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Nos. IPT/17/86/CH
IPT 17/87/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 20 December 2019

Before:

LORD JUSTICE SINGH (PRESIDENT)
LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)
SIR RICHARD McLAUGHLIN
MR CHARLES FLINT QC
PROFESSOR GRAHAM ZELLICK QC

B E T W E E N :

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

Claimants

- and -

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

Respondents

MR B. JAFFEY QC and Ms C. ROONEY (instructed by Bhatt Murphy) for the Claimants

SIR J. EADIE QC, MR D. PERRY QC, Ms V. WAKEFIELD QC, Ms C. BROWN, Ms N. BARNES and MR W. HAYS (instructed by Government Legal Department) for the Respondents.

MR J. GLASSON QC and Ms S. HANNETT appeared as Counsel to the Tribunal

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Hearing dates: 5 – 7 November 2019

OPEN JUDGMENT

Lord Justice Singh, Lord Boyd and Sir Richard McLaughlin:

Introduction

1. This case raises one of the most profound issues which can face a democratic society governed by the rule of law. The Claimants, which are all non-governmental organisations, challenge a policy which was publicly acknowledged to exist by the Prime Minister on 1 March 2018, which they submit purports to "authorise" the commission of criminal offences by officials and agents of the Security Service (often known as MI5). The Claimants submit that the policy is unlawful, both as a matter of domestic public law and as being contrary to the rights in the European Convention on Human Rights ("ECHR"), as set out in Schedule 1 to the Human Rights Act 1998 ("HRA").

2. The Claimants advance seven grounds of challenge, but, as was apparent at the hearing before this Tribunal, it will be convenient to address those grounds in a different order as follows:

(1) There is no lawful basis for the policy, either in statute or at common law. This corresponds to ground 3.

(2) The policy amounts to an unlawful *de facto* power to dispense with the criminal law. This corresponds to ground 4.

(3) The secret nature of the policy, both in the past and now, means that it is unlawful under domestic principles of public law. This corresponds to ground 2.

(4) For the purposes of the ECHR, the policy was not and is not "in accordance with law". This corresponds to ground 1.

(5) Any deprivation of liberty effected pursuant to a purported authorisation given under the policy violates the procedural rights under Article 5 of the ECHR. This corresponds to ground 5.

(6) Supervision of the operation of the policy by the Intelligence Services Commissioner ("ISC") in the past, and now the Investigatory Powers Commissioner

("IPC"), does not satisfy the positive investigative duty imposed by Articles 2, 3 and 5 of the ECHR. This corresponds to ground 6.

(7) Conduct authorised under the policy in breach of Articles 2, 3, 5 and 6 of the ECHR is in breach of the negative and preventative obligations in the ECHR. It is submitted that the policy itself is unlawful to the extent that it sanctions or acquiesces in such conduct. This corresponds to ground 7.

Background

3. Before these proceedings took place, two directions issued by the Prime Minister were in the public domain. The first concerned the consolidated guidance which governs the United Kingdom's involvement in detention and interviewing of persons overseas: see the Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014. The second concerned the agencies' use of bulk personal datasets: see the Intelligence Services Commissioner (Additional Review Functions) (Bulk Personal Datasets) Direction 2015.

4. In proceedings which were then before the Tribunal (*Privacy International v Secretary of State for Foreign and Commonwealth Affairs*, IPT/15/110/CH) the existence of a further direction was disclosed, hence it has become known as the "Third Direction". That disclosure was made in the Confidential Annex to the ISC's report for 2014, which stated that the Prime Minister had now issued three such directions.

5. In June 2017 the present proceedings were commenced by the first and second Claimants. Since at that time only the fact of the existence of the Third Direction had been made public but nothing else, those Claimants challenged the legality of the secret Third Direction.

6. On 20 October 2017 the Respondents filed preliminary submissions, challenging the Claimants' standing to bring these proceedings. On 9 November 2017, the Tribunal invited submissions on that issue as well as in respect of whether the complaints were frivolous or vexatious. The parties filed submissions and, on 18 December 2018, the Tribunal declined to strike out the claim under section 67(4) of the Regulation of Investigatory Powers Act 2000 ("RIPA").

7. Oversight of certain functions of the agencies was originally conducted by the ISC under section 59 of RIPA. In 2013 a new power was inserted into RIPA, by which the Prime Minister could direct the ISC to keep under review the carrying out of any aspect of the functions of the agencies: see section 59A(1)(a), inserted by the Justice and Security Act 2013. A direction made under section 59A has to be published unless it appears to the Prime Minister that such publication would be contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom, or the discharge of functions reviewed by the ISC: see section 59A(5).

8. From 1 September 2017, the ISC was replaced by the IPC: see section 227 of the Investigatory Powers Act 2016 ("the 2016 Act"). The power to give directions under section 59A(1) was replaced by section 230 of the 2016 Act.

9. The relevant direction which was made by the Prime Minister to the IPC on 22 August 2017 is the Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Security Service's Agent Participation in Criminality) Direction 2017. It states as follows:

> "The Prime Minister, in exercise of the power conferred by section 230 of the Investigatory Powers Act 2016 ('the Act'), directs the Investigatory Powers Commissioner as follows.
>
> **Citation and commencement**
>
> 1 …
>
> 2 This direction comes into effect on 1 September 2017.
>
> **Additional review functions**
>
> 3 The Investigatory Powers Commissioner shall keep under review the application of Security Service Guidelines on the use of agents who participate in criminality and the authorisations issued in accordance with them."

10. During the course of the present proceedings, it became clear that the direction given to the IPC had replaced an earlier direction made in 2014 to the ISC. That was the direction to

which Sir Mark Waller (the ISC at the time) referred in the Confidential Annex to his report for 2014.

11. As will be apparent from the direction, reference is made to the Security Service Guidelines. It is to those Guidelines to which we must next turn.

Security Service Guidelines

12. The current version of the Guidelines on the use of agents who participate in criminality was issued in March 2011. On their face, they were to be reviewed in January 2014, but we were informed at the hearing before this Tribunal that, subsequent to that review, no change to the policy was made. We will refer here to the Guidelines insofar as they are available in OPEN.

13. Under the 'Policy Aim', it is said that the aim of the policy is to provide guidance to agent-running sections on the use of agents who participate in criminality. The audience of the policy is said to be agent handlers and their managers. Under the heading 'Principles', it is said:

> "The guidance explains the circumstances in which agent-running sections may use agents who participate in criminality and sets out relevant procedures [redacted]."

14. In the section headed 'Summary', there is a gist which states that these Guidelines are intended to provide guidance to agent-running sections on the use of agents who participate in criminality. In the table of contents, there is reference to an introduction, authorisation of uses of participating agents, effect of an authorisation, [redacted], and agent handlers.

15. Under the heading 'Introduction', the Guidelines state as follows:

> "(1) These Guidelines are intended to provide guidance to agent-running sections on the use of agents who participate in criminality.
>
> (2) Part II of the Regulation of Investigatory Powers Act 2000 ('RIPA') creates a regime for authorising the conduct and use of Covert Human Intelligence Sources ('CHISs'). This regime applies to the Service's use of agents, and the Service conducts its agent operations in accordance with RIPA, its subordinate legislation and the CHIS Code of Practice issued under it.

(3) RIPA does not provide any immunity from prosecution for agents or others who participate in crime. Section 27 of RIPA provides that conduct specifically authorised under a CHIS authorisation is 'lawful for all purposes'. [There then follows a redaction for reasons of legal professional privilege.]

(4) Subject to this, neither RIPA nor the Code of Practice provides for CHISs to be authorised to participate in criminality. However, the Service has established its own procedure for authorising the use of agents participating in crime, which it operates in parallel with the RIPA authorisation. [There is then a redaction which, according to a gist of it, 'governs the use and conduct of CHIS'.]

(5) [redacted] The nature of the work of the Service is such that its agents are frequently tasked to report on sophisticated terrorist and other individuals and organisations whose activities may pose a threat to national security and/or involve the commission of serious offences. In those circumstances, it may sometimes be necessary and proportionate for agents to participate in criminality 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."

Under the heading 'Authorisation of use of participating agents', the Guidelines continue as follows:

(6) An officer empowered to issue a CHIS authorisation under RIPA (an 'authorising officer') may in appropriate cases authorise the use of an agent participating in crime. [Redacted but gisted as follows: 'The procedure applies to any situations involving the use of an agent participating in crime.']

(7) [Redacted] the authorising officer may authorise the use of the agent [redacted] if [redacted]:

a. there is a reasonable prospect that the agent will be able to provide information concerning serious crime [redacted];

b. the required information cannot readily be obtained by any other means; and

c. the need for the information that may be obtained by the use of the agent justifies his use notwithstanding the criminal activity in which the agent is or will be participating.

(8) The criterion at para. 7(c) is satisfied unless the authorising officer is satisfied that the potential harm to the public interest from the criminal activity of the agent is outweighed by the benefit to the public interest from the information it is anticipated that the agent may provide and that the benefit is proportionate to the criminal activity in question."

Under the heading 'Effect of an authorisation', the Guidelines state:

"(9) An authorisation of the use of a participating agent 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 prosecuting authorities. In particular, the authorisation process and associated records may form the basis of representations by the Service to the prosecuting authorities that prosecution is not in the public interest. Accordingly, any such authorisation should, on its face, clearly establish that the criteria for authorisation are met, in terms which will be readily understood by a prosecutor."

Under the heading 'Procedure', para. (10) is redacted but has been gisted as follows:

"An authorisation form is completed which records the authorising officer's decision."

The Guidelines continue under the same heading:

"(11) It is vital that full and accurate records are made of everything said to an agent on the subject of participation and of his response. [redacted] It should be clearly

explained to the agent that the authorisation process does not bestow on them any immunity from prosecution. [redacted but gisted as follows: 'MI5 officers involved in the authorisation process should understand that they may be called to account for their decisions and actions about the lawfulness of the agent's conduct.']"

Under the heading 'Commission of criminal offences not covered by an authorisation', para. (12) is redacted but has been gisted as follows:

"[This paragraph explains what steps MI5's officers should take in these circumstances.]"

Finally, under the heading 'Agent handlers', para. (13) states as follows:

"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."

16. This Tribunal has seen, in OPEN, earlier versions of similar Guidelines. The first document, which dates from 1995 or earlier, is headed "Guidelines for the Security Service use of informants in terrorist related cases". The next guidance, which dates from 1997, is headed "Security Service policy on running agents in serious crime". The next guidance, dating from 2003, is headed "Security Service Guidelines on the use of agents who participate in criminality".

The involvement of the Intelligence Services Commissioner/Investigatory Powers Commissioner

17. On 23 September 2011 Andrew Parker (then the Deputy Director-General of the Security Service) wrote to Sir Mark Waller, the ISC, in terms which included the following, at para. 3:

"The Guidelines have been in place since the early 1990s and incoming Home Secretaries have been briefed on them. The Guidelines have, in our view, been highly effective in enabling us to reach sustainable, practical decisions, [redacted] in what can be very difficult cases. However, my predecessors and I have always been conscious that the Guidelines, whilst enabling us to manage some very difficult risks [redacted]. That said, the Guidelines give us the flexibility, we need to run these

agent cases to the best effect and, perhaps above all, a better alternative that is practicable and deliverable has yet to be identified."

18. The redacted passage has been gisted as follows: ["The redacted text refers to some of the matters set out in para. (9) of the Guidelines"].

19. On 27 November 2012, the then Prime Minister (David Cameron MP) wrote to Sir Mark Waller inviting him, in addition to his statutory functions and his current non-statutory functions, "to keep the application of this policy under review with respect to the necessity and proportionality of authorisations and consider such related issues as you find appropriate."

20. For the avoidance of doubt, the letter continued that:

> "I should be clear that such oversight would not provide endorsement of the legality of the policy; you would not be asked to provide a view on whether any particular case should be referred to the prosecuting authorities; and your oversight would not relate to any future consideration given by prosecuting authorities to authorisations, should that happen."

21. In a letter dated 6 December 2012, Sir Mark Waller replied to say that he would be happy to take on the role outlined in the Prime Minister's letter and would include a report on this in the Confidential Annex to his annual report.

22. In a letter dated 27 November 2014, sent by Mr Cameron to Sir Mark Waller, it was noted that the ISC's 2013 annual report mentioned that his extra-statutory functions would be put on a statutory footing through a formal direction under section 59A of RIPA (which was then being introduced by the Justice and Security Act 2013). The Prime Minister, it was noted, had subsequently written to Sir Mark on 23 June 2013 to confirm that he intended to issue a direction to formalise two of his extra-statutory functions: first, his oversight of compliance with those aspects of the Consolidated Guidance for which he had responsibility; and, secondly, his oversight of Security Service agents' participation in criminality. In that earlier letter, the Prime Minister had confirmed that the latter direction would be "secret (i.e. non-avowed) given the potential damage to national security were its existence to be made public." With his letter of 27 November 2014, the Prime Minister issued the two directions,

including the direction relating to oversight of Security Service agent participation in criminality.

23. In July 2017, in the Confidential Annex to the report of the ISC for 2016, Sir Mark Waller said:

> "In a letter to me dated 27 November 2014 the Prime Minister said the direction to oversee CHIS participation in criminality would not be avowed given the potential damage to national security were its existence to be made public. However, the existence of a 'Third Direction' was revealed by GCHQ to the Investigatory Powers Tribunal, and therefore made public, during this year. I have had requests to make public the subject matter of this direction, with which I have not complied. However, the Government will need to consider how it communicates any additional oversight it asks the Investigatory Powers Commissioner to undertake."

24. In a document which is undated but refers to the ISC's oversight of MI5 in 2013, the ISC observed that:

> "As part of my oversight, I am not concerned if CHIS go ahead with criminal activities. Instead I am looking at the public interest of [redacted, but gisted as 'using CHIS who participate in criminality'.]"

25. The Tribunal has seen a number of annual inspection reports by the ISC for the years 2013-16. It has also seen similar reports by the new IPC for 2017 and 2018.

26. On 3 September 2012 a letter was written on behalf of the Security Service to the Crown Prosecution Service on the subject of "Security Services Guidelines on the use of agents who participate in criminality". At para. 2 of that letter, it was said:

> "… you will be aware from previous case work that the Security Service has for many years operated Policy Guidelines on the use of agents who participate in criminality. We recently reviewed the Guidelines and shared the revised version with the Home Secretary. In approving them, the Home Secretary accepted a recommendation that she should ask the Intelligence Services Commissioner, Sir Mark Waller, as part of his future role, to review a random selection of the authorisations in place under the

Guidelines at any one time. The aim, which we fully support, is to enhance the assurance that the Guidelines are being applied appropriately. In preparing for his new task, Sir Mark has asked us to share the Guidelines with you, on the basis (we believe) that cases may arise in which our two Services need to discuss participation by a Security Service agent. I therefore attach a copy of the Guidelines as revised."

The Prime Minister's written statement

27. The written statement made by the Prime Minister (Theresa May MP) on 1 March 2018 was as follows:

"On 1 September, the Investigatory Powers Commissioner, Lord Justice Fulford took on responsibility for overseeing the use of investigatory powers by public authorities. This was a significant milestone in the transition to new oversight arrangements under the Investigatory Powers Act 2016.

To enable the Investigatory Powers Commissioner to take on additional oversight functions not covered by his statutory responsibilities, I gave two directions to the Commissioner on 22 August 2017. Issuing these directions forms part of our rigorous intelligence oversight system.

One direction instructed the Commissioner to keep under review compliance with the Consolidated Guidance on Detainees by officers of the security and intelligence agencies, and members of the armed forces and employees of MOD so far as they are engaged in intelligence activities. The Consolidated Guidance sets out the standards that personnel must apply during the detention and interviewing of detainees held by others overseas. The other direction instructed the Commissioner to keep under review the application of the Security Service Guidelines on the use of agents who participate in criminality and the authorisations issued in accordance with them. In accordance with my obligation to publish such directions under section 230 of the Investigatory Powers Act 2016, I am now depositing in the Libraries a copy of both directions."

The report of the Patrick Finucane review

28. Mr Patrick Finucane was a solicitor who was killed in Northern Ireland in 1989. There has long been concern that those who killed him may have had assistance from agents of the State. In due course the Prime Minister (David Cameron MP) asked a well-known member of the Bar, Sir Desmond de Silva QC, to conduct a review of the case. In December 2012 Sir Desmond published his report.

29. In the Executive Summary of the report, in setting out his overall assessment, Sir Desmond said, at para. 115:

> "Overall, I am left in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements of the State. The significance is not so much, as Sir John Stevens concluded in 2003, that the murder could have been prevented, though I entirely concur with his findings. The real importance, in my view, is that a series of positive actions by employees of the State actively furthered and facilitated his murder and that, in the aftermath of the murder, there was a relentless attempt to defeat the ends of justice."

30. At paras. 112-113, earlier in his Executive Summary, Sir Desmond noted the importance of the use of agents within terrorist groups:

> "112. There are … some broad themes that may still have relevance to the world of intelligence-gathering. I have not concluded that the running of agents within terrorist groups is an illegitimate or unnecessary activity. On the contrary, it is clear that the proper use of such agents goes to the very heart of tackling terrorism. The principal lesson to be learned from my report, however, is that agent-running must be carried out within a rigorous framework. The system itself must be so structured as to ensure adequate oversight and accountability. Structures to ensure accountability are essential in cases where one organisation passes its intelligence to another organisation which then becomes responsible for its exploitation.
>
> 113. It is essential that the involvement of agents in serious criminal offences can always be reviewed and investigated and that allegations of collusion with terrorist

groups are rigorously pursued. Perhaps the most obvious and significant lesson of all, however, is that it should not take another 23 years to properly examine, unravel and publish a full account of collusion in the murder of a solicitor that took place in the United Kingdom."

31. Chapter 4 of the report was on the subject of "Agent-handling". At paras. 4.31-4.34 it referred to the Guidelines applicable to the Security Service.

32. At paras. 4.54-4.55, the report mentioned the Northern Ireland Office Working Group, which had drafted a set of guidelines in this context in 1989. It set out the text of the draft guidelines as follows:

> "4. The informant must be clearly instructed that his employment or continued employment as an informant does not carry with it immunity from criminal prosecution. In particular, he should be warned that he should not expect to avoid criminal proceedings if he is detected committing or having committed any physical assaults, or attacks on property causing serious damage, or acts of extortion. Moreover, no police officer will counsel, incite or procure the commission of such criminal offences. However, subject to paragraph 5 below an officer may employ a person as an informant whom he believes to be engaged in criminal activities provided that, at the time of employing him he is satisfied that
>
> > (a) the informant is likely to be able to provide information concerning offences involving a risk of death or injury to persons, serious damage to property extortion or offences connected with the financing of terrorism;
> >
> > (b) the required information cannot readily be obtained by any other means; and
> >
> > (c) the need for the information that may be obtained by the employment of that person as an informant justifies his employment notwithstanding the criminal activities on which he may be engaged;
>
> 5. The employment of an informant believed to be engaged in criminal activity must be specifically authorised by an officer not below the rank of Assistant Chief Constable. It must be regularly reviewed."

33. On behalf of the Claimants Mr Ben Jaffey QC draws attention to the fact that, on its face, that draft version of the Guidelines set out limits, as to what types of offence could be "authorised" under them. He submits that, in the absence of any similar limits having been placed in the public domain, the Claimants have to proceed on the basis that the current version of the Guidelines places no limits on the types of offence that could be "authorised" under them.

Material legislation

34. The long title to the Security Service Act 1989 ("the 1989 Act") includes that it was an Act "to place the Security Service on a statutory basis". Section 1 provides:

> "(1) There shall continue to be a 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 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 …"

Subsection (4) was not in the original Act as enacted in 1989 and has been added subsequently by amending legislation.

Section 2 provides:

> "(1) The operations of the Service shall continue to be under the control of a Director-General appointed by the Secretary of State.

(2) The Director-General shall be responsible for the efficiency of the Service and it shall be his duty to ensure –

(a) 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 serious crime or for the purpose of any criminal proceedings; and

(b) that the Service does not take any action to further the interests of any political party; and

(c) that there are arrangements agreed with the Director-General of the National Crime Agency, for co-ordinating the activities of the Service in pursuance of section 1(4) of this Act with the activities of police forces, the National Crime Agency and other law enforcement agencies …

(4) The Director-General shall make an annual report on the work of the Service to the Prime Minister and the Secretary of State and may at any time report to either of them on any matter relating to its work."

35. The 1989 Act, as enacted, included provision in section 3 for a system of warrants to be issued by the Secretary of State to authorise what would otherwise be unlawful entry on or interference with property. That system of warrants has now been replaced by section 5 of the Intelligence Services Act 1994 ("the 1994 Act"). Section 5 provides:

"(1) No entry on or interference with property or with wireless telegraphy shall be unlawful if it is authorised by a warrant issued by the Secretary of State under this section …"

The 1994 Act also put on a statutory basis for the first time both the Secret Intelligence Service (MI6) and the Government Communications Headquarters (GCHQ).

36. Section 7 of the 1994 Act provides:

"(1) If, apart from this section, a person would be liable in the United Kingdom for any acts 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 …"

37. On behalf of the Claimants Mr Jaffey draws attention to the express terms of section 7 of the 1994 Act by way of contrast to what is contained in the 1989 Act. He submits that, when Parliament wished to confer immunity from the criminal (or civil) law for certain conduct, it said so expressly. He submits that there is no such legal immunity conferred on acts which may be criminal but which the Security Service purports to "authorise" under the Guidelines.

38. Section 26 of RIPA describes the conduct to which Part II of RIPA applies. So far as material, it includes at subsection (1)(c) "the conduct and use of covert human intelligence sources." Section 29 of RIPA creates a system for the authorisation of the conduct or the use of a covert human intelligence source.

39. Section 27 of RIPA provides that conduct to which Part II applies "shall be lawful for all purposes" if (a) an authorisation confers an entitlement to engage in that conduct on the person whose conduct it is; and (b) his conduct is in accordance with that authorisation. Subsection (2) provides that a person shall not be subject "to any civil liability" in respect of any conduct of his which (a) is incidental to any conduct that is lawful by virtue of subsection (1) and (b) is not itself conduct for which an authorisation or warrant is capable of being granted under a relevant enactment and might reasonably have been expected to have been sought in the case in question.

40. Subsection (4) defines "Relevant enactment" to mean an enactment contained in RIPA itself, the 2016 Act or section 5 of the 1994 Act (we leave out of account immaterial provisions which do not apply to the agencies).

41. It was common ground before this Tribunal that the provisions of RIPA are not relevant for present purposes. This is because of the saving provision in section 80 of RIPA, which provides:

> "Nothing in any of the provisions of this Act by virtue of which conduct of any description is or may be authorised by any warrant, authorisation or notice, or by virtue of which information may be obtained in any manner, shall be construed –
>
> (a) as making it unlawful to engage in any conduct of that description which is not otherwise unlawful under this Act and would not be unlawful apart from this Act; …"

42. It follows that it is also common ground that the source of the power to do what the Security Service does under the Guidelines is not to be found in RIPA. If that power exists at all, its source must be found elsewhere. As will become apparent, the Respondents' case is that the source of that power is to be found in the 1989 Act.

Relevant case law

43. In *R(A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24; [2010] 2 AC 1, at para. 28, Laws LJ said that:

> "… *all* the functions of the Security Service are, and have been since the coming into force of the Security Service Act 1989, statutory functions." (Emphasis in original)

44. Before the 1989 Act the Service was created under, and governed by, the Royal Prerogative. Although the origins of the Service can be traced back to before the First World War, its existence was not "avowed" for many decades. It was governed from 1952 by a Directive issued by the then Secretary of State for the Home Department, Sir David Maxwell Fyfe, on 24 September 1952 to the Director-General. This Directive was kept secret until after the "Profumo" affair in 1963: see Andrew, The Defence of the Realm: The Authorized History of MI5 (2010), p.323. Paras. 2-5 of that Directive were quoted by Sir John Donaldson MR in *Attorney General v Guardian Newspapers Limited and Others (No. 2)* [1990] 1 AC 109 (often referred to as the '*Spycatcher*' case as it concerned attempts to restrain publication of a

book with that title which was written by Peter Wright, a former officer with the Security Service), at p.187. We should set out here paras. 2-3 of the Directive in particular:

> "2. 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 of the state.
>
> 3. 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."

45. According to the history of MI5 by Professor Andrew, at p.615, the functions of the Security Service were expressly extended to include counter-terrorism in 1972.

46. In the *Spycatcher* case, at pp.189-190, Sir John Donaldson MR said:

> "It would be a sad day for democracy and the rule of law if the Service were ever to be considered to be above or exempt from the law of the land. And it is 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."

At p.190 he continued:

> "Even in the context of the work of the Security Service which, I must stress, is the defence of the realm, there must be stringent limits to what breaches of the law can be considered excusable. Thus I cannot conceive of physical violence ever coming within this category or physical restraint, other than in the powers of arrest enjoyed by every citizen or under the authority of a lawful warrant of arrest. But covert invasions of privacy, which I think is what Mr Wright means by 'burglary', may in some circumstances be a different matter."

The Master of the Rolls continued:

> "It may be that the time has come when Parliament should regularise the position of the Service. It is certainly a tenable view. The alternative view, which is equally tenable, is that the public interest is better served by leaving members of the Service liable to prosecution for any breach of the law at the instance of a private individual or of a public 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." (Emphasis in original)

47. The other members of the court did not say anything in agreement with that passage nor did the House of Lords comment on it when the '*Spycatcher*' case went there.

<u>The first issue</u>

48. The first issue is whether the Security Service has power as a matter of public law to undertake the activities which are the subject of the policy under challenge.

49. It is common ground that, although the Security Service was before 1989 governed by the Prerogative, the enactment of the 1989 Act has superseded the Prerogative and "occupied the field". The consequence, as Sir James Eadie QC accepts on behalf of the Respondents, is that the power to do what the Security Service does arises, if at all, from statute and nothing else.

50. Sir James Eadie submits that there is indeed such power in statute, to be found as a matter of necessary implication on the true interpretation of the 1989 Act, in particular, section 1(2) read with section 2(1).

51. On behalf of the Claimants, Mr Jaffey submits that there is no such power on the true construction of the 1989 Act. He submits that express words would be required or at the very least there would have to be a necessary implication. He submits that no such implication should be found in a context which touches upon fundamental rights or at least fundamental constitutional principles. In that context he relies upon the well-known principle of statutory interpretation, known as the "principle of legality". He submits that the test for what is a "necessary implication" in a statute is strict and, in that regard, draws attention to what was said in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21; [2003] 1 AC 563, in particular at para. 45 (Lord Hobhouse); and in *R (Black) v Secretary of State for Justice* [2017] UKSC 81; [2018] AC 215, in particular at para. 36 (Lady Hale PSC).

52. What became clear during the course of the hearing before this Tribunal is that this fundamental issue of principle does not depend upon there being a policy at all. Although these proceedings have arisen in the form of a challenge to the policy set out in the Guidelines, Mr Jaffey acknowledged at the hearing that, if his submissions are correct, the Security Service has no power to undertake the activities in question at all. Even if it had no policy on the subject, it would still lack such power. Furthermore, in answer to questions from the Tribunal, Mr Jaffey made it clear that his submissions would have the consequence, if correct, that the Security Service would not in practice be able to "run" an agent who is embedded within a proscribed organisation at all. This is because inherent in such an operation would be the fact that a proscribed organisation is banned by the criminal law of this country.

53. The relevant provisions are now contained in the Terrorism Act 2000 ("the TA"). Section 3 empowers the Secretary of State to proscribe terrorist organisations. Section 11 makes it an offence for a person to belong, or to profess to belong, to a proscribed organisation. Other offences created by the TA include fund-raising for a proscribed organisation: see section 15. At the time that the 1989 Act was enacted by Parliament, the predecessor to the TA was in force: the Prevention of Terrorism (Temporary Provisions) Act 1989 ("the PTA"). Section 1 proscribed the Irish Republican Army ("IRA") and the Irish National Liberation Army ("INLA"). The Secretary of State was given power by the PTA to add other organisations to be proscribed in a list if it appeared to him that they were concerned in, or in promoting or

encouraging, terrorism occurring in the United Kingdom and connected with the affairs of Northern Ireland. Section 2 of the PTA made it an offence to belong, or to profess to belong, to a proscribed organisation. Sections 9 and 10 made it an offence to provide support, or to invite support, for a proscribed organisation in the form of resources, property or funds. There had been similar legislation in place since the Prevention of Terrorism (Temporary Provisions) Act 1974.

54. If the Security Service runs an agent in a proscribed organisation, and in particular if it embeds that agent into the organisation, it necessarily knows that that person must be a member of an illegal organisation and he may thereby be committing a criminal offence without more. Mr Jaffey submitted that this would not prevent the Security Service from running agents in other circumstances. Nevertheless, in our view, this would strike at the core activities of the Security Service. 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?

55. It is well-established in public law that a public authority has not only those powers which are expressly conferred upon it by statute but also implied powers: see Wade and Forsyth, Administrative Law (11th ed., 2014), pp.177-178, and Auburn, Moffett and Sharland, Judicial Review: Principles and Procedures (2013), pp.282-283. The principle, as set out in 19th century cases such as *Attorney General v Great Eastern Railway* (1880) 5 App Cas 473, at p.478 (Lord Selborne LC) and p.481 (Lord Blackburn) has been codified in the context of local authorities in section 111(1) of the Local Government Act 1972: see *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1, at pp.28-29 (Lord Templeman).

56. Section 111(1) provides:

> "Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act … a local authority shall have power to do any thing … which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

57. It will be noted that the principle, as formulated there, refers to something being incidental to the discharge of an authority's "functions" and not (for example) "express powers". In *Hazell*, at p.29, Lord Templeman made it clear that "functions" in this context

> "embraces 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. Accordingly a local authority can do anything which is calculated to facilitate or is conducive or incidental to the local authority's function of borrowing [that being the subject-matter of that case]."

58. The principle in respect of other public authorities is summarised as follows by Auburn, Moffett and Sharland, at para. 11.21:

> "Where no statutory 'incidental' power is provided for, a public body will usually have an implicit power to do those things that may reasonably and fairly be consequential upon or incidental to its express statutory functions, provided they are necessary to the exercise of the primary function: it is not sufficient that such a power is sensible or desirable, the implication has to be necessary to make the statutory power effective to achieve its purpose."

59. For that last proposition the authors cite *Ward v Commissioner of Police for the Metropolis* [2005] UKHL 32; [2006] 1 AC 23, at paras. 23-24 (Baroness Hale of Richmond). For his part Sir James Eadie was prepared to accept that the relevant test is indeed one of necessity and not mere desirability but submits that that test is met in the present context.

60. In our view, Sir James Eadie is correct as to the true interpretation of the 1989 Act. In our view, 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. 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.

62. It is hardly necessary for there to be evidence for this but there is in fact evidence before the Tribunal. For example, in the statement by a witness from MI5, at para. 51, it is stated 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." Many of those reasons have had to be redacted but we have seen the CLOSED version of that witness statement and refer to it in our CLOSED judgment.

63. The events of recent years, for example in Manchester and London in 2017, serve vividly to underline the need for such intelligence gathering and other activities in order to protect the public from serious terrorist threats. In this context, we would note what was said about the continuing importance of being able to run agents by Sir Desmond de Silva in his report of the Patrick Finucane review, at paras. 112-113, which we have quoted earlier.

64. Thirdly, we would observe that it is not necessarily and always going to be the case that the authorisation of an activity under the Guidelines would amount to a criminal offence. Although the Guidelines refer on their face to the "authorisation" of "participation" in criminality, we agree with Mr David Perry QC, who also made submissions on behalf of the Respondents, that, on their true meaning, it would be more apt to say that they govern the procedure for authorising conduct which *may* involve criminality. One possibility is that the activity does not involve criminality. The sincere hope of those involved in handling an agent will be precisely to prevent an atrocity (or the commission of any offence) taking place. Even if something does take place, there may be the lack of the requisite fault element on the part of the agent in order to prove a criminal offence, for example, if intention is required as a

matter of substantive criminal law. There may be a defence available to the agent, for example, necessity or duress depending on the circumstances of the particular case.

65. We bear in mind in this context that it is, generally speaking, not the function of the civil law to state in advance whether or not a criminal offence would be committed in a particular case: see the line of authority beginning with *Imperial Tobacco Ltd v Attorney General* [1981] AC 718 which was summarised in *R (Rusbridger and Anr) v Attorney General* [2003] UKHL 38; [2004] 1 AC 357, at paras. 16-18 (Lord Steyn). All will depend on the precise facts of a particular case, usually to be judged after the event rather than before.

66. Fourthly, we consider (although this is not necessary for our decision on the first issue) that, if the Security Service lack the power to do what they are doing in running agents in a proscribed organisation, the same could be said of the ordinary police. Yet Mr Jaffey sought throughout his submissions to draw a fundamental distinction between the activities of the Security Service and those of the police. He drew attention, for example, to the fact that each constable has to take an individual oath of office and has the duty to prevent or to detect crime, whereas officers of the Security Service do not have that individual duty. However, it seems to us that this distinction (although of potential relevance to the second issue) cannot be relevant to the first issue, which concerns the basic question of public law: does a public authority have the relevant power to do something in the first place?

67. 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.

68. On behalf of the Respondents Sir James Eadie accepts that, if what the Security Service were doing was to confer immunity from legal liability (either criminal or civil), or purporting to do so, that would require clear authorisation by Parliament and that there is no such legislation. His fundamental argument, however, is that that is not what the Security Service does.

69. It is important to appreciate that the only question which arises under the first issue is one of *vires*: does the Security Service have any power to engage in the conduct concerned? The

concept of a "power" must be kept carefully distinct from the concept of an "immunity": see Hohfeld, Fundamental Legal Conceptions as applied in judicial reasoning (1919), pp. 36, 51 and 60. As Hohfeld says, at p.51, the nearest synonym for a "power" is the legal "ability" to do something.

70. In our respectful view, the judgments of the minority in this Tribunal fail sufficiently to draw the distinction between a power (or legal ability to do something) and an immunity from legal liability.

71. Before we conclude on the first issue, we emphasise again that it is not the effect of either the Respondents' submissions or the judgment of the majority in this Tribunal that the Security Service has the power to confer any immunity from the ordinary criminal law of this country (or the civil law).

The second issue

72. The second issue is whether the policy under challenge creates an immunity from the general criminal law. Mr Jaffey submits that this is an example of the executive purporting to "dispense" with the law of the land, something which has been prohibited at least since the Bill of Rights 1689.

73. We are unable to accept that submission. It is clear from the words of the policy itself (in particular para. (9)) that it does not confer any immunity from criminal prosecution on anyone. In fact the Guidelines require that to be made clear to agents.

74. For that fundamental reason this case can be readily distinguished from cases upon which Mr Jaffey relied in his submissions, in particular the decision of the Court of Appeal in *The King v London County Council* [1931] 2 KB 215. In that case, it was the primary enforcement authority itself which purported to give immunity from prosecution under the Sunday Observance Act 1780, and indeed did so for payment of money, albeit that money was to go to charity rather than to the authority itself.

75. For similar reasons, we consider that cases concerned with assisted suicide and the guidance which can or cannot appropriately be given in advance by the Director of Public Prosecutions are distinguishable. What is not permitted, as Lord Bingham said in *R (Pretty) v Director of*

Public Prosecutions [2001] UKHL 61; [2002] 1 AC 800, at para. 39, is the "proleptic grant of immunity from prosecution" in advance. There is no such grant of immunity in the present context.

76. What in substance Mr Jaffey submits in this context is not that there is immunity in the true sense but that there is immunity *de facto* or in practice. In that regard he relies particularly on what he submits is a "critical omission" from the policy. In other words, his complaint becomes not so much what is stated in the policy but what is not stated there. In particular, Mr Jaffey complains that nowhere is there spelt out any duty on the part of the Security Service to inform the relevant police or prosecution authorities of their activities.

77. In our view, Mr Jaffey has failed to point to any legal duty on the Security Service to do any such thing.

78. The closest to which Mr Jaffey was able to come in pointing to any such legal duty is a provision in the Criminal Law Act (Northern Ireland) 1967, section 5, which has no counterpart in the other legal systems of the UK. Section 5 provides:

> "(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 had 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 and shall be liable on conviction on indictment to imprisonment according to the gravity of the offence about which he does not give that information …"

79. There are several difficulties in the way of that submission. 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.

80. Finally, in the context of the second issue, Mr Jaffey submits that the policy of the Security Service cuts across and undermines the independence of the prosecution authorities, for example, the Crown Prosecution Service in England and Wales and the Lord Advocate in Scotland. He makes similar submissions in respect of Northern Ireland.

81. The fundamental difficulty with those submissions is that the policy under challenge does nothing of the sort.

82. As is well known, the prosecution authorities do not (and have no duty to) prosecute in every case where there is sufficient evidence that a criminal offence has been committed (the "evidential test"). They still go on to consider whether a prosecution would be in the public interest ("the public interest test").

83. The policy does not seek or purport to displace the exercise by independent prosecution authorities of their proper functions, for example, of assessing where the public interest lies in whether or not to prosecute a person even when the evidential test has been met. All 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.

84. In our view, there is nothing improper or unlawful about the Security Service having such a policy. This is entirely consistent, by way of analogy, with the well-known Shawcross exercise (named after Sir Hartley Shawcross, who was Attorney General in 1951), under which it is appropriate for the Attorney General to canvas the views of other Ministers in deciding where the public interest lies in relation to a prosecution decision, so long as the Attorney General acts independently and does not act for political reasons or under political influence. In that regard, it is important to note the observations of Lord Bingham in *R*

(Corner House Research and Anr) v Director of the Serious Fraud Office [2008] UKHL 60; [2009] 1 AC 756, at para. 6.

85. The prosecution authorities will not be bound by the views expressed by the Security Service as to where the public interest lies.

The third issue

86. The third issue is whether, as a matter of domestic public law, the policy falls foul of the principle in the decision of the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, because it was in the past completely secret and even now has only been made public in part.

87. The fundamental difficulty with this submission is that it is well established, and indeed is common ground, that a policy need not be disclosed where that is necessary in the interests of national security. That was recognised by Lord Dyson JSC in the *Lumba* case itself: see para. 38.

88. Furthermore, also at para. 38, Lord Dyson JSC said:

> "What must … be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made."

89. That principle, which lies beneath the requirement of publication of a policy in the context of a case such as *Lumba*, obviously has no application to the present context.

90. Insofar as Mr Jaffey's complaint comes down to one that there was no need for complete secrecy *in the past* given that the policy has *now* been made public in part, it seems to us that no practical purpose would be served by this Tribunal granting any remedies to the Claimants in this regard. True it is that the policy was avowed after these proceedings had been commenced. Nevertheless, what this Tribunal (which has in part an investigatory function and not merely an adversarial one) has been able to do, with the assistance of Counsel to the Tribunal in dialogue with the Respondents, is to have placed in OPEN such elements of the policy as can properly be made public without harm to national security or to the public interest more generally.

91. For reasons which are set out in our CLOSED judgment there is no more of the text of the Guidelines which can properly be put into the public domain.

The fourth issue

92. The fourth issue relates to the requirement in many provisions in the ECHR, in particular Article 8, that any interference with a fundamental human right must be "in accordance with law". This requires not only that there is a source in domestic law but that that law has the requisite quality of law. In particular, Mr Jaffey relies on the requirement in ECHR jurisprudence, which has been followed by the courts and tribunals of this country under the HRA, that there must be set out in law adequate safeguards against the risk of abuse of a discretionary power. This was considered at some length by the Divisional Court (Singh LJ and Holgate J) in the recent case of *R (Liberty) v Secretary of State for the Home Department & Ors* [2019] EWHC 2057 (Admin), in particular at paras. 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.

93. In the present context we have come to the conclusion 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. We note in particular that they have had 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 proportionality of the authorisations.

94. Mr Jaffey complains of the limitations which were placed on the role of the ISC/IPC when they were asked by the Prime Minister to perform this oversight function. In particular he complains that they were not to endorse the legality of the Guidelines.

95. We accept the submissions made by Sir James Eadie in this regard. It was not necessary for the Prime Minister to ask the ISC or the IPT 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. Nor was it required that they should have any function of referring matters to the prosecution authorities. We accept Sir James Eadie's submission that there was nothing in the policy to prevent them from doing so if they wished to. We do not consider that it was a defect in the policy that they were not asked to look at the question of

future consideration of where the public interest lies by the relevant prosecution authorities. It is no part of the IPC's function (or previously the ISC's) to review the exercise of the functions of the prosecution authorities.

96. Finally, in this context, we note that the ISC had to be a person who had held "high judicial office": see section 59(5) of RIPA. There is a similar provision in regard to the office of the IPC under the 2016 Act, in section 227(2). The first incumbent of the office of IPC was a serving Lord Justice of Appeal, Sir Adrian Fulford. He has recently been replaced by the former President of the Queen's Bench Division, Sir Brian Leveson.

The fifth, sixth and seventh issues

97. We can deal more briefly with the fifth, sixth and seventh issues, all of which raise the question of whether the policy in some way breaches the substantive obligations in the ECHR and, therefore, the HRA.

98. We leave to one side for the moment the question of the Claimants' standing under the HRA, although that was disputed by the Respondents, unlike the situation in relation to the purely domestic law grounds of 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*."

Standing

102. As we have mentioned, there is no dispute between the parties that the Claimants have standing to bring these proceedings insofar as they rely on domestic public law grounds of challenge.

103. The jurisdiction of the Tribunal is governed by section 65 of RIPA. So far as material, section 65 provides that:

> "… (2) The jurisdiction of the Tribunal shall be –
>
> > (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;
> >
> > (b) to consider and determine any complaints made to them which, in accordance with subsection (4) … are complaints for which the Tribunal is the appropriate forum; …"

Subsection (4) provides that:

> "The Tribunal is the appropriate forum for any complaint if it is a complaint by a person who is aggrieved by any conduct falling within subsection (5) which he believes –
>
> > … (b) to have taken place in challengeable circumstances or to have been carried out by or on behalf of any of the intelligence services."

Subsection (5) includes conduct by or on behalf of any of the intelligence services.

104. It is common ground therefore that the threshold for standing to invoke the Tribunal's jurisdiction in a case such as this is a low one and is crossed by these Claimants, because they do have the relevant "belief".

105. The position in law is different insofar as the HRA is concerned. This is because section 7 of the HRA requires 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." Furthermore, section 7(7) of the HRA makes it clear that, for the purposes of section 7, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the ECHR if proceedings were brought in the European Court of Human Rights in respect of that act.

106. The leading authority in this context is the decision of the European Court of Human Rights in *Zakharov v Russia* (2016) 63 EHRR 17, paras. 163-179. It is recognised in the context of secret surveillance at least that it will not always be possible for a person to adduce evidence that they have been the subject of surveillance. This can be not least because of the "neither confirm nor deny" policy which is maintained, for example, by the agencies in the United Kingdom. Nevertheless, as a general matter, a person will only be a "victim" within the meaning of Article 34 if they can show that they would be affected by a law or policy directly and personally. The ECHR does not in general permit an *actio popularis*. Nor does it generally permit a representative action to be brought on behalf of persons who could themselves bring proceedings.

107. In the circumstances of the present case, we are not persuaded that the Claimants do have standing to rely on the Convention rights. Nevertheless, we would not dispose of this case for that reason alone. More fundamental are the reasons we have given earlier which mean that the Convention rights issues do not arise as a matter of substance in this challenge to the policy of the Security Service.

Ancillary matter

108. The final matter that we have to address is a procedural one, arising out of an interview given by Lord Evans (a former Director-General of the Security Service) on the Radio 4 programme *Today* on 5 November 2019, the first day of the hearing in this case. Reliance

was placed by Mr Jaffey, in particular, on the decision of Bean J in *DIL v Commissioner of Police of the Metropolis* [2014] EWHC 2184 (QB).

109. Mr Jaffey submits that in circumstances where the former Director-General, as he alleges, disclosed more of the contents of the policy of the Security Service than has to date been made open, this Tribunal should order more disclosure of that policy.

110. We are unable to accept that submission. First, there is no analogy which can properly be drawn between the official disclosure by the serving Commissioner for the Metropolitan Police in the case of *DIL* and a retired official, such as Lord Evans, in the present case. Secondly, this Tribunal has determined for itself, with the assistance of Counsel to the Tribunal, what can and cannot be disclosed in OPEN as to the contents of a policy under challenge. This Tribunal has a continuing duty of its own to ensure that no harm occurs to the interests of national security or the public interest more generally: see rule 7(1) of the Investigatory Powers Tribunal Rules 2018.

111. As we have already mentioned, for the reasons which are set out in our CLOSED judgment, there is no more of the text of the Guidelines which can properly be put into the public domain.

Conclusion

112. For the reasons we have given, we would dismiss this claim.

Charles Flint QC (dissenting)

113. I regret that I am unable to agree with the reasoning and decision of the majority on the first issue, which as set out in the list of issues is whether section 1 of the Security Service Act 1989 ("the 1989 Act") provides a legal basis for authorisation of agent participation in criminality. On that issue of statutory interpretation I would generally accept the submissions of Mr Jaffey QC for the Claimants and reject the arguments of Sir James Eadie QC for the Respondents. It follows that I would also decide, under the fourth issue, that the Security Service policy which is challenged is not in accordance with the law under the ECHR. Otherwise I agree with the judgment of the majority and the CLOSED judgment.

The issue

114. The argument for the Respondents is that there is to be implied in sections 1 and 2 of the 1989 Act a general power vested in the Director-General to authorise the running of agents embedded in terrorist organisations and to authorise such agents to participate in criminality. The basis of the argument is that agent participation in criminality is an essential element of agent running. As set out in the Report of the Patrick Finucane Review by The Rt Hon Sir Desmond de Silva QC and published in December 2012 "the proper use of such agents goes to the very heart of tackling terrorism" (para 112) and:

> "I accept that any effective intelligence-gathering operation against terrorist groups required the use of human agents within those organisations and that this necessarily meant that such agents would become enmeshed in terrorist-related conspiratorial activity."

Thus it is argued that in defining the functions of the Service at section 1(2), including protection against threats from espionage and terrorism, and the power of the Director-General section 2(1) to authorise the operations of the Service for such purposes, Parliament by clear and necessary implication authorised the Director-General to continue to sanction the use of agents who might be permitted to participate in criminality.

115. I entirely accept the operational necessity for the Service to run agents who may need to participate in serious criminal activity. That necessity is convincingly demonstrated by the report of Sir Desmond de Silva at Chapter 4 of his report, in particular at paras 4.1 to 4.7. But amongst the conclusions of that report was that there had been no clear guidance from the Government on the handling of agents in Northern Ireland in the late 1980s so that handlers and agents were being asked to undertake tasks that in some cases could not be carried out in a way which was lawful and effective (paras 4.86, 4.87). Sir Desmond stated that what was required was clear statutory recognition that agents must be run at the heart of terrorist groups, some recognised limits as to the extent to which agents could become involved in criminal enterprises and a rigorous regulatory framework to prevent abuses (para 4.88). In his view that legislative framework was not in place until the Regulation of Investigatory Powers Act 2000 ("RIPA") was enacted, although he doubted that RIPA and its codes of practice provided a real resolution to these difficult issues (paras 4.75, 4.88). He was correct to express that doubt as it is accepted by the Claimants and the Respondents that on proper analysis Part II of RIPA (with which I deal at paras. 124-127 below) does not actually address the central issue whether agents may be authorised to participate in criminality.

116. It is necessary to define the limits of the implied power which is asserted by the Respondents. In the Respondents' written argument at para 34 the submission is made that embedded within each of the functions specified at section 1(2) is the vires "to do what is necessary to perform those functions", and no obvious legal boundaries to the implied power were suggested in argument. Prior to the enactment of the Human Rights Act 1998 the power would not have been subject to the constraint of section 6(1). In my view the logic of the argument has to be that the limits of the implied power are not limited by the statute, but depend on the operational judgement of the Director-General. From the De Silva report it is evident that an agent may need to contravene the criminal law to protect his own life, to maintain his cover as an agent or to prevent a terrorist act which poses a risk to the lives of others. Depending on the particular circumstances there may well be defences available to the agent against any criminal charge, but the risk of serious criminal conduct may be substantial and in certain eventualities inevitable. The legal issue may be tested by asking the question whether the implied power includes, inter alia, the power to authorise conduct by an agent which, depending on the circumstances, might constitute a tort or a crime against another person.

The 1989 Act

117. Section 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 conduct authorised under the warrant is in respect of specified property if necessary to obtain information likely to be of substantial value in assisting the discharge by the Service of any of its functions (section 3(2)). The limits on that power were thus defined and the warrant was limited in time (section 3(4)). The exercise of the power to grant warrants was to be subject to the oversight of the Security Service Commissioner appointed under section 4. A Tribunal was appointed under section 5 to investigate complaints about the Service made by any person who had been the subject of inquiries by the Service who might complain about anything done in relation to him or his property (section 5(1) and Schedule 1, paras. 1 and 2(1)).

118. The contrast between those statutory provisions and the implied power asserted by the Respondents is stark. Both the power to enter property and the power to run agents who may participate in crime is said to derive from the same source, the Royal Prerogative to defend the realm. Yet the statute is argued to supersede those prerogative powers, which may in some cases overlap operationally, in very different ways. Sections 3 to 6 define and limit the power to enter property, provide oversight and the remedy of a complaint to the Tribunal. The power to authorise participation in criminal activity by agents must be made in exercise of one of the functions of the Service but otherwise is not subject to any requirement to obtain a warrant, is unlimited in scope and time, is not to be subject to any external oversight and is not challengeable in the Tribunal (see Schedule 1 paras 2, 3 and 6). The legislative purpose of providing a statutory protection of property rights, but not making any provision for the more serious power to authorise the commission of a criminal offence or tort against a person is difficult to understand.

119. The Respondents rely on the observations made by Sir John Donaldson MR in *Attorney General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 at 190. Those comments do indicate a judicial acceptance that on occasion officers of the Security Service may indeed need to contravene the criminal law, but provide no support for an argument that there is a

recognised general power which may extend to the commission of a tort or criminal offence against a person. At page 190 the Master of the Rolls states:

> "Even in the context of the work of the Security Service which, I must stress is the defence of the realm, there must be stringent limits to what breaches of the law can be considered excusable. Thus I cannot conceive of physical violence ever coming within this category. Or physical restraint, other than in the powers of arrest enjoyed by every citizen or under the authority of a lawful warrant of arrest. But covert invasions of privacy, which I think is what Mr. Wright means by 'burglary', may in some circumstances be a different matter."

The 1989 Act did provide for the covert entry into property, but did not provide any express power to authorise physical violence or restraint.

The principle of legality

120. On the way in which I have framed this core issue, namely whether the commission of a crime or tort against a person could be authorised, the issue does engage the principle of legality, as set out by Lord Hoffmann in *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115 at 131 to the effect that fundamental rights cannot be overridden by general or ambiguous words and that:

> "In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

In *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at para. 53 Lord Dyson applied the same principle to the commission of a tort as to the protection of fundamental common law rights.

121. The case of *Morris v Beardmore* [1981] AC 446 was not cited in argument but is a decision of some relevance to the issues in this case, in three respects. Firstly it states the general rule,

consistently with the principle of legality, that in the absence of express provision or necessary implication to the contrary Parliament does not intend to authorise tortious conduct which infringes fundamental common law rights (see Lord Diplock at p. 455G, Lord Scarman at pp. 463-464). Secondly in judging the legality of a power regard must be paid not just to a minor or excusable use of the power, but also to cases in which it may be used unreasonably, including by the exercise of force (see Lord Diplock at p. 456A, Lord Edmund-Davies at p. 461H, Lord Roskill at p. 468C). That supports my approach in focusing on the limits of the power. Thirdly the fact that the person who exercises the power may be liable to prosecution does not make the act lawful (Lord Diplock at p. 455H, Lord Roskill at p. 469E). That is the answer to the Respondents' argument that the implied power does not involve a dispensation from criminal investigation and prosecution, and is thus lawful and may be implied in the 1989 Act.

122. Applying the principles derived from those cases I am unable to find a necessary implication from the words of the 1989 Act that the commission of a tort or crime against a person could be authorised by the Director-General of the Service. The operational necessity for such a power in the context of terrorist threats is very clear, subject to such proper limits and safeguards as legislation may provide, but the question is what "the express language of the statute must have included" (per Lord Hobhouse in *R (Morgan Grenfell) v Special Commissioner* [2003] 1 AC 563 at para. 45).

The comparable legislation

123. That conclusion is consistent with a consideration of subsequent legislation which affects the operations of the Security Service, namely the Intelligence Services Act 1994 ("the 1994 Act"), RIPA and the Investigatory Powers Act 2016 ("the 2016 Act"). The 1994 Act made some changes to the power of the Secretary of State to issue warrants to the Security Service. One particular class of warrants in support of the police forces was, under section 5(3A), not to be issued on the application of the Security Service in relation to property in the British Isles unless it related to certain specified classes of serious criminal conduct. Section 7 provides:

> "(1) If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Isles, 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."

Section 7 applied to authorisations issued to the Secret Intelligence Service for acts to be done abroad, but did not apply to the Security Service. The sections I have noted give an indication that 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.

124. Part II of RIPA made provision as to the conduct and use of covert human intelligence sources, often referred to as CHIS. That term as defined at section 26(8) would include agents handled by the intelligence agencies, including the Security Service, to whom the power to grant authorisations under section 29 was expressly applied (through section 30 (4) (b) and Schedule 1, para. 5).

125. Under section 27(1) there is a provision that authorised conduct shall be "lawful for all purposes", but because of the precise definition of "conduct" at section 26(7) and (8) that provision is limited to the obtaining and disclosure of information derived from a personal or other relationship. In effect the provision provides protection only in respect of interference with the right to privacy. It is common ground that section 27(1) does not provide general protection for officers of the Security Service or its agents from the legal consequences of participation by the agent in criminality.

126. Under section 27(2) there is also an exemption from civil liability in respect of the conduct of an authorised CHIS which is incidental to any conduct authorised under subsection (1) and which "is not itself conduct an authorisation or warrant for which is capable of being granted under a relevant enactment" (subsection (2)(b)), which expressly includes section 5 of the 1994 Act). So this legislation did recognise the power of the Security Service to use an agent to enter into and interfere with property under a warrant issued by the Secretary of State. It is thus difficult to reconcile section 27 with the existence of a parallel power to permit agents to

commit unlawful acts, including covert entry into property, but which acts do not require any statutory authorisation or warrant.

127. The Security Service's official guidance on the use of agents who participate in criminality has been disclosed in redacted form. The current version of the guidance states at para 4:

> "… neither RIPA nor the Code of Practice provides for CHISs to be authorised to participate in criminality. However, the Service has established its own procedure for authorising the use of agents participating in crime, which it operates in parallel with the RIPA authorisation [which govern the use and conduct of CHIS (redacted gist)]."

That paragraph clearly illustrates the problem that the Security Service faces in asserting a statutory basis for the power asserted. The 1989 Act did not expressly confer such a power. While RIPA provided at Part II a power for the Security Service, and the other intelligence agencies, to authorise the use of CHIS, that power was considered inadequate. So the Service designed its own parallel procedures, outside the scope of the restraints and safeguards provided by RIPA.

128. Looking at the scheme of this legislation as a whole 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.

129. Since the Interception of Communications Act 1985 exceptional powers to interfere with private rights have been granted using substantially the same drafting technique. The power requires a warrant or authorisation and, provided the power is exercised in accordance with that statutory authority, then the conduct of the person exercising the power is to be lawful for all purposes. That is the general scheme used in the 1989 Act, the 1994 Act, RIPA (for example at section 21(2)) and the 2016 Act (for example at section 6(3)). 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 would be extraordinary.

Conclusion

130. The policy under challenge has been exercised with scrupulous care by the Security Service so as to discharge its essential functions in protecting national security, whilst giving proper regard to the human rights of persons who may be affected by the activities of agents. But I am unable to find that the 1989 Act provides any legal basis for the policy under challenge. Sir Desmond de Silva, at para 4.71, quoted from a note dated 14 July 1993 from Sir John Chilcot, then Permanent Secretary of the Northern Ireland Office, who, expressing the views of an inter-departmental working group, stated that the existing law appeared to leave agents and handlers "unduly exposed" and in conclusion:

> "…a stable and satisfactory way forward, which is fair to agents, handlers and the others could only (in the view of my group) be achieved by new legislation."

131. For the reasons which are set out above and in an addendum to the CLOSED judgment I would respectfully disagree with the majority decision on the first issue. It follows that I would also decide that the policy under challenge cannot be regarded as being in accordance with the law under the ECHR.

Professor Graham Zellick QC (dissenting)

Introduction

132. This case exposes a tension between two vital interests – the Rule of Law and national security. The Respondents maintain that MI5's policy on agent participation in crime is the exercise of a lawful power flowing by necessary implication from the Security Service Act 1989. The Claimants deny the existence of any such power. Section 1 of the Act states:

> "(1) There shall continue to be a Security Service . . . .
>
> (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."

133. I have the misfortune to differ from my colleagues who accept the Respondents' argument. In my view, the Respondents' argument faces insurmountable obstacles and must fail. However, the Claimants advance many grounds as to why the policy is unlawful which I do not endorse. They say, *inter alia*, that it effectively grants immunity from prosecution; that it dispenses with or suspends the law, contrary to the Bill of Rights; that it improperly fails to require routine referral to the police and prosecuting authorities; and that it fails to indicate proper limits. They also submit that it falls foul of the European Convention on Human Rights and that submission becomes irresistible once it is established that the challenged policy has no basis in domestic law. I say, quite simply, that the policy, and the practices underlying it, which all parties agree require legal authority, is not authorised by the only source of authority identified by the Respondents, namely, the Security Service Act 1989.

134. In view of the importance of the issue, I set out my reasoning fully. Mr Charles Flint QC has taken a slightly different approach in his separate dissenting judgment, but I nevertheless concur in his reasoning and conclusions.

Background

135. It is no surprise to discover that the United Kingdom's Security Service (better known as MI5) uses informants – persons embedded in criminal or terrorist groups in order to provide intelligence so that MI5 can fulfil its functions. These informants are ordinary persons who are already, or willing to become, active in the criminal or terrorist group that is of interest to MI5 and they are known as "agents". Agents provide information to their MI5 handlers so that serious criminal or terrorist activity may be frustrated and averted and dangerous offenders brought to justice. It is a vital part of MI5's work and contributes greatly to the safety of the public.

136. Using agents in this way requires no special legal authority because in itself it involves no unlawful action. Nevertheless, there is now an elaborate regime governing what are known as "Covert Human Intelligence Sources" ("CHIS") in Part II of the Regulation of Investigatory Powers Act 2000 ("RIPA"). Its purpose is to secure compliance with the privacy rights contained in Article 8 of the European Convention on Human Rights. It is common ground that nothing in RIPA gives MI5 the statutory authority it needs. Indeed, it is arguable that Part II of RIPA, together with its accompanying statutory code of practice, constitutes an exhaustive scheme for regulating CHIS, thus excluding and supplanting any pre-existing provisions (if such existed).

137. It may also be no surprise that, in order to carry out their task, agents may themselves be drawn into criminal participation. It may actually involve them in committing crimes, although in some instances defences which negative liability may be available. Or they may lack the necessary mental element or their participation may take a form that for whatever other reason does not constitute an offence. All these possibilities are conveniently encapsulated in the phrase "participation in criminality". Agents may find themselves in this situation for a variety of reasons: for example, if the organisation is a proscribed organisation, their membership may in itself render them guilty of an offence; or their participatory conduct may serve to maintain their cover or credibility; to ingratiate themselves with others in the group; to avoid repercussions for refusing to do what is asked of them; to go along with preparatory steps in order to frustrate the commission of a serious crime or terrorist outrage; or for self-defence.

138. The Respondents submit, and I readily accept, that such participation by agents is a necessary and inescapable feature of their use. It will also implicate MI5 if they "authorise" the conduct. At one end of the spectrum, the Service will merely be aware and acquiesce in the agent's participation; at the other it may in effect commission or facilitate it; and in both it will condone the conduct and give comfort to the agent. The Service is to be commended on developing an internal policy, which is described in the majority judgment, but the existence of internal procedures, however rigorous and well applied, does not answer the question before the Tribunal.

139. The Respondents acknowledge that this must be justified in law and they say that the necessary authority for it may be found in the Security Service Act 1989.

The Respondents' case

140. There are several steps in the Respondents' argument:

(i) Agent participation in criminality is an inevitable aspect of running agents and is vital and indispensable to carrying out its work.

(ii) MI5 operated, prior to the Security Service Act 1989, under the royal prerogative, which provided the necessary legal basis for agent participation in criminality.

(iii) The 1989 Act entirely supplants the prerogative and "occupies the field".

(iv) It is unthinkable that Parliament, in enacting the 1989 Act, intended to end a power so essential to MI5's work and thereby render unlawful that which was previously lawful.

(v) Section 1 of the Act can be read, by adopting the interpretative tool of "necessary implication", as conferring the requisite power.

Apart from points (i) and (iii), with which I agree, I regard the other propositions as untenable.

141. For the sake of clarity, it is worth listing three possible arguments that the Respondents do not advance (in my view correctly):

(i) That the necessary power is supplied by the prerogative, which remains in place despite the 1989 Act.

(ii) That no legal authority is required for the practice or the policy.

(iii) That Part II of RIPA yields the necessary power.

Summary of conclusions

142. I set out here the conclusions to which the analysis I develop below leads:

(i) A policy under which servants of the Crown, or a government entity, acquiesce in, condone or support participation in criminal activity by persons with whom they have a relationship requires positive legal justification. This is not disputed.

(ii) The royal prerogative, under which the Security Service operated before the Security Service Act 1989, did not provide such a power. Any such policy, and the practices with which it dealt, were therefore unlawful.

(iii) There is thus no question of the Act of 1989 rendering unlawful that which was theretofore lawful.

(iv) Section 1 of the 1989 Act, whatever the previous position under the prerogative, does not grant the power to operate such a policy.

(v) Section 1 is not the source of any of the Service's powers; and even if it were, its general wording cannot, through the doctrine of "necessary implication", be read so as to imply such a power. It would require language much more specific to indicate Parliament's intention to confer a power touching, as the policy here does, the principle of legality and the Rule of Law.

(vi) To apply the "necessary implication" principle in this context would create a dangerous precedent and lay the foundation for much legal uncertainty both in relation to MI5 and more generally.

(vii) The Respondents are right to emphasise the high importance of being able to operate a system of agent participation in criminality, but it is for Parliament to provide the necessary power, together with appropriate limitations, procedural safeguards and oversight arrangements, as it has done in comparable contexts.

Genesis and scope of the Security Service Act 1989

143. The Act does five things. It puts the Security Service for the first time on a statutory basis and sets out its purposes (section 1); it sets out the responsibilities of the Director-General (section 2); it makes lawful interference with property when properly authorised (section 3); it provides for oversight by a Commissioner who holds or has held high judicial office (section 4); and it establishes a tribunal to investigate complaints – a forerunner to this Tribunal (section 5).

144. The Respondents admit that the Act in all respects supersedes the prerogative in relation to MI5. In any case, there is so far as I can see no basis for the assertion that the prerogative gave MI5 or its officers the kind of power claimed by the Respondents. As Lord Denning observed in his report on *The Profumo Affair* (Cmnd. 2152, 1963, para. 273):

> "The members of the Service are, in the eye of the law, ordinary citizens with no powers greater than anyone else. They have no special powers of arrest such as the police have. No special powers of search are given to them. They cannot enter premises without the consent of the householder, even if they may suspect a spy is there."

145. This statement of general principle has never, so far as I know, been questioned. Sir John Donaldson MR developed the theme in the course of the well-known *Spycatcher* litigation (*Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 189-190, CA):

> "It would be a sad day for democracy and the rule of law if the service were ever to be considered to be above or exempt from the law of the land. And it is not. At any time any member of the service who breaks the law is liable to be prosecuted. But there is a need for some discretion and common sense. Let us suppose that the service has information which suggests that a spy may be operating from particular premises. It needs to have confirmation. It may well consider that, if he proves to be a spy, the interests of the nation are better served by letting him continue with his activities under surveillance and in ignorance that he has been detected rather than by arresting him. What is the service expected to do? A secret search of the premises is the obvious answer. Is this really 'wrongdoing'?"

146. I take Sir John to be asking, rhetorically, whether this is reprehensible conduct, even though it is strictly speaking tortious and probably criminal. As we shall see later, Lord Denning makes a similar point in relation to the police before the Police and Criminal Evidence Act 1984.

147. Sir John then uses the analogy of emergency vehicles exceeding the speed limit, driving on the wrong side of the road and crossing red traffic lights. This involves breaches of the law, but "The responsible authorities in a very proper exercise of discretion simply do not prosecute them." He continued:

> "Even in the context of the work of the Security Service which, I must stress, is the defence of the realm, there must be stringent limits to what breaches of the law can be considered excusable. Thus I cannot conceive of physical violence ever coming within the category. Or physical restraint, other than in the powers of arrest enjoyed by every citizen or under the authority of a lawful warrant of arrest. But covert invasions of privacy . . . may in some circumstances be a different matter.
>
> It may be that the time has come when Parliament should regularise the position of the service. It is certainly a tenable view. The alternative view, which is equally tenable, is that the public interest is better served by leaving the members of the service liable to prosecution for any breach of the law at the instance of a private individual or of a public 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. . . . It is not for me to form or express any view 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."

148. Several factors combined to persuade government that the legislative route was to be preferred: there were the revelations in *Spycatcher* itself; there were concerns that MI5 disclosed information about individuals to their employers, resulting in their dismissal; and there was an emerging jurisprudence bearing on security agency activities from the European Court of Human Rights.

149. It was decided that the legislation required the Security Service to be explicitly recognised and named; hence section 1 (quoted above). This is in contrast to the earlier Interception of Communications Act 1985 which managed to put telephone-tapping and cognate interception on a statutory basis – in order to secure conformity with the Strasbourg case law – without mentioning MI5 or any other agency by name.

150. The 1989 Act explicitly makes conduct in relation to property interference lawful but only where it is authorised by a Secretary of State and on grounds specified in the Act; and it prohibits improper disclosure of information as well as action to further the interests of any political party. No other explicit powers were given to, or prohibitions imposed upon, MI5. Yet the Respondents argue that section 1(2) is the source of other legal powers, including the one needed to render lawful the conduct and policy challenged in this case.

Analysis

151. Section 1 is not on its face a provision conferring powers at all. It sets out functions or purposes. It might be called an objects clause. In other words, it defines the limits or scope of the Service's activities. In classic public law terms, it is stating that *lawful* action may be carried out by MI5 for these purposes but only for these purposes. Action, even if on its face lawful, which is carried out for any other purpose will be *ultra vires* and therefore unlawful. So far from conferring specific or additional powers on the Security Service, section 1(2) is in law a limiting provision.

152. The Respondents pray in aid section 2(2) to reinforce their reading of section 1(2). Section 2(2) casts on the Director-General of MI5 the responsibility of running an efficient service. However broad a meaning is ascribed to "efficiency", it cannot possibly extend to operations or activities that lack a lawful basis. The burden of establishing the legal basis must thus be borne entirely by section 1(2) without any assistance from section 2(2). Nor can I see any justification for attaching legal significance to the wording in section 1(1) that "There shall continue to be a Security Service". In my opinion, that does no more than recognise the actual position, but if it did have any legal implications, it would surely imply that the Service continued to operate on the same legal principles as before except to the extent that they were expressly altered or extended by the Act, as in section 3.

153. If the argument of the Respondents as to section 1(2) is correct, MI5 would have been able to rely on it to justify the property interference authorised by section 3 if there had been no section 3. Can that possibly be correct? Where does it end? What other powers does MI5 have as a result of the section?

154. Take the comparable situation of entry and search by the police. In *Ghani v Jones* [1970] 1 QB 693, [1969] 3 All ER 1700, 1702, CA, Lord Denning MR explained the legal situation at that time (pre-echoing the observations of his successor in the *Spycatcher* case):

> "The first thing to notice is that the police officers had no search warrant. The reason is simple. No magistrate – no judge even – has any power to issue a search warrant for murder. He can issue a search warrant for stolen goods and for some statutory offences, such as coinage, but not for murder. Not to dig for the body. Not to look for the axe, the gun or the poison dregs. The police have to get the consent of the householder to enter if they can; or, if not, to do it by stealth or by force. Somehow they seem to manage. No decent person refuses them permission. If he does, he is probably implicated in some way or other. So the police risk an action for trespass. It is not much risk."

155. Warrants to search and seize were placed on a rational and comprehensive basis by the Police and Criminal Evidence Act 1984 ("PACE"). Is it to be believed that, before that statute, Lord Denning was wrong, because the necessary powers could be implied from the statute or statutes establishing police forces with the duty of maintaining the Queen's peace and investigating and preventing crime? Search and seizure are as much an essential part of policing as is running of agents and their inevitable participation in crime by MI5, but it was never suggested that the legislation creating police forces conferred powers of this kind.

156. Counsel were unable to refer to a single commentary or observation of any kind – ministerial, parliamentary, official, judicial or academic – in support of the proposition that section 1(2) was the source of MI5's powers.

157. Nevertheless, the Respondents maintain that agent-running and its essential concomitant, participation in criminality, was an essential part of the work of MI5 long before the 1989 Act when it operated under the royal prerogative. The scope of the prerogative, they argue, must therefore have encompassed and did encompass those powers and abilities and it is inconceivable that Parliament could have intended when it enacted the 1989 Act to undermine the Service's ability to protect the public in that way.

158. These arguments, however, are fallacious. First, there is, as noted earlier, no evidence of any kind that the prerogative authorised these particular activities, any more than it authorised trespass or seizure of property. The latter required the express provisions of section 3 to make it lawful. The Service could under the prerogative engage in any *lawful* conduct. When it acted unlawfully, it did so at its own risk, as Sir John Donaldson explained (see above), as did the police in many respects before the enactment of PACE. The Respondents' argument that it must have been lawful under the prerogative because it was common practice is circular and untenable and flies directly in the face of all commentaries on MI5's powers before the 1989 Act.

159. Had there been such a prerogative power, an argument that Parliament could not have intended to abrogate it would have had some cogency, but if it was not lawful before the Act, as I judge to be the case, it could be lawful afterwards only if the Act specifically said so (as it did with section 3).

160. They also say that section 1(2) must give *vires* or the Service has none at all. This is not correct. The Act recognises the continued existence of the Service as an entity or emanation of the Crown, and in so doing replaces the prerogative, but it is important to note that it is not established as a body corporate: see *R (A) v Director of Esablishments of the Security Service* [2010] 2 AC 1, 15, CA, at para. 29 (Laws LJ). Cases on the powers of statutory corporations, such as local authorities, are therefore of no assistance or relevance. Accordingly, the Service can do whatever is lawful provided that it is within the ambit of section 1. No special statutory authority is required. But it will be required where, as here, the conduct and policy are of such an exceptional nature that they cannot be regarded as the exercise of an ordinary lawful power.

161. The simple if awkward fact is that, in accordance with the Government's wishes, Parliament gave no attention to this aspect of MI5's work and the Government was content for it to remain under wraps and accept whatever legal or political risks it entailed. To attribute an intention to Parliament in these circumstances is fanciful.

162. Strong and, I would add, irrefutable support for this view is found in the Rt Hon Sir Desmond de Silva QC's *Report of the Patrick Finucane Review* (Vol. 1, HC 802-I, 2012), Chap. 4, "Agent-handling". Sir Desmond was given much official material relating to the use of agents, and particularly their participation in crime, albeit in the context of Northern Ireland, but the legal principles are the same throughout the United Kingdom.

163. The Report describes a protracted struggle, involving MI5, government departments, legal advisers, ministers and the Law Officers, over policies relating to agent participation in criminality, with solutions proving elusive. These debates pre-dated and post-dated the 1989 Act. The possibility of legislation was mooted in July 1989 (para. 4.53), three months after the 1989 Act received Royal Assent. In 1992, MI5's Legal Adviser expressed the view that "legislation would be politically unobtainable" (para. 4.64). In 1993, an official (Sir John Chilcot) wrote (para. 4.70):

> "The difficulties of legislating on intelligence subjects are familiar. But it has been achieved more than once in recent years. . . . The alternatives of doing nothing, or of going down the non-statutory route, seem both unsatisfactory in practice and arguably unacceptable in principle over the long run."

164. A little later, Chilcot reported to the Secretary of State on the conclusions of an interdepartmental working group he had chaired (para. 4.71):

> ". . . a stable and satisfactory way forward, which is fair to agents, handlers and the others could only (in the view of my group) be achieved by new legislation."

165. The case for legislation attracted the support of the Northern Ireland and Defence Secretaries and the Attorney-General in a Cabinet sub-committee, but "grave reservations about opening up such a sensitive area to Parliament" in view of the Government's slender majority were voiced by the Prime Minister, Foreign Secretary, Home Secretary and Chancellor of the

Exchequer. The possibility of legislation was left open if a satisfactory non-statutory solution could not be identified (para. 4.72).

166. In 1995, the Northern Ireland Secretary, the Rt Hon Sir Patrick Mayhew, QC, MP, a former Attorney-General, wrote to the Prime Minister stating that "I still consider that legislation is the only effective solution" when an opportunity arises (para. 4.74).

167. An opportunity did, in fact, arise shortly thereafter. The Security Service Act 1996 amended the 1989 Act, particularly with regard to MI5's functions and to property interference, but nothing was included on the point in issue here. Nor was it done when the next opportunity, RIPA, presented itself, despite its extensive provisions on CHIS.

168. The most striking thing about the papers disclosed to the Finucane Review is that not once was it suggested by anyone that either the royal prerogative, or after 1989 the Act, provided any lawful basis for a policy on agent participation in criminality. Yet that is the argument mounted by the Respondents in these proceedings and accepted by the majority.

Necessary implication

169. I turn now to consider whether, regardless of the above analysis, the general language of section 1(2) (perhaps assisted by section 2) may yield the result for which the Respondents contend by employing the "necessary implication" doctrine of statutory interpretation.

170. In *Ward v Commissioner of Police of the Metropolis* [2005] UKHL 32, [2006] 1 AC 23, the House of Lords held that a statutory power to issue a warrant authorising a police officer to remove a person to a place of safety conferred no power to impose conditions on the execution of that warrant that were not spelt out in the statute. The particular conditions in the case were the naming of specified persons who had to be present when the warrant was executed. The general principle that there can be implied into a statutory power such incidental powers as are necessary for its operation did not extend to such powers as were merely sensible or desirable. "The implication has to be necessary in order to make the statutory power effective to achieve its purpose", said Baroness Hale of Richmond (at para. 24).

171. In *R. (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, the House of Lords refused to endorse by necessary implication a power to order disclosure of material covered by legal professional privilege (LPP). It is hardly surprising that a general power to order disclosure of documents stopped short of overriding LPP material, which is, as Lord Hoffmann noted (para. 7), a fundamental human right. A "necessary implication" is not the same as a "reasonable implication", said Lord Hobhouse of Woodborough (at para. 45), who continued:

> "A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation" (*ibid*.).

172. The Supreme Court fully considered the "necessary implication" principle in *R. (Black)* v. *Secretary of State for Justice* [2017] UKSC 81, [2018] AC 215. The issue was whether the Crown was bound by the statute prohibiting smoking in public places and workplaces. The specific point was whether it applied to a prison. The normal principle is that a statutory provision does not bind the Crown except by express words or necessary implication.

173. The Court endorsed Lord Hobhouse's dictum in *Morgan Grenfell* (*supra*) subject to the addition of the word "purpose" after "context" (para. 36). It was not enough that it would be more beneficial to imply the meaning in question, but nor was it necessary to show that otherwise the legislation would be "wholly frustrated". It turns in the end, as does all statutory interpretation, on what Parliament intended: "Necessary implication entails that Parliament must have meant to" confer the power (para. 50).

174. I do not see how the Respondents' argument satisfies the requirements set out in these authorities. Even if the power in question here does not seek to override a fundamental human right such as LPP material, it is plainly a matter of considerable legal importance such that specific language is required. The power may well be sensible and desirable, even

essential, but Parliament would, I fancy, be astonished to be told that it had conferred this power in 1989.

175. There is moreover a more fundamental objection to the Respondents' use of the principle in respect of section 1(2). The subsection, together with subsection (3), sets out the Service's functions or purposes in terms of the protection of national security, listing a number of particular threats. I can readily see that many of the terms included in the subsections, none of which is defined – such as national security, espionage, sabotage, parliamentary democracy, political, industrial and violent means – might call for judicial construction in which the necessary implication approach played a part. That would respect the scope and integrity of the section. But to use this technique to deduce a specific power when the section is wholly silent about powers would be an exercise in legislating and not interpreting and would, to my mind, constitute a remarkable and unprecedented application of the principle.

176. In the final analysis, legislation to authorise a matter as important and grave as the practices and policy relating to agent participation in criminality must be expressed in clear and unambiguous language, even if national security considerations demand that much of the detail must remain confidential.

The majority judgment

177. Whether MI5's powers flow from the 1989 Act (as the majority accept) or are inherent in the Crown at common law (as I believe), what matters for the purpose of dealing with what is called "The first issue" is how the asserted power is analysed. The majority conclude that the power to authorise agent participation in criminality is unexceptionable because it does not confer or purport to confer any immunity: agent and handler remain (in theory at least) fully amenable to the law. But immunity is an entirely separate issue. A power to condone or permit the commission of crimes cannot acquire the quality of legality because those breaking the law in compliance with the authorisation may subsequently be prosecuted. The authorisation is in itself intrinsically unlawful: it will impact on the legal rights of others, it may involve the commission of tortious and criminal acts and – in the absence of clear legal authority – is subversive of the Rule of Law. Mr Flint deals further with this point in his dissenting judgment, with particular reference to the House of Lords' decision in *Morris* v. *Beardmore* [1981] AC 446.

178. The majority judgment also places weight on the fact that many agents will be working within terrorist organisations which will have been proscribed so that in all likelihood even running an agent in such circumstances will mean that an offence has been committed. Thus, to declare the policy unlawful would have the consequence that the Service would be prevented from carrying out its essential work across a significant proportion of its responsibilities. I make two comments on this. First, this cannot be relevant to whether the power exists. It is said to show the absurdity of the contention that Parliament could ever had intended any such thing, but I have already dealt with the argument as to parliamentary intention. Secondly, I would liken this aspect of agent criminality to the breach of the road traffic laws by the emergency services, referred to by Sir John Donaldson MR in the *Spycatcher* case (above). If the MI5 policy did no more than turn a blind eye to offences in relation to proscribed organisation, I would have had no hesitation in denying the Claimants the declaration sought. There is no direct impact on the legal rights of others; and it would be an exaggeration to describe such a policy as subversive of the Rule of Law.

179. As there is in my judgment no basis for the impugned policy in domestic law, it follows that the Claimants should also succeed on "The fourth issue", but even if the power had been established, I remain unconvinced that the requirements of the ECHR in other respects have been met.

Conclusion

180. The Respondents, having accepted that some legal authority must underpin the Security Service's policy on agent participation in criminality, and the practices underlying it, have identified only one possible source – section 1(2) of the Security Service Act 1989. I should have liked to be able to conclude that statutory authority did exist, but for the reasons I have developed above I am unable to do so.

181. To accede to the Respondents' argument would open the door to the lawful exercise of other powers of which we have no notice or notion, creating uncertainty and a potential for abuse. It is no answer to that concern to say that we are dealing here with one particular power and nothing else if the effect of the Tribunal's decision is to open that door.

182. I cannot emphasise too strongly that this is a disagreement with the majority on a pure point of law: there is no divergence of view on the need for such a power and the national security and law enforcement imperatives.

183. I add one final point. The Claimants requested injunctive relief. Had they succeeded, I would have denied that request. First, I doubt whether the Tribunal has that power (but we could have heard submissions on that point). Secondly, an abrupt end – indeed, any end – to MI5's policy and practice would be inimical to the public interest, seriously hamper their work, expose the public to danger and put lives at risk. Parliament should be afforded reasonable time to resolve the issue.

184. I would grant the declaration sought.

185. Save as set out in this judgment I agree with the majority and also agree with the CLOSED judgment.