Neutral Citation Number: 2014 EWHC 2184 (QB)

Case No: HQ12X02912

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2014

Before :

MR JUSTICE BEAN

- -

Between :

DIL (4) **TEB (5)** **RAB (6)** **Helen Steel (7)** **Belinda Harvey (8)**	**Claimants**
- and -	
COMMISSIONER OF POLICE OF THE METROPOLIS	**Defendant**

- -
- -

Phillippa Kaufmann QC and Charlotte Kilroy (instructed by **Birnberg Peirce and Partners**) for the **Claimants**
Monica Carss-Frisk QC and David Pievsky (instructed by **The Solicitor, Metropolitan Police**) for the **Defendants**

Hearing dates: 5th & 6th June 2014

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE BEAN

Mr Justice Bean :

1. The claimants are seeking damages for deceit, assault, misfeasance in public office and negligence arising out of long term and intimate sexual relationships which they had with four men, who they allege were undercover police officers acting under the direction and control of the defendant. They are not the only claimants of this kind. Others have already brought claims reported as *AKJ v Commissioner of Police for the Metropolis,* in which there have been interlocutory decisions of Tugendhat J ([2013] 1 WLR 2734) and the Court of Appeal ([2014] 1 WLR 285) and in which all four counsel appearing before me were also instructed. (The principal issue considered in the reported judgments in *AKJ* was whether the Investigatory Powers Tribunal established by the Regulation of Investigatory Powers Act 2000 had exclusive jurisdiction over claims under the Human Rights Act 1998. That is not an issue in the present case**.)**

2. The claimants, other than Ms Harvey, are environmental activists or campaigners on social justice issues. They allege that the defendant encouraged or permitted undercover officers in the Special Demonstration Squad ("SDS"), a unit which was later disbanded, to embark on sexual relationships with women members of groups whose activities were of concern to the police, as a means of infiltrating such groups. Turning from the general to the individual, each claimant names a man with whom she was (or thought she was) in an intimate sexual relationship over a period of years and says that he was in fact an undercover police officer operating under a false name and identity. In his Defence the Commissioner has expressly refused either to confirm or to deny each of these allegations, both the general and the individual. His position is based on a well established policy that the police will neither confirm nor deny ("NCND") whether a particular person is either an informer or an undercover officer.

3. After service of the Particulars of Claim and Defence in this case the defendant applied on 13th September 2013, citing the decision of the Court of Appeal in *Carnduff v Rock* [2001] 1 WLR 1786, to strike out all the claims on the grounds that he could not take any active role in the case without infringing the NCND policy; alternatively, for an order releasing him from the standard disclosure obligations and prohibiting the disclosure of the identity of each alleged tortfeasor and each witness in the proceedings. These applications were listed to be heard over three days, on 18th – 20th March 2014, before Tugendhat J. By letter of 14th March 2014 the defendant's solicitor withdrew the strike-out application, writing that in the light of a recent announcement by the Home Secretary and the recent publication of two reports about the defendant's undercover policing it was recognised as being "unsustainable for the MPS [the Metropolitan Police Service] to continue to regard the public interest in maintaining NCND as requiring that the claimants' claims be struck out at the present time".

4. At the oral hearing on 18th March 2014 leading counsel for the defendant made it clear that it remained the Commissioner's case that he was entitled in his Defence neither to confirm nor deny the claimant's allegations. Tugendhat J directed the issue of an application notice by the claimants "seeking a determination and consequential Order that pursuant to CPR 3.1(m) the defendant is not entitled to rely on NCND so as to resist pleading a Defence in accordance with CPR 16.5(1)". He also gave permission for an amendment of the Defence but specified that this was "without

prejudice to the defendant being able to apply for permission to amend the Defence if so advised should the application [relating to NCND] be determined against him". The NCND application is now before me.

5. The defendant's evidence relied on for the purposes of this application was originally adduced in support of the application to strike out. There are two witness statements from Commander Richard Martin, who has responsibility for the oversight of intelligence and covert policing in the MPS and also chairs the National Undercover Working Group, which gives direction to undercover operations and associated standards on behalf of the Association of Chief Police Officers. The statements are dated 13th September and 18th December 2013.

6. Commander Martin's view is that:-

> "The rationale for NCND applies whether the proceedings are criminal or civil, or indeed whether any proceedings are brought at all. … It covers information relating to an informant's or undercover officer's identity or any operation in which they had been involved. The underlying purpose of the policy was and is to protect the safety of the individuals concerned as well as to uphold the effectiveness of their use of undercover operatives in complex and dangerous operations (both for the present and in the future). It goes without saying that undercover operations are designed to detect and prevent crime. That can involve engaging with very dangerous individuals. The whole point of an undercover operation is that it is essential that the operation is not discovered, and that at the very least, the true identity of the undercover agent is not revealed. ……
>
> The unmasking of an undercover operative would be seen as a significant achievement for any criminal or terrorist organisation which had been infiltrated or subject to investigation. It would also be seen as sending a clear message to future operatives that their safety could not be guaranteed. The risk to undercover operatives does not disappear with time. This is because they may have been involved in numerous operations before or since a specific deployment. Exposing their identity, even long after their deployment has ended, may cause risk not only to them but may cause risk to other individuals associated with the role they performed. This may include other undercover operatives or informants who may be identified once the actions of the undercover operative purports to "self disclose"; the MPS will neither confirm nor deny that the individual concerned is or ever was an undercover police officer."

Operation Herne

7. In October 2011 the MPS appointed the Chief Constable of the Derbyshire Constabulary, Mr Mick Creedon, to investigate allegations of misconduct by

undercover officers in the former SDS. The inquiry was later given the name "Operation Herne". Some of the allegations concerned the investigation of the Stephen Lawrence case, as to which the Home Secretary has established a separate review conducted by Mark Ellison QC; others did not.

8. Among the allegations which went beyond the Stephen Lawrence case was that SDS officers engaged in sexual relationships as a police tactic while deployed. In an interim report published on 6 March 2014 Mr Creedon expressed the following opinions on that topic:-

> "No evidence has been found of sexual activity ever being explicitly authorised and to date no evidence of sexual activity being utilised as a management supported tactic to aid infiltration has been found…….
>
> Officers have admitted to inappropriate sexual relationships while deployed undercover……
>
> There is no evidence at this time to suggest sexual relationships between undercover operatives and activists were either officially sanctioned or organised by SDS management. However, documents suggest that there was informal tacit authority regarding sexual relationships and guidance was offered for officers faced with the prospect of a sexual relationship. …..
>
> Irrespective of the more recent introduction of RIPA legislation and the improved training and management of undercover officers, *there are and never have been any circumstances where it would be appropriate for such covertly deployed officers to engage in intimate sexual relationships with those they are employed to infiltrate and target. Such an activity can only be seen as an abject failure of the deployment, a gross abuse of their role and their position as a police officer and an individual and organisational failing.* It is of real concern that a distinct lack of intrusive management by senior leaders within the MPS appears to have facilitated the development and apparent circulation of internal inappropriate advice regarding an undercover police officer's engagement in sexual relationships." [emphasis added]

9. Since the Defence in this case gives no clue as to the Commissioner's stance on the propriety of undercover officers engaging in intimate sexual relationships with those they are employed to infiltrate and target, should it be established at trial that this is what happened, I asked Ms Carss-Frisk QC, leading counsel for the defendant, to obtain instructions on the point. The answer was that if such facts are proved, the Commissioner will *not* seek to argue that the officers were acting appropriately. (Ms Carss-Frisk mentioned a possible argument that one should never say never: it might be legitimate for an officer to sleep with someone on a single occasion in order to obtain information about an imminent terrorist act. That is so far from the present facts that I will leave discussion of it to a case in which it arises, if it ever does.)

The allegations by the individual claimants

10. DIL claims that she had a relationship from 1999-2007 with a man known to her as Jim Sutton. They were married in July 2005, by which time they had had two children. She says that Jim Sutton disclosed to her in November 2001 and to the media in June 2013 that he was in fact an undercover police officer. His real name is given as Jim Boyling in the book *Undercover* published last year by Guardian Books and written by the journalists Rob Evans and Paul Lewis. On 27th October 2011, at a public meeting of the Metropolitan Police Authority, the Commissioner, Sir Bernard Hogan-Howe, confirmed that the MPS' Directorate of Professional Standards had started an investigation into a number of allegations, which had also been reported in the media, concerning an undercover officer who had used the name of Sutton. The previous week Mr Boyling had been named in BBC2's *Newsnight* programme as being under investigation by the Directorate of Professional Standards following allegations that he had married an activist whom he was supposed to be spying on. He is also alleged to have used his false name (Sutton) when appearing as a defendant in court on a charge of disorderly behaviour during a demonstration.

11. TEB also alleges that she had a relationship with "Jim Sutton" although in her case it was of shorter duration (1997-99). They had no children and the relationship did not lead to marriage.

12. Belinda Harvey had a relationship in 1987-88 with a man who called himself Bob Robinson. This was, she says, the name used by an undercover officer whose real name was Bob Lambert, who has since left the police and become an academic. In an article in the *Guardian* newspaper's online version on 23rd October 2011 Mr Lambert admitted that he had been "an undercover police officer who had created the fictional persona of Bob Robinson to spy on political activists" and that "as part of my alter ego's cover story, I had a relationship with 'Jenny', to whom I owe an unreserved apology". As the article stated, "Jenny" [the name used for Belinda Harvey] was not an environmental activist. The *Guardian* article alleges that "he was using her as his girlfriend so that he could portray himself as a fully rounded person with a private life to the rest of his political and social circle". As part of his cover story he had built a reputation as a committed member of London Greenpeace, his aim apparently being to penetrate the Animal Liberation Front. Mr Lambert, who by the time he left the police service had become a Detective Inspector, has recently been described publicly as a former MPS officer in a report by Mr Ellison QC concerning the Stephen Lawrence investigation, and in a press statement on that subject issued by the Independent Police Complaints Commission on 2 June 2014.

13. RAB had a relationship from 1995-2000 with a man known to her as Mark Cassidy. By a great deal of what may be summarised as detective work of her own she has established, in my view, a clear *prima facie* case that Mark Cassidy was in fact an undercover officer called Mark Jenner. This has not been confirmed by the defendant, although officers of the MPS' Department of Professional Standards interviewed RAB on 14th December 2012 and (as she perceived it) at least implied that they were taking an interest in the man with whom she had had a relationship. A *Guardian* article in 2013 alleged that Mark Cassidy and Mark Jenner were the same person and published his photograph; the book *Undercover* makes the same allegation, in some detail.

14. Helen Steel, who was one of two defendants in a well known and very lengthy libel action brought by McDonalds, is for present purposes in a similar position to RAB. She had a relationship from 1990 to 1992 with a man known to her as John Barker. She believes that he was an undercover officer by the name of John Dines. She too was interviewed by the Department of Professional Standards, this time in August 2012. The allegation that John Barker was in truth John Dines was also the subject of an article with a photograph in the *Guardian* in 2013.

15. I should also note one of the allegations made by the three claimants in *AKJ v Commissioner of Police for the Metropolis*. Their case was that each of them had had a relationship with a man who used the false name Mark Stone, but was in fact an undercover officer of the National Public Order Intelligence Unit called Mark Kennedy. Kennedy disclosed his true identity to the media in January 2011; he was then named, and his assumed name also given, in July 2011 in a judgment of the Court of Appeal Criminal Division ("CACD") in *R v Barkshire* [2011] EWCA Crim 1885, in a report by HM Inspectorate of Constabulary in February 2012, and in the reported judgments in the *AKJ* litigation. He is not alleged to have had a relationship with any of the present claimants.

16. Another former MPS undercover officer, Peter Francis, has alleged to the media that he engaged in sexual relationships (not with any of the Claimants) as part of his work. Mr Creedon's report of March 2014 finds that the general allegation that undercover officers entered into such sexual relationships is credible and can be corroborated, although he also notes that there has been no complaint to nor contact with Operation Herne from anyone alleging to have been in such a relationship with Peter Francis.

17. The state of public knowledge and official confirmation or otherwise about undercover officers of the MPS alleged to have engaged in sexual relationships to facilitate their infiltration of target groups may therefore be summarised as follows: (a) Mark Kennedy (alias Mark Stone) has been named authoritatively by the CACD and HMIC, and in the judgments in the AKJ litigation; (b) Jim Boyling (alias Jim Sutton) has self-disclosed, and the Commissioner has confirmed that "Sutton" is under investigation by the Department of Professional Standards; (c) Bob Lambert (alias Bob Robinson) has self-disclosed, and has been named by the IPCC as under investigation though in a different context; (d) Mark Jenner (alleged to be the man using the name Mark Cassidy) and John Dines (alleged to be the man using the name John Barker) have each been identified by the *Guardian*, in the book *Undercover* and by one of the Claimants, but there has been no official confirmation of their identity (e) Peter Francis has self-disclosed, and has been identified in Mr Ellison's report as a former officer in the Special Demonstration Squad.

The pleaded Defence

18. The Defence says very little about what the defendant's case would be at a trial. It includes the following:-

> "3. As the claimants know, the defendant's policy is neither to confirm nor deny ("NCND") allegations concerning undercover police operations.

> 4. The purpose of the NCND policy is to protect undercover officers and to uphold the effectiveness of operations and the prevention and detection of crime. The NCND policy must be adhered to if it is to have its intended protective effects.
>
> 5. The defendant adopts and applies that policy in relation to the factual allegations made by the claimants in these proceedings.
>
> 6. It is neither confirmed nor denied that the individuals mentioned in paragraph 1 of the Particulars of Claim were police officers; that (even if they were police officers) they served with the Metropolitan Police Service; that they were part of the Special Demonstration Squad; that they ever used a false identity; or that they took part in any intimate or sexual relationship with any of the claimants.
>
> 7. In any event, it is denied that the defendant is liable for the actions complained of for the further reasons set out below."

19. The defence then goes on to deal with (or, it might be said, not deal with) the individual cases. In answer to the claims of DIL and Helen Steel there is a detailed plea raising limitation, and in DIL's case an allegation that the defendant is not liable because on her own case DIL continued her relationship with "Jim Sutton" even after he had disclosed his true identity to her in 2001 (a plea which lawyers have traditionally labelled *volenti non fit iniuria).* With these exceptions, the pleading in the individual cases is entirely opaque. An example is in the case of RAB, described as the Sixth Claimant, where the Defence reads:-

> "15. As set out above, the Sixth Claimant's allegations about "Mark Cassidy" are neither confirmed nor denied.
>
> 16. Save as aforesaid, the Sixth Claimant is required to prove the matters set out at 34-45 of the Particulars of Claim.
>
> 17. For the reasons set out below it is denied in any event that the Defendant is liable for the torts of deceit, misfeasance, assault/battery or negligence (or at all)."

20. The Defence goes on to plead that the claimants' allegations "in so far as they relate to the SDS or the alleged actions of alleged undercover officers are neither confirmed nor denied". As to the causes of action relied on by the claimants: it is denied that the acts alleged constituted the tort of deceit; in respect of the claim in assault or battery it is argued that, if the claimants voluntarily engaged in sexual activity with individuals who had lied about their identities and occupations, consent would not as a matter of law have been vitiated by such alleged deception; and in answer to the claim in negligence the existence of a duty of care is disputed.

21. As to the claim alleging misfeasance in public office, the Defence states:-

> "29. The allegation that officers of the Defendant expressly authorised or tacitly acquiesced in the formation of the sexual relationships alleged by the Claimants is neither confirmed nor denied.
>
> 30. The Claimants are required to prove that officers of the Defendant (a) acted unlawfully and (b) acted with malice, or knew that the unlawful acts (or any of them) would probably injure the Claimants. The Claimants are required to prove, in particular, that:
>
> > 30.1 officers foresaw that the Claimants would be damaged by a sexual relationship and/or were recklessly indifferent to the risk of such damage.
> >
> > 30.2 officers knew that it was unlawful for undercover officers to enter into intimate sexual relationships with individuals, and/or were recklessly indifferent as to whether it was unlawful for them to do so."

22. One of the most important recommendations made by Lord Woolf in his Access to Justice report in 1996 was that pleadings should not be technical documents, and in particular that "the Defence will set out the defendant's detailed response to the claim and make clear the real issues between the parties". To give effect to this CPR 16.5, headed "Contents of Defence", provides:-

> "In his defence, the defendant must state-
>
> (1) which of the allegations in the particulars of claim he denies;
>
> > (a) which allegations he is unable to admit or deny, but which he requires the claimant to prove; and
> >
> > (b) which allegations he admits. …
>
> (3) A defendant who-
>
> > (a) fails to deal with an allegation; but
> >
> > (b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant;
>
> shall be taken to require that allegation to be proved.
>
> …
>
> (5) Subject to paragraphs (3) and (4) a defendant who fails to deal with an allegation shall be taken to admit that allegation."

23. For the claimants Phillippa Kaufmann QC submits that a defendant is only "unable" to confirm or deny the truth of an allegation if he does not know whether it is true or

not. I accept that this is by far the most common reason for an inability to plead to an allegation, but I do not consider that the rules should be interpreted in such a literal way. As Ms Carss-Frisk points out, Lord Woolf's original proposal was that a defendant should only be permitted neither to admit nor deny an allegation where the reason was because he did not know whether or not it was true; but that restrictive wording does not appear in CPR 16.5(1).

24. In any event, there must be cases in which a defendant can properly refuse on policy grounds either to admit or to deny a pleaded allegation the truth of which he knows perfectly well. Suppose an individual is charged with possession of Class A drugs with intent to supply following a police raid on his home. Wishing to know the identity of the informant who told the police about his activities, he brings a civil claim against the police and alleges that the informer is his neighbour across the road. The defendant Chief Constable is *able* to confirm or deny that allegation but declines to do either, relying on the NCND principle. He would, on those facts, be entitled to do so.

NCND: the law

25. The common law has long recognised a rule of policy whereby the identities of informers must not be revealed. In *Attorney General v Briant* (1846) 18 M&W 168 Pollock CB held that a prosecution witness could not be asked a question about whether he was the source of information which had led to the defendant's arrest. He said that:-

> "This has been a settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience…"

26. In criminal trials, where this issue occurs regularly, the general principle that the identity of an informer must not disclosed is subject to the duty of the trial judge to ensure the fairness of the trial. This has been settled law at least since *Marks v Beyfus* (1890) 25 QBD 494, where Lord Esher MR said:-

> "If upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoners innocence then one public policy is in conflict with another public policy and that which says an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. But excepting that case, this rule of public policy is not a matter of discretion; it is a rule of law and as such should be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell a witness whether to answer or not."

27. A century after *Marks v Beyfus*, in *R v Agar* (1990) 90 Cr App R 318, the CACD said that:-

> "There [is] a strong, and absent any contrary indication, overwhelming public interest in keeping secret the source of

> information; but, as the authorities show, there [is] an even stronger public interest in allowing a defendant to put forward a tenable case in its best light."

28. A striking example of the application of the NCND rule in a civil case is *In re Scappaticci* [2003] NIQB 56. The claimant alleged that his life was endangered because of newspaper articles and television coverage suggesting that he had been an undercover agent working within the IRA as an informer for the security services. Public denials by the applicant himself had failed to dispel the suspicion, and he sought public confirmation from a minister at the Northern Ireland Office that he was *not* an undercover agent. When this was declined, he applied for judicial review. Carswell LCJ accepted that there was "a real and present danger" to the life of the applicant following the press allegations, and that the confirmation which he was seeking from the minister would be a "simple and quick action for her to take". Nevertheless the application for judicial review of the minister's refusal either to confirm or to deny that he was an agent was refused. The Lord Chief Justice said at [15]:-

> "To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some case endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent so possibly placing his life in grave danger.
>
> … If the Government were to deny in all cases that persons named were agents the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be greatly reduced. There is in my judgment substantial force in these propositions and they form powerful reasons to maintaining the strict NCND policy."

29. In the observations just cited Carswell LCJ was echoing dicta of Lords Diplock and Simon of Glaisdale in *D v NSPCC* [1978] AC 171 (at 218D and 232F respectively).

30. In *Savage v Chief Constable of Hampshire* [1997] 1 WLR 1061 the plaintiff alleged that after his arrest in 1990 for a drugs offence he had worked for the police as an informer, and that it had been agreed he would be paid for information which led to the arrest and conviction of person's involved in serious crime, the prevention of such crime or the recovery of stolen property. At first instance his claim was struck out as disclosing no reasonable course of action, on the ground that he was precluded by public policy from asserting in open court that he was a police informer. The Court of Appeal reversed this decision and allowed the claim to proceed. Judge LJ said at 1067E:-

> "… if a police informer wishes personally to sacrifice his own anonymity, he is not precluded from doing so by the automatic application of the principle of public interest immunity at the behest of the relevant police authority. This follows, not from waiver of privilege attaching personally to the informer, but from the disappearance of the primary justification for the claim for public interest immunity.
>
> That, of course, is not an end of the matter. It is possible that, notwithstanding the wishes of the informer, there remains a significant public interest, extraneous to him and his safety and not already in the public domain, which would be damaged if he were allowed to disclose his role. However, I am unable to understand why the Court should infer, for example, that disclosure might assist others involved in criminal activities, or reveal police methods of investigation on hamper their operations, or indicate the state of their enquiries into any particular crime, or even that the police are in possession of information which suggests extreme and urgent danger to the informer if he were to proceed. Considerations such as these might, in an appropriate case, ultimately tip the balance in favour of preserving the informer's anonymity, against his wishes, in the public interest. There is no evidence that any such consideration applies to the present case."

31. *Carnduff v Rock* [2001] 1 WLR 1786 was the foundation of the Commissioner's original application to strike out the present claim. The claimant, a registered police informer, claimed payment for information and assistance provided to the police. He alleged that he had orally agreed to provide such information and assistance in return for reasonable remuneration; and that it was an implied term of the agreement that the amount of the remuneration to be paid would reflect the seriousness of the criminal activity, the financial rewards likely to accrue to criminals from it, the value to the police of the information and assistance and the personal danger to which he and his family would be exposed. He alleged that the information he had given had been instrumental in bringing to justice a number of people involved in the illegal supply of heroin. There was no dispute that he had in fact been a police informer. Nevertheless the Court of Appeal, by a majority, struck out the claim.

32. Laws LJ said at paragraph 34:

> "……The very business of trying this claim would transfer the difficult and delicate business of tracking and catching serious professional criminals… from the specialist and confidential context of police operations to the glare of the public arena of a court of justice".

33. Similarly, Jonathan Parker LJ said at paragraph 50:-

> "…..In the instant case it is in my judgment inevitable on the face of the statement of claim that a fair trial of the issues there raised will necessary involve the disclosure of

> information and material by the police, the disclosure of which is not in the public interest."

He then went on to quote from the statement of claim the argument that the factors to be taken into account when determining the amount to be paid to the claimant included "the value to the police of his information and assistance" and "the financial rewards likely to accrue to criminals from the relevant criminal activity". He took the view that the court's investigation would inevitably cover sensitive areas which should remain confidential.

34. *Chief Constable of Greater Manchester Police v McNally* [2002] 2 Cr App R 37 (p617) concerned a claim against the police for wrongful arrest, false imprisonment and malicious prosecution. The claimant had been remanded in custody for 10 months on a charge of murder: the trial was terminated with verdict of not guilty on the direction of the trial judge. A witness for the claimant at the civil trial before Rafferty J was cross-examined on the basis that he had retracted his witness statement in the murder trial because of being threatened by a man, X. The claimant at this point raised the issue of whether X was a police informer. Rafferty J, balancing the competing interests of the public interest in protecting informers against the interests of justice in the civil claim, ordered the Chief Constable to disclose the status of X. Her decision was upheld on appeal.

35. Auld LJ noted that in a number of cases including *Savage* the Court of Appeal had accepted "the need to soften the rigidity of Lord Diplock's statement of the law in *D v NSPCC* so as to permit a balance of competing public interests in a case-specific manner", observing that this was "part of a wider jurisprudential move away from near absolute protection of various categories of public interest in non-disclosure." He said that "given the nature of the claim, one seeking compensation for a long period of allegedly wrongful imprisonment, the limits of the information sought and its criticality to the central issue in the case", the trial judge's finding that the balance of competing interests favoured the claimant should be upheld. There was a serious risk of a miscarriage of justice if the question of X's status went unanswered. Although the claimant's liberty was not by then at stake, he was seeking redress for wrongful deprivation of liberty for over 10 months. And although Rafferty J had not treated the case as one in which X had consented to disclosure of information that he was an informer, the scope for protecting him was limited by the fact that both sides knew who he was, and that the claimant believed, rightly or wrongly, that he was an informer.

36. Mr Carnduff took his case to Strasbourg, complaining that the decision of the Court of Appeal violated his ECHR Article 6 rights. The complaint was declared manifestly ill-founded. The decision was mentioned without disapproval by Lord Kerr of Tonaghmore in *Tariq v Home Office* [2012] 1 AC 452 at [110] and by several of the Justices in *Al-Rawi v Security Service* [2012] 1 AC 531, although in *Al-Rawi* Lord Dyson noted at [15] that *Carnduff* was the only case cited to the Supreme Court in which the public interest in maintaining confidential information had led to a trial being prevented altogether on that ground.

37. In the *AKJ* case one of the defendants' applications at first instance was to strike out the common law claims (that is, those which were not within the jurisdiction of the Investigatory Powers Tribunal) on the grounds that they could not fairly be tried.

Tugendhat J rejected this (although he granted a stay pending the tribunal proceedings, which was later reversed on appeal). He said at [216]-[217]::

> "The claims of these claimants which I have held cannot be heard in the tribunal are that they have suffered the gravest interference with their fundamental rights recognised by the common law. There is at this stage of the proceedings no evidence before the court as to what facts are to be put in the balance which could lead the court to conclude that these claimants' rights to bring their non-HRA claims before this court are outweighed by the public interest in ensuring that information about police operations are not disclosed to the public at large.
>
> The NCND policy is one that is of obvious importance as a means of preserving the confidentiality of police operations. There may be cases where it is also a means of advancing other interests, such as the protection of the fundamental and Convention rights of informants and police officers, including their rights under articles 2, 3 and 8……..But the NCND policy does not give the equivalent of an immunity from claims in tort. It may well be that where it is invoked it will in some cases outweigh a claimant's right to proceed with civil proceedings. Mr Pierce [a witness for the defendants] refers to the importance of not disclosing information which would be damaging to the public interest. But he does not give any specific reasons relevant to the Tuckers claimants as to why their right to proceed with the non-HRA claims in the High Court is outweighed by the public interest or the need to protect the fundamental or Convention rights of other individuals."

38. The most recent decision to which my attention was drawn was *Mohamed and CF v Secretary of State for the Home Department* [2014] EWCA Civ 559, a claim for judicial review of control orders and terrorism prevention and investigation measures (TPIMs) against the two appellants on the grounds that they had been obtained by an abuse of process. An issue arose as to the disclosure of information which led to the appellants' arrest. The Secretary of State relied on the NCND policy to resist disclosure. Maurice Kay LJ said at paragraph 20:-

> "Lurking just below the surface of a case such as this is the governmental policy of "neither confirm nor deny" (NCND), to which reference is made. I do not doubt that there are circumstances in which the courts should respect it. However, it is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so. In the present case I do not consider that the appellants or the public should be denied all knowledge of the extent to which their factual and/or legal case on collusion and mistreatment was accepted or rejected. Such a total denial offends justice and propriety."

Discussion and conclusion

39. I derive the following guidance from the authorities:

(1) There is a very strong public interest in protecting the anonymity of informers, and similarly of undercover officers (UCOs), and thus of permitting them and their superiors neither to confirm nor deny their status; but it is for the court to balance the public interest in the NCND policy against any other competing public interests which may be applicable *(McNally; Mohamed and CF v SSHD)*.

(2) There is a well-established exception in a criminal trial where revealing the identity of the informer or the UCO is necessary to avoid a miscarriage of justice (*Marks v Beyfus; R v Agar)*: this does not arise in the present case.

(3) Even where an individual informant or UCO has self-disclosed, the police (or the Secretary of State) may nevertheless be permitted to rely on NCND in respect of allegations in the case where to admit or deny them might endanger other people, hamper police investigations, assist criminals, or reveal police operational methods. (*Savage; Carnduff*).

40. I will deal first with the general allegation and then with the specific ones. The general allegation is that officers of the MPS, as part of their work as undercover officers and using false identities, engaged in long term intimate sexual relationships with those whose activities the MPS wished to observe; and (although it will no doubt be a matter for legal argument at trial how significant this issue is) that this was authorised or acquiesced in by senior management.

41. I do not accept that there is now, in 2014, any legitimate public interest entitling the Commissioner to maintain the stance of NCND in respect of this general allegation. The claims relate to alleged activities of officers of the SDS prior to its disbandment in 2008. It is not suggested that the use of long term sexual relationships of this kind as a police tactic is continuing. It is also not argued that it would be appropriate now, nor that (if it did occur) it was appropriate then. The Chief Constable conducting the Operation Herne investigation has expressed in trenchant terms the view that if this did happen it was a "gross abuse": I believe that most people would agree with him. Whether the facts set out by the claimants, if proved, establish one or more of the pleaded causes of action as a matter of law is of course a different issue, and a matter for argument at the trial.

42. One of the justifications for NCND is that police operational methods should not be revealed. This is in my view clearly intended to apply to operational methods which continue to be in use or are likely to be used in future. Moreover, just as (in the well-known words of Page Wood V-C in *Gartside v Outram* (1856) 26 L.J.Ch 113) "there is no confidence as to the disclosure of iniquity", so there can be no public policy reason to permit the police neither to confirm nor deny whether an illegitimate or arguably illegitimate operational method has been used as a tactic in the past.

43. I therefore rule that the defendant cannot rely on NCND to avoid answering the general allegation to which I have referred above..

44. I turn to the specific allegations that the individual men with whom the Claimants had relationships were undercover officers. All have been publicly named in the media. Some have also self-disclosed; some have been the subject of official confirmation. Self-disclosure is relevant, but it does not have the same significance as official confirmation by the police force concerned, HMIC, a Minister or a court. Mr

Creedon, in commenting on the self-disclosure by Peter Francis, declined to confirm or deny whether he had ever been an undercover police officer. He wrote:

> "To avoid placing any individual in danger, this [NCND] principle is paramount. To comment either way would raise clear inferences in other cases where no comment can be made. This position is essential to ensure that danger and additional risk can be avoided."

45. "Jim Sutton" has been publicly named as an UCO by the Commissioner in person. (Commander Martin evidently regards this as a mistake, but he is not the defendant in this claim.) In the two cases involving him, reliance on the NCND policy to avoid admitting that he was an UCO is simply unsustainable.

46. In the case of "Bob Robinson" I also consider that NCND can no longer be relied on. He has not only self-disclosed (using his real name of Bob Lambert), but has been publicly named by the IPCC as a former MPS officer; and he is no longer in the police service.

47. However, in the cases of "Mark Cassidy" and "John Barker" I take a different view. Neither of them has self-disclosed nor been officially named as an undercover officer, although each has been named publicly in a variety of media (with a photograph of each man in the *Guardian*). In those circumstances I consider that the Commissioner should not be required to admit or deny whether either of them is an undercover officer or has the real name alleged. This may only postpone the day of reckoning, in the sense that if the case proceeds and no evidence is adduced to challenge that put forward by RAB and Helen Steel respectively, it appears likely that the respective factual cases put forward by them will be accepted. As I have already noted, the consequences of that in law would be a matter for argument in due course.

48. In accordance with the procedure envisaged in the order of Tugendhat J, the Commissioner will have 28 days from the handing down of this judgment in which to amend his Defence in order either to admit or deny that: (a) officers of the MPS, as part of their work as undercover officers and using false identities, engaged in long term intimate sexual relationships with those whose activities the MPS wished to observe; (b) this was authorised or acquiesced in by senior management; (c) "Jim Sutton" was such an officer; and (d) "Bob Robinson" was such an officer. The time for disclosure of documents, which was to have expired on the second day of the hearing before me, will be extended until 56 days from the handing down of judgment.

49. Ms Kaufmann argued that if I hold that the Commissioner is not entitled to rely on NCND but he fails to amend his Defence to deal properly with the allegations, the Defence should be struck out and judgment entered for the Claimants. I regard that as a disproportionate sanction. The order I propose to make in respect of the general allegation and the specific allegations concerning "Jim Sutton" and "Bob Robinson" is, in accordance with CPR 16.5(5), that if the Commissioner fails to deal with them in an Amended Defence served within 28 days he will be taken to admit them.

50. I will hear counsel if necessary on the wording of the order, and on any directions which are sought for the further progress of the claim.