IN THE COURT OF APPEAL **Court of Appeal Ref: 2020/0317**

ON APPEAL FROM THE INVESTIGATORY POWERS TRIBUNAL

BETWEEN:

(1) PRIVACY INTERNATIONAL

(2) REPRIEVE

(3) COMMITTEE ON THE ADMINISTRATION OF JUSTICE

(4) PAT FINUCANE CENTRE

Claimants / Appellants

-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

RESPONDENTS' SKELETON ARGUMENT

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*References **[J/X]** are to paragraphs in the IPT's OPEN decision dated 20 December 2019.*
*References **[SA/X]** are to paragraphs in the Appellants' appeal skeleton dated 2 November 2020.*

INTRODUCTION

1. The functions of the Security Service are set out in ss.1(2)-(4) of the Security Service Act 1989 ('the 1989 Act'), namely:

   "(2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from action intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

   (3) It shall also be the function of the Service to safeguard the economic wellbeing of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.

   (4) It shall also be the function of the Service to act in support of the activities of police forces, the National Crime Agency and other law enforcement agencies in the prevention and detection of serious crime."

2. It would be impossible to fulfil these functions effectively without Covert Human Intelligence Sources ('CHIS'), also known as agents. They are indispensable to the work of the Security Service, and thus to its ability to protect the public from the threat of serious harm. The importance of acquiring intelligence and of protecting the CHIS who do so is scarcely capable of overstatement.

3. That is the position now and it was the position at the time the 1989 Act was passed. That Act put the activities of the Security Service - including running CHIS - onto a statutory footing. It did so through the broad functional provisions set out above. Parliament plainly intended that the Security Service should be able (through these provisions to continue to run CHIS (with the inevitable and necessary possibility of participation in criminality). The Appellants' case necessarily involves the propositions either that the Security Service never had power to do so, or that (if they did) the 1989 Act took it away. Both are equally difficult.

4. It is critical to the performance of the Security Service's functions that their agents can participate in crime. Given the covert nature of CHIS, and given the types of person with whom and entities with which they have relationships, they need to behave in certain ways and participate in certain activities. This is reflected in §5 of the Guidelines on the use of Agents who participate in Criminality ('the Guidelines'). This provides that participation in criminality may be necessary *"in order to secure or maintain access to intelligence that can be used to save life or disrupt more serious criminality, or to ensure the agent's continued safety, security and ability to pass such intelligence."* Such behaviour is an inevitable and necessary part of agents' ability to function as providers of vital life-saving intelligence whilst also protecting themselves from the hostile and dangerous environment in which they operate.

5. The conduct which is the subject of the Security Service's processes under challenge in these proceedings may or may not be criminal. Indeed, there is likely to be doubt about that question. The IPT was entirely right to say; *"it would be more apt to say that they [the Guidelines] govern the procedure for authorising conduct which may involve criminality"* **[J/64]**. It is of obvious and particular importance to note the fundamental point that the whole purpose of CHIS, their *raison d'être*, is to act to frustrate plans for and acts of terrorism and serious crime. If criminality is or may be committed by the CHIS,

whilst putting his life and safety in jeopardy, that is done for the common good. Thus, for example:

a. Where *mens rea* is an element of the offence, the CHIS may (and very often will) lack the requisite fault element.
b. Even where the offence appears in some respects to be one of strict liability, the position as to criminality may be far from clear. For example, if the CHIS is acting so as to frustrate say the actions of terrorists and the offence in question is under the terrorism legislation.
c. However, on occasion the CHIS will, or just as importantly may, be committing a criminal offence. That may be so where the CHIS is acting to maintain cover.

6. The Security Service has accordingly developed detailed policies, practices and procedures in relation to such conduct. That is a virtue not a vice. It would not have been responsible to encourage a CHIS to infiltrate and provide intelligence on say a terrorist organisation without providing some guidance as to likely real life scenarios that might arise, including the CHIS having to show support for and participate to some extent in the activities of that organisation. On the contrary, it is responsible and proper for the State not to tum a blind eye to the realities and necessities of CHIS reporting. A decision to abandon the CHIS in that way would operate to the detriment and uncertainty not only of CHIS but also of all those who provide them with support.

7. The policy and procedures therefore reflect, and responsibly support, the basic ability and power in the Security Service to run CHIS as an essential, vital part of its core protective functions. As already noted, and as the majority of the IPT found **[J/60]**, it is inconceivable that Parliament could possibly have intended, when it enacted the Security Service Act, to undermine the Security Service's ability to protect the public in that way. As the IPT held, the power of the Security Service to authorise its agents to engage in conduct which may be criminal *"does not depend upon there being a policy at all"* **[J/52]**. That power exists irrespective of the policy documents.

8. As set out further below, and as held by the majority of the IPT in **[J/67]**, the Security Service does not have the power to confer immunity from criminal liability. This is in contradistinction to the power granted by Parliament under s.7 of the Intelligence Services

Act 1994 (and of course any such power to grant immunity could only be granted by Parliament). Nor does the Security Service purport to confer such immunity. As set out at §9 of the Guidelines, an "*authorisation*":

> *"has no legal effect and does not confer on either the agent or those involved in the authorisation process any immunity from prosecution. Rather, the authorisation will be the Service's explanation and justification of its decisions should the criminal activity of the agent come under scrutiny by an external body, e.g. the police or a prosecuting authorities. In particular, the authorisation process and associated records may form the basis of representations by the Service to the prosecuting authorities that prosecution is not in the public interest."*

9. The "*authorisation*" cannot therefore be equated to a forbidden *"proleptic grant of immunity"* (as per Lord Bingham, *R (Pretty) v DPP* [2002] 1 AC 800, §39) **[J/75]**. Nor does it *"frustrate the constitutional principle of prosecutorial independence"* **[SA/75-77]**. It involves rather the careful and legitimate consideration of the public interest factors in a proposed course of action, whilst knowing that this does not mean that the relevant prosecuting authorities are bound to reach the same conclusion. This is not *de facto* immunity for the reasons developed at §§35-43 below.

10. Finally, the Security Service does not purport to "*authorise*" breaches of the ECHR, as implemented by the Human Rights Act 1998. As set out by the IPT at **[J/98]**, *"the Security Service is a "public authority" and therefore is bound by the obligations in section 6 of the HRA"*. It has no power to do so, and its policies do not purport to exercise any such power. The Respondents submit that the IPT was right to reject the Appellants' arguments in this regard: the policy is lawful and that it was inappropriate to determine breaches of the ECHR in the abstract rather than by reference to the concrete facts of a particular case **[J/100-101].** Should this Court take a different view, however, then - in accordance with its Respondents' Notice - the Respondents will rely on the legal submissions which it advanced below and, so far as the facts are concerned, on its actual Participation in Criminality ("PiC") forms which were provided to the IPT and to Counsel to the Tribunal. These PiC forms are addressed further in the Respondents' CLOSED skeleton.

THE GROUNDS OF APPEAL AND SUMMARY OF RESPONSE

11. The Appellants advanced seven grounds of challenge before the IPT. Those grounds were

all dismissed.[1] The Appellants now appeal on six of the same grounds.[2] Their skeleton argument therefore largely repeats arguments already fully considered and rejected by the IPT.

12. The Respondents' response to the grounds of appeal can be summarised as follows:

    a. Ground 1 (*vires*): The Appellants contend that the policy has no legal basis **[SA/6, 55-69]**. Sections 1 – 2 of the 1989 Act provide the necessary implied power for Security Service agents to participate in criminality as such participation is clearly necessary for the performance of the Security Service's statutory functions. Parliament must have intended, and plainly did intend, to confer *vires* for that activity to continue.

    b. Ground 2 (*de facto immunity*): The Appellants contend that the practical effect of the policy is a *de facto* immunity and a dispensing power from the criminal law **[SA/7, 70-84]**. The Security Service does not *"dispense"* with the criminal law. It does not confer any kind of immunity, it does not purport to make prosecutorial decisions and its conduct does not have any of those effects. There is no legal duty on the Security Service to inform the relevant police or prosecution authorities of their activities.

    c. Ground 3 (*not in accordance with law*): The Appellants contend the policy was not in accordance with law as the Commissioners' oversight was inadequate and the policy was secret until 2018 **[SA/8-9, 85-89]**. The IPT was correct to conclude that oversight by the Commissioners provided an adequate safeguard against the risk of abuse. The underlying conduct has always been widely known and is obvious.

    d. Grounds 4 – 6 (*ECHR*): The Appellants contend the IPT was wrong to conclude that the policy did not give rise to a significant risk of breach of Convention rights in circumstances where there appear no express limits on the conduct that can be

[1] Charles Flint QC and Professor Zellick dissented in respect of *vires* and whether the policy was in accordance with law for the purposes of the ECHR.

[2] The IPT refused permission to appeal in respect of its refusal to grant relief in relation to the operation of an unlawful secret policy (see decision dated 29 January 2020). The Appellants renewed their application for permission to appeal to the Court of Appeal but the Court of Appeal also refused permission. See Order of Dingemans LJ dated 11 May 2020.

authorised **[SA/10-11, 90-97]**. The Respondents neither confirm nor deny whether there are limits to the policy but the Security Service cannot, and does not, "authorise" activity that would constitute a breach of a Convention right.

STATUTORY & FACTUAL BACKGROUND

13. The relevant statutory background is set out in **[J/34-42].**

14. The Guidelines and their oversight is addressed in **[J/7-27]**, on which the Security Service relies. Before the IPT, the Security Service adduced further evidence, much of it in CLOSED, in respect of its policy, practice and procedure. This is not addressed in this skeleton argument because it is unnecessary to do so (although it is included in the bundles and so remains available to the parties and to the Court).

15. The Respondents address two particular factual matters. **First**, the Appellants rely on Operation Kenova and also on the murder of Pat Finucane [**SA/5 and 34-38]** to support an argument that agent participation in criminality has led, in the past, to grave breaches of fundamental rights. Any such allegation would involve a detailed exploration of facts which could not be explored in OPEN, and which is neither necessary nor appropriate given the issues of principle that arose before the IPT (and, as points of principle, *a fortiori* at this level). For the avoidance of doubt, the Security Service does not accept that its "*authorisation*" of agent participation in criminality, as set out in the Guidelines and as evidenced by the entire body of PiCs since October 2000[3], has involved breaches of fundamental rights, grave or otherwise.

16. **Secondly**, the Appellants suggest the Respondents are now seeking to remedy the gap in the legislation through the introduction of the Covert Human Intelligence Sources (Criminal Conduct) Bill 2020 ('the Bill') **[SA/1, 66]**. However, the Bill does not replicate the powers contained in s.1 of the 1989 Act. It does a different thing, namely it makes authorised participation by a CHIS in conduct which would otherwise constitute a

[3] The Respondents reviewed all available PiC forms since October 2000 and Counsel to the Tribunal selected PiCs which they considered might usefully be the subject of more detailed consideration by the IPT.

criminal offence lawful for all purposes. The Respondents have always accepted that express legislative provision would be required to provide such a power. Moreover, the Bill provides for a range of public authorities, not just the Security Service, to authorise CHIS to participate in crime. In any event, enactment of legislation of this kind involves no acknowledgement or acceptance of prior legislative inadequacy or, still less, unlawfulness.

GROUND 1: *VIRES* [SA/55-69]

17. The majority of the IPT held that the 1989 Act provided the necessary implied power for Security Service to "*authorise*" agents to participate in activity which may be criminal **[J/48-71**]. Having summarised the submissions of the parties, and set out the applicable legal principles **[J/48-59]**, the majority concluded that "*there is an implied power in the 1989 Act for the Security Service to engage in the activities which are the subject of the policy under challenge*" **[J/60]**. They gave four reasons in support of this conclusion **[J/60-66**], of which the fourth – the position of the police - was said to be *obiter* **[J/66]** and the third – that the activity may not amount to a criminal offence – must be uncontentious **[J/64-65]**. The first two reasons are as follows:

> *"60… We bear in mind first what the position must have been on the eve of the introduction of the 1989 Act. The running of agents, including the running of agents who are embedded in an illegal or criminal organisation, such as the IRA, would obviously have been occurring before 1989. The express terms of the 1989 Act make it clear that it was intended to "continue" the existence of the Security Service and the operations to be conducted by the Director-General of it. The 1989 Act did not create the Service for the first time; it simply continued it. It is impossible, in our view, to accept that Parliament intended in enacting the 1989 Act to bring to an end some of the core activities which the Security Service must have been conducting at that time, in particular in the context of the "Troubles" in Northern Ireland.*
>
> *61. Secondly, the word "efficiency" in section 2(1) of the 1989 Act is important. It could hardly be said to be an efficient exercise of the performance of either the Director-General's or the Security Service's functions if they could not carry on doing an essential part of their core activities. That it is essential to run an agent in a proscribed organisation is clear. This is necessary for the gathering of intelligence, but also for disrupting the activities of such organisations."*

18. The majority concluded by emphasising that the Security Service had no power to confer immunity from criminal liability **[J/67-71].**

Parliament intended the 1989 Act to "*continue*" the existence of the Security Service

19. The 1989 Act first placed on a statutory footing an organisation which had formerly existed by virtue of the prerogative. From 1952 until 1989, its powers had been as set out in the Maxwell-Fyfe Directive **[J/44]**.[4] The Directive provided, so far as material, as follows:

> *"The Security Service is part of the defence forces of the country. Its task is the defence of the realm as a whole, from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organisations whether directed from within or without the country, which may be judged to be subversive to the State.*
>
> *You will take special care to see that the work of the Security Service is strictly limited to what is necessary for the purposes of this task."*

20. In authorising the Security Service to do what was necessary for the purpose of defence of the realm, the Maxwell-Fyfe Directive necessarily allowed for agents to operate. The Security Service has since its inception run agents and agents have had to participate in conduct that might be or would be criminal as an integral part of their ability to operate. It cannot realistically be said that there has never been any ability for agents to do so; or for the state (or Security Service in whatever incarnation over history) to operate a system in which agents do so. On the contrary, such a possibility has been a necessary part of agent cover for as long as agents have been operating. Agent running, and its necessary concomitants, have thus plainly been within the scope of the Maxwell-Fyfe directive since its promulgation and have been a necessary part of the Security Service's protective functions before that. The scope of the prerogative powers under which the Security Service used to operate plainly encompassed those powers/abilities.

21. The comments of Sir John Donaldson MR in *Attorney General v Guardian Newspapers Limited and Others (No. 2)* [1990] *1 AC* 109, quoted at **[J/46]**, are apt:

> *"It would be a sad day for democracy and the rule of law if the [Security Service] were ever to be considered to be above or exempt from the law of the land. And it is not. At any time any member of the service who breaks the law is liable to be prosecuted. But there is a need for some discretion and common sense…*
>
> *It may be that the time has come when Parliament should regularise the position of the service. It is certainly a tenable view. The alternative view, which is equally tenable, is*

[4] 24 September 1952: a Directive from Sir David Maxwell Fyfe, then Home Secretary, to the Director General of the Security Service.

that the public interest is better served by leaving the members of the service liable to prosecution for any breach of the law at the instance of a private individual or of a prosecuting authority, but may expect that prosecuting authorities will exercise a wise discretion and that in an appropriate case the Attorney-General would enter a nolle prosequi, justifying his action to Parliament if necessary. In so acting, the Attorney-General is not acting as a political minister or as a colleague of ministers. He acts personally and in a quasi-judicial capacity as representing the Crown... It is not for me to form or express any view on which is the most appropriate course to adopt in the interests of the security of the nation and the maintenance of the rule of law. However that problem is resolved, it is absurd to contend that any breach of the law, whatever its character, will constitute such "wrongdoing" as to deprive the service of the secrecy without which it cannot possibly operate."

22. Parliament did choose to regularise the position of the Security Service: *"the enactment of the 1989 Act has superseded the Prerogative and "occupied the field""* **[J/49]**. There is no indication that Parliament's intention in enacting the 1989 Act was to strip away activity which the Service could previously perform. Indeed, it is inconceivable that this was Parliament's aim given the plain and extremely serious national security consequences that would flow from agents being unable to participate in such conduct, and thus to operate safely or at all. Parliaments' intention was quite the reverse - to preserve the Security Service's ability to perform essentially the same functions (the core one being the protection of national security and thus the public from the most serious threats) but to place the legal basis for those functions on a statutory footing.

23. Parliament achieved this by creating the functions of the Service set out and controlled by the terms of s.1. It allowed the Security Service to continue to undertake its functions, which plainly included running agents and doing so in the most effective and safe way possible. The Appellants rely upon the fact that s.1 only sets out the Security Service's statutory functions and *"does not provide power to the Security Service"*, saying "*these are powers not duties*" **[SA/56]**. This submission ignores the legislative technique, which:

    a. Confers only one express *vires*, namely that in s.3 for the Secretary of State to grant warrants.
    b. Otherwise confers no express powers at all.

    The legislative technique was, therefore, to include within each of these functions listed within s.1 a *vires* to do what is necessary to perform those functions.

24. In this regard, the IPT was right to rely, by analogy, on the proper interpretation of the word "*functions*" in s.111(1) of the Local Government Act 1972, as interpreted in *Hazell v Hammersmith and Fulham LC* [1992] 2 AC 1, at p.29 per Lord Templeman as meaning "*all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions*." **[J/56-57]**

25. The Appellants do not address the Respondents' central point that there can be no sensible basis for imputing an intention to Parliament to restrict the activities with which this case is concerned. They criticise the majority for taking account of the practical consequences if s.1 did not provide the implied power for the Security Service to run agents within proscribed organisations **[SA/66]**. But the majority (i) was plainly right to take into account the plain reality that Parliament could not have intended, when enacting the 1989 Act, that Security Service agents could no longer be embedded within a proscribed organisation; and (ii) properly directed itself as to the relevance of the practical implications of their decision **[J/54]**:

> *"If that is the result on the correct interpretation of the 1989 Act, this Tribunal must say so. Whether or not that would be a satisfactory or desirable state of affairs is not a matter for this Tribunal. That would be a matter for Parliament to remedy if there were thought to be a defect in the legislation. The only question for this Tribunal to determine is a question of law: what is the true meaning of the 1989 Act?"*

26. This is not a "nice to have" power, which would be sensible or desirable. Rather, it is critical. Without it, the statutory functions of the Security Service would be hopelessly frustrated. The purpose of the 1989 Act was plainly to permit the Security Service to continue, on a statutory footing, to protect the public effectively (as it had been doing). In those circumstances, Lord Bingham in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at §8 is apt:

> *"The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some*

improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

Express scheme of authorisation

27. The Appellants contend that, where Parliament intended to confer a power to do something that would otherwise be a crime, then it provided an express scheme of authorisation (see s.3 of the 1989 Act and s.7 of the 1994 Act) **[SA/58-59];** and thus there is no scope for the IPT's conclusion on *vires*. This argument is flawed for three reasons.

28. **First**, there is a critical distinction between s.1 of the 1989 Act on the one hand and s.3 of the 1989 Act and s.7 of the 1994 Act on the other. Section 3 of the 1989 Act and s.7 of the 1994 Act (which in any event post-dates the 1989 Act) both in effect create an immunity from criminal liability.[5] In contrast, it has never been suggested that s.1 of the 1989 Act confers any such immunity on those agents authorised to participate in conduct which may be criminal. The IPT emphasised this point at **[J/67]**:[6]

"We conclude on the first issue that the Security Service does have that power as a matter of public law. It is important to appreciate that this does not mean that it has any power to confer immunity from liability under either the criminal law or the civil law (e.g. the law of tort) on either its own officers or on agents handled by them. It does not purport to confer any such immunity and has no power to do so."

29. The Appellants argue this distinction is immaterial as the House of Lords made clear in *Morris v Beardmore* [1981] AC 446 that *"the fact that an agent may remain liable for prosecution cannot provide a statutory basis for actions where there is none"* **[SA/60]**.[7]

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[5] S.3 of the 1989 Act gave the Secretary of State power to issue a warrant to the Security Service which would render lawful entry on or interference with property. The effect is that such activity will not be unlawful where it is subject to a warrant. S.7 empowers MI6 and GCHQ to authorise agents to commit crimes abroad.

[6] The Guidelines also explicitly state that an authorisation does not confer immunity from prosecution (§9).

[7] The Appellants refer to Lord Roskill's judgment at p.468C but the correct reference appears to be to Lord Diplock at p.455H and lord Roskill at p.469E. See the dissenting judgment of Charles Flint QC at **[J/121]**.

The issue in that case was whether Parliament had intended that a constable should retain the power under s.8(2) of the Road Traffic Act 1972 to require an individual to take a breath test when the constable was acting unlawfully (trespassing upon the individual's property). In circumstances where it could not be shown that Parliament intended a constable to retain the power, the House of Lords held it was no answer that the individual may have the remedy of a civil action of tort against the constable. The Court's reasoning does not apply to the circumstances of this case where Parliament clearly intended that the Security Service could continue to be able to authorise its agents to participate in conduct which may be criminal.

30. **Secondly**, the fact that s.3 of the 1989 Act (later re-enacted in s.5 of the 1994 Act) singled out one activity to be warranted reveals nothing about the continuing power to run agents under s.1. There is nothing within the 1989 Act to suggest that Parliament was using s.3 to select exhaustively those activities that might touch illegality or criminality and require authorisation, thereby implicitly excluding this sort of policy. To the contrary, it is inconceivable that Parliament's intention was to limit the Security Service's powers in such a way that would fundamentally undermine its ability to carry out its essential function of protecting national security.

31. **Thirdly**, the Appellants' argument that *"even s.7 of the 1994 Act is subject to the principle of legality… s.7 could not be used to permit torture"* takes matters no further **[SA/62]**. Nor does their suggestion that *"applying the principle of legality, the Courts should be cautious before adopting a construction of legislation that grants the executive powers to commit crimes that Parliament did not expressly authorise"* **[SA/67-68]**. In particular:

    a. The Respondents do not accept that the principle of legality applies. This is because it cannot be said that the basic power, with its concomitants of likely involvement in criminal activities of others, "*overrides"* fundamental rights (see *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, §§7-8 per Lord Hoffmann and §§44-45 per Lord Hobhouse). To the contrary, the agents' activities are being undertaken for a purpose diametrically opposed to *overriding* the fundamental rights of innocent the public. Their activity is undertaken with the sole purpose of protecting the public. The Security Service does not purport to "*authorise*" breaches of the ECHR.
    b. The Appellants rely upon *R (Morgan Grenfell) v Special Commissioner of Income*

Tax [2003] 1 AC 563 for the proposition that "necessary implication" means that it must be clear from the express language of the statute **[SA/69]**. In *R (CPAG) v Secretary of State for Work and Pensions* [2011] 2 AC 15, Lord Dyson expressly held that, where the question does not engage fundamental rights or the principle of legality, the *"high hurdle"* set in *Morgan Grenfell* does not apply (§31). In any event, in considering the effect and meaning of the phrase "necessary implication", the Appellants accept that it is necessary also to consider the statement of principles set out by the Supreme Court in *R (Black) v Secretary of State for Justice* [2018] AC 215 at §36 – including the important of focusing on the purpose of the legislation in question.

c. Whatever the precise nature of the test, it is met here. The express language of s.1 makes it clear that the Security Service has the functions it has, which – in a statute which contained only one express *vires*, namely the s.3 power for the Secretary of State to grant warrants – must mean that it has the powers necessary to perform those functions. Otherwise, the Security Service would have no powers to operate at all, let alone effectively.

Renders other powers obsolete

32. The Appellants contend that there would have been no need for Parliament to enact either s.3 of the 1989 Act or s.27(2) Regulation of Investigatory Powers Act 2000 ('RIPA') if there already existed an overlapping implied power under s.1 of the 1989 Act **[SA/58, 63]**. However, the express power in s.3 goes further than the implied power in s.1 because it has the effect of conferring immunity. RIPA postdates the 1989 Act by more than 10 years and it cannot therefore be used to signify Parliament's intention when enacting s.1; the Security Service either had or did not have the necessary power in the intervening period. Moreover, the saving provision in s.80 RIPA, set out in **[J/41]**, means that RIPA cannot be relied upon in the way in which the Appellants seek to do.

Section 2 of the 1989 Act

33. The majority of the IPT were correct to conclude that s.2 of the 1989 Act provides further support for the existence of the implied power. They relied in particular on the word "*efficiency*" in s.2(1) **[J/61]**, since it could hardly be said to be an efficient exercise of the performance of either the Director-General's or the Security Service's functions if they could not carry on doing an essential part of their core activities. This is further supported

by s.2(1)(a), which provides for *"arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by except so far as necessary for that purpose"*. This presupposes that the Service has *vires* to obtain and disclose information where necessary for the proper discharge of its functions.

34. The IPT commented that whilst it was *"hardly necessary"* for there to be evidence demonstrating that it was essential, for example, for agents to be members of a proscribed organisation, such evidence was before the Tribunal **[J/62]**. The OPEN statement of MI5 witness 3, dated 17 June 2019, made clear that *"It is necessary for agents to participate in criminality for all the reasons outlined above; it is therefore equally necessary that MI5 have the ability to authorise that involvement in criminality"* (§51).

GROUND 2 – *DE FACTO* IMMUNITY [SA/70-83]

35. The IPT rejected this ground of challenge. The reasoning of the majority is as follows (with which Charles Flint QC agreed **[J/113]** and, so far as the Respondents understand, so too did Professor Graham Zellick QC **[J/133]**):

    a. The majority held that the policy *"does not confer any immunity from criminal prosecution on anyone"* as the Guidelines make clear (see §9 and §11 of the Guidelines). Accordingly, the cases of *The King v London County Council* [1931] 2 KB 215 and *R (Pretty)* on which the Appellants sought to rely could be distinguished **[J/73-75]**.
    b. They held that the policy could not be said to create a *de facto* immunity in circumstances where there was no legal duty on the Security Service to inform the relevant police or prosecution authorities of their activities **[J/76-79]**.
    c. They held that the policy did not cut across and undermine the independence of the prosecution authorities in England and Wales, Scotland and Northern Ireland **[J/80-85]**.

36. The Appellants contend that whether the Security Service is under a positive duty to inform the police or prosecuting authorities *"is not the relevant question… the issue was whether the Security Service had granted itself a de facto power to dispense with the application of the criminal law"* **[SA/71]**. However, the Appellants' key complaint is that

"no attempt is made to notify police or prosecutors" **[SA/76]** and they described this as the *"critical omission"* in the policy before the IPT **[J/76]**.

37. The IPT considered the question of whether the Security Service was under a duty to notify the police or relevant prosecuting authorities and correctly concluded that the Appellants had *"failed to point to any legal duty on the Security Service to do any such thing"* **[J/78]**. The Appellants seek to argue that the IPT's conclusion was wrong for two reasons **[SA/79-83]**:

    a. Whilst a member of the public may not be subject to a duty to notify, the Security Service, as a public body and branch of the executive, is under such a positive duty. This is reflected in the Directory of Civil Service Guidance.[8]
    b. A duty arises in Northern Ireland by virtue of s.5 of the Criminal Law Act (Northern Ireland) 1967 ("CLA(NI) 1967").

Civil Service Policy

38. The Directory of Civil Service Guidance provides central guidance to all civil servants on a variety of topics. This includes a short section on the professional and policy obligations that apply when civil servants become aware of crimes in other contexts. It begins by stating *"Civil servants who believe that they have information (including documents) which may be relevant to planning or committing a criminal offence… have a general professional duty to draw this fact to the attention of the appropriate authorities".* Self-evidently, it is not designed to apply either in terms or implicitly to all activities of the Security and Intelligence Agencies. Not all policies that apply to the civil service generally can be taken to apply directly to the actions of the Security and Intelligence Services, for obvious reasons. Further, and in any event, the Guidance makes clear in the foreword that *"it should not be regarded as a rigid set of rules. While the Directory may indicate the key principles, it cannot and does not seek to provide a blueprint for every situation. Every new issue that confronts us has its own particular circumstances and must be judged on its own merits."*

Section 5 CLA(NI) 1967

[8] Cabinet Office, Directory of Civil Service Guidance – Volume 1: Guidance Summaries, 2000.

39. The IPT was correct to conclude that there were *"several difficulties"* with the Appellants' submission that s.5 CLA(NI) 1967 imposed a duty to notify on the Security Service in Northern Ireland **[J/79]**:

> *"The first is that it presupposes what the outcome would be after the event in a criminal court on the individual facts of a particular case. As we have already mentioned, that is not usually the function of a civil court or tribunal. Certainly it is not usually their function to give a categorical view on matters of criminal law in advance. Secondly, it may well be, depending on the facts of a particular case, that a person will have "reasonable excuse" where they rely on the fact that conduct was authorised in accordance with the policy of the Security Service. Thirdly, there might well be a need to interpret section 5 of the 1967 Act consistently with the duties which fall upon the Director-General in section 2(2) of the 1989 Act, in particular his duty not to disclose certain information except so far as necessary for the purpose of discharging the functions of the Security Service or for the purpose of preventing or detecting serious crime."*

40. The Appellants do not engage with the IPT's first point.

41. The Appellants submit that the IPT erred in relying, second, upon the reasonable excuse proviso when the Police Service of Northern Ireland ("PSNI") has constables who are security cleared to the highest levels **[SA/82]**. This does not alter the fact that information regarding agents' participation in crime is some of the most sensitive information held by the Security Service and subject to a strict need-to-know requirement. Further, contrary to the Appellants' assertion, the Guidelines are not inconsistent with the 1967 Act. The Act provides for a 'reasonable excuse' qualification to the strict notification duty and conduct authorised under the policy falls squarely within that exemption.

42. The Appellants also submit that the IPT was wrong to rely, third, upon s.2(2) of the 1989 Act because s.2(2)(a) expressly authorises disclosure to police and prosecutors. However, S.2(2)(a) only refers to disclosure necessary *"for the purpose of any criminal proceedings"*. As set out in the witness statement of MI5 witness 4 dated 19 June 2019, the Security Service protocol between the Security Services, the PSNI and the Public Prosecution Service of Northern Ireland ('PPSNI') expressly provides for such disclosure.[9] It sets out that *"In a prosecution where a Service becomes aware that it holds material which may be relevant to that prosecution, it will bring it to the attention of the*

[9] The Security Service in England and Scotland operate a similar disclosure process as set out in their respective Memorandums of Understanding with the relevant police force and prosecuting authority.

prosecutor and, as appropriate, the officer in charge of the investigation, to enable the prosecutor to decide upon disclosability". S.2(2)(a) does not compel disclosure more generally; the IPT was right to conclude that s.5 CLA 1967 needs to be read consistently with the general disclosure limitations contained within s.2(2)(a).

Prosecutorial independence and the position in Scotland and Northern Ireland

43. Finally, the IPT fully considered the Appellants' argument that the policy cut across the statutory and constitutional arrangements for ensuring the independence and accountability of prosecutors in Scotland and Northern Ireland **[SA/84]**. It correctly concluded that *"the fundamental difficulty with those submissions is that the policy under challenge does nothing of the sort"* **[J/81]**. The Respondents rely upon the IPT's reasoning **[J/82-85]**.

GROUND 3 – NOT IN ACCORDANCE WITH LAW [SA/85-89]

Oversight

44. The majority of the IPT concluded that *"the oversight powers given to the IPC now, and previously to the ISC, do provide adequate safeguards against the risk of abuse of discretionary power"* **[J/93]**.[10] In reaching their conclusion, the majority:

    a. relied on the statement of the law in *R (Liberty) v Secretary of State for the Home Department & Ors* [2019] EWHC 2057 (admin), in particular at §§76-86. "*As that case made clear, summarising the relevant ECHR principles, it is not necessary in every context for there to be a judicial authorisation in advance. Everything depends on the particular context.*" **[J/92]**
    b. relied on the fact that the Commissioners have *"the opportunity to conduct a sample review entirely at their discretion, so that the Security Service would not know in advance which files might be reviewed by them. In particular, they were asked by the Prime Minister to consider the questions of necessity and*

[10] Charles Flint QC agreed with the majority's conclusion (with his dissent on "in accordance with law" limited to the question of *vires* – **[J/113]**) though the Respondents understand that Professor Graham Zellick QC did not agree **[J/133]**).

proportionality of the authorisations" **[J/93].**[11]

c. rejected the various alleged defects in the oversight, such as the fact that the Prime Minister did not ask the Commissioners to give a view on the lawfulness of the policy **[J/95].**

d. noted that the ISC, and subsequently the IPC, had to be a person who had held *"high judicial office"* **[J/96]**.[12]

45. The Appellants argue that the IPT erred in concluding that the Commissioners' oversight provided adequate safeguards against the risk of abuse **[SA/86-89]**. They say that the oversight exercised by the Commissioners was deficient in three ways.

46. **First**, they rely on the fact that the Prime Minister told the Commissioner that his remit did not include *"endorsement of the legality of the policy"* **[SA/86-87]**. However, the IPT fully addressed this point at **[J/95]**:

> *"It was not necessary for the Prime Minister to ask the ISC or the IPT[13] to provide any endorsement of the lawfulness of the policy. That was not their function. Such questions of law are ultimately ones for courts and tribunals to determine".*

By stipulating that the Commissioner was not expected to endorse the legality of the policy, the Government was simply recognising that the Security Service could not rely upon the fact of oversight to demonstrate that the Commissioner believed the policy to be lawful. As emphasised by the IPT, the lawfulness of the policy was properly within the sole purview of the courts. Whilst the Appellants contend that *"it is unrealistic… to rely on the courts to perform that function"* when the policy was secret, that is the function the IPT has performed in this case.

47. **Secondly**, the Appellants rely upon the fact that the Commissioner was not *"asked to provide a view on whether any particular case should be referred to the prosecuting authorities".* However, referrals to the prosecuting authority did not form part of the Guidelines and accordingly, there was no need for formal oversight in this respect.

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[11] Details of the process by which the Commissioners come to inspect authorisations is set out in §§8-13 of the second witness statement of MI5 Witness 2 dated 30 November 2018.

[12] See s.59(5) RIPA and s.227(2) Investigatory Powers Act 2016.

[13] This appears to be a typographical error in the judgment. The Respondents assume the IPT meant to refer to the IPC not the IPT.

Whilst the Commissioner was not formally asked to provide a view on the appropriateness of any referrals, the IPT correctly pointed out that "*there was nothing in the policy to prevent them from doing so if they wished to"* **[J/95]**.

48. **Thirdly**, the Appellants rely upon the fact that the policy was not subject to oversight prior to 2012, and criticise the IPT for failing to address this issue. In the Security Service's submission, the IPT was fully entitled to focus on the post-2012 position.

Secret policy

49. There is a single sentence in the relevant part of the Appellants' skeleton which addresses publication of the policy: "*Nor did [the IPT] address the consequences under the Convention of the policy being unjustifiably kept secret until 1 March 2018*" [**SA/89**]. If this is seriously pursued on appeal, the Respondents - in accordance with their Respondents' Notice - submit that:

    a. as to foreseeability, the underlying conduct – namely the participation in possible criminal activities by agents - was widely known and entirely obvious. It was and is to be expected, as obvious, that the Security Service uses agents and plain that on occasion they will have to participate in activities that are or may be criminal. This is an unavoidable part of their maintaining their cover and acquiring vital intelligence. There is no need in this context for more specific "signposting" of this activity. The activity is a paradigm of the activity that a reasonable person would understand as falling squarely within the basic functions of the Security Service – as a necessary component of protecting the public from threats posed to national security and to the public posed by terrorist organisations. (See further §§94-97, Respondents' Skeleton Argument for the hearing before the IPT, dated 25 October 2019.)
    b. although greater publication and "opening-up" of documents took place during the IPT proceedings, this does not mean that the previous position was in breach of Convention rights. The Respondents rely in this regard upon §82 of the IPT's judgment in *Greennet* [2016] UKIP Trib 14_85-CH:

        > *"[a] conclusion that procedural requirements, or the publication of them, can be improved (i) does not have the necessary consequence that there has prior thereto been insufficient compliance with Weber... and (ii) does not constitute such a material non-compliance as to create a contravention of art. 8. This Tribunal sees it as an important by-product of the exercise of its*

statutory functions to encourage continuing improvement in the procedures adopted by the Intelligence Agencies, and their publication (and indeed such improvements took place as a consequence of our judgments in Liberty/Privacy No 1, Liberty/Privacy No 2 and Belhadj v Security Service [2014] UKIP Trib 13_132-9H), but it does not conclude that it is necessary, every time an inadequacy, particularly an inadequate publication, is identified, to conclude that that renders all previous conduct by the Respondents unlawful."[14]

GROUNDS 4 – 6 ECHR ([SA/90-93])

50. The IPT was correct to reject the Appellants' argument that the policy breaches the substantive obligations in the ECHR, and therefore the Human Rights Act 1998. The Respondents rely upon the three reasons the IPT gave for rejecting the Appellants' challenge:

> *"99. The first difficulty with this set of submissions is that it is common ground that the Security Service is a "public authority" and therefore is bound by the obligations in section 6 of the HRA. Nothing in any policy could detract from that as a matter of law.*
>
> *100. The second difficulty is that there is nothing inherent in the policy which creates a significant risk of a breach of Article 3 or indeed any other Convention right. There is a line of authority to which, in fact, no reference was made at the hearing before this Tribunal, to the effect that there can be cases in which it is appropriate for a court to declare a policy to be unlawful if it exposes a person to a significant risk of treatment which is prohibited by Article 3: see e.g. R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58; [2006] 2 AC 148, in particular at para. 29 (Lord Bingham).*
>
> *101. The fundamental difficulty, as it seems to us, is that the question whether there has been a breach of a Convention right is usually one to be determined after the event on the concrete facts of a particular case rather than in the abstract. That is very much the approach which the European Court of Human Rights itself takes and has been adopted by the courts of this country under the HRA: see e.g. Brown v Stott (Procurator Fiscal, Dunfermline) [2003] 1 AC 681, an early decision of the Privy Council after incorporation of the ECHR into domestic law. As Lord Bingham said at p.704: "The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. Ex facto oritur ius."*

[14] The IPT endorsed this paragraph at §62 of *Privacy International v Secretary of State for Foreign & Commonwealth Affairs* [2017] All ER 647, which contains a useful summary of the requirements of "in accordance with law".

The Appellants' arguments

51. The Appellants do not engage at all with the first difficulty identified by the IPT.

52. The Appellants make no legal submissions in respect of the second difficulty identified by the IPT. Their submissions are limited to arguing that, assuming there are no limits on the criminal conduct that can be authorised under the policy, then as a matter of fact the policy is unlawful because *"there are no procedures in place to avoid or prevent a significant risk of a breach"* **[SA/93]**. The Respondents neither confirm nor deny in OPEN whether there are limits to the policy. The IPT has endorsed the Respondents' national security concerns for adopting that position.

53. The Appellants also make no submissions in respect of the third and *"fundamental"* difficulty identified by the IPT.

54. The Appellants do make submissions on the applicable principles for State responsibility **[SA/96-97]**, but that issue was not determined by the IPT.

55. The Respondents submit that the IPT was right to hold that the policy was lawful and that it was inappropriate to determine breaches of the ECHR in the abstract rather than by reference to the concrete facts of a particular case for the reasons set out above**.** The Appellants do not advance any challenge in principle to that approach.

56. However, should the Court of Appeal take a different view then, in accordance with their Respondents' Notice, the Respondents will rely on the legal submissions and the evidence that was before the IPT. In particular,

    a. as to the broad legal principles that apply, including State responsibility, the Respondents will rely upon §§76-86 of the Respondents' OPEN skeleton argument before the IPT, dated 25 October 2019.
    b. As to the evidence, the Respondents will rely on the CLOSED material, most obviously the PiCs, and the section of the skeleton argument before the IPT which addressed them.

STANDING

57. The IPT correctly set out at **[J/105]** that any person who wishes to *"rely on the Convention right or rights concerned in any legal proceedings"* may only do so *"if he is (or would be a victim of the unlawful act"* (s.7 HRA) and that a person is a victim of an unlawful act for the purposes of s.7 only if he would be a victim for the purposes of Article 34 ECHR if proceedings were brought in the European Court of Human Rights in respect of that act (s.7(7) HRA). The European Court has consistently held that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention (for example, see *Zakharov v Russia* (2016) 63 EHRR 17 at §164).

58. The IPT was accordingly right to conclude that *"we are not persuaded that the Claimants do have standing to rely on the Convention rights"* **[J/107]**. In so doing, the IPT properly relied upon the case of *Zakharov* which is the leading authority on the circumstances in which an individual can rely on a Convention right in respect of a challenge to a secret measure.

59. The Appellants seek to argue that the IPT's decision on standing is premised on a misstatement of the law, namely that *"as a general matter, a person will only be a "victim"... if they can show that they would be affected by a law or policy directly and personally"* **[J/106] [SA/94]**. That argument is flawed for three reasons.

60. **First**, the IPT was right to state that, as a general rule, an individual will only have standing if they are at risk of personally being affected by a measure. The test is as set out in *Zakharov* at §171, namely that *"the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that,* ***due to his personal situation,*** *he is potentially at risk of being subject to such measures"* [Emphasis Added].

61. **Secondly**, in describing this as the *"general"* rule, the IPT recognised that there may be exceptions whereby those not directly and personally affected by conduct can rely upon Convention rights to bring a challenge. However, such situations are rare. As regards non-governmental organisations, the Court does not grant *"victim"* status to associations whose interests are not at stake, even if the interests of their members - or some of them - could be at stake. Nor is *"victim"* status granted to NGOs even if the associations have been

founded for the sole purpose of defending the rights of the alleged victims (*Smits et al* (application no 39032/97), *Van Melle & Ors v The Netherlands* (19221/08). The European Court has only exceptionally granted status where conduct would otherwise be rendered unchallengeable. For example, in *Gorraiz Lizarranga and Others v Spain* (2004) 45 EHRR 1031, on which the Appellants rely at **[SA/94]**, the Court was anxious not to render protection of the rights conferred by the Convention ineffectual and illusory. It noted that, faced with *"particularly complex administrative decisions"*, the use of collective bodies is *"one of the accessible means, sometimes the only means, available to"* individuals. The position is markedly different in this case. There may well be various clients of the NGOs who may be able to say, because of their particular personal situations (as suspected or convicted terrorists, for example), that they feel they may be particularly at risk of being subject to agent participation in criminality. There is no need for Reprieve, for example, to bring the case on their behalf.

62. **Thirdly**, in those circumstances, the IPT was correct to conclude, as a matter of fact, that the Appellants lack standing in respect of their Human Rights claims. The Appellants are not "*victims*". They cannot show that, due to their personal situations, they are potentially at risk of being subject to the challenged measures. The Appellants are four NGOs whose personal situations are not such that they will be subject to any agent's participation in criminality. They are neither co-conspirators or criminal actors themselves. Nor are they, by virtue of their personal situations, at risk of being victims of relevant crime. The Respondents rely further upon the submissions made in their CLOSED skeleton argument.

CONCLUSION

63. For these reasons, the Respondents submit that this appeal should be dismissed.

SIR JAMES EADIE QC
DAVID PERRY QC
VICTORIA WAKEFIELD QC
WILL HAYS
NATASHA BARNES

11 December 2020