IN THE COURT OF APPEAL (CIVIL DIVISION) **2020/0317**

ON APPEAL FROM THE INVESTIGATORY POWERS TRIBUNAL

B E T W E E N : -

(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

APPELLANTS' APPEAL SKELETON

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*References to the core and supplementary bundles are in the form **[C/tab/page]** and **[S/tab/page]**.*

References to paragraphs of the Tribunal's Judgment are in the form (§X).

SUMMARY OF THE APPEAL

1. The Appellants appeal the Tribunal's order made on 20 December 2019, which determined the preliminary issues in the Respondents' favour. The appeal concerns a formerly secret policy pursuant to which the Security Service purport to authorise its agents to participate in serious crimes. The existence of the policy was only disclosed during the proceedings below. Despite the Respondents maintaining throughout these proceedings that there is a lawful basis for the policy, the Government has recently invited Parliament to put the policy in this area on a statutory footing in the Covert Human Intelligence Sources (Criminal Conduct) Bill 2020 (the "**Bill**").

2. The limits of the policy, if they exist, remain undisclosed. Further, under the policy, the Respondents do not notify police or prosecutors of the authorisation or the crimes committed. The

practical effect of the policy is thus to shield agents and officials from prosecution, because crime is self-authorised by the Security Service and is never notified to the police or prosecutors, so that they can take an independent decision as to whether prosecution is justified in the public interest.

3. The combination of the policy, and the withholding of information from the police and prosecutors, creates a situation in which:
   3.1. crimes are authorised (and committed) by public officials;
   3.2. information is then withheld from independent prosecutors;
   3.3. Those prosecutors are thus unable to exercise their constitutional function, separate from HM Government, of assessing whether the public interest favours prosecution.

4. Agent participation in criminality has given rise to grave breaches of fundamental rights. HM Government, for example, has acknowledged "*shocking levels of state collusion*" in the murder of Pat Finucane, the lawyer after whom the Fourth Appellant is named. Nor are the issues raised historic. In 2019, as part of 'Operation Kenova', the police recommended the prosecution of 20 individuals (including officers of the Security Service) for crimes including murder, kidnap, torture, misconduct in public office and perverting the course of justice.

5. By a bare majority, the Tribunal (3-2 Lord Justice Singh, Lord Boyd of Duncansby and Sir Richard McLaughlin, Charles Flint QC and Professor Graham Zellick QC dissenting) held that the policy was lawful, finding that s.1 of the Security Service Act 1989 ("**1989 Act**") provides a legal basis for it. The dissentients' view of the law is to be preferred. Section 1 of the 1989 Act cannot provide a legislative basis for the policy. It is a general provision, which sets out the Security Service's statutory functions. It provides no powers. And it is silent as to the authorisation of crime. The policy itself contains no requirement for the police or prosecutors to be notified of the authorisation or crimes. And there are no limits to what crimes can be authorised, at least on the partial version of the policy that is currently public. The Appellants appeal on the following grounds.

Ground 1 – *vires*

6. The majority of the Tribunal erred in finding that the Security Service had an implied power under the 1989 Act to undertake the activities that are subject to the policy (§60). There is no lawful basis for the policy, the practical effect of which is to grant immunity to agents and their handlers. Both the principle of legality and the doctrine of necessary implication, were that applicable, preclude an interpretation of s.1 of the 1989 Act which permits the authorisation of serious crimes. The

alleged implied power cannot be inferred from the words of the statute, nor can it be reconciled with the legislative scheme read as a whole. Indeed, it is now clear that HM Government has tacitly accepted the need for legislation to remedy the position – hence the introduction of the Bill.

Ground 2 – *de facto* immunity

7. The Tribunal erred in finding that the policy does not create an unlawful *de facto* immunity from the criminal law (§73). The policy does not purport to grant immunity, but that is the practical effect of the policy. This is because neither the police nor the prosecutor is notified of criminal conduct or its authorisation. Where conduct is authorised and conducted in secret, and withheld from the police and prosecutors, the practical effect is inevitably a *de facto* immunity and a dispensing power from the criminal law. That is itself unlawful, and contrary to the Bill of Rights, a statute of constitutional importance. It also undermines fundamentally the statutory independent role of police and prosecutors and, in turn, frustrates the special constitutional arrangements for the independent investigation and prosecution of crime in the devolved jurisdictions.

Ground 3 – not in accordance with law

8. A majority of the Tribunal held that the policy was in accordance with law for the purpose of the Convention. This is despite there being no oversight of the policy for most of the period in which the policy operated. Further, the Tribunal held that the oversight carried out (until recently on an informal, non-statutory basis) by the Commissioners provided an adequate safeguard against the risk of abuse (§§92-96). The Tribunal was wrong do so where the Commissioners were told by the Prime Minister (and agreed) not to comment on the legality of the policy or its operation.

9. The Tribunal failed to consider the lengthy period during which the policy was subject to no oversight. Nor did it explain how an interference with Convention rights arising from the policy is "foreseeable" for Convention purposes. The Respondents' contention that the policy was "*widely known and entirely obvious*" (Response, §47a) cannot be reconciled with their efforts over several decades to maintain its secrecy.

Grounds 4-6: ECHR

10. The Appellants' fourth to sixth grounds concern breaches of the Convention. The Tribunal erred in finding 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" (§100). That conclusion was wrong in circumstances where there appear to be no express limits on the conduct that can be authorised.

11. The Tribunal stated that it was "*not persuaded*" that the Appellants have standing to bring their Convention claims. As representative organisations with a long-standing constitutional interest in these issues, the Appellants do have standing to challenge undisclosed conduct authorised under a hitherto secret policy, the effect of which is to prevent challenge by any 'direct' victim.

STATUTORY AND FACTUAL BACKGROUND

The Security Service: the 1989 Act and parallel legislation

12. The Security Service was put on a statutory footing in the 1989 Act (s.1(1)), before which time it operated solely under the Royal Prerogative as an emanation of the Crown. It is not in dispute that since the coming into force of the 1989 Act, all of its functions are statutory: see *R (A) v Director of Establishment of the Security Service* [2009] EWCA Civ 24, per Laws LJ at [28].[1]

13. Section 1 provides:

> "1. – The Security Service
>
> (1) There shall continue to be Security Service (in this Act, referred to as "*the Service*") under the authority of the Secretary of State.
>
> (2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.
>
> (3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the action or intentions of persons outside the British Islands…
>
> (5) 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…"

14. Section 2 of the 1989 Act provides that the operation of the Security Service will be under the control of a Director-General, who is responsible for the "*efficiency of the Service*" and is under a duty, *inter alia*, to ensure that there are "*arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention or detection of crime or for the purpose of any criminal proceedings*" (s.2(2)).

[1] This analysis was not disturbed on appeal.

15. The 1989 Act, as originally enacted, also provided for a system of warrants for interference with property (s.3). By that provision, no entry or interference with property by the Service was lawful save as was authorised by a warrant issued by the Secretary of State (s.3(1)). A warrant could only be issued under that provision where it was necessary to do so to obtain information of "*substantial value in assisting the Service to discharge any of its functions*", and which could not reasonably be obtained by other means (s.3(2)). Any warrant issued was also time-limited (s.3(4)) and the 1989 Act created a Tribunal for the purpose of investigating any complaints (s.5 and Schedule 1).

16. The system of warrants in the 1989 Act was subsequently replaced by section 5 of the Intelligence Services Act 1994 (the "**1994 Act**") which contained similar provisions, but extended the relevant powers to GCHQ and the Secret Intelligence Service. The 1994 Act also formally avowed the existence of the SIS and GCHQ and placed those agencies on a statutory footing. Notably, s.7 of the 1994 Act expressly provides for the authorisation of criminality outside the British Islands:

> "7. – Authorisation of acts outside the British Islands
> (1) 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.
> (2) In subsection (1) above "*liable in the United Kingdom*" means liable under the criminal or civil law of any part of the United Kingdom.

17. The power under s.7 of the 1994 Act may only be exercised by the Secretary of State acting personally (s.7(5)). It is also subject to 'threshold conditions' (s.7(3)) and time limits (s.7(6)-(8)).

18. Part II of the Regulation of Investigatory Powers of Act 2000 ("**RIPA**") governs the conduct and use of covert human intelligences sources ("**CHIS**"). That concept is defined in s.26(8) of RIPA and would include agents handled by Security Service officials who are authorised under the policy. Security Service officials are expressly empowered to authorise the use of CHIS (s.29), and authorised conduct is deemed to be lawful for all purposes (s.27(1)).

19. RIPA contains an exemption from incidental civil liability (s.27(2)), which expressly excludes conduct that might be authorised under the system of warrants for which s.5 of the 1994 Act now provides (s.27(2)(b)). In any event, the 'conduct' that may be authorised is limited to the obtaining and disclosure of information derived from a personal or other relationship (s.26(7) and (8)) and it is not in dispute that s.27(1) of RIPA is not of general application to agents participating in crime.

The 'Third Direction'

20. RIPA, as enacted, provided for oversight of some (but not all) aspects of the work of the Agencies by the Intelligence Service Commissioner (the "**IS Commissioner**"): s.59 of RIPA. In 2013, a new power was inserted into RIPA, pursuant to which the Prime Minister could direct the IS Commissioner to review the "*carrying out of any aspect of the functions of*" the Agencies (s.59A(1)(a), inserted by the Justice and Security Act 2013). A direction must be published unless the Prime Minister concludes that it would be prejudicial to national security to do so: s.59A(5).

21. From 1 September 2017, the IS Commissioner was replaced by the Investigatory Powers Commissioner (the "**IP Commissioner**"): section 227 of the Investigatory Powers Act 2016 (the "**2016 Act**"). The power to issue a direction is now found in section 230 of the 2016 Act.

22. Before the Appellants issued this claim, two directions had been published. The first concerned the "*Consolidated Guidance*" governing the UK's involvement in the detention and interview of detainees overseas. The second concerns the Agencies' use of Bulk Personal Datasets.[2]

23. In the course of other proceedings before the Tribunal, the existence of a third direction was disclosed (the "**Third Direction**").[3] In June 2017, the Appellants issued proceedings challenging the legality of the Third Direction. At that time, both the subject matter of the Third Direction and the policy now under challenge were secret.

24. After unsuccessfully applying to strike out the claim,[4] on 1 March 2018, the then Prime Minister made a written statement to Parliament **[ref]**.

> "… 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… The other direction instructed the

[2] See, respectively, the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014 and the Intelligence Services Commissioner (Additional Review Functions) (Bulk Personal Datasets) Direction 2015.

[3] The relevant proceedings are *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* IPT/15/110/CH). The Third Direction was referred to in a Confidential Annex to the IS Commissioner's Report for 2014, disclosed in those proceedings, which stated that the "*the Prime Minister has now issued three such directions*" (emphasis added).

[4] See further, the Respondents' preliminary submissions on standing; the Appellants' submissions in response; and the Tribunal's decision, refusing to strike out the claim.

> 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 obligations 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." (emphasis added)

25. The title of the Third Direction, which was made on 22 August 2017, is the "*Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Security Services agent participation in criminality) Direction 2017*". It provides:

> "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 authorisation issued** in accordance with them." (emphasis added)

26. The direction made to the IP Commissioner in 2017 in fact replaced an earlier direction made in 2014.[5] The 2014 direction, which is materially identical to its successor, was secret at all times prior to this announcement.

The operation and oversight of the policy

27. The policy that is the subject of the Third Direction concerns the Security Service's "*guidelines on the use of agents who participate in criminality and the authorisations issued in accordance with them*". This policy has been in place since at least the 1990s, in various iterations, which have been consolidated in the "*Guidelines on the use of Agents who participate in Criminality (Official Guidance)*" (the "**Guidelines**").

28. The Guidelines are addressed to "*Agent handlers and their managers*". The agents in question are not themselves Security Service officers but are recruited and receive instructions from MI5.

[5] The Intelligence Services Commissioner (Additional Review Functions) (Security service agent participation in criminality) Direction 2014**.**

29. The purpose of the Guidelines is to "*to provide guidance to agent-running sections on the use of agents who participate in criminality"*. What they record is the Security Service's "*own procedure for authorising the use of agents participating in crime*", by which it seeks to "*secure and maintain access to intelligence*". The policy does not purport to grant immunity from prosecution to agents or officers. The authorisations under the Guidelines instead constitute "*the Service's explanation and justification of its decisions should the criminal activity come under scrutiny by an external body, e.g. police or prosecuting authorities*": paragraph 9.

30. Paragraph 13 of the Guidelines expressly permits officers to encourage, counsel and procure crime, providing that an authorisation under the Guidelines has been issued: "*No member of the Service shall encourage, counsel or procure the commission by an agent of a criminal offence, save and to the extent that the offence is covered by an authorisation issued under these Guidelines" (emphasis added).*

31. Nothing in the Guidelines requires officers to disclose the criminal conduct or their authorisation of it to police or prosecutors. Indeed, the Respondents contend that it would be "*absurd*" to notify the relevant authorities.[6]

32. The Director of Public Prosecutions was only informed of the policy in 2012.[7] The Respondents state that the Public Prosecution Service for Northern Ireland ("**PPSNI**") and the Lord Advocate in Scotland are "*now aware of the existence of the Guidelines*".[8] It is to be inferred that the existence of the Guidelines was only recently disclosed to the officers responsible for prosecutions in the devolved jurisdictions.

33. In 2012, the Commissioner was invited to review the application of the Guidelines pursuant to a "*non-statutory*" request. Previously there had been no oversight of the policy. The Commissioner was instructed that "*such oversight would not provide endorsement of the legality of the policy*" and that he was not to "*provide a view on whether any particular case should be referred to the prosecuting authorities*", nor was any oversight to relate to "*any future consideration given by prosecuting authorities to authorisations, should that happen*".[9] Those express limits were

[6] See, for example, the Response to the RFI, para. 11(e)(ii); and the IS Inspection Report from June 2015, which records that "*the Commissioner asked about the suggestion that the CPS should be consulted…*" and that he was told that "*this did not happen at present*".
[7] Response to the RFI, para. 30(c).
[8] Response to the RFI, para. 30-32.
[9] See the letter from the Prime Minister to Sir Mark Waller, dated 27 November 2012.

accepted by the Commissioner.[10] From the outset, oversight of the policy did not include any consideration of the legality of its operation and there were no arrangements for the disclosure of criminal conduct to police or prosecutors. That limited form of oversight was put on a statutory basis in 2014 but remained secret at all times until after these proceedings had been commenced.

Agent participation in crime

34. The risk of serious criminal conduct arising from the policy "*may be substantial and in certain eventualities inevitable*" (§116). The authorisation of agent participation in criminality appears to have led to grave breaches of fundamental rights in the past. Two examples suffice.

35. First, the murder of Pat Finucane. Mr Finucane was a solicitor. In February 1989, gunmen burst into his home and shot him dead in the presence of his family, injuring his wife. In 2019, the Supreme Court recognised Mr Finucane's murder as "*one of the most notorious of what are euphemistically called "the Northern Ireland troubles"*" (*Re Finucane's Application for Judicial Review (Northern Ireland)* [2019] HRLR 7, per Lord Kerr at [1]). In 2012, the then Prime Minister, the Rt Hon David Cameron, recognised that there had been "*shocking levels of state collusion in the murder*" and that undercover agents had been involved in "*identifying, targeting, and murdering Mr Finucane, supplying a weapon and facilitating its later disappearance*".[11]

36. Sir Desmond de Silva QC was asked to conduct a review of Mr Finucane's case. His report (the "**Finucane Report**"),[12] which was published in December 2012, records his "*significant doubt as to whether Patrick Finucane would have been murdered…. had it not been for the different strands of involvement by elements of the state*". It further records that "*a series of positive actions by employees of the State actively furthered and facilitated his murder*" and that there was a "*relentless attempt to defeat the ends of justice*".[13]

37. The Report records the Respondents' internal debates over policies relating to agent participation in criminality, which both predate and postdate the 1989 Act. Notably:

    37.1. Just three months after the 1989 Act received Royal Assent, the Government was advised that there may be a need for further legislation.[14]

[10] Report of the IS Commissioner for 2014, dated June 2015.
[11] https://www.gov.uk/government/speeches/prime-minister-david-cameron-statement-on-patrick-finucane-2
[12] The Rt Hon Sir Desmond da Silva QC's *Report of the Patrick Finucane Review* (Vol. 1, HC 802-1, 2012).
[13] Finucane Report, Executive Summary, para. 115.
[14] Finucane Report, Chapter 4, para. 4.53.

37.2. The Attorney General refused to endorse the legality of "*any guideline which appeared to condone in advance the commission of serious criminal acts*".

37.3. Sir John Chilcot (then Permanent Secretary in the Northern Ireland Office), advised that "*going down the non-statutory route*" was both "*unsatisfactory in practice and arguably unacceptable in principle*", later recording his view that "*a stable and satisfactory way forward…could only… be achieved by new legislation*".[15]

37.4. Despite attracting the support of several Ministers, legislation was not pursued. A Home Office briefing records "*grave reservations about opening up such a sensitive area to Parliament when the slenderness of the Government's majority could not guarantee a satisfactory outcome*".[16]

38. Secondly, the activities of Mr Freddie Scappaticci ("Stakeknife"). Mr Scappaticci is an alleged Security Service agent, who is believed to have been a member of the 'Internal Security Unit' of the IRA. In that capacity, along with other "*members of… the Security Services or other government personnel*", he is believed to have participated in serious crimes.[17] In 2016, the police launched 'Operation Kenova' to investigate claims of state involvement in kidnap, murder and torture of more than 50 individuals, leading to Mr Scappaticci's arrest in January 2018. As part of that inquiry, at least 20 individuals (including officers of the Security Service and Crown prosecutors) have now been referred to the PPSNI for potential prosecution.[18]

THE LAW

Constitutional Principles

39. The relevant principles are not in dispute. They can be summarised as follows.

40. First, the Executive has no power to dispense with the criminal law made by Parliament. That principle was recognised at the latest by 1610 in the *Case of Proclamations* (1610) 12 Co Rep 74: "*the King by his proclamation or other ways cannot change any part of the common law, or statute*

[15] Finucane Report, Chapter 4, para. 4.70-4.71.
[16] Finucane Report, Chapter 4, para. 4.72.
[17] See further, *Scappaticci's Application for Judicial Review* [2003] NIQB 56.
[18] See further, the quotation from a spokesperson for Operation Kenova: *"British spy in IRA and 20 others could be charged with Troubles-era crimes"*, published in the Guardian on 2 October 2019. Available here: https://www.theguardian.com/uk-news/2019/oct/02/ira-spy-and-20-others-could-be-prosecuted-for-troubles-era-crimes

law, or the customs of the realm…" See further, Lord Denning in *Gouriet v Union of Post Office Workers* [1977] QB 729, at p.761E. The Bill of Rights continues to prohibit the pretended power of "*suspending laws or the execution of laws*" and "*dispensing with the laws"* without the Parliament's consent.

41. The Courts must assess the practical effect of any policy, and not simply its stated purpose: *King v The London County Council* [1931] 2 KB 21, per Lord Scrutton at p.228. To similar effect, the unanimous Supreme Court in *R (Miller) v Prime Minister* [2019] 3 WLR 589 recognised that the prorogation of Parliament was unlawful insofar as it had the "*effect of frustrating or preventing, without reasonable justification, the ability to carry out its constitutional functions as a legislature…*" (per Baroness Hale, at [50]). See further, *R (Nicklinson) v Ministry of Justice* [2015] AC 657, at [241]; and *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800.

42. Second, the decision as to whether to bring a criminal prosecution lies with the prosecutor and the prosecutor alone. In consequence, "*no other authority may exercise [the relevant] powers or make the judgments on which such exercise must depend"*: *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756, per Lord Bingham at [30]. The Executive may offer information to the prosecutor but, under the Shawcross principles, it must not usurp the role of the prosecutor: *Corner House*, at [6].

43. Third, the principle of constabulary independence provides that the police are not an emanation of government and are not under executive control. Thus, in *Commissioner of Police of the Metropolis ex parte Blackburn* [1968] 2 QB 118, at p.135F-136C, Lord Denning stated as follows: "*I have no hesitation in holding that, like every constable in the land, he should be, and is independent of the executive… 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*". Similarly, in, *R (Mousa) v Secretary of Defence* [2013] HRLR 32, the Court recognised, at [74], that it is "*axiomatic that decisions on whether to pursue an investigation and then whether to prosecute must be made independently of the Executive*", which could have no "*influence whatsoever*" in those decisions.

44. Fourth, as part of the UK's constitutional arrangements, the UK's nations have separate criminal laws and separate bodies that investigate and prosecute crime. The Scottish legal system is "*self-contained and independent*" and is recognised to have "*criminal laws and rules of procedure [that are] entirely separate from those that exist in England and Wales*": *Montgomery v HM Advocate*

[2003] 1 AC 641, at p.645B-E. The Scottish prosecution service is led by the Lord Advocate, whose role is different to that of the DPP in England and is appointed by and accountable to the Scottish Parliament: *Montgomery*, at p.648A-B; and *R v Manchester Stipendiary Magistrate, Ex p Granada Television* [2001] 1 AC 300.

45. The Northern Irish system is also separate. In particular, the Attorney General for England and Wales has ceased to have a 'superintendence' role for Northern Ireland: see the Justice (Northern Ireland) Act 2002, s.40. There is a separate Attorney General for Northern Ireland, who has no power to give directions to the PPSNI, who takes the vast majority of prosecution decisions in Northern Ireland.

ECHR

46. The principle of legality.[19] A measure giving rise to an interference with a Convention right must be in accordance with law. This requires not only that it has a basis in domestic law, but also that it has the requisite quality of law. It must be accessible and the interference sufficiently foreseeable. There must be adequate safeguards that are effective in practice to minimise the risk of arbitrary or unlawful conduct.

47. In *Privacy International v Secretary of State for Foreign & Commonwealth Affairs* [2016] HRLR 21 at [62], the IPT summarised its approach to those requirements in the national security context.[20] The principle of legality requires "*adequate and effective guarantees against abuse*" and prohibits "*unfettered discretion for executive action*". The rules providing for those safeguards must themselves be clear and, so far as possible, in the public domain. That requires "*an adequate indication or signposting*", in order that any interference is reasonably foreseeable, albeit that it does not require a public authority to publish its detailed procedures. The Tribunal's jurisprudence emphasises the importance of effective oversight by the Commissioner.

48. Standing. Under Article 34 of the Convention, the test for standing is one of victimhood. The Strasbourg Court interprets the category of persons said to be directly affected by a decision broadly: see, for example, *Dudgeon v UK* (1982) 4 EHRR 149. It also recognises 'indirect victims',

[19] The principle of legality is expressly recognised in many of the ECHR rights, including Article 2, 5 and 6, but "*legal certainty*" is in any event "*necessarily inherent*" in each Convention right (*Marckx v Belgium* (1979-80) 2 EHRR 330, [58])

[20] The Claimants reserve their position as to the correctness of this analysis in light of any forthcoming Strasbourg jurisprudence or on appeal.

including "*collective bodies*", particularly where those organisations provide the only means available for challenge: *Gorraiz Lizarraga and Others v Spain* (2004) 45 EHRR 1031, at [38].

49. In respect of a secret measure, the mere existence of the measure will suffice. That is because it is "*unacceptable that the assurance of enjoyment of a right guaranteed by the Convention could be removed by the simple fact that the person concerned is kept unaware of its violation*": *Klass v Germany* (1979-80) 2 EHRR 214, at [36]. The leading authority is *Zakharov v Russia* (2016) 63 EHRR 17, where the Strasbourg Court reiterated that "*the secrecy of surveillance measures does not result in the measures being effectively unchallengeable*" [171]. On that basis, at [171], the Court held that an applicant can claim to be a victim of a secret measure "*where the domestic system does not afford an effective remedy*" and that, in such cases, there is no need to demonstrate the "*the existence of any risk*" that the secret policy was in fact applied.

50. Article 2. The Convention provides for an absolute and non-derogable prohibition on killing, save in the limited circumstances listed in Article 2(2).

51. Article 3. The Convention contains an absolute and non-derogable prohibition on torture and inhuman or degrading treatment or punishment. Whether treatment amounts to torture or inhuman or degrading treatment depends on intensity of suffering, and may be reclassified depending on changing circumstances: *Ireland v UK*, App. No. 5310/71, [167]; *Gäfgen v Germany* (2010) 52 EHRR 1, [90]; and *Selmouni v France* (1999) 29 EHRR 403, [99]-[100] and *Ireland v UK (No. 2)*, App.No. 5310/71 (Revision) (20 March 2018). There is no excuse of actual or claimed necessity. In *Gäfgen* (where the police threatened torture in order to find the location of a missing child whose life was thought to be immediately at risk), the Strasbourg Court recognised that the absolute prohibition in Article 3 does not permit any "*weighing of interests*", and that neither the "*protection of human life nor the securing of criminal conviction may be obtained at the cost of compromising the protection of the absolute right*". A public authority cannot authorise a breach of Article 2 or Article 3 and there can be "*no license for torture or for any other inhuman or degrading treatment*": *AKJ v Commissioner of Police of the Metropolis* [2013] 1 WLR 2734, per Tugendhat J. These principles reflect the common law, which has rejected recourse to torture since the decision in *Felton's Case* (1628) 3 How. State Tr. 371.

52. Article 5. Article 5 provides for the right to liberty and security of person and prohibits any deprivation of liberty save for enumerated purposes. Detention "*for the sole purpose of intelligence*

exploitation" is impermissible: *Mohammed v Secretary of State for Defence* [2017] 2 WLR 327 (SC), at [80]. Any deprivation of liberty must be in accordance with a procedure prescribed by law, which contains adequate safeguards: *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19 at 38. It must be subject to judicial oversight, which cannot be dispensed with in the interests of national security: see, for example, *Al-Nashif v Bulgaria* (2003) 36 EHRR 655 at [94].

53. Article 6. Article 6 provides for the right to fair trial. The use of undercover agents, or *agent provocateurs*, may give rise to a breach of the Convention: *Teixeira de Castra v Portugal* (1999) 28 EHRR 101. The test is whether any conduct of the police or other law enforcement agency was "*so seriously improper as to bring the administration of justice into disrepute*": *R v Looseley, Attorney-General Reference (No. 3 of 2000)* [2001] 1 WLR 2060, per Lord Nichollas at [25]. The Courts are therefore clear that there are "*limits of acceptable "pro-active" conduct by the police*": *Looseley*, per Lord Nicholls at [5], where, for example, the conduct would "*affront the public conscience*": *R v Latif and Shahzad* [1996] 2 Cr App R 92, per Lord Steyn.

54. State responsibility. Under the "*settled case-law*" of the Strasbourg Court, the test for state responsibility is "*acquiescence*": *Al-Nashiri v Romania* (2019) EHRR 3, at [594]). That test does not permit states to 'contract out' of their obligations or turn a blind eye to wrongdoing.

SUBMISSIONS

Ground 1 - *vires*

55. The majority of the Tribunal held that the Security Service had an implied power under s.1 of the 1989 Act to "*engage in the activities which are the subject of the policy under challenge*" (§60). The Tribunal's decision is premised on the logic that "*the running of agents, including the running of agents who are embedded into illegal or criminal organisations, such as the IRA, would obviously have been occurring before 1989*" and that it is impossible to accept that Parliament, in enacting that legislation, intended to "*bring to an end some of the core activities*" of the Security Service (§60). Relying on the wording of s.2(2) of the 1989 Act, which provides that the Director-General is responsible for the "*efficiency*" of the service, the majority concluded that the relevant power arose by necessary implication from the 1989 Act, the purpose of which was to "*continue*" the existence of the Security Service by placing it on a statutory footing.

56. The majority's approach is not consistent with the scheme of the 1989 Act. Section 1 sets out the statutory functions of the Security Service, not its powers. Accordingly, if the Security Service were to exercise its powers for some other purpose, it would act unlawfully. Section 1 does not provide power to the Security Service. The same applies to Section 2, the effect of which is to impose duties on the Director-General to disclose or not disclose certain information and not to take any action to advance the interests of a political party. Again, these are not powers, but duties.

57. The decision of the majority is reliant on the words "*efficiency*" in s.2(2) and, in turn, its conclusion that "*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*" (§61). But there is no power in the legislation to do whatever the Director-General considers to be efficient, if it would otherwise be contrary to the criminal or civil law. Operational necessity is not enough absent statutory language from which a power to commit crime can be inferred; nor can the word "*efficiency*" bear the weight placed on it by the Tribunal.

58. Where Parliament wished the Security Service to have power to do something that would otherwise be a crime (such as to break into property, or interfere with it), it provided an express scheme for authorisation. See s.3 of the 1989 Act, now re-enacted in s.5 of the 1994 Act. If the Tribunal's approach was correct, that careful scheme of powers, with a number of attendant safeguards, would have been redundant since the conduct could have been authorised under an implied power derived from s.1. This point is made powerfully in the dissenting judgment of Mr Flint QC at §129.

59. Nor is the purported power compatible with the legislative scheme. For example, s.1 of the 1989 Act can be contrasted with the language of s.7 of the 1994 Act, which expressly empowers both MI6 and GCHQ (but not the Security Service) to authorise their agents to commit crimes abroad. The 1994 Act consolidated a number of the Agencies' powers. Despite re-enacting the systems of warrants in s.5(3A), it did not extend the s.7 power to the Security Service. Nor did it provide a scheme for criminal conduct to be authorised within the British Islands. That omission is notable. As Mr Flint QC put it, "*Parliament was prepared to continue, and extend, the power of the Security Service in relation to entry into property, but otherwise confined an exemption from the civil and criminal law to the overseas acts of the Secret Intelligence Service authorised by the Secretary of State*" (§123).

60. The answer of the majority in the Tribunal was that the Security Service authorises its agents to participate in crime but that it "*does not purport to confer any such immunity and has no power to*

do so" (§67). However, the fact that an agent may remain liable for prosecution cannot provide a statutory basis for actions where there is none: *Morris v Beardmore*, per Lord Roskill at p.468C.

61. Moreover, the decision of the majority that there is "*an implied power which authorises conduct contrary to the general criminal and civil law but leaves the person engaging in such conduct liable to criminal prosecution*" (Charles Flint QC, §129) is both unpalatable and extraordinary. The clearest words would be required to achieve such an outcome, which would be as unfair to agents and officers of the Security Service as it would be inimical to the public interest.

62. In any event, even s.7 of the 1994 Act is subject to the principle of legality. Notwithstanding the express wording authorising agent participation in foreign criminality, without express words, s.7 could not be used to permit torture. As recognised by Lord Bingham in *A (No. 2)*, at [55], "*English 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 of 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 makes no mention of torture at all*". The same principle applies *a fortiori* to s.1 of the 1989 Act.

63. The provisions of RIPA are also inconsistent with the Tribunal's interpretation of the 1989 Act. Section 27(2) of RIPA provides an exemption from civil liability in respect of CHIS conduct authorised thereunder. The power in s.27 and the accompanying safeguards would be obsolete if there already existed an overlapping implied power under s.1 of the 1989 Act. As Mr Flint QC's dissent records, at §128, it would be "*very surprising if, in providing the powers at Part II of RIPA, Parliament had contemplated that there could be parallel powers exercised by the Security Service directed to the same objective, but using means which RIPA clearly did not sanction*".

64. At §66, the Tribunal noted its view that, insofar as the Security Service lack the power to authorise crime, the same could be said for ordinary police. That analogy is misplaced where (1) unlike the Security Service, the police are not an emanation of the Crown and (2) the role of a police informer is very different to an agent participating in crime. The sole purpose of the police is to prevent and detect crime. While a participating informant may be used to gather evidence, he is not permitted to encourage or create crime and may be prosecuted where he does. In contrast, the role of an agent of the Security Service may be to gather intelligence for reasons of national security, rather than to prevent crime.

65. For those reasons, the majority of the Tribunal erred in finding that s.1 of the 1989 Act provides a legal basis for the policy. The implied power cannot be inferred from the express statutory wording, nor can it be reconciled with the wider statutory scheme or the parallel legislative regimes. The purported power is not subject to any of the safeguards applicable to the far less onerous powers that appear in both the 1994 Act and RIPA.

66. The majority's judgment appears in practice to have been driven by a concern that if they did not imply a broad power to commit crimes into s.1 of the 1989 Act, the Security Service will be unable to "run" an agent who is embedded in a proscribed organisation, where membership of the organisation is itself a criminal offence (§§52-54). That is no doubt a genuine concern. But, as the dissenting opinion of Professor Graham Zellick QC recognises (§178), absent statutory wording from which the power necessarily arises, the remedy is to legislate, not to adopt an unjustifiably broad approach to the powers of the Security Services. It is no doubt for this reason that the Respondents have introduced the Bill in response to these proceedings. The Court should not usurp the role of Parliament in deciding whether (and to what extent) the Security Service should be able to self-authorise criminal conduct. Implying a broad power into legislation to commit criminal conduct, without safeguards, circumvents this.

67. Further, as the Finucane Report records, the Respondents have been repeatedly advised by officials (and Ministers are recorded as having accepted) that the Guidelines are not necessarily a lawful basis for participation in criminality and that the issue can only be properly remedied by legislation. This is why, 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.

68. As Lord Hoffmann explained in *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115:[21]

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to the fundamental principles of human rights… 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. That

[21] The same principle has been expressed in respect of tortious conduct. See, for example, *Morris v Beardmore* [1981] AC 446, in which the House of Lords recognised that "*if Parliament intends to authorise the doing of an act which would constitute a tort actionable at the suit of the person to whom the act is done, this requires express provision in statute*" (per Lord Diplock, at p. 455E).

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." (emphasis added)

69. The Respondents contend that the principle of legality is not engaged and rely on the doctrine of necessary implication. An implied power will only arise where it necessarily follows from the express provisions of the statute, construed in context and in light of the legislative purpose: *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, as analysed in *R (Black) v Secretary for State for Justice* [2018] AC 215, per Baroness Hale at [36]. It is not enough that the power is "*sensible or reasonable*"; rather, it must arise from the "*express language of the statute*": *Morgan Grenfell*, at [103]. That is *a fortiori* in the respect of constitutional rights, where it is "*not the task of judges, exercising their ingenuity in the field of implication, to go further in the invasion of fundamental private rights and liberties than Parliament has expressly authorised*": *Morris v Beardmore* [1981] AC 446, per Lord Scarman at p.463G.

Ground 2 – *de facto* immunity

70. The Tribunal rejected ground 2 because there is ordinarily no duty on a member of the public to inform police or prosecutors of criminal conduct (§§76 and 77).

71. The Tribunal's approach erred in law. Whether the Security Service is under a positive duty to disclose criminality to police and prosecutors was not the relevant question. Rather, the issue before the Tribunal was whether the Security Service has granted itself a *de facto* power to dispense with the application and enforcement of the criminal law.

72. The Tribunal found that "*[a]ll that the policy does, as para. (9) makes clear, is to set out what the Security Service would intend to say by way of representations as to where the public interest lies if that becomes necessary*" (§83). The Tribunal thus held that the Security Service does not purport to confer any immunity in respect of conduct authorised under the policy or the authorisation itself (§67), distinguishing *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800, at [39] (where the Court made clear that a "*proleptic grant of immunity from prosecution*" issued by a public body without statutory authority would not be lawful).

73. The Tribunal's finding gives no consideration to the practical effect of the policy. The Bill of Rights prohibits the "*pretended power of suspending with laws or the execution of laws*". These

words make clear that a *de facto* policy which has the practical effect of suspending the execution of the law is equally objectionable to a purported suspension of the law or a grant of immunity. In assessing whether the Executive has granted itself a dispensing power, the Court must not only consider the stated purpose of its conduct but also its practical effect. The Tribunal did not do this. Moreover, it did not explain its analysis of the Bill of Rights.

74. This point is reinforced by the constitutional arrangements in the UK for prosecutions. The decision as to whether to investigate and prosecute a crime belongs to the police and prosecutors alone. Where there are public interest reasons which may militate against prosecution, the executive has no power to prevent a prosecution. Instead, the proper approach is the so-called 'Shawcross procedure', under which Ministers may make representations to the Attorney General (or the DPP in Northern Ireland[22]) as to the application of the public interest test, but never make the decision as to whether or not to prosecute.

75. The Tribunal's response (§82) is that the "*prosecution authorities do not (and have no duty to) prosecute in every case*". That is correct but it is no answer to the Appellants' case. The Appellants' complaint is that applying the Guidelines, the independent prosecution authorities will not be told about the criminal conduct, which will be kept secret by the Security Service. Without such knowledge, the prosecutor is for all practical purposes deprived of the opportunity of making any decision as to whether the public interest favours prosecution.

76. The stated purpose of the policy is to provide the Security Service with "*an explanation and justification*" for authorisations made under the policy, so that it can make submissions on the application of the public interest test. Such submissions would be permissible under the Shawcross procedure and are unobjectionable. But the practical effect of the policy is to confer *de facto* immunity because no attempt is made to notify police or prosecutors. Indeed, it is clear that the latter have only recently been made aware of the existence of the policy and even now are not told about what crimes are committed under it. The Tribunal's finding that the policy is "*entirely consistent*" with the Shawcross principles (§84) is, therefore, unsustainable. The Shawcross

[22] Upon devolution of justice and policing in Northern Ireland, the superintendent role of the Attorney General was devolved to the Director of Public Prosecutions in Northern Ireland (save in respect of a small number of offences under Schedule 7 of the Justice (Northern Ireland) Act 2002). For the most part, therefore, the Attorney General has no ongoing role in prosecutions in Northern Ireland. A process that is effectively identical to the Shawcross procedure is adopted between HM Government and the PPSNI. See the letter from the DPP to CAJ, dated 8 February 2019.

principles seek to prevent the exact vice arising in consequence of the policy, namely the Executive arrogating to itself the decision as to whether a prosecution should be brought in the public interest.

77. A policy under which crime is authorised in secret and the authorisation is then concealed from police and prosecutors is in breach of the Bill of Rights, which prohibits the pretended powers of suspending or dispensing with the execution of law, as well as the law themselves. It is no different to a policy not to enforce the law. It moreover plainly frustrates the constitutional principle of prosecutorial independence (per *Miller (No. 2)*, above), as reflected in the Shawcross procedure.

78. The Security Service has therefore granted to itself a *de facto* power to dispense with the criminal law. In *King v the London County Council* [1931] 2 KB 21, the Court held that the local council had acted unlawfully, where it had refused to grant a licence to a cinematographer to show films on a Sunday, but agreed not to take formal action against him per Scrutton LJ, at p.288. The Tribunal distinguished *King* on the basis that the Security Service is not the "*primary enforcement authority*" (§74). That is a triumph of form over substance in circumstances where the Security Service is careful not to notify the relevant enforcement authority of the crimes.

79. The Tribunal also noted that there is no general legal duty on individuals to inform police and prosecutors of a crime (§§76 and 77). As set out above, that is not the relevant question. The Tribunal's answer is in any event wrong in two respects.

80. First, while the Tribunal may be correct that a member of the public does not ordinarily incur criminal liability for failing to disclose a crime, that is a different question from whether a public body may lawfully adopt a policy to commit crimes. In the IPT, the Appellants relied on a published policy of the civil service,[23] which provides that "*[c]ivil servants who believe that they have information (including documents) which may be relevant to planning or committing of a criminal offence, or to the investigation or prosecution of a criminal offence or to the defence, have a general professional duty to draw this fact to the attention of the appropriate authorities*". This reflects the underlying principle that there is a duty on the executive to comply with the law, a duty which is supervised by the High Court (in England and Wales and Northern Ireland) and the Court of Session (in Scotland). The Tribunal was wrong to find that Security Service officials were under

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

no duty to report to police and prosecutors; they were under precisely that duty. The Tribunal failed to address the policy set out in the civil service guidance, or the Appellants' submissions on it.

81. Second, an express statutory reporting duty exists in Northern Ireland under section 5 of the Criminal Law Act (Northern Ireland) 1967 (the "**1967 Act**"):

> "s.5 Penalties for concealing offences etc.
>
> (1) Subject to the succeeding provisions of this section, **where a person has committed an arrestable offence, it shall be the duty of every other person, who knows or believes**—
>
> (a) that the offence or some other arrestable offence has been committed; and
> (b) that he has information which is likely to secure, or to be of material assistance in securing, the apprehension, prosecution or conviction of any person for that offence;
>
> to give that information, within a reasonable time, to a constable and **if, without reasonable excuse, he fails to do so he shall be guilty of an offence**

82. The scheme of the 1967 Act is that crimes must be notified to the police, so that the police can decide whether to investigate. The PSNI has constables who are security cleared to the highest levels. National security cannot therefore provide a reasonable excuse for failing to notify. The Guidelines themselves cannot provide a reasonable excuse for non-notification because they are inconsistent with the scheme of the 1967 Act that crimes must be notified to the police.

83. The Tribunal considered that the duty in s.5 of the 1967 Act was negated by section 2(2)(a) of the 1989 Act (§79), which provides that the Director-General is under a duty to make 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 it except so far as necessary for the proper discharge of its functions*". That provision, however, expressly authorises disclosure to police and prosecutors (s.2(2)(a)).

84. The Tribunal also erred in finding that the policy did not cut across the statutory and constitutional arrangements for ensuring the independence and accountability of prosecutors in Scotland and Northern Ireland (§§80 and 81).[24] The general position is *a fortiori* in respect of those jurisdictions, where the Security Service only appears to have notified the prosecuting authorities in those jurisdictions of the existence of its policy during the course of these proceedings. The practical

[24] The IPT is a UK-wide Tribunal. In the present case it sat with members from England and Wales, Scotland and Northern Ireland. The Court of Appeal of England and Wales has been certified by the Tribunal as the appropriate Court to hear the appeal. It therefore has the same UK wide jurisdiction to consider arguments relating to the other nations as the Tribunal.

effect is that the independent DPP of Northern Ireland and the Lord Advocate in Scotland (each of which have separate and distinct lines of accountability and duties) are deprived of the opportunity of making a decision as to whether the public interest in a particular case favours prosecution.

Ground 3 – not in accordance with law

85. The policy (and the Commissioners oversight of it) went through five separate phases of secrecy.[25] A majority of the Tribunal nonetheless found that the policy was in accordance with law for the purposes of the ECHR (§§92 to 96). The Tribunal erred in so finding.

86. First, the Tribunal was wrong to find that oversight by the Commissioners provided adequate safeguards against the risk of abuse, where neither the IS Commissioner nor the IP Commissioner reviewed the legality of the policy or the authorisations made under it (§§93 and 95). The Tribunal found that this was "*not their function*" and that "*such questions of law are ultimately ones for courts and tribunals to determine*" (§95). It is unrealistic, however, to rely on the courts to perform that function, where the secrecy of the policy precluded any prospect of review.

87. The Tribunal accepted the Respondents' submission that nothing in the policy prevented the IS or IP Commissioner from commenting on the legality of the policy. However, the Prime Minister expressly told the Commissioner that his remit did not include "*endorsement of the legality of the policy*".[26] The Commissioner accepted that limitation. He did not in any of his reports seek to comment on the legality of the policy. Secret oversight on such terms cannot sensibly be described as providing an "*adequate safeguard against the risk of abuse".* There was no mechanism in place to ensure the legality of the policy or the conduct authorised under it.

88. Second, the Commissioner agreed that when conducting oversight he was not to "*provide a view on whether any particular case should be referred to the prosecuting authorities*". He was therefore unable to cure the failure to notify the police or prosecutors.

[25] (1) Before 2012, the policy was not only secret, but was subject to no oversight. (2) Between 2012 and 28 November 2014, the policy remained secret and was subject to oversight by the IS Commissioner, pursuant to a 'non-statutory direction'. (3) Between 28 November 2014 and 2017, while the policy was subject to statutory oversight by the IS Commissioner, that oversight was pursuant to a secret direction and the policy remained undisclosed. (4) Between 2017 and 1 March 2018, while the existence of the 'Third Direction' had been disclosed, its subject matter remained secret as did the policy. Secret oversight was carried out by the IP Commissioner. (5) The Third Direction was published on 1 March 2018. Guidelines were thereafter disclosed, albeit heavily redacted.

[26] Letter from the Prime Minister to Sir Mark Waller, 27 November 2012.

89. Third, the Tribunal failed to address that the policy was subject to no oversight at all prior to 2012. The Tribunal did not explain how the policy could be described as having adequate safeguards during that earlier period. Nor did it address the consequences under the Convention of the policy being unjustifiably kept secret until 1 March 2018.

Grounds 4-6 - ECHR

90. The Guidelines (at least in the redacted form provided to the Appellants) do not refer to the Convention and do not contain any provision to ensure that Convention rights are met. In particular, there is nothing in the Guidelines prohibiting the Security Service from authorising killing, torture or inhuman and degrading treatment, or deprivation of liberty.

91. Such limits have been adopted in other comparable jurisdictions. The Canadian Security Intelligence Act 1985 (as amended in 2019) permits the authorisation of criminal conduct subject to express statutory limits. Section 20.1(18) provides:

> "Nothing in this section justifies:
>
> (a) causing, intentionally or by criminal negligence, death or bodily harm to an individual;
>
> (b) wilfully attempting in any manner to obstruct, pervert or defeat the course of justice;
>
> (c) violating the sexual integrity of an individual;
>
> (d) subjecting an individual to torture or cruel, inhuman or degrading treatment or punishment, within the meaning of the Convention Against Torture;
>
> (e) detaining an individual; or
>
> (f) causing the loss of, or any serious damage to, any property if doing so would endanger the safety of an individual."

92. Risk of a significant breach. The Tribunal appears to have given only brief consideration to Grounds 5 to 7. The Tribunal erred (§100) in finding 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*". The operation of the policy and the limits of the conduct authorised under it have never been disclosed, if such limits exist. The most recent public summary of the policy, however, given on the first day of the hearing below by Lord Evans, the former Director General of the Security Service, gives cause for concern. In particular, Lord Evans refused to rule out the possibility that

"*a punishment like beating or a knee-capping*" might be authorised under the Guidelines. Lord Evans also noted that "*there are no specific rules on exactly which crimes*" are authorised.[27]

93. Absent limits on conduct such as torture and inhuman and degrading treatment, and safeguards to guard against it, the policy is unlawful because there are no procedures in place to avoid or prevent a significant risk of a breach. It is no answer, in those circumstances, that the Appellants' challenge is not based on "*concrete facts of a particular case*" (§101). That is inevitably so where the operation of the policy remains secret (see *Klass v Germany*, above).

94. Standing. The majority of the Tribunal stated that they "*were not persuaded*" that the Appellants have standing (§107). The Tribunal's decision is premised on its conclusion that "*as a general matter, a person will only be a "victim"*" for Convention purposes "*if they can show that they would be affected by a law or policy directly and personally*" (§106). That is stated too broadly. As set out above: (1) the Strasbourg Court has long recognised the need to interpret the category of persons who are 'direct victims' flexibly: *Dudgeon v UK*. (2) The Court recognises various categories of 'indirect victims'. A representative organisation may bring a challenge on behalf of others, where Convention rights would otherwise be rendered "*ineffectual or illusory*": see, for example, *Gorraiz Lizarraga v Spain*, at [38], as can the relatives of a deceased victim: *McKerr v UK* (2002) 34 EHRR 20. (3) The mere existence of a measure will often give rise to standing where the domestic system does not afford an effective remedy to the direct victims because the relevant measures are applied secretly: *Zakharov*, at [171].

95. Each of the Appellants is a charity or not-for-profit NGO with a long history of work on the matters raised by these proceedings. The Fourth Appellant, the Pat Finucane Centre, carries the name of one of the few acknowledged direct victims of agent criminality. It also advocates on behalf of over 200 bereaved families, including a number who are directly involved in Operation Kenova and others who have on-going investigations with the Police Ombudsman alleging agent participation in crimes including murder. There is no one else who can bring this challenge. In those circumstances, the Appellants have standing to challenge the conduct authorised pursuant to the policy under the Convention. Were it otherwise the policy would be unchallengeable save by a direct victim, notwithstanding the fact that the secrecy of the operation of the policy prevents any such challenge.

[27] Interview of Lord Evans Baron Evans of Weardale, former Director General of the British Security Service by Mishal Husain on the Today Programme, BBC Radio 4. 5 November 2019.

96. State responsibility. Where the Security Service aids, abets, counsels or procures conduct amounting to a breach of the Convention it would ordinarily incur liability as if it had carried out the acts itself. In the Tribunal below, however, the Respondents sought to establish a novel test, limiting state responsibility to those acts which it "*instigated and decisively caused*" (Response, §102). The Respondents contend that "*the State, in tasking CHIS in relation to that conduct, is not the instigator of that activity and cannot be treated as responsible for it*" (Response, §117).

97. The Tribunal failed to address this issue of law, at least in OPEN. The test for state responsibility is one of "*acquiescence*", which the Strasbourg Court has recently confirmed as "*settled law*": *Al Nashiri v Romania* (2019) EHRR 3, at [594]. The Security Service has established "*its own procedure for authorising the use of agents participating in crime*"[28]. Such direct authorisation by public officials plainly meets the test for state responsibility. The fact that the State has outsourced its intelligence gathering functions should not give rise to a dilution of Convention standards; if anything, there is a greater risk of abuse in this situation.

CONCLUSION

98. The Appellants invite the Court to allow the appeal on the preliminary issues and remit the case back to the Tribunal.

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BHATT MURPHY

2 November 2020

[28] Guidelines for the Security Service: Use of Information in Terrorist Related Cases, 1995.