Lords from the High Court of the Justiciary. The result is that the judicial developments of Scots criminal law has remained exclusively in the hands of Scottish judges. But it is also due to the Parliamentary convention which has existed ever since the Union in 1707, that legislation for Scotland in matters of criminal law and criminal procedure is dealt with separately from that for England and Wales and for Northern Ireland. This convention has now received statutory expression in Schedule 5 of the Scotland Act 1998…*

65. The criminal legal system in Scotland is therefore distinct from the English system: see the Scotland Act 1998, Schedule 5. The Scottish system includes an independent and autonomous prosecution service, led by the Lord Advocate, such that, in Scotland, "*the commencement and maintenance of the prosecution is an act of the Lord Advocate*": *Montgomery*, above, per Lord Hoffmann at p.648A-B. The Lord Advocate is appointed by the Scottish Government, with the consent of the Scottish Parliament.

66. As Lord Hope recognised in *R v Manchester Stipendiary Magistrate, Ex p Granada Television Ltd* [2001] 1 AC 300, while the prosecution services on either side of the border will often cooperate:

> *... the entire system for the investigation and prosecution of crime in Scotland is in the hands of the public prosecutor. Overall responsibility for the investigation and prosecution of crime rests with the Lord Advocate. He presides over a system which is operated on his behalf in the sheriff and district courts by the procurator fiscal. The functions and powers of the procurator fiscal long pre-dated the inception of the police forces in Scotland. So, while there is a close working relationship between the prosecutor and the police, the police remain subject to the control of the procurator fiscal: Laws of Scotland (Stair Memorial Encylopaedia), vol 17 (1989), "Procedure", p.218, para. 615...*

67. The criminal law and procedure of Northern Ireland has far more in common with England than Scots law does. There are nonetheless important differences. Two are particularly noteworthy.

68. First, Northern Irish law contains certain offences that go beyond the scope of English criminal law. Section 5 of the Criminal Law Act (Northern Ireland) 1967, for example, provides as follows.[27]

> ***5. Penalties for concealing offences etc.***
>
> *(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 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 of indictment to imprisonment according to the gravity of the offence about which he does not give that information...* (emphasis added)

69. Second, whereas the DPP in England is subject to the superintendence of the Attorney-General, the same is not true in Northern Ireland. The Attorney-General for England and Wales has ceased to act in that capacity for Northern Ireland: see the Justice (Northern Ireland) Act 2002, s.40. A separate Attorney General for Northern Ireland has been appointed. He has no power to give directions to the DPPNI, or to exercise superintendence over the DPPNI. The DPP of Northern Ireland has a statutory duty to exercise his functions independently of any other person (s.40), including the Attorney

[27] Cf. the more limited provision under English law: Criminal Law Act 1967, s5.

General for Northern Ireland. These changes were part of the package of measures introduced following the Good Friday Agreement, and reviews of policing and prosecution arrangements that followed that Agreement.

ECHR

70. By s 6 of the Human Rights Act 1998 (the "HRA"), it is unlawful for a public authority to act in a way which is incompatible with one of the rights set out in Schedule 1 to the Act, which incorporates the European Convention on Human Rights ("ECHR").

71. A claim may be brought against a public authority for contravention of s 6 under s 7(1)(a) HRA in the appropriate court or tribunal by a "*victim of the unlawful act*". The "*only appropriate tribunal*" for the purposes of proceedings under s 7(1)(a) against the Agencies or in respect of their conduct is the IPT (RIPA, s 65(2)(a), (3)(a), (b)).

(1) Victim status

72. A person is a "victim" for the purposes of s 7 HRA if "*he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights*". Article 34 ECHR sets out eligible applicants before the ECtHR, namely "*any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation*".

(2) The Convention principle of legality

73. A domestic measure that interferes with a Convention right must meet the requisite standard of lawfulness imposed by the Convention. This standard is expressly stated in many of the ECHR rights.[28] Legal certainty is in any event "*necessarily inherent*" in each Convention right (*Marckx v Belgium* (1979-80) 2 EHRR 330, §58).

74. The Convention principle of legality requires that measures interfering with a Convention right must meet three criteria, namely they must: (1) have some basis in domestic law; (2) be "*adequately accessible*" (such that a citizen is able to have an adequate indication of the legal rules applicable in a given case); and (3) be sufficiently foreseeable and precise: *Sunday Times v UK* (1979) 2 EHRR 345; *Silver v UK*(1983) 5 EHRR 347.

75. The law will not be accessible in circumstances where it is entirely unpublished or secret.

(3) Article 2 ECHR

76. Article 2 of the Convention provides:

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

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

77. This provision imposes three duties on the Government of the United Kingdom:

    a. The negative duty to refrain from taking life other than in the exceptional circumstances set out in Article 2(2).

    b. The protective duty to take steps to protect the lives of those in their jurisdiction in certain circumstances: *Osman v United Kingdom* (1998) 29 EHRR 245.

    c. The positive duty properly and openly to investigate deaths for which the state might be responsible, since "*There is not much point in prohibiting police and prison officers … from taking life if there is no independent investigation of how a person in their charge came by her death*": *Savage v South Essex Partnership NHS Foundation Trust* [2009] 2 WLR 115 (HL).

78. The negative duty may be breached, for example, if the criminality 'authorised' includes, for example:

    a. killing: *McCann v United Kingdom* (1995) 21 EHRR 97; and/or

    b. killing in the course of or incidental to secret operations: *Andronicou and Constantinou v Cyprus* (1997) 25 EHRR 491.

79. The exceptions in Article 2(2) are strictly construed in light of the fundamental nature of the right at stake and the use of the words "*absolutely necessary*" indicate a stricter test of necessity than under other Convention rights: *McCann* at §§147-149. When the circumstances which lead to death are fully within the control of the State, strong presumptions of fact arise and the burden of proof rests on the authorities to provide a satisfactory and convincing explanation: *Jordan v United Kingdom* (2003) 37 EHRR 52 at §105.

80. The protective duty may be breached, for example, if the 'authorisations' granted involve detention of persons who die or suffer serious injury while detained, or who require medical attention: see e.g. *Kats v Ukraine* (2008) 51 EHRR 1066 at §104.

81. The duty continues to apply in difficult security conditions, including in a context of armed conflict: *Al-Skeini v United Kingdom* (2011) 53 EHRR 589 at §164. It can arise:

    a. even if there is no breach of Article 2 in the death itself — because the killing was "*absolutely necessary*" or the death occurred despite reasonable protective steps; and

    b. not only in the case of deliberate killing by state agents but also, for example, where an attempted suicide in custody results in long-term injury: *R (JL) v Secretary of State for Justice* [2009] AC 588 (HL) at §§37-41 per Lord Phillips, 54-59 per Lord Rodger.

82. This positive duty requires a thorough and effective investigation so that the cause of any death "*can be determined and those responsible made accountable*": *Vo v France* (2005) 40 EHRR 12 at §89. An Article 2 investigation must, *inter alia*, be:

    a. independent;

    b. effective, i.e. capable of leading to a determination of whether the force used was justified and to the identification and punishment of those responsible;

    c. reasonably prompt;

    d. involve "*a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts*"; and

    e. involve "*[i]n all cases … the next of kin of the victim … in the procedure to the extent necessary to safeguard his or her legitimate interests*". See *Jordan v United Kingdom* (2001) 37 EHRR 2 at §§103-121; *R (Amin) v SSHD* [2004] 1 AC 653 (HL) at §25 per Lord Bingham.

83. Any investigation carried out in secret will fail at least the fourth and fifth of those requirements. Any oversight carried out pursuant to the Guidance involves no public scrutiny and does not involve the next of kin. Even where "*publication of … investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations*", the lack of a "*reasoned decision available to reassure a concerned public that the rule of law had been respected … cannot be regarded as compatible*" with Article 2: *Jordan v UK* at §§121-124.

84. Accordingly, the obligations under Article 2 are breached if the criminal activities 'authorised' under the Third Direction involve state-sanctioned murder, lethal operations or the false imprisonment of individuals at risk of death or serious injury. Secrecy of the activities and of any mechanisms for investigation is not compatible with the positive obligations under Article 2.

(4) *Article 3 ECHR*

85. Article 3 of the Convention provides:

> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

86. Torture is any act by which severe pain or suffering intentionally inflicted for such purposes as obtaining information or a confession, punishing or intimidating, at the instigation of or with the consent or acquiescence of a public official: see Article 1(1) of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition on torture, upon which there is international consensus, is absolute: see further A v Home Secretary (No. 2) [2006] 2 AC 221, per Lord Bingham of Cornhill at [33]: "*there can be few issues on which international legal opinion is more clear than on the condemnation of torture…*".

87. That torture is anathema to the common law was given judicial recognition in the landmark decision in Felton's Case (1628) 3 How. State Tr. 371, in which judges were clear that the "*[the individual] ought not to be tortured by the rack because no such punishment is known or allowed by our law*". Marking a turning point in the development of the common law, Blackstone noted that it was "*to [the judges'] honour and the honour of the English law, that no such proceeding was allowable by the laws of England*": see further Blackstone's Commentaries on the Laws of England (1789) vol IV, ch 25, pp. 320-321.

88. Torture has not been officially sanctioned in England since 1640, at which time the Long Parliament abolished the so-called 'Court of Star Chamber' which had received torture evidence: Blackstone's Commentaries on the Laws of England, above, pp. 320-321. Since that time, the common law has "*set its face firmly against the use of torture*": A v Home Secretary (No. 2) [2006] 2 AC 221, per Lord Bingham of Cornhill at §10 and §12. Indeed, as his Lordship recognised in A (No. 2), the prohibition on torture was "*hailed as a distinguishing feature of the common law*" and was thus the subject of "*proud claims by English jurists*": per Lord Bingham, at §11.

89. The prohibition on torture at common law stemmed not only from recognition of the unreliability of confessions or other evidence so procured, but also in recognition of the "*cruelty of the practice*" and in light of the belief that torture "*degraded all those who **lent themselves** to the practice*": per Lord Bingham, at §11, emphasis added. In A History of English Law, 3rd Ed (1945), vol 5, p. 194, Sir William Holdsworth recognised a further rationale for the prohibition, namely that "*[o]nce torture has become acclimatised in a legal*

system it spreads like an infectious disease... It hardens and brutalizes those who have become accustomed to use it".

90. The distinction between 'torture' and 'inhuman or degrading treatment' is found in the intensity of the suffering, although torture also has a purposive element and is an intentional act: *Gäfgen v Germany* (2010) 52 EHRR 1 at §90. As standards progress, treatment that has previously been held not to reach the threshold of severity required to constitute torture may be classified differently now: *Selmouni v France* (1999) 29 EHRR 403 at §§99-100 and *Ireland v UK (No. 2) (Application for Revision)* (20 March 2018, Application 5310/71).

91. As with Article 2, Article 3 imposes:

    a. a negative obligation not to torture;

    b. a protective obligation to take steps to avoid torture;

    c. a positive obligation to conduct an effective official investigation capable of leading to the identification and punishment of those responsible: *Labita v Italy* (2008) 46 EHRR 1228 at §131.

92. The negative or protective obligations may be breached, for example, if the Third Direction and the Guidance permitted the 'authorisation' of acts amounting to torture or inhuman and degrading treatment.

93. The investigative obligation would arise if the secret activity involves or could involve allegations of:

    a. Ill-treatment by agents of the State or by private individuals under its control: see *Premininy v Russia* (2011) 31 BHRC 9 at §74.

    b. Mistreatment by another State to which a person has been delivered, under the direction or at the instigation of the state which handed him over, or with a sufficient level of involvement in the mistreatment to amount to complicity: see *Al-Saadoon v Secretary of State for Defence* [2017] 2 WLR 219 (CA) at §§138-139.

94. The "*same essential ingredients apply to an Article 3 investigation*" as under Article 2: *R (AM) v SSHD* [2009] EWCA Civ 219 at §§32, 86. In particular, the investigation must secure the "*right to the truth*". In *El Masri v Macedonia* (2013) 57 EHRR 25, the Court found that the investigation undertaken by the authorities into the incommunicado detention and rendition of the applicant was not effective for the purposes of Article 3. The Court went on to "*address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth*". It stated at §§191-192:

... it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened... The concept of "state secrets" has often been invoked to obstruct the search for the truth. ...

... there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory ...

95. As set out above in relation to Article 2, that requirement cannot be fulfilled by secret oversight by the IS or IP Commissioner. The Strasbourg Court was precisely concerned to avoid determination in secret of (i) whether particular activities constituted torture or inhuman or degrading treatment and (ii) if so, what responsibility should be attributed for those activities.

96. Under the Convention, a public authority cannot authorise a breach of Article 2 or Article 3 under any circumstances.[29] In *AKJ v Commissioner of Police of the Metropolis* [2013] 1 WLR 2734, Tugendhat J accurately summarised the law:

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

(5) Article 5 ECHR

97. Article 5 of the Convention provides:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an

[29] That position is also recognised in other jurisdictions. See, for example, *Public Committee against Torture in Israel* (1994) 53(4) PD 817, at 835, per Barak P: "*... not all means are permitted... not all methods used by [our] enemies are open. At times democracy fights with one hand tied behind her back. Despite that democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance.*".

offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

98. Deprivation of liberty for the purposes of Article 5 need only be for a short time, for example while in transit in a vehicle: *Bozano v France* (1986) 9 EHRR 297. It does not require that the person be kept in a locked cell if it is clear that he would be prevented from leaving: *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at §§41-42; *Guzzardi v Italy* (1980) 3 EHRR 333. It is irrelevant that the authority that authorised the detention had a benevolent purpose: *Cheshire West and Chester Council v P* [2014] AC 896 at §34.

99. A number of issues arise under Article 5 if detention or false imprisonment is 'authorised' under the arrangement overseen in the Third Direction.

100. First, deprivation of liberty may only be in accordance with a procedure prescribed by law (Article 5(1)). This requires not only lawfulness as a matter of domestic law, but compliance with Convention requirements of adequate procedural safeguards sufficiently accessible and precise laws regulating the detention: *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19 at 38; *HL v United Kingdom* (2005) 40 EHRR 32; *Shtukaturov v Russia* (2012) 54 EHRR 27.

101. Any detention or false imprisonment approved in secret under the Third Direction is unlawful. The Guidelines do not specify the circumstances in which the Security Services may authorise an agent to detain or falsely imprison another individual, alternatively any such guidance is secret.

102. Further, inadequate safeguards are not remedied by the secret oversight of the IS or IP Commissioner. Deprivation of liberty on these terms is not in accordance with a procedure "*prescribed by law*".

103. Second, deprivation of liberty is permitted only for certain enumerated purposes. If the secret activity involves 'authorisation' of detention for some other purpose, such as to assist a covert human intelligence source maintain his or her cover, or to obtain information, it will breach Article 5. For example, the Supreme Court has recently noted that "***detention for the sole purpose of intelligence exploitation*** *is incompatible with article 5.1 of the Convention in a domestic context,* ***even in the face of a significant terrorist threat***" (emphasis added): *Mohammed v Secretary of State for Defence* [2017] 2 WLR 327 (SC) at §80 per Lord Sumption (with whom Lady Hale DPSC agreed).

104. Third, Article 5 also imposes a positive obligation to "*conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since*": *Imakayeva v Russia* (2008) 47 EHRR 4 at §171. For the reasons explained above in relation to Articles 2, 3 and 4, a review by the IS or IP Commissioner will not satisfy that requirement.

105. Fourthly, secret or incommunicado detention supervised only by the IS or IP Commissioner could not satisfy the procedural rights in Article 5. Judicial control of detention is "*implied by the rule of law*": *Brogan v United Kingdom* (1988) 11 EHRR 117 at §58. "*The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Art.5*": *Imakayeva* at §171.

106. In particular, Article 5 requires judicial oversight for two purposes.

a. Where the state authorizes detention, under Article 5(1)(c), the detained individual must be "*brought promptly before a judge or other officer authorised by law to exercise judicial power*" (Article 5(3)).

b. For any deprivation of liberty, procedures must be available to have the lawfulness the detention "*decided speedily by a court and his release ordered if the detention is not lawful*" (Article 5(4)). The right must be practical and effective, not merely theoretical or illusory: e.g. *R (Walker and James) v Secretary of State for Justice* [2008] EWCA Civ 30; *Mohammed* at §§101-103.

107. This judicial oversight imports the minimum standards associated with judicial power. For example:

a. It must be independent, impartial and capable of giving a binding judgment requiring release.

b. The procedure adopted must "*ensure equal treatment*" and be "*truly adversarial*": Toth v Austria (1991) 14 EHRR 551 at §84.

c. The applicant must be afforded adequate legal assistance, disclosure and time to prepare: Weeks v United Kingdom (1987) 10 EHRR 293 at §66.

d. Often the circumstances are such as to make it "*essential … that the applicant be present at an oral hearing*": Waite v UK (2002) 36 EHRR 1001 at §59. In appropriate circumstances, a public hearing may be required: Reinprecht v Austria (2007) 44 EHRR 797 at §41.

e. The judicial authority must have the power to order, rather than merely to recommend, the person's release: X v UK (1981) 4 EHRR 188.

108. The Strasbourg Court has expressly stated that national security concerns cannot be invoked to dispense with these procedural requirements: "*National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved*": Al-Nashif v Bulgaria (2003) 36 EHRR 655 at §94.

109. Secret oversight by the IS or IP Commissioner could not satisfy these procedural requirements.

(6) *Article 6*

110. Article 6(1) of the Convention provides:

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

111. The use of an agent as an *agent provocateur* may give rise to a breach of the Convention: Teixeira de Castro v Portugal (1999) 28 EHRR 101. Further domestic case law is clear that, in

respect of the undercover agents, the end will not always justify the means: *R v Latif and. Shahzad* [1996] 2 Cr App R 92.

112. The leading case remains *R v Looseley, Attorney-General Reference (No.3 of 2000)* [2001] 1 WLR 2060. Having reviewed the relevant Strasbourg jurisprudence, including *Teixeira de Castro*, above, their Lordships provided guidance as to the "*limits of acceptable "pro-active" conduct by the police*": per Lord Nicholls at [5]. The "*overall consideration*" was said to be "*whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute*": per Lord Nicholls, at [25]. A similar formulation of conduct which would "*affront the public conscience*" was adopted by Lord Steyn in *Latif*. Relevant factors include: the nature of the offence; the reason for the particular operation; and the nature and extent of participation in the crime.

113. An undercover agent stands to be prosecuted for any resulting offence, save in exceptional circumstances. Archbold, 2019, explains that the agent may only escape conviction where the offence was "*already "laid on" solely for the purpose of apprehending the offenders*" and that whether that is the case should be "*scrutinized with the greatest care… [e]ven if the offence was already planned, the defence should fail unless it is clear that the assistance given by the undercover officer or informer made no difference to the commission of the offence*" (para. 18-25, p.2185). Thus "*[t]he true principle is that the motive for rendering assistance is irrelevant (except to sentence),* ***as is the fact that the agent provocateur did not have the mens rea required of a principal.***" (emphasis added)

Public law

114. Public law standards of fair and reasonable decision making require any policies or guidelines under which decisions are taken to be made public. In particular:

a. "*The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised*": R *(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, per Lord Dyson at [34]; and

b. If "*a policy has been formulated and is regularly used by officials, it is the antithesis of good government to keep it in a departmental drawer*": *B v Secretary of State for Work and Pensions* [2005] 1 WLR 3796, per Sedley J at [43].

GROUNDS

Ground 1: not in accordance with law - unsupervised conduct, conduct subject to secret oversight and conduct authorised in accordance with unpublished guidelines

115. The Third Direction and the Security Service's policy of authorising agent participation in criminality have gone through various 'phases' of secrecy:

a. Before 2012, the existence of the policy itself was not only secret but subject to no oversight.

b. Between 2012 and 28 November 2014, the policy was secret and only subject to the secret 'non-statutory' oversight by the IP Commissioner.

c. The existence of the Third Direction (but not its nature) was disclosed in the course of proceedings before the Tribunal. It was not published until 1 March 2018. Between 28 November 2014 and 1 March 2018, criminal conduct - purportedly authorised pursuant to an unpublished policy - was overseen by the IS Commissioner and IP Commissioner at a time when both the title and content of the Third Direction remained secret. During this period, a wholly secret policy was therefore subject to secret oversight.

d. While the Third Direction has now been published, the Guidelines remain heavily redacted. Without explanation, much of the policy (including the content of the arrangements and the limits, if any, to the crimes that may be committed) remain undisclosed.

116. Before 1 March 2018, all oversight of the policy and the application of the Guidelines was secret. It was thus "*not in accordance with law*" or "*prescribed by law*", as required by the Convention. During that period, the authorisation regime did not contain adequate safeguards, sufficiently accessible to the public, to provide proper protection against arbitrary conduct. In particular:

a. Between 28 November 2014 and 1 March 2018, the application of the Guidelines was subject to oversight under the Third Direction, which was conferred by the Prime Minister on the IS Commissioner. The Third Direction was only published on 1 March 2018, before which time: the nature and scope of the function of any oversight was secret; the Agency or Agencies carrying out the functions was secret; and the terms on which the IS Commissioner kept the Agency's exercise of the function under review was secret.

b. Before 2012, there were no safeguards at all.

117. To the extent that any conduct was purportedly 'authorised' under the Guidelines at a time when the Third Direction remained secret, and interfered with any Convention right, all such interferences were unlawful.

a. Any interference with a Convention right must be "*in accordance with law*". It requires a legal regime that complies with the rule of law by providing both (i) adequate safeguards against abuse of executive power, including judicial or quasi-judicial oversight and (ii) sufficient clarity to enable individuals to appreciate the existence and nature of those powers.

b. A procedure or function that interferes with rights cannot comply with that principle of legal certainty if it is entirely secret.

c. Further, safeguards, including oversight, only aid compliance with the rule of law if they are publicly known. A regime cannot comply with the rule of law where safeguards that are "*below the waterline*" and "*not adequately signposted*".[30]

d. The nature of the activity conducted under the Third Direction, the regime governing that activity, and the terms of its oversight were - during any period when the existence or content of the Third Direction remained secret - all "*below the waterline*". They were not "*signposted*" adequately or at all before the existence of the Third Direction or its contents were known.

118. The Guidelines remain heavily redacted and the limits of the policy remain secret. To the extent that any conduct: (1) continues to be authorised under the Guidelines in those circumstances; and (2) interferes with any Convention right, it will be unlawful. Where a direction is exercised in accordance with unpublished guidelines, the law will be inadequately accessible and unforeseeable. It is thus insufficiently certain and cannot be "*prescribed by law*" or "*in accordance with law*".

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

119. The underlying policy, by which the Security Service purport to authorise agent participation in criminality, was entirely secret before 1 March 2018. The Guidelines remain heavily redacted. Even the outer limits of the policy remain undisclosed - the Respondents having refused to disavow state-sanctioned torture and murder.

[30] The Claimants reserve their position as to the correctness of the test applied by the Tribunal in *Liberty 1* and *Liberty 2*, but even on that test, the activities overseen under the Third Direction did not comply with the requirements of foreseeability.

120. The content of the law cannot be secret: *Black-Clawson International Limited v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591: "*the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it*" (per Lord Diplock, at 638D). Where the government operates a policy, individuals that are affected by that policy must be provided with a means by which they can make informed or reasonable representations on the operation of that policy or its application to them. See *R (Lumba) v SSHD*, above.

121. For any period when the existence of the Guidelines or any previous iteration of the policy was secret, it was clearly unlawful. It remains so, in circumstances where: (1) arrangements pleaded above provide no means by which a persons affected can make any such representations to the Agencies; and (2) the limits of the policy remain undisclosed.

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

122. There is in any event no legal basis for the policy, the effect of which would be to circumvent the statutory scheme governing the Agencies.

123. The Security Service purports to authorise agent participation in criminal conduct. The Respondents' rely on section 1(2)-(4) of the Security Services Act 1989 as a legal basis for that policy:[31]

> (2) *The functions 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 functions 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 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 crime.*

124. The Respondents contend that "*it would be impossible to fulfil these functions effectively without the use of agents*".[32] No doubt that is correct. But absent express wording, that provision provides no basis for the authorisation of criminal conduct by those agents, still less authorising crimes involving grave breaches of fundamental rights. The above

[31] See further, the Open Version of the Respondents' CLOSED Response, dated 8 June 2018, para. 3-4.
[32] Ibid, para. 4.

provisions are simply a statement of the functions of the Security Service. They give the Service no power to carry out conduct that is otherwise criminal.

125. Any interpretation of s.1 SSA 1989 allowing the Security Services to authorise crime under that provision would need express words. The principle of legality requires that general words be read so as to avoid encroachment on a fundamental or constitutional right. In *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, Lord Hoffmann described the principle as follows.

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

126. The importance of the principle in respect of torture was noted by Lord Bingham in *A (No.2)* at [55].

> *... the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention. I am* ***startled, even a little dismayed, at the suggestion*** *(and the acceptance by the Court of Appeal majority) that this* ***deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute and a procedural rule which make no mention of torture at all.***

127. It is moreover clear that, where Parliament intends to allow the executive branch of government to authorise crime, it will provide a legislative basis. Compare s.1 SSA 1989 with section 7 of the ISA 1994, which permits an authorisation to be given to the Secret Intelligence Service or GCHQ or their agents to carry out criminal activity abroad: "*If, apart from this section; a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section*" (s.7(1)). That provision is express and clear that its purpose and effect is to authorise crime outside the British Islands.