

128. Unsurprisingly, the statutory power is accompanied by limitations and stipulations as to the permissible scope of any authorisation thereunder. In particular, such conduct may only relate to acts done outside of the British Islands. For obvious reasons, Parliament did not contemplate the Agencies committing criminal conduct here. To the extent that they needed to do things that might otherwise be criminal (e.g. interference with property), express warrantary powers were provided. By contrast, on the Respondents' case, the scope of s.1 SSA 1989 would seem to be unlimited – or limited only by what the Security Services, in their absolute discretion, deemed necessary for the performance of their functions.

Ground 4: no de facto power to dispense with criminal law / usurp the proper functions of the prosecution services and the police in the United Kingdom

129. First, absent an express statutory power, the Agencies – as part of the executive – have no power to dispense with the ordinary application and enforcement of the criminal law. The importance of the functions of the Security Service provides no exception to the principle that the “pretended power of dispensing with the laws or the execution of laws” is impermissible.

130. Second, the Respondents have effectively usurped the function of both the prosecution services and the police by purporting to authorise crime and – by failing to notify the various prosecution services and the police – denying those organisations the prosecutor the opportunity to investigate or prosecute the resulting offences, or even to make their own judgement as to whether the public interest weighs against doing so prosecution:

- a. Both agents and Security Service officers will commit criminal offences, pursuant to the arrangements in the Guidance.
- b. The decision as to whether to investigate and prosecute offences is solely a matter for the independent prosecutor and the police services, as set out above.
- c. Just as the prosecutor in *Nicklinson* could not dispense with his own power to investigate and prosecute crimes, nor can the Respondents deprive the prosecutor of that power (nor the police of their powers to make inquiries and investigate crime) by a policy whose purpose and effect is to *de facto* permit crimes to be committed, and then concealed from the police and prosecution authorities.
- d. The proper approach is for independent prosecutors and police to decide: (1) whether the public interest justifies non-prosecution for criminal conduct; and (2) whether to investigate the alleged offence in question, respectively. In respect of the former, Ministers (and the Agencies) may provide information on considerations that are relevant to the exercise of that discretion, but they may not make the decision for the prosecutor (nor the police). Equally, they cannot withhold information from either organisation prosecutors so as to achieve the same effect.

- e. Yet, that is the inevitable effect of the Respondents' policy. The whole purpose of the policy is to frustrate the statutory roles of the various prosecutors and police forces in the UK.
- f. An (undisclosed) memorandum of understanding with the CPS cannot remedy that error, where it is clear that, in practice, the prosecutor is not notified of authorisations made pursuant to the Guidelines.
- g. Nor can oversight by the Commissioner as to the application of the public interest test save the unlawful policy. The discretion to (1) prosecute and (2) investigate crime belongs to the prosecution service and the police alone, respectively. The Commissioner is not statutorily tasked with assessing the merits of the prosecution and investigation of crime and should not have agreed to do so. Nor can the Commissioner even refer a case of concern to the relevant prosecutor or police force.
- h. In R v Incedal [2016] 1 WLR 1767 Lord Thomas of Cwmgiedd CJ held:

(d) Duty of the Executive to provide the evidence

61 It is necessary, in the light of some of the material provided to the court, to make it clear that if the DPP decides to proceed with a prosecution on the basis of the court's decision to allow certain information or evidence to be heard in public, no part of the Executive can refuse to provide the evidence required by the DPP on the basis that it perceives that it is not in the interests of national security to provide it. The court has made its decision and the Executive must abide by it. It must also abide, subject to the qualification set out in para 44 above, by the decision of the prosecutor, whether in the light of the decision of the court, the prosecution should continue. If the DPP decides on continuation, then the Executive must give the prosecution its full co-operation and assistance.

Under the Guidance, those important constitutional principles are frustrated by a secret policy under which the Security Service arrogates to itself (without even requiring ministerial authorisation) the power to decide whether crimes should be committed, and then keeps such conduct strictly secret so as to prevent the DPP from making his independent decision as to whether the public interest favours prosecution of the relevant agent, or the officers of the Security Service who authorised the criminal conduct.

131. Third, the policy is UK-wide. The Respondents have disregarded entirely the role of the prosecution authorities and police in Northern Ireland and Scotland. The adoption of the policy, and any authorisations thereunder, amount to an illegitimate interference with the criminal justice systems of those jurisdictions. Notably:

- a. In Scotland, as Lord Hope recognised in Granada Televisions, the "entire system for the investigation and prosecution of crime in Scotland... rests with the Lord Advocate" (at p.306). That constitutional settlement has been in place for three hundred years.

Despite that, the Respondents' have essentially usurped the function of the Lord Advocate by adopting a policy that would allow them to authorise agent participation in crime in Scotland without notifying the Lord Advocate, or the Police Service of Scotland.

- b. The policy also fails to account for the important differences in criminal law and procedure in Northern Ireland (including in respect of the statutory complete independence superintendence of the DPP NI from superintendence or direction by the Attorney General). The Respondents' position is that it would be "absurd" if the Security Services were required to notify the PPSNI of notifiable offences. In fact, their failure to do so is an offence under s.5 of the Criminal Law Act (Northern Ireland) 1967. These statutory arrangements are in place for sound historical and constitutional reasons. The policy circumvents them.

Ground 5: Breaches of procedural rights under the Convention

132. Any deprivation of liberty (including false imprisonment) effected pursuant to a purported 'authorisation' given by the Security Service, carried out under the supervision of the IS or IP Commissioners under the Third Direction, is in breach of Articles 5(3) and/or (4).
 - a. Under Articles 5(3), a person arrested for an offence must be brought promptly before a judge.
 - b. Under Article 5(4), any person detained must have access to judicial procedures to challenge the lawfulness of his detention.
 - c. Under both provisions, the judicial process must be independent, impartial, adversarial, ensure equal treatment and adequate hearing rights, afford adequate time, disclosure and legal assistance and involve an oral and where appropriate public hearing. In particular, the detained person must have the opportunity to make representations.
 - d. Any secret deprivation of liberty effected by the Agencies is necessarily incommunicado detention without access to courts.
 - e. Secret review by the IS or IP Commissioner of an individual's detention does not provide the judicial oversight required by Article 5.
 - f. Further, before 28 November 2014, when the Third Direction came into force, there was no system of statutory oversight.

Ground 6: Breaches of investigative duties under the Convention

133. 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 positive investigative duty imposed by Articles 2, 3 and/or 5 ECHR:

- a. Each of those Articles imposes on Contracting States a positive duty to properly and openly investigate conduct infringing those Articles, namely conduct causing death or serious injury (Article 2), torture or inhuman and degrading treatment (Article 3), or deprivation of liberty (Article 5).
- b. The investigative duty is not fulfilled by an investigation by the IS Commissioner, including because:
 - i. it is not capable of leading to identification and punishment of those responsible for a breach of Articles 2, 3 or 4;
 - ii. it does not involve a sufficient element of public scrutiny, or any public scrutiny at all;
 - iii. it does not involve the victim or the next of kin to the extent necessary to safeguard their legitimate interests, or at all.

134. In the premises, in the oversight of the IS and IP Commissioners is in breach of Article 2, 3, and/or 5 to the extent that the conduct ‘authorised’ might involve arguable instances of breaches of those Articles.

Ground 7: Breaches of the Convention

135. Any purported ‘authorisation’ of conduct in breach of certain articles of the Convention would be unlawful:

- a. Article 2, to the extent that it involves deprivation of life that is not absolutely necessary for the defence from unlawful violence, lawful arrest, prevention of unlawful escape or quelling a riot or insurrection; for example:
 - i. targeted killings,
 - ii. killings in the course of secret operations or to maintain cover as a covert human intelligence source.
- b. Article 3, to the extent that it involves torture or inhuman and degrading treatment.
- c. Article 5, to the extent that it involves the deprivation of liberty of any person for a purpose other than that enumerated; for example, for the obtaining of intelligence.
- d. Article 6, to the extent that there is a real risk of an unfair trial. As set out above, the use of an agent as an *agent provocateur* may give rise to a breach of Article 6 of the Convention: Teixeira de Castro v Portugal (1999) 28 EHRR 101. That will be the

case if and to the extent that the conduct of any agent authorised to participate in crime by the Security Services was “so seriously improper as to bring the administration of justice into disrepute” (*R v Looseley*, at [25]) or is an “affront to the public conscience” (*Latif*, per Lord Steyn).

136. Articles 2, 3, 5 and 6 of the Convention enshrine fundamental rights which are not balanced against other interests (cf. Articles 8 and 10 ECHR). To the extent that any conduct purports to be ‘authorised’ under the guidelines breaches or breached any of those rights, it is or was unlawful. It is not within the state’s gift to purport to give ‘authority’ for violations of such rights. Any policy which seeks to do so is equally unlawful.

CONCLUSION

137. The Claimants therefore seek the following orders:
- a. A declaration that the Respondents’ conduct is unlawful;
 - b. An order quashing the Guidance;
 - c. An injunction restraining further unlawful conduct; and
 - d. Such further or other relief as the Tribunal thinks fit.

BEN JAFFEY QC

CELIA ROONEY

~~29 March 2019~~

15 July 2019