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Case No: IPT/11/167/H

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 30 September 2021

Before :

LORD BOYD OF DUNSCANBY (VICE-PRESIDENT)
MRS JUSTICE LIEVEN
and
PROFESSOR GRAHAM ZELLICK QC

- -

Between :

KATE WILSON

Claimant

-and-

(1) THE COMMISSIONER OF POLICE OF THE METROPOLIS
(2) NATIONAL POLICE CHIEFS' COUNCIL

Respondents

- -

Ms C Kilroy QC, Ms I Buchanan and Mr T Lowenthal (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Mr D Perry QC, Mr P Hill and Ms R Hollos (instructed by the **Metropolitan Police Directorate of Legal Services**) for the **Respondents**

Ms S Hannett QC and Ms J Thelen (instructed by the **Government Legal Department**) as **Counsel to the Tribunal**

Hearing dates: **19, 20, 21, 22, 23, 26 and 27 April 2021**

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APPROVED JUDGMENT

Lord Boyd, Professor Zellick and Mrs Justice Lieven:

A. INTRODUCTION

1. This is the unanimous judgment of the Tribunal to which all members of the panel have contributed.

2. There is also a short CLOSED judgment dealing with several discrete issues, mostly where the Tribunal has previously upheld claims by the Respondents to NCND ("Neither Confirm Nor Deny"). Our findings there are entirely consistent with the conclusions we express here.

3. The case concerns an undercover police operation in which the undercover officer, Mark Kennedy, entered into a sexual relationship with the Claimant, who claims breaches of Arts 3, 8, 10, 11 and 14 of the European Convention on Human Rights. The Respondents admit breaches of Arts 3, 8 and 10, but there remain a number of aspects of the Claimant's case to be resolved both in regard to those Articles where violations have been admitted and those where they have been denied. The facts are set out fully below.

4. We set out Arts 3 and 8 here; Arts 10, 11 and 14 are set out below in the relevant sections of the judgment:

> *Art 3. "Prohibition of torture*
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
>
> *Art 8. "Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

5. We use the following abbreviations throughout the judgment:

- CHIS: Covert human intelligence source
- ECHR: European Convention on Human Rights
- ECtHR: European Court of Human Rights
- HASC: (House of Commons) Home Affairs Select Committee
- HMIC: Her Majesty's Inspectorate of Constabulary
- HRA: Human Rights Act 1998
- MK: Mark Kennedy (undercover police officer)
- MPS: Metropolitan Police Service (first Respondent)
- NCND: Neither confirm nor deny
- NDEU: National Domestic Extremism Unit
- NPOIU: National Public Order Intelligence Unit
- RIPA: Regulation of Investigatory Powers Act 2000
- SDS: Special Demonstration Squad
- SIO: Senior Investigating Officer
- SOCA: Serious Organised Crime Agency
- SSH: Witness statements of Sir Stephen House, Deputy Commissioner, Metropolitan Police Service
- UCPI: The Undercover Policing Inquiry
- UCO: Undercover officer

6. This is inevitably a lengthy judgment. It covers events over many years and the documentary evidence was voluminous. We reproduce here only a fraction of what was adduced before the Tribunal, but we have had to include enough to explain and justify the conclusions to which we have come. We describe here the structure of the judgment to assist those reading it. In section B, we set out the background to these proceedings. Section C explains various aspects of the evidential issues and section D covers the facts, including our conclusions on the factual issues. The next five sections deal with the particular legal issues: E answers the question whether the Respondents were in breach of their positive obligations under Arts 3 and 8; F with whether the legal regime for undercover operations was "in accordance with the law" as required by the ECHR; G with the actual interference with the Claimant's right to privacy under Art 8; H with the issue of discrimination under Art 14; and I with the alleged breaches of Arts 10 and 11. Some material has been placed in annexes, not because it is unimportant, but simply to relieve pressure on the already-lengthy main judgment and to avoid interrupting the flow of the narrative and analysis. The annexes contain the Metropolitan Police's apology following the civil proceedings in the High Court (1); the concessions made by the Respondents (2); the list of issues (3); the relevant RIPA provisions (4); and our reasons for excluding MK's evidence to the HASC (5).

B. BACKGROUND

7. The Claimant comes from a politically engaged family. As she describes in her statement to the Tribunal, she has, since childhood, been committed to challenging injustice and trying to create a better, fairer world. In 1996, she went to Oxford University to study modern history. She became involved in a number of campaigning groups and protest movements. She took a year out in 1998 and moved to London to focus on political activism, in particular Reclaim the Streets as well as a number of other campaigns. She returned to Oxford to finish her degree. After graduation in 2000 she moved to Manchester but also spent a lot of time with her then boyfriend in Nottingham. She became involved in a range of different campaigns, centred particularly on climate change and environmental issues. In October 2003 she moved to Nottingham.

8. Shortly after moving there she met a man whom she understood to be called Mark Stone and began a sexual relationship with him. He was in fact Mark Kennedy, an undercover police officer and a married man with children, who had been tasked with infiltrating the Sumac Centre in Nottingham. The Claimant describes the Centre as a vibrant, self-organised social space which was frequented by a range of political activists. The sexual relationship continued until February 2005 when the Claimant left the UK to live in Barcelona. Although the sexual relationship ended in February 2005, a close personal and affectionate relationship continued up until, in circumstances described below, MK's true identity was revealed in October 2010.

9. It is not necessary for us, at this point, to detail the effect the revelation of MK's true identity had on the Claimant. She describes it as having turned her life

upside down. She felt that she had been cynically used and sexually violated. She was deeply distressed and psychologically traumatised. The hurt and feeling of violation was compounded by an interview given by MK in the *Daily Mail*. She also began to learn of the presence in her life at various times since 1998 of other UCOs. She knew too that MK had had other sexual relationships during his time as an undercover police officer, but she also became aware that other UCOs had also had sexual relationships with women during their deployment.

(i) Procedural History

10. In October 2011, the Claimant, along with two other women who had sexual relations with UCOs, issued a claim in the High Court against the Respondents for damages in tort and under the HRA. Shortly thereafter, a protective claim was lodged with the Tribunal. Five other women, whose relationships with UCOs predated the coming into force of the HRA, brought claims for damages in tort only. The High Court ruled that in respect of the claims under the HRA it had no jurisdiction and that the common law claims should be stayed pending the outcome of the HRA claims in the Tribunal: *AKJ and others v Commissioner of Police of the Metropolis and another* [2013] EWHC 32 (QB). The Court of Appeal held that the Tribunal was the proper forum for the claims under the HRA. The Court further held that the High Court proceedings should not be stayed: *AKJ and others v Commissioner of Police of the Metropolis and another* [2013] EWCA Civ 1342.

11. In June 2015, the two women who had brought the High Court claims along with the Claimant settled their actions following mediation. Part of the

settlement included a public apology made on behalf of the Respondents by Assistant Commissioner Martin Hewitt. This apology was subsequently extended to the Claimant on 30 March 2017 by AC Fiona Taylor and is set out in full in Annex 1. Importantly it acknowledged that:

> ". . . these (sexual) relationships were a violation of the women's human rights, an abuse of police power and caused significant trauma."
>
> "They were wrong and were a gross violation of personal dignity and integrity."
>
> "[I] accept that it may well have reflected attitudes towards women that should have no part in the culture of the Metropolitan Police."
>
> "[T]he Metropolitan Police recognises that these cases demonstrate that there have been failures of supervision and management."
>
> "By any standards the level of oversight did not offer protection to the women concerned against abuse."

12. The Claimant settled her common law case, without an admission of liability by the Respondents, but the settlement did not apply to the breaches of the Claimant's human rights. The statement of grounds of claim in the Tribunal was lodged by the Claimant in 2017.

(ii) Concessions

13. The Respondents' conduct of proceedings in this Tribunal has been marked by a number of shifts of position as well as by changes in legal representation. Some aspects of the conduct of the Respondents' case have contributed to the distress and anxiety which the Claimant has experienced. For most of the time the Claimant has been represented by an experienced legal team of counsel and

solicitors but for part of the proceedings she was left unrepresented and faced formidable obstacles in making her case (although she represented herself with commendable skill). From at least 19 January 2021 the Claimant's legal team were acting pro bono.

14. The Respondents have admitted very significant breaches of Arts 3, 8 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The details of these concessions are set out in Annex 2A. In response to a request from the Tribunal, the Respondents gave further particulars of the concessions on Art 8 under reference to issues 6 to 8 of the list of issues identified for the purpose of these proceedings by the parties and subsequently approved by the Tribunal. The particulars of the concessions can be found at Annex 2B. In summary, the Respondents conceded the following:

- MK's decision to deceive the Claimant into a long-term intimate and sexual relationship amounted to inhuman and degrading treatment of her under Art 3 of the ECHR.

- The breach of Art 3 was aggravated by the fact that MK's principal cover officer was aware that MK was conducting a close personal relationship with the Claimant and the principal cover officer ought to have made enquiries as to whether it was sexual in nature. The relationship is likely to have persisted owing to this failure by the principal cover officer and in doing so the principal cover officer acquiesced in that relationship.

- The sexual relationship with the Claimant also constituted a gross violation of her right to respect for her private and family life under Art 8 of the ECHR. It was neither necessary nor proportionate; it was one of the most substantial and gravest interferences of its kind; it would have been known to family and friends; it invaded the core of her private life; it was an abuse of trust of the highest order.

- MK's actions in conducting a sexual relationship with the Claimant as a means of obtaining intelligence also constituted an unlawful interference with the Claimant's right to freedom of expression under Art 10.

- For the reasons set out in para 4 of Annex 2A, MK invaded the Claimant's bodily integrity, deeply degraded and humiliated her, and caused her mental suffering.

- By gaining consent to sexual intercourse based on his undercover identity, MK grossly interfered with the Claimant's sexual autonomy.

- By exploiting the imbalance of power that the Respondents had created between him and the Claimant to develop an intimate sexual relationship with the Claimant and to deeply infiltrate her social and family life in the role of her lover, MK debased, degraded and humiliated the Claimant.

- MK showed a profound lack of respect for the Claimant's bodily integrity and human dignity.

- MK acted outside the scope of his authority when he conducted a sexual relationship with the Claimant. Insofar as the sexual relationship was used to obtain intelligence, it was out of all proportion to the aim of the prevention and detection of crime or of preventing disorder or any other legitimate objective.

- The Respondents were under a positive obligation under Arts 3 and 8 of the ECHR to take reasonable measures to obviate the risk that MK would engage in a sexual relationship whilst deployed undercover.

- The Respondents were in breach of their positive obligations under Arts 3 and 8 of the ECHR in that MK's principal cover officer failed in his duty to supervise MK.

- MK was not removed from his undercover role despite the fact that his principal cover officer ought to have been aware that MK was conducting a sexual relationship with the Claimant.

15. As the President of the Tribunal, Singh LJ, noted at para 14 of the Tribunal's judgment of 16 May 2019 ([2019] UKIPTrib IPT 11 167 H), this is a case in which liability is largely, though not entirely, admitted by the Respondents. This includes a breach of Art 3, which, as the President noted, was in the Panel's experience almost if not entirely unprecedented. The Respondents do not seek

to defend in any way the actions of MK. They accept that the Claimant was subjected to inhuman and degrading treatment by one of its officers on official duty over a protracted period of time. They accept that his behaviour amounted to a gross violation of the most serious kind into her right to a private and family life. They accept failures in supervision. Accordingly, the issues in this case largely, though not exclusively, go to the severity of the admitted breaches.

(iii) Issues

16. A list of issues was largely agreed between the parties and approved by the Tribunal. The remaining issues to be adjudicated by the Tribunal are summarised below. We have grouped the "factual issues" together as Issues 1 and 2, and we have kept the legal issues which follow from those facts as enumerated in the List of Issues and Skeleton Arguments. The full list is set out in Annex 3.

    1. Whether other officers, including more senior officers, were aware of MK's relationship with the Claimant and either expressly or tacitly acquiesced in the sexual relationship (Issues 2 and 3).

    2. Whether MK's conducting of the sexual relationship with the Claimant was part of a practice adopted or tolerated to facilitate the gathering of intelligence (Issue 2).

    3. Whether the Respondents failed in their positive obligation under Art 3 of the ECHR to take adequate measures to protect

her and other women against the accepted risk of UCOs entering into sexual relationships (Issue 4).

4. Whether the RIPA regime in force at the time was in accordance with the law (Art 8(2) of the ECHR) (Issue 5).

5. Whether there were any other failures of the Respondents' positive obligations under Art 8 of the ECHR (Issue 6).

6. Whether the deployment of UCOs was in accordance with the law, necessary and proportionate (Issue 8).

7. Whether, along with the breaches of Arts 3 and 8, there was a breach of Art 14 of the ECHR (Issue 9).

8. Whether there was a breach of Art 10, other than as admitted, and a breach of Art 11 (Issues 10 and 11).

Issue 7 was resolved prior to the hearing and has therefore been removed from Annex 3, Issues 1, 2 and 3 have been combined and reordered into Issues 1 and 2.

C. THE EVIDENCE

17. Witness statements have been submitted by the Claimant and a number of witnesses on her behalf. The Respondents elected not to cross-examine any of the witnesses or to challenge their testimony. Accordingly, we proceed on the basis that the Claimant's evidence is accepted by the Respondents. As explained below, the Respondents have put in a number of witness statements from Sir Stephen House, but none from witnesses with direct knowledge of the facts.

(i) The Respondents' evidence

18. In its Order of 11 October 2018, which followed a directions hearing on 2 October 2018, the Tribunal ordered the Respondents:

> "… to serve one or more witness statements of fact which comply with the Respondents' *duty of candour and co-operation* (our emphasis) to the Court and which set out fully their response to the Claimant's claim, including by exhibiting such documents as are necessary to comply with their duty of candour and co-operation."

19. This was to respond fully to the Claimant's claim and to exhibit such documents as may be necessary to comply with their duty. At a directions hearing on 16 May 2019, the Tribunal observed that the Respondents had sought to comply with the Order by serving a lengthy witness statement by Sir Stephen House, Deputy Commissioner of the Metropolitan Police. As the statement explained, he had no direct knowledge of any of the events in question, nor had he spoken to anyone who did have such direct knowledge. The statement had been prepared by a team of lawyers, including two members of the Bar. The statement quoted from documents, which at that point were not exhibited, and drew certain inferences. Ms Kilroy QC complained that this approach was completely inadequate and invited the Tribunal to make a number of directions, in particular using the Tribunal's investigative powers to obtain further material from the Respondents to enable the Tribunal to adjudicate on the outstanding issues.

20. The Tribunal was not persuaded that further enquiries should be ordered of the Respondents. As the President noted in the judgment of 16 May 2019 (para 17): "The evidence is as it is." The Respondents had made the enquiries. The Tribunal stated that it would not comment at that stage on the adequacy of those,

saying that in due course they would no doubt be the subject of submissions and there was no doubt that the Tribunal would be invited to draw the appropriate inferences.

21. While a number of other witness statements have been submitted by the Respondents, none of them is from anyone with direct knowledge of any of the factual background to the Claimant's case. There are, however, a large number of contemporaneous documents consisting of cover officer logs, recorded decisions by the deployment manager, notebooks, RIPA authorisations and other material from which a number of inferences can be drawn. We have also been provided with answers to questions posed by the Respondents' solicitors to a number of former police officers from the National Public Order Intelligence Unit who it was thought would have knowledge of some of the events. These are not attested as witness statements.

22. We have also had brought to our attention three reports of official inquiries which have been carried out as a result of the revelations of the activities of certain undercover police officers. These include:

    (a) A report on MK's deployment as an undercover police officer following a review undertaken by the Serious Organised Crime Agency. It is undated but refers to 2011 and must predate the report by Her Majesty's Inspectorate of Constabulary referred to below because it is annexed thereto. The terms of reference were agreed by the Association of Chief Police Officers, Nottinghamshire Police and the Metropolitan Police Service. The review was conducted

within the overarching remit of the HMIC independent review of the National Domestic Extremism Unit. The terms of reference were:

- to identify whether the actions of MK were consistent with those authorised for his deployment and if found to be inconsistent to report upon the nature and seriousness of any breach;

- to establish if the management and records relating to his overall deployment against environmental extremism, and in particular this investigation, were in accordance with the relevant codes and legislation, and that appropriate records were made by the appropriate authorising authorities.

(b) A report from HMIC entitled A Review of National Police Units Which Provide Intelligence on Criminality Associated with Protest published in 2012. This review was subject to independent oversight in the form of an External Reference Group. The SOCA report is annexed to the HMIC report.

(c) A report by The Rt Hon Sir Christopher Rose (formerly Vice-President of the Court of Appeal Criminal Division and Chief Surveillance Commissioner) entitled Ratcliffe-on-Soar Power Station Protest; Inquiry into Disclosure published in December 2011. This report was commissioned by the Director of Public Prosecutions, Keir Starmer QC,

following the quashing of convictions of 20 persons convicted of trespass at the power station by the Court of Appeal Criminal Division because of non-disclosure of documents relating to the activities of MK, who was one of those arrested at the protest but not charged.

23. We draw on these reports at appropriate points in our judgment.

24. There are, however, significant gaps in the Respondents' evidence. The contemporaneous documents do not include the cover officer logs or deployment manager decisions for the period October 2003 to February 2004. SSH notes that, "if they ever existed", they have not been located despite enquiries and that it does not appear that any of the other investigations or reviews ever had them. In our view, there is no reason to believe that they did not originally exist. While two mobile phones attributed to MK have been recovered, no material evidence concerning the Claimant has been found on them. There is no laptop attributable to MK. Nor is there a laptop or mobile phone attributable to MK's principal cover officer (EN-31), even though it is apparent that he must have had both, as the cover logs make clear reference to his communicating with MK by phone and laptop.

25. It should also be noted that EN-31 explained in interview, as reported by SSH in his first witness statement (145.2), that he had deleted and amended items in the logs, not for any improper purpose but to hide it from MK if he thought that MK should not be made aware of it. Apparently, MK made use of the logs to create his own UCO reports.

26. The absence of logs covering the period October 2003 to February 2004 is particularly troubling as that is the period that covers the start of the sexual relationship between MK and the Claimant. Ms Kilroy submitted that there was no proper explanation for their absence and that no proper inquiry had been made. Mr Perry QC submitted that proper inquiries had been made although there is little evidence on what these inquiries consisted of. However, there is no evidence that any material has been suppressed rather than lost.

27. Ms Kilroy points out that a phone attributable to MK was found to have intimate messages and images relating to "Lisa", another woman with whom MK had a long-term sexual relationship. She submits that this demonstrates that, if a phone attributable to MK during the period of his relationship with the Claimant had been found, it would undoubtedly contain material of an intimate nature relating to the Claimant and thus support her claim that other officers must have known of the sexual nature of the relationship.

28. Two investigations are presently under way into alleged criminality and misconduct of undercover officers and their managers within both the Metropolitan Police Service Special Demonstration Squad and the NPOIU. Operation Elter is investigating the NPOIU. Operation Herne relates to the SDS. Temporary Detective Chief Inspector Kirstie Masters is the SIO for Operation Elter. She has explained in her witness statement the steps taken to take possession of all NPOIU paper and electronic exhibits, including computers, hard drives, phones etc.

29. It is true, as Ms Kilroy points out, that neither T/DCI Masters nor anyone else describes the steps taken to find or recover the missing material; for example,

there is no witness statement which tells the Tribunal what possible repositories may or may not have been searched, or which persons may have been questioned about their disappearance. Nevertheless, we are not persuaded that we should draw the conclusion that proper searches have not been made. While it is regrettable that the documents are not available, we do not draw the conclusion that the Respondents have failed in this respect in their duty of candour and co-operation.

(ii) Assessing the evidence – standard of proof and inferences

30. The legal principles to be applied are not seriously in dispute. In *El Masri v Macedonia* [2013] 57 EHRR 25, the European Court of Human Rights set out the principles which the Court will apply in evaluating conflicting accounts of events:

> "151. In cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. It reiterates that, in assessing evidence, it has adopted the standard of proof 'beyond reasonable doubt'. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Art 19 of the Convention — to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention — conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions

> of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights.
>
> 152. Furthermore, it is to be recalled that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*. The Court reiterates its case-law under Arts 2 and 3 of the Convention to the effect that, where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent Government."

31. The same approach was taken by the ECtHR in *Ireland v UK* (1979–1980) 2 EHRR 25 at para 161. Mr Perry drew our attention to the speech of Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 when he considered the standard of proof to be applied by the Special Immigration Appeals Commission (SIAC) in considering an appeal against deportation on the grounds of national security. The Commission had described the standard of proof to be applied as a "high civil balance of probabilities". Lord Hoffmann described this as "an unfortunate mixed metaphor" (para 55). He continued:

> "The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *Re H (Minors) (Sexual Abuse: Standard of Proof*) [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature

> seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

32. Many of the conclusions on the facts are to be drawn inferentially from what is in effect circumstantial evidence. The central issue is whether the admitted serious breaches of the ECHR have been aggravated in the manner alleged by the Claimant. For these reasons we consider that the approach of the ECtHR in seeking proof by means of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact is the correct one and the one we shall follow.

33. In *R (on the application of Mousa) v Secretary of State for Defence* [2013] HRLR 32, Sir John Thomas, President of the Queen's Bench Division, sitting with Silber J, adopted (at para 192) the test for a State practice given by the ECtHR in Ireland (para 159):

> "an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but a pattern or system."

34. In *Caraher v UK* (2000) 29 EHRR CD119, 122, the ECtHR identified the existence of an administrative practice as requiring two elements: a repetition of acts and official tolerance thereof. Repetition of acts referred to a substantial number of acts which were linked or connected in some way by the circumstances surrounding them (e.g. time and place, or the attitudes of persons involved) and were not simply a number of isolated cases. By official tolerance

is meant that, although acts are plainly unlawful, they are tolerated in the sense that the superiors of those responsible take no action to punish them or prevent their repetition, or that a higher authority, in the face of numerous allegations, manifests indifference by refusing any inadequate *[sic]* investigation of their truth or falsity. A practice may be found even where no official tolerance is established at the higher official levels, and even where some acts may not have been the subject of disciplinary action or criminal prosecution, since the higher authorities are under an obligation to take effective steps to bring to an end the repetition of such acts. It is not sufficient, however, that the existence of an administrative practice be alleged. Its existence must be shown by substantial evidence, namely evidence prima facie establishing its existence.

(iii) Duty of candour and inferences to be drawn

35. Ms Kilroy submitted strongly that the Respondents had failed in their duty of candour and co-operation in failing to provide explanations for matters which she submitted inevitably followed from the inferences to be drawn from the admitted facts. In particular, that the failure to provide witness statements from former officers in the NPOIU meant that there was simply no defence to the Claimant's case. The matters at issue lay within the exclusive knowledge of the Respondents and in those circumstances the burden of proof lay with them to provide a satisfactory and convincing explanation: *El Masri*, para 152; *Rupa v Rumania* (2010) 50 EHRR 12 at para 97. In the absence of such explanation, the court can draw inferences which may be adverse to the Respondents: *El Masri*, para 152; *Orban v Turkey* (25656/94), 18 June 2002, at para 274.

36. A similar approach in relation to inferences to be drawn from the absence of witness evidence applies in judicial review cases: *R (Das) v Secretary of State for the Home Department* [2014] 1 WLR 3538 at para 80; *R (Citizens UK) v Secretary of State for the Home Department* [2018] 4 WLR 123, paras 105-106, citing *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 at paras 13–23.

37. The Respondents' duty in judicial review proceedings is to assist the court with a full and accurate explanation of the facts relevant to the issues which the court has to decide, as Singh LJ said in *Citizens UK*:

> " 106. … (3) The duty of candour and co-operation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. As I said in *Hoareau* at para 20:
>
> 'It is the function of the public authority itself to draw the court's attention to relevant matters; as Mr Beal [leading counsel for the Secretary of State in that case] put it at the hearing before us, to identify "the good, the bad and the ugly". This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.'
>
> (4) The witness statements filed on behalf of public authorities in a case such as this must not either deliberately or unintentionally obscure areas of central relevance; and those drafting them should look carefully at the wording used to ensure that it does not contain any ambiguity or is economical with the truth. There can be no place in this context for 'spin'.
>
> (5) The duty of candour is a duty to disclose all material facts known to a party in judicial review proceedings. The duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact."

38. In *Das*, Beatson LJ in the Court of Appeal, with whom Underhill and Moses LJJ agreed, approved the judgment of the first instance judge, Sales J (as he then was):

> "Where a Secretary of State fails to put before the court witness statements to explain the decision-making process and the reasoning underlying a decision they take a substantial risk. In general litigation where a party elects not to call available witnesses to give evidence on a relevant matter, the court may draw inferences of fact against that party …. The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well-known obligation owed to the court by a public authority facing a challenge to its decision, in the words of Lord Walker of Gestingthorpe in *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6 at [86] 'to co-operate and to make candid disclosure by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings'."

39. Ms Kilroy argued that the absence of witness statements from MK's cover officer, his deployment manager and other senior officers from the NPOIU meant that there was no evidence to displace the obvious inferences to be drawn from the unchallenged facts. Accordingly, she argued, the Respondents' defence failed.

40. The contemporaneous documents only take the Respondents so far. There were no witnesses who could explain them or put them in context. For example, in relation to the RIPA authorisations, there were no witnesses who could justify the decisions taken by officers in granting them.

41. Mr Perry did not challenge the legal principles to be applied, but he submitted that the absence of witness statements should not be taken against the Respondents. The principal cover officer and the deployment manager and some other officers had responded to questions which had been posed by the Respondents' solicitors. These answers had been provided to the Tribunal. It was true that witness statements from them were to be made to the Undercover Policing Inquiry. However, in the UCPI the Attorney General had given an undertaking that any evidence given by former officers in the NPOIU to the UCPI would not be used in evidence in any subsequent proceedings against them. These former officers did not have the benefit of that protection in giving evidence to this Tribunal. Mr Perry argued that this was a legitimate reason for them not to have been asked to produce witness statements and no adverse inferences should therefore be drawn from the lack of this witness evidence.

42. Mr Perry argued that a very large quantity of disclosure had been made both to the Claimant in OPEN and to the Tribunal in CLOSED. Eight days had been allocated for the substantive hearing. The Respondents had admitted very serious breaches of the ECHR and had attempted to be fair and balanced in their duty of candour and co-operation. It was also relevant that it was highly unusual to call witnesses in judicial review proceedings.

43. In our view, the Tribunal has no choice but to consider the documentation and draw whatever inferences it considers appropriate from that material. Limited weight can be given to what officers have said publicly, whether to other inquiries or in written answers, as the Claimant has had no opportunity to challenge that evidence. This is a situation comparable to that in *El-Masri*,

where the matter in issue, i.e. dissemination of information within the NPOIU and the knowledge of more senior officers, is exclusively within the knowledge of the Respondents. It is therefore appropriate to place the burden on the Respondents to provide a satisfactory and convincing explanation. For the reasons given below, much of the written material does give rise to obvious inferences and therefore cries out for an explanation.

44. As we have said, the Respondents have sought to fulfil their duty of candour and co-operation by the disclosure of a large number of contemporaneous documents and through a number of witness statements from SSH, and their solicitors on more procedural matters. So far as the authorisations are concerned, we accept Mr Perry's position that it is not necessary to have witnesses to speak to them and in particular to explain the underlying rationale for their being granted. The reasons for the authorisations appear on the face of the documents. Whether these are sufficient is another matter and we deal with that issue below.

45. The position is, however, different with respect to the conclusions on the knowledge of other officers within NPOIU of MK's activities. Over the course of these proceedings, SSH has provided six statements. These take the form of a review of the various documents which have been disclosed, as well as providing information on the steps taken to address the issues raised by the disclosure of the sexual relationships entered into by MK and other UCOs in the course of their duties. He has, however, made it clear that he has no first-hand knowledge of these events nor any direct responsibility for the NPOIU, nor has he spoken to any of the officers who do have direct knowledge of the

allegations made by the Claimant. We decided in an earlier hearing that so far as SSH sought to make comments or draw inferences from the documentation, we would disregard his evidence. Given that the Respondents resisted calling SSH to give oral evidence and be subject to cross-examination, Mr Perry accepted that the approach of the Tribunal was correct. We depart from this, exceptionally, only where his comments or inferences support the Claimant's case and are therefore uncontested.

46. The best evidence would have come from officers with a direct knowledge of MK and his work as a UCO and those with knowledge of the structure and operation of the NPOIU. We note Mr Perry's explanation as to why some of them might be reluctant to give evidence to the Tribunal, particularly given the existence of Operation Elter. However, there are a number of senior officers, with oversight of NPOIU and MK's deployment, who would be unlikely to face prosecution and who apparently had not been asked to give evidence to the Tribunal. In those circumstances we do not consider that the Respondents have properly explained the decision-making process, and as referred to in *Das* it is therefore appropriate for us to draw inferences from the documentation received, and what we can glean of the structure within the NPOIU.

47. There is some evidence from other officers. For example, EN-31, who was MK's principal cover officer throughout his deployment as a UCO, provided a witness statement to the Operation Herne inquiry and answered a series of questions posed by the Respondents' solicitors (see SSH's first witness statement, paras 149 and 150). He has categorically denied that he had any knowledge of MK's sexual relationship with the Claimant or any other female

who was a target of MK's deployment. In due course we shall have to assess the weight to be attached to such statements, but we do take into account the categorical denial of knowledge of MK's sexual relationship with the Claimant by a number of officers.

48. In our view it would, at least, have been possible to provide a witness statement from a senior officer with direct knowledge of or responsibility for the operation of the NPOIU. Two of the central questions that we have to answer are whether, and if so to what extent, officers higher up the chain of command either knew of MK's sexual relationship with the Claimant or had reason to question the appropriateness of his relationship with her; and closely related to that, how information was disseminated within the NPOIU. The Respondents have been on notice since the filing of the statement of grounds that these were central issues for the Tribunal. They were aware that one of the questions which the Tribunal would have to answer was who had access to the flow of intelligence from MK and whether they would have identified the fact that the source of the intelligence was engaged in a sexual relationship with the target. Most pertinent is the question of who else may have seen the cover logs which it is conceded disclose a close personal relationship between MK and the Claimant. The answers to these questions appear somewhat opaque. A witness statement from someone who knew the practice of the NPOIU and how it worked would have assisted us. We comment further on the absence of such a statement when we come to assess the question of who had access to the cover logs.

D. THE FACTS

(i) The National Public Order Intelligence Unit

49. The NPOIU was formed in 1999 by the Metropolitan Police Service as a national unit to address campaigns and public protest which generated violence and disruption. It was funded by the Home Office and its aim was to reduce criminality and disorder from domestic extremism and to support forces managing strategic public order issues. The NPOIU gathered and co-ordinated intelligence that enabled the police to protect the public by preventing crime and disorder. It was essentially a national unit though located within the MPS. It was governed by and comprised police officers and civilian staff seconded from the MPS and other police forces. A number of officers were deployed undercover. Deployments were generally outside London. The authorisation of surveillance under RIPA was therefore generally by officers in forces outside the MPS.

(ii) Special Demonstration Squad

50. The SDS was formed by the MPS Special Branch in 1968 initially to focus on anti-nuclear and anti-Vietnam war protest, as well as Irish terrorism. The SDS's focus was on operations in London. However, the targets of some operations, such as Reclaim the Streets, overlapped between the two units. The SDS was disbanded in 2008. It also routinely deployed officers undercover.

51. There was some overlap between the two units in terms of officers.

(iii) The authorisations

52. Any interference by a public authority with a person's private and family life must, if it is not to amount to a violation of that person's right under Art 8(1), be capable of justification under para 2 of that Article. Art 8(2) requires, *inter*

alia, that the interference must be "in accordance with the law". The relevant law for the purpose of an undercover police operation is Part II of the Regulation of Investigatory Powers Act 2000, which deals with surveillance and covert human intelligence sources. The relevant RIPA provisions in force at the time are set out in full in Annex 4.

53. Where a member of a criminal gang or extremist or terrorist organisation agrees to provide information on a regular basis to the police or other law enforcement authority, it is the member, as the informant, who is the CHIS, but it is different in an undercover operation. This distinction was formally recognised in the Regulation of Investigatory Powers (Source Records) Regulations 2000 which defined a "source" as a CHIS and an "undercover operative" as "a source who holds an office, rank or position with a relevant investigating authority" (see now the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order 2013, SI 2013 No 2788, which introduced enhanced authorisation requirements in respect of the latter).

54. Thus, a police officer who is deployed in a covert manner to infiltrate an organisation, group or situation, or the life of an individual, in order to obtain intelligence or evidence from the people with whom he or she forms relationships becomes, for the purpose of the law, a CHIS. That deployment must accordingly comply with the requirements of Part II of RIPA; in particular, there must be in place an authorisation under s. 29.

55. We discuss in section F below the detailed requirements of s. 29, but in this section we describe the actual authorisations granted in respect of MK's undercover deployment that led to his meeting and cultivating a relationship

with the Claimant. Our descriptions are intended to provide a better understanding of the background to the undercover operation, its legal underpinning and the basis for the conclusions we reach about their legality and compliance with Art 8. The Respondents concede that the breadth of the authorisations and the cumulative length of the operation failed the proportionality requirement and also that there was inadequate consideration of collateral intrusion: they were therefore unlawful, resulting in a breach of the Claimant's Art 8 right. They maintain, however, that all met the necessity test in s. 29(2)(a) and (3) and Art 8(2).

56. We describe the authorisation materials for the most part without comment at this point, using the language in the materials, but we feel it appropriate to express some general observations before expressing our findings of fact at the end. Some of the statements and assertions that appear in the applications and quoted below ring hollow in the light of what we now know about the operation and MK's conduct; see, for example, paras 68, 73, 74 and 83 below. There is no evidence to suggest that these statements and assertions were subject to any real scrutiny or challenge by the senior officers approving, granting, updating or reviewing the authorisations. The tests of proportionality and necessity were applied in a largely perfunctory manner. The one exception (see para 64 below) rather proves this point. There was no adequate understanding of collateral intrusion, it apparently being supposed that there was no problem provided that anyone who was the victim of such intrusion would not have suffered if no reports were made. In any event, the Claimant was not spared the most detailed reporting on her private life and activities over several years. Nor was any

consideration given to the risks to those who were the subjects of the undercover operation, whether named or unnamed.

57. MK's deployment ran from July 2003 to February 2010. For the first seven months it was called Operation Penguin and thereafter Operation Pegasus. Authorising forces and officers changed from time to time as follows:

- 4.7.03-18.2.04: Nottinghamshire Police
- 12.2.04-1.2.07: Metropolitan Police
- 29.1.07-7.10.08: West Yorkshire Police
- 3.10.08-31.10.08: Metropolitan Police
- 5.11.08-10.2.10: Nottinghamshire Police

58. There were two short periods during which authorisations were not in place: 12-15 February 2005 and 31 October to 5 November 2008. The former was caused by carelessness and the latter was a "calculated risk" as responsibility passed from the Metropolitan Police to Nottinghamshire Police.

59. Every application for an authorisation would, according to SSH in his first witness statement, contain a variety of information, the most significant for present purposes being the following:

- the grounds for the authorisation in terms of s. 29(3) of RIPA;
- details relating to those being targeted;
- the intelligence case and details of the operation;
- the operational objectives and strategy, including what the UCO will be tasked to do, location, comments on collateral intrusion, the information that is expected to be obtained and, in the case of renewals, the necessity for continuing with the activity;

- how the requirements of s.29(2) are met, that consideration has been given to the use of less intrusive measures and the handling of any confidential information that may be acquired;
- any application to participate in criminal activity;
- a risk assessment covering physical risks to and psychological pressures on the UCO, and legal, economic and ethical issues; and
- a risk management plan.

60. The application would normally be completed by a Detective Constable or Sergeant and passed to the Operational Head and Superintendent for quality control before being placed in front of the authorising officer, a Commander (in the Metropolitan Police) or an Assistant Chief Constable.

61. An authorisation lasts for a year unless cancelled, and may then be renewed, and there are regular periodic reviews. Separate authorisations would be applied for deployments abroad or at specific events. Over the seven years of MK's role in Operations Penguin and Pegasus, there were 15 authorisations and six renewals, including authorisations for special deployments. Over the same period, there were 41 reviews and 11 updates. A number of documents - whether authorisations, reviews or updates - have not been disclosed in OPEN, but they have of course been made available to the Tribunal in CLOSED.

62. The separate authorisations for MK's special deployments covered short-term visits (in some cases more than once) to Ireland, Spain, Scotland, Germany, France, Italy and Denmark.

63. From the first authorisation in 2003, permission for MK to participate in minor criminality was granted. As this is not an issue in this case, this point is not further explored.

64. The authorisation in force on 25 May 2005 was cancelled owing to mistakes in the paperwork. A revised application was made the following day and granted. An application to deploy MK to Manchester for two days in February 2006, including permission to participate in minor criminality, was rejected on the grounds that the risk assessment was deficient, it was a "blanket application", there was no articulated arrest strategy and the authorising Commander was not convinced that it was proportionate and could not be achieved by other means.

65. We describe the first application in 2003 in some detail since it sets the scene from which all the later authorisations flowed.

66. The grounds were said to be for the purpose of preventing and detecting crime or preventing disorder, and in the interests of public safety, drawing on the language of s.29(3)(b) and (d) of RIPA and Art 8(2) of the ECHR. No individual subjects of the proposed operation were named. The intelligence justification stated that the application related to the Sumac Centre in Nottingham, "a centre used by persons involved in extremism relating to animal rights, environmentalism, anarchy, anti-weapons and war issues and anti-globalisation", and it listed several groups that met there, including Nottingham Animal Rights Group, which supported Stop Huntingdon Animal Cruelty, which engaged in criminal activity; Nottingham Earth First, an umbrella organisation used by groups involved in environmental extremism; Nottingham

Anti-Fascist Association; Animal Rights Coalition; and those involved in anti-war issues. Examples of the activities of each of these groups were given.

67. The primary objective of the operation was for the UCO "to maintain himself in a long-term basis into the activist/extremist elements who frequent the Sumac Centre", the purpose being to provide intelligence on their planned activities, concentrating on criminality and public disorder: "The operation is not aimed at people who wish to carry out their democratic right to protest within the law."

68. It continued: "The issue of collateral intrusion will be dealt with by way of the trained cover officer and the reporting officer providing direction in relation to specific groups and individuals known to be involved with such groups." These officers would ensure that reporting was subject specific, and any information considered to have been obtained as a result of collateral intrusion would be discounted.

69. Although the focus of the operation was "extremism and criminality used by those involved in . . . extremism", it was acknowledged that intelligence might be obtained in relation to large protests involving no planned criminality: "such intelligence would only look to ascertain the numbers of those involved and the likely tactics, so that proportionate and appropriate police response can be assure[d], for the safety of all concerned".

70. It was emphasised that it was primarily an intelligence-gathering operation rather than one seeking evidence to support prosecution: "In order to do this the undercover officer will establish and maintain personal relationships with persons involved in this type of activity with the intention of obtaining . . . information and intelligence in relation to the areas of criminality referred to

above." "Personal relationships" is the term used in s. 26(8) of RIPA and is not referring specifically to a relationship of an intimate or sexual nature.

71. The application is then said to be necessary and proportionate as the offences involve large numbers of people acting together for a common purpose and using criminality to support extreme ideologies. The absence of the intelligence would impact on public and community safety and have an adverse effect on the public and businesses.

72. The application includes a request for the UCO to participate in criminal activity in a minor role. There is no reference in this application, or in any other application, review or authorisation, to engaging in sexual activity with those subject to the operation.

73. The only aspect of physical and psychological risk raised is to the UCO himself, who is said to be fully and appropriately trained, to have undergone psychometric and psychological assessment and felt to be strong enough to carry out the role.

74. There is a heading "Legal risks" where the proposed UCO is said to be trained and to be aware of the relevant legal issues, including knowledge of the ECHR and RIPA. "*The integrity of this operation is uppermost in the minds of all parties concerned . . .*" (emphasis added). It is then asserted that the obtaining of intelligence in this way was considered to be moral and ethical and it would be managed in an ethical manner. It was said to be moral because the failure to obtain the necessary intelligence would have an adverse effect on the safety of the public and police officers.

75. The main risks were said to be the safety of the UCO and the cover officer. Those risks were not thought to be high and could be effectively managed.

76. The application was supported by the Operational Head and the relevant Superintendent before the authorisation was granted by an Assistant Chief Constable who noted that it was legal, necessary and proportionate and met the criteria in the HRA and RIPA; that it fell within the definition of an investigation into serious crime; that the desired result could not reasonably be achieved by less intrusive means; and the risk of collateral intrusion had been properly considered.

77. We draw attention (without comment at this point) to three features of the authorisation: its scope, which allowed the UCO to form relationships with unnamed persons congregating at the Sumac Centre with no explicit limits on how or where this was to be done; the reference to this being envisaged as a long-term deployment; and a consideration of collateral intrusion that showed no appreciation of the intrusion into the private lives of many people unlikely to be involved in any criminal or improper activity.

78. We deal much more briefly with the reviews, updates and renewals that followed, noting only points of significance. The recurring theme throughout is that the "authorisation criteria continue to be met".

79. In a review dated 26 November 2003, the Cornerstone Co-operative in Leeds is mentioned for the first time. It is described as similar to the Sumac Centre. There is also the first mention of a specific individual, "A-3", as a subject or target of the surveillance.

80. In an update approved by an Acting Assistant Chief Constable (ACC) on 24 December 2003, it is noted that MK has been asked by "activists" to move in with them. The documentation submitted to the ACC states: *"It has been decided* that he will do this as it will provide him with further extremist contacts and provide even more pre-emptive intelligence" (emphasis added). The importance of this is that it reveals, or confirms, that the stipulation of the Sumac Centre in the existing authorisation was a loosely identifying factor rather than a defining locational limit to the scope of MK's surveillance.

81. In the next update of 9 January 2004, authorised by a different ACC, directed surveillance under s.28 is granted for the first time. The affirmative box has been ticked and is followed by this explanation: "The interception of communications intended for, or sent by, the Undercover Officer(s) nominated, with their written consent, by means of monitoring, listening and recording of the communications by or with the assistance of an electronic device." It does not appear from the documentation that this power was requested; nor, so far as we are aware, was any use made of it.

82. In a review on 21 July 2004, MK is tasked to focus on the forthcoming G8 summit.

83. In a renewal dated 14 February 2005, A-3 is joined by A-1 as a subject or target. The application recognises that there will be a degree of collateral intrusion: "however only those persons who show a propensity to commit crime or disorder will be reported upon". No explanation is given of how this was to be applied, enforced or reviewed.

84. A new application dated 1 June 2005 lists the Claimant for the first time as one of the subjects of the deployment, along with four others. She is described as one of the main organisers and planners at the Cornerstone Co-operative together with A-3.

85. In a review on 17 July 2005, MK is recorded as having provided a number of intelligence reports of "inestimable . . . value to the overall policing plans in relation to the G8 summit".

86. The Claimant is listed again in a renewal of the authorisation on 1 September 2005 with a similar description to that noted in para 84 above.

87. In a review dated 1 November 2005, it is said that 36 "items of intelligence" (which we take to mean information regarding future or planned protests or events) had been submitted. MK is commended for working extremely hard to achieve his objectives and producing very high-quality intelligence. On November 23, 41 items of intelligence are said to have been provided. This apparently includes the 36 noted at the beginning of the month.

88. The authorisation is renewed on 22 December 2005 with the Claimant again named. The application comprises a summary of the intelligence case which includes 21 intelligence reports which have generated 43 items of intelligence. These are said to have helped various police forces in developing their policing plans. A subsequent review on 17 January 2006 reported only three further items of intelligence, but again they were said to be useful.

89. The authorisation is renewed on 30 May 2006. The Claimant is again named as a subject and the following is stated:

> "[The Claimant] is well educated (Oxford) and comes from a well 'connected' family in Putney, London. She travels the world attending camps and conferences on environmental issues. She speaks several languages fluently and has just returned from Venezuela where amongst other activities she translated the words of the Venezuelan President Hugo Chavez at a conference. She is travelling to Africa in the summer to act as a translator. [She] was identified by MK as an influential person in the world of activism almost at the beginning of this operation. As such the operation has utilised her reputation, knowledge, energy and contacts (both national and international) to progress and promote [MK's] own standing."

90. A review on 27 June 2006 again mentions the Claimant and notes that 24 items of intelligence were submitted during the review period.

91. An update on 1 December 2006, which lists the Claimant as a subject, notes that 131 items of intelligence have been submitted by MK.

92. A review on 7 July 2008 contains a report of collateral intrusion relating to a wedding of an activist attended by MK.

93. By 10 July 2009, a review refers to "the careful management of [MK's] exit strategy"; a further review of 8 September 2009 notes that the withdrawal strategy is ongoing and MK was "using every natural opportunity to voice his exit strategy".

94. Authorisation was renewed on 26 October 2009 for the minimum activity to extricate MK from the deployment safely. Authority to participate in criminality was no longer sought.

95. The final authorisation was cancelled on 10 February 2010 and Operation Pegasus was ended. It was noted that MK had provided an "immense amount of pre-emptive intelligence over the last seven years to many police forces".

96. Our findings of fact based on the above are threefold. First, that the breadth and open-ended quality of the authorisations rendered them virtually meaningless as a limit on the UCO's activities and as any kind of protection for those affected by the operation. Second, that much of MK's activities in insinuating himself into the private life of the Claimant fell outside the remit of the authorisations insofar as they can be read as imposing any limits. Third, that the reviews and renewals were conducted on a largely perfunctory basis, with the emphasis given to the value of the intelligence gathered, and we are not satisfied that even that aspect was conducted with any rigour. The legal consequences of these findings are discussed below at paras 287-289.

97. We elaborate on the first of these findings. We acknowledge that a CHIS authorisation cannot usually be cast with the kind of precision that would be found in, say, a search warrant or a warrant to tap a telephone; a degree of flexibility is essential, but that does not absolve those granting an authorisation from doing so in a way that secures a reasonable degree of clarity and certainty. These authorisations could hardly have been more open-ended.

98. The Sumac Centre was not a criminal organisation. It was merely a place where various groups congregated. Some were entirely above board and neither engaged in nor contemplated any criminal activity. Indeed, they were groups exercising rights enshrined in the ECHR. (It is worth noting here the decision of the Supreme Court in *DPP v Ziegler* [2021] UKSC 23, handed down after

the hearing in this case, to the effect that deliberate obstruction of the highway as a political protest may constitute a lawful excuse to a charge of obstructing the highway contrary to the Highways Act 1980.) To place a UCO in such a place for what was intended to be, and was, a lengthy deployment was to subject significant numbers of people and whole groups to an interference for which there was no legitimate basis.

99. This was not an operation to embed a UCO in a suspect organisation; it placed him within a legitimate organisation in the hope and expectation that he would come within the orbit of suspect groups and individuals and thereby obtain valuable intelligence. This, in our view, is akin to a fishing expedition. It is like a general search warrant that authorises search of the properties of those suspected and those not with a view to seizing vast quantities of material that can be examined subsequently. As Mr Perry concedes, they are over broad and treat collateral intrusion as largely irrelevant. The key is, of course, proportionality. Had the Sumac Centre, for example, been harbouring terrorist groups, which could not be infiltrated in any other way, the undercover operation could be justified as many lives might otherwise be at risk. But this operation was a very long way from anything of that character.

100. It is clear that it was not intended that MK's activities should be confined to the Sumac Centre. That was merely a starting point. He could select the individuals and the groups he would target and follow those leads wherever they led him, all the while hoovering up information which he passed to his cover officer. As time went on, various named individuals were added to the authorisations, but that apparently did not imply that other persons were off-limits. In short, the

authorisations set no clear boundaries as to place, time or people and no express limitations on what MK could or should not do.

(iv) Mark Kennedy

101. MK joined the MPS in 1990. In 1999 he completed a test-purchase course which trained officers to act undercover for the purchase of illegal drugs on the streets. In 2002 MK was successful in a pre-selection interview assessment to attend the National Undercover Training and Assessment Centre course (NUTAC). Subsequently in 2002 he passed a psychological assessment and then passed the national selection interview. MK completed the NUTAC course and the NPOIU undercover course in 2003. He was then qualified for deployment as a UCO by the NPOIU. On 4 July 2003 he was first deployed as part of Operation Penguin under the pseudonym Mark Stone. The RIPA authorisation was granted by an officer of Nottinghamshire Police.

102. Throughout the period of his deployment, MK had the same principal cover officer, EN-31. His role was to provide day-to-day supervision of and support for MK. He was responsible for his welfare as well as providing advice and reviewing the intelligence MK provided. Two other officers, O-19 and O-20, performed the role from time to time as cover for EN-31. Above EN-31 was the deployment manager or SIO, sometimes referred to as the DCI. A number of officers held this post in relation to MK during the period of his deployment.

103. MK's deployment as a UCO lasted from July 2003 to September 2009. MK was an officer serving with the MPS (the first Respondent), but whilst deployed as a UCO he was seconded to the NPOIU. During that time, apart from the Claimant, the unchallenged evidence indicates that he had sexual relationships

with at least 10 other women, five of whom have given witness statements. This included a lengthy intimate relationship with "Lisa", which began in September 2004 and ended in October 2010 when she discovered that he was a UCO. Lisa made a statement to the Tribunal which described that relationship and the degree to which MK was integrated into her life. Lisa's evidence was that the relationship was conducted openly and was well-known within the community they were living in.

104. It is noteworthy that MK started a relationship with the Claimant within four months of the start of his deployment and was then continually in relationships until the end of his deployment.

105. MK's backstory or "legend" when the deployment commenced was that he was single. He was a relatively young, healthy heterosexual male. He was infiltrating a community of young people, many of whom were themselves single. The Claimant submits that the sexual relationship might have been avoided had MK been provided with a false romantic attachment with another UCO. We deal with this in more detail in our CLOSED judgment.

106. The fact is that MK was not provided with such a cover and there is no suggestion in any of the logs that we have seen that any consideration was given to the use of another UCO in such a capacity for MK's benefit or that any consideration was given as to how MK might avoid intimate relationships. Therefore, for the six years of his deployment, the Respondents' position is that all relevant officers believed that MK was holding himself out as a single man. The Respondents deny that any member of NPOIU, other than his cover officer,

should have been alerted to the possibility that he was having sexual relationships with those in the community under surveillance.

(v) MK's relationship with the Claimant

107. The Claimant has set out the details of her relationship with MK in her fifth witness statement and accompanying exhibits. It is not challenged by the Respondents. It is clear to us that the relationship was deep, close, loving and affectionate, at least on the Claimant's part, and ostensibly so on the part of MK too. He frequently took the Claimant out to dinner. He bought her gifts. They went on day trips, weekends away and holidays. He wrote to her in affectionate and loving terms. He wrote her poetry. He taught her to drive his van and let her use it when he was away. He was accepted into the Claimant's family and was clearly treated by them as the Claimant's partner and in that capacity attended family events.

108. In the early part of their relationship, MK and the Claimant would spend three or four nights together in any one week. In November 2003, MK moved into a shared house in Foxhall Road, Nottingham with the Claimant's best friend "Jane" and two other friends. At the time, the Claimant was living in a caravan and treated the Foxhall Road house as her own. In around May 2004 the occupants of Foxhall Road, including MK, moved into another house in Wiverton Road, Nottingham. The Claimant moved in with him. Although she had her own room on the ground floor, MK and the Claimant shared MK's room on the top floor. MK built a four-poster bed out of scaffolding. They used the Claimant's room as a study and spare room with a futon for sleeping on. On one occasion, the Claimant's parents stayed in MK's room.

109. Crucially for MK's deployment, he and the Claimant ostensibly shared politics. The Claimant says that their shared politics was a fundamental part of their relationship. They discussed and planned political activity together. They often worked on the same projects. They were "a very dynamic team". Most of what they did was political mobilising and organising. They organised the agenda and logistics for big events in relation to the G8 summit to be held in Scotland in 2005. They were involved in organising the first Dissent! gathering at the Sumac Centre in November 2003. They attended demonstrations together. In January 2004 they both attended a demonstration at Lindholme Detention Centre. The Claimant has exhibited a photograph of MK climbing a fence at the Centre during this demonstration.

110. In short, MK and the Claimant were acting together, and were seen to be acting together, as a loving, affectionate couple who shared a deep commitment to political activism. "Lisa" describes how they were publicly a couple who lived together in the same house. They would attend events together and leave together. When they were away from home at demonstrations and events, they would share a bed together and it would be clear to others that they did so. The planning meetings for protests at the G8 summit were often held over a weekend. At these meetings, accommodation was informal, and they would often sleep on the floor of big warehouses or in tents in fields. It was obvious to others who was sleeping with whom. Other members of their community would message the Claimant to get messages to MK and *vice versa*.

111. In February 2005, the sexual relationship came to an end when the Claimant moved to Barcelona. Despite that, they remained close and affectionate. MK

visited the Claimant in Barcelona and Berlin. He wrote her loving emails. He attempted to persuade the Claimant to rekindle their sexual relationship. The Claimant would stay with MK when she returned to the UK and MK remained the principal contact for the Claimant's UK friends. MK also remained in contact with her family after the breakup.

(vi) The cover logs and other records of contact between MK and the Claimant

112. The Claimant appears in a number of contemporaneous records, most importantly the cover logs but also MK's personal diary, NPOIU intelligence reports and decision logs. The cover logs were maintained by the cover officer. The Claimant is mostly referred to as "Katja", the name she used at the time. "Source" is MK.

113. A review of these materials covering the period of the subsistence of the sexual relationship does not reveal any express or explicit evidence of the sexual nature of the relationship. It does, however, demonstrate an extremely close personal relationship. "Katja", the Claimant, features prominently in the logs and other records. We do not intend to cite all of the occasions in which she appears – only those which appear to us to be particularly noteworthy. We quote them in their original form without correction of punctuation etc.

114. The first mention of the Claimant is in an NPOIU intelligence report which records:

> "Katja stayed the night of the 17/11/2003 at [address in Nottingham] the home address of Mark Stone."

115. The next entry in the cover logs is for 18 February 2004 which records that the Claimant had invited MK to a farewell party in Oxford. She was going to do a course in Barcelona for seven weeks. The entry notes that it would be good to attend to meet up with others. On February 22, MK and the Claimant attended a tree-planting in Hebden Bridge. On February 22, he stayed at the Claimant's parents' flat in Putney. On February 23, the contact log gives details of a tasking given to MK to attend an anti-G8 meeting in Serbia and records:

> "Source has worked hard to achieve a trusted position with one of the main persons attending from England. (Katja) this person will be attending all important meetings acting as an interpreter and Source will be able to travel with her."

116. The entry also noted that they would travel out a week beforehand and return immediately after to attend an Earth First meeting where the Claimant was again going to be acting as interpreter. A note for the SIO records that the Claimant had vouched for MK at Greenpeace. This was seen as important as MK had been told when he was first deployed that, if at all possible, he was to infiltrate Greenpeace "because there was a need and it had never been achieved". MK had been given a telephone number to make contact. MK was told to put the call in and meet with whoever attends from Greenpeace "to keep faith with Katja".

117. On 26 February 2004, MK met up with the Claimant in London and drove with her to Nottingham. The weekend of February 28/29 was spent in Oxford. The Claimant was with MK and according to his notebook she drove them there. There was a debrief on Monday, March 1 in the course of which MK told EN-31 that he spent Sunday with activists doing tourist things and had visited

Katja's old college "for old times sake". On Monday he had travelled back to London with the Claimant. She had given him her guitar to look after while she was in Spain. It is then noted that:

> "Katja returns on 24 April and is looking forward to going to Serbia with Source. Katja wants to travel through France but Source has persuaded her to go through Germany."

118. There is then a note for the SIO, partially redacted: "Katja wants to meet sources Mum."

119. The Claimant's visit to Spain was to stand trial on a charge of "aggravated shoplifting". She was convicted but the conviction was quashed on appeal. The log records that on March 17 MK had received a text from the Claimant who was outside court. He had texted her back and wished her luck. The notebook records that he had called the Claimant on a number of occasions to offer support.

120. On February 23, MK had been tasked with attending the May Day EU summit in Dublin to depart on 26 April 2004 and return on 4 May 2004. A number of entries thereafter deal with arrangements for MK's visit there. This included a decision dated March 22 about travel arrangements. It is clear that he is travelling with Katja. Notably, there were three officers from the NPOIU in Dublin, and it is apparent from the logs that there was very close engagement with MK's activities. On 16 April a decision is taken by O-24 (MK's deployment manager from February 2004 to March 2005) to authorise the purchase of a used mountain bike for up to £80 for Katja to use around Dublin. The reason is recorded as being for ease of transport around Dublin and also to:

> "Provide facility for quality time to reinforce bond/relationship
>
> Provide for joint interest."

121. It should be noted that O-24 explains his rationale for authorising the expenditure as being that riding bicycles together would afford them an opportunity to discuss issues, and, not being surrounded by others, might have led the Claimant to be more open with her knowledge. His use of the word "relationship" was, he says, as defined in s. 26(8) and (9) of RIPA and not to a sexual relationship.

122. On the same day, 16 April, EN-31 met MK. Amongst other things he records:

> "Source spoke with Katja who is still very keen and excited about going to Belgrade with Source."

123. Two days later the log records that MK had had a text from the Claimant to say that she would be back on April 23.

124. On April 23, MK tells EN-31 that he will travel to Putney to meet the Claimant and spend the night at her parents' home. The following day he is still in London with the Claimant. There are then entries in which MK describes the Claimant as suffering from "Post Traumatic Stress Syndrome" brought on from her political activity. She was questioning her need to be present at protests, putting herself in danger. She also questions MK as to why he is going to Ireland and what are his political reasons for going. These questions are said to be rhetorical rather than born of suspicion. They had been discussing these matters until 3am. EN-31 records that he instructed MK that if the Claimant was reluctant to travel

to Manchester or Ireland, he should not put any pressure on her but that he must go to Manchester. There are further entries about the Claimant's mood and apparent reluctance to travel to Dublin. In her witness statement, the Claimant makes clear that MK persuaded her that she should go. That appears to be contrary to the instruction he received from EN-31.

125. There are many entries relating to activities in Dublin. At one point there is a record of MK being out cycling with the Claimant, carrying out a recce of Phoenix Park. Another says that he was seen as "a player with Katja". A later entry is as follows:

> "How are we fixed for staying after the 4th from my point of view it would be awesome useful."

126. EN-31 says that he would need to talk about that and discuss with O-24, who was acting as deployment manager at the time. MK texts:

> "It's up to the bosses Katja might stay as well I don't mind but could be good to have the option."

127. MK and the Claimant were arrested in Dublin on 3 May. The Claimant described the experience as extremely distressing. They returned from Dublin together. At 12.20 on 4 May there is the following entry:

> "Katja has asked Source to help her buy a car. Katja would like a Peugeot Diesel estate for about £1000.
>
> The Irish organisers have expressed major respect for both Source and Katja, they say they are compassionate and non-judgemental."

128. It should be noted that a decision had been taken on April 30 to help facilitate the purchase of a vehicle for the Claimant.

129. On Wednesday, May 5, the log shows that MK had left the Claimant's parents' house at 8am. He was meeting up with the Claimant on Friday evening for a curry and had made arrangements to see her on Saturday to help her look for a car. Early that evening he is recorded as going to Putney (where the Claimant's parents lived) to take the Claimant her passport and purse which she had left in the car. The following two days were spent at a safe location. At 7pm on Thursday, May 6, the Claimant phoned MK for a general chit chat and for details of a bank account for an Irish prisoner support fund. The following day the debrief continued and MK was then taken to London for an evening meeting with the Claimant. The notebook records that he stayed the night at the Claimant's parents' house. The following day EN-31 called MK who was with the Claimant.

130. On May 10 the log records that the Claimant had asked if she could use his vehicle while he was in Oslo. MK had used various excuses, but it became necessary to agree: "This would have been natural between friends." Subsequently the DCI is updated about the vehicle.

131. On May 16 the log records that MK may be going to see a film in Leicester Square with the Claimant. The following day he is recorded as leaving Putney with the Claimant. On May 18 they both go looking for a vehicle for the Claimant and then travel together to Nottingham.

132. On May 20 the log records that MK will spend the day looking for accommodation for the people who had lived at Foxhall Road and the Claimant.

He secures the house at Wiverton Road. They will have the keys that day. The rent of £800 per month is split between the five of them. A decision log for the same day is to the effect that EN-31 should conduct a comprehensive risk assessment. The risks include "residing within joint accommodation". The reasons are to ensure that relevant risks are identified and managed, ensure that safeguards are in place and risks minimised and for the duty of care "to the operative and cover officer".

133. On May 26 the log records that MK was building a bed out of scaffold poles. MK travelled to London to load MK's vehicle with the Claimant's belongings. He stayed the night in London and the following day they travelled back to Nottingham. On June 2 the log records that he and the Claimant travelled together by coach to London. They stayed the night in Putney. On June 4 MK is recorded as travelling back to Nottingham in the Claimant's father's car.

134. On June 8 the log records a discussion as to whom MK should name for the purpose of his "one phone call" in the event of his arrest at a forthcoming demonstration. It was agreed that "it would be natural for Source to call Katja". The following day EN-31 received a phone call on a new phone, the number of which had been given only to the Claimant.

135. On June 13 the log records:

> "On Monday Source will travel to London with Katja to assist with transporting furniture from IKEA for Katja's brother having been put on the spot by Mrs Wilson."

136. The following day, EN-31 received a phone call from MK who was just leaving IKEA with a vehicle full of furniture. On June 15, MK met the Claimant in East London. He was then in Putney. On June 16, he travelled to London to meet the Claimant and they went to the cinema together.

137. MK was in Ireland from June 18 until July 2. On July 3, he is recorded as being in Nottingham with the Claimant and others. On July 6, the Claimant and MK travelled to Devon to the Claimant's parent's house to deliver furniture and collect furniture that the Claimant's parents had donated to the new house in Nottingham. They stayed in Devon for a few days. An entry on July 9 records that MK had spent the day with the Claimant in Beer. A later post gives the address in Beer where he had stayed and states that the house was owned by the Claimant's parents. Entries over the next few days record discussion about the Claimant's not being able to afford the insurance on MK's vehicle so she might not buy it. The Claimant had gone for a job interview. The Claimant had lost her phone. MK's phone was playing up; the Claimant had phoned it and got a French answerphone message.

138. A decision log for July 23 notes that the Claimant was attending a meeting in Belgrade as an interpreter and wanted MK to accompany her. The note is to the effect that the fact that an invitation has been achieved had implications for MK and needed to be managed.

139. MK is then on leave from 3 to 14 August 2004. On return, he collected his vehicle from the Claimant's parents' home in Putney and then travelled with the Claimant to Leeds, collecting two others on the way. Over the next few days there is discussion about the Claimant's purchasing MK's vehicle. They go the

cinema together and then travel to London together. On August 26, they are again in London overnight. On September 1, which is recorded as a rest day, MK texted EN-31 to say that he was going to London the following day. Amongst other things he was going to be helping the Claimant's mother with a job that needed going up a ladder. Two days later he was still in London helping the Claimant's parents.

140. On September 23, MK and the Claimant are both in Putney at the Claimant's parents' house. On October 9, MK is in Putney. On October 13, MK is recorded as spending the night with two individuals and the Claimant at the Claimant's parents' house. He is back in Putney on October 15 and stays that night and again on October 16 and 18.

141. On October 22, the following entry appears:

> "Call from Source
>
> Source had received a telephone call [REDACTED] wanting to know a next of kin. Source was having lunch at the time with a number of subjects so initially gave my alias details. After the call Katja suggested that Source should have given her details. Source called them back and gave Katja's details.
>
> I don't fall out with this decision as it is another indication that Source is a real person. Source explained that Sources elderly mother should not be given the responsibility."

142. The following day they travel to Leeds together. On October 31, MK and the Claimant travelled to Putney where they stayed overnight. The next morning MK drove the Claimant to Gatwick Airport for an early morning flight to Spain. MK was in Ireland for part of the time the Claimant was in Spain. The next

mention of the Claimant is on December 2 when it is clear that the Claimant had been in the vehicle with MK.

143. On December 13, there is a record that the Claimant was going to Spain on 5 February 2005. MK is going to London the following day to collect the Claimant. On Monday, December 14 there is an entry that discloses that MK is going to the theatre the following day with the Claimant and her mother. That evening there is a meeting with O-20 and O-24 in the course of which, recorded under the heading "House", the implications of the Claimant's moving out in February are discussed. At the end of the meeting, MK is taken to a safe location "to prepare for a return to the arena and meet with Katja".

144. The following day EN-31 asked MK if attending the Wilsons' "drinks and nibbles" party was a good idea. The answer is redacted.

145. The log records "Off Duty" from Tuesday, December 21 until Tuesday, 5 January 2005. During this time the Claimant and others understood that MK was in Thailand on a kick-boxing trip. The tsunami hit south-east Asia during the time that the Claimant understood MK to be in Thailand. There was obvious concern for his safety. The Claimant now believes that MK was not in Thailand during this time. We dealt with this in an OPEN judgment of 19 March 2021 (in which we upheld the Respondents' claim to NCND with respect to the Thailand trip) and also deal with it in the CLOSED judgment which accompanies this judgment.

146. The Claimant collected MK from Heathrow Airport on 5 January 2005. EN-31 notes in the log that he had observed the Claimant arrive at Heathrow. Later that night MK texted EN-31 to say that everything was fine and that he was off to

bed. O-20 is updated. The following day the log records that MK is in Putney with the Claimant. An entry reads:

> "Call from Source
>
> Everything went well with Katja and others. (This was just a quick call just to let me know the initial reaction)."

147. Later it is recorded that MK and the Claimant had spent the afternoon in the Natural History Museum and whilst they were there had researched the causes and history of tsunamis. People had been calling MK saying that they were glad that he was safe and well. The following day there is an entry recording that the Claimant and her family were concerned that MK had lost weight and looked pasty because of the trip to Thailand.

148. In her witness statement the Claimant says that MK talked to her about his experiences in Thailand. He told her that he had not been near the coast when the tsunami hit. He had claimed that it was incredibly hard for him to talk about it and over several days he opened up about witnessing the aftermath of the tsunami and helping with the rescue effort. He described digging a dead child out of the sand on the beach and how deeply that affected him. She comments that their relationship involved many deep conversations and often tears and vulnerability that she believed were genuine on both sides.

149. Returning to the logs, there is an entry on January 23 in which a subject, A-11, is described as being "also" the Claimant's boyfriend.

150. On January 29, MK and the Claimant travelled together to Oxford to make contact with Corporate Watch members so that, when the Claimant goes to

Spain, MK can meet them in his own right. The following day EN-31 is in Oxford to meet MK and observes MK and the Claimant together in a vehicle.

151. On February 5, MK is recorded as attending a function with the Claimant in London. MK is then due to travel to Bristol, but the arrangements change, and he stayed at Putney. On 7 February 2005, EN-31 receives a text:

> "Katja is just pulling out of Dover."

(vii) Events after the end of the relationship

152. The Claimant says there was no formal end to the relationship; in practice the sexual relationship ended in February 2005. However, she and MK remained close friends thereafter until his true identity was exposed in 2010. He was her main contact with friends in the UK and the Claimant says they retained a close emotional connection. We note that the Claimant's brother invited MK to his wedding in 2007, although he did not attend. MK made special efforts to visit the Claimant in Spain and Germany.

153. It was only after the Claimant ceased living in the UK that she became a named subject on the authorisations. It is accepted by the Respondents that she was wrongly identified as being at the Cornerstone property in Leeds, which was not in fact the case. She only ceased to be named in January 2007.

154. On 13 April 2009, MK was arrested for conspiracy to commit aggravated trespass/criminal damage at Ratcliffe-on-Soar power station. It was this event that led to his withdrawal from the deployment in September 2009. His involvement in events at Ratcliffe-on-Soar led to the collapse of the

prosecutions against some 20 individuals because of a desire to maintain MK's cover. This in turn led to Sir Christopher Rose's inquiry (see para 22 (c) above).

155. MK resigned from the MPS in March 2010. It appears that he then returned to some form of undercover role for a private company. In October 2010, MK was exposed as a UCO by Lisa. The Claimant in her witness statement sets out the impact this had on her, causing her fear, paranoia, confusion, grief and a feeling of betrayal. The Claimant states that she continues to suffer from those effects. We note that this evidence is not challenged.

(viii) Other UCOs

156. The Claimant in the years she was involved with the protest movement (including when she was in a relationship with MK) came into contact with a number of other UCOs, but on a relatively fleeting basis. Those include Jim Boyling (real identity) when the Claimant first left university. During the time the Claimant knew him, Mr Boyling had sexual relationships with two women in the Reclaim the Streets movement, both relationships being openly known within the movement. She also knew Rod Richardson (an alias when a UCO), who was MK's predecessor as a UCO in Nottingham.

157. The Claimant met Marco Jacobs (an alias when a UCO) in Brighton between 2003 and 2005. Mr Jacobs later had sexual relationships with two women who were involved in the protest movement. The Claimant met Lynn Watson (an alias when a UCO) on a number of occasions.

158. The Claimant believes that two men, introduced to her by MK as friends named "Ed" and "Vinny", were in fact UCOs brought along to bolster his legend. She

says that they would have observed the closeness of her relationship with MK and would have included that information in their reports, thus bringing it to the attention of MK's superiors. We upheld the Respondents' claim to NCND with respect to whether Ed and Vinny were UCOs in an OPEN judgment of 13 January 2021 ([2021] UKIPTrib_167_01_H, with our reasons for so concluding contained in a CLOSED judgment of the same date) in which we explained that if they were UCOs, there was no evidence to support the Claimant's supposition that reports were made on the nature of her relationship; and if they were not, then the assertion simply falls away. We also say more about this in the CLOSED judgment accompanying this judgment.

(ix) Sir Stephen House's inferences from the cover logs

159. The logs record regular and frequent briefings of officers described as "DCI" or "SIO" or named and cyphered for the purposes of disclosure. These take the form of briefings by EN-31, sometimes with MK and sometimes by himself. There are also debrief meetings at safe locations.

160. The Claimant is not the predominant focus of these briefings. The logs contain a great deal of information about the activities of those with whom MK was in contact. Some of it appears little more than gossip but other information which MK passed on was clearly regarded as useful intelligence and individuals are named and identified. What does stand out is the closeness and intensity of the relationship between MK and the Claimant.

161. Reviewing the log entries, Sir Stephen House concludes:

> "…the Defendants acknowledge that the cover officer logs do raise questions as to the nature of MK's relationship with the

> Claimant; that a reasonably competent and trained cover officer could have been expected to have formed reasonable doubts about the nature of MK's relationship with the Claimant; that overall the cover officer ought to have been considerably more 'intrusive' in his oversight of MK than he was; and that in the light of the information available to him, it might reasonably be expected that appropriate enquiries would have been made by the principal cover officer and steps taken to cause an investigation."

162. SSH continues that there is no evidence that any investigation was ever undertaken. If an investigation had been carried out, it is likely, he says, that the true nature of the relationship would have been discovered and that appropriate steps would have been undertaken to have him removed from operational duties as soon as possible.

163. Although we ruled earlier that the Respondents could not rely on SSH's comments or inferences from the documentation, in this instance even he accepts that the cover logs raised questions about MK's relationship with the Claimant that should have led to further inquiries. This falls within the exception we identified in para 45 above.

(x) The officers' evidence

164. The SOCA review concluded that there was no evidence that any sexual relationship was identified by the cover officer or the NPOIU, nor that this was ever considered or authorised as a tactic as part of the infiltration (para 10.3.34).

165. MK gave evidence to the House of Commons Home Affairs Select Committee in February 2013. We are unable, because of art 9 of the Bill of Rights, to admit this in evidence for the purpose required by Mr Perry for the reasons set out in Annex 5. We were also referred to an interview MK had with the *Mail on*

Sunday. It is plain from the history of this matter that MK is a highly unreliable narrator, and in the absence of his giving evidence and being subject to cross-examination, we do not consider we can put any weight on statements and comments he has made.

166. EN-31 was MK's principal cover officer during the whole of his deployment. He gave a statement to the Operation Herne Inquiry in which he said:

> "I had no indication from either his [MK's] behaviour or things that he said that he had been sleeping with members of the target group. He did not give me any cause for concern during the deployment with regards to this issue."

167. A letter from EN-31's solicitors addressed to the Respondents' solicitor dated 14 December 2018 states:

> "Our client wishes to make clear that he/she categorically denies that he/she had any knowledge of MK's sexual relationship with the Claimant or any other female who was a target of his/her deployment."

168. O-24 was the deployment manager during the period of MK's intimate sexual relationship with the Claimant. In a letter to the Respondents' solicitor, he said:

> "The nature and extent of the relationship, and the fact that it was a sexual relationship, was unknown to me."

(xi) Flow of intelligence within NPOIU

169. The cover logs were maintained by the cover officer who throughout the period of MK's deployment was EN-31. EN-31 explained in his interview with SOCA

that he compiled the log on his laptop as that allowed him to search names and places during the operation. The use of the laptop may not have been the usual method of recording logs; in training a notebook was used. The Respondents argue that this suggests that the cover logs were not further disseminated as senior officers may not have known of EN-31's method of recording the logs. This is entirely speculative in the absence of evidence. It is equally possible that the electronic recording of the logs made it easier to disseminate further. MK would sometimes use the logs to complete his own UCO report book entries when debriefed.

170. For the majority of the period of MK's deployment when he was in the relationship with the Claimant, the SIO (otherwise known as the deployment manager) was O-24. At some point in 2004 he took a decision, known as Decision 13, to the following effect:

> "On a weekly basis the cover officer in liaison with the operative will complete a daily deployment log which will be despatched to NPOIU via secure email to deployment manager or deputy on the following Monday morning."

171. The precise date of this decision is not clear, but it appears in a Decision Log Book started on 12 February 2004, and it appears before a document with a date of July 2004. The Claimant submits that this decision shows that, at the very least, O-24 saw the cover officer logs and therefore must have been aware of the close personal relationship between MK and the Claimant. She points to the use of the word "source" in the logs suggesting that it was expected that the logs would be read by others. She also points out that the entries contain references "Note for DCI", i.e. O-24, again suggesting that they were to be read by O-24.

172. The Respondents observe that the daily deployment log is not necessarily the same as the cover officer logs and they were in any event to be produced in liaison with the operative (MK). There was no obvious reason why O-24 should want to see the whole cover officer logs as they contained a large number of references which were operationally irrelevant and did not require any decision from the SIO. Even if the daily deployment log is the same as the cover officer logs, the Respondents maintain that it is not clear that Decision 13 was fully implemented. They point out that, in his SOCA interview, EN-31 said that he regarded the cover officer logs as "his notes", compiled by him to provide him with the ability to answer questions. EN-31 also told SOCA that he sent the "debrief" to the SIO with a colour-coding to draw particular matters to the SIO's attention. O-24's position in correspondence was that he cannot recall whether he had ever seen the log. The Respondents suggest that even if all the logs were sent to O-24, it is not clear that he would have read them all, especially since the entries which would require his attention would be colour-coded in red.

173. We note that the Respondents are asking us to draw inferences about how intelligence was handled, and which officers saw which documents, in circumstances where the knowledge of this matter lies entirely within the knowledge and control of the Respondents. The degree to which knowledge of these matters is simply lost by the passage of time is impossible to know in circumstances where the Respondents have chosen not to call more senior officers who could give direct evidence of the working of the NPOIU.

174. The NPOIU compiled a Policy Flow for Intelligence which explained the handling of intelligence within the Unit. The policy evolved over time but, in

substance, intelligence reports were compiled by the cover officer on the basis of reports from the UCO. These were then submitted to a confidential unit in the NPOIU which sanitised them to ensure that the source of the information could not be exposed. The confidential unit would not be provided with the real or cover identity of the source of the intelligence to prevent exposure of the UCO. Instead, they used a code name for the source. The confidential unit then forwarded the intelligence report in its sanitised form to the relevant intelligence desk for analysis. A flow chart shows a firewall between the cover officer and the confidential unit and between the confidential unit and the intelligence desk.

175. Nevertheless, an email from O-137 to O-27 dated 11 May 2007 describes the flow charts as "somewhat dishonest". The email continues:

> "By this I mean that they (the flow charts) do not show us as having any interaction with the covert side of the house, yet we clearly do. This is in the form of briefings by them to us and taskings by us to them, especially post event with tactics and photos."

176. He also notes that when they move into operations the flow is somewhat different.

(xii) Training of undercover officers

177. Like many other aspects of this case, the full details of the relevant training for undercover officers have proved elusive and we have had to piece the contents together as best we can from a number of fragments.

178. The training given to UCOs is important to this case because it is an aspect of the positive obligations resting on the Respondents with respect to both Arts 3 and 8.

179. The Respondents have withdrawn an earlier admission that the training was inadequate to discharge the positive obligation under Art 3. They now say that the training, consisting of an oral prohibition on entering into sexual relationships and the training course, was sufficient.

180. MK attended and passed the National Undercover Training and Assessment Centre course in 2003 prior to his deployment. We would have expected full written materials of that course, even though 18 years ago, to have been retained and made available, but they apparently no longer exist.

181. EN-980, who was the course director when MK took the course, has confirmed that trainees were informed that they remained bound by the Police (Conduct) Regulations. The Code of Conduct scheduled to those Regulations called, inter alia, for honesty and integrity by all police officers and proscribed abuse of authority and any behaviour likely to bring discredit on the police service. We do not doubt that these standards would apply, and be understood by all police officers to apply, to normal policing duties, but an undercover operation is premised on lies and deception, its purpose is to collect intelligence and evidence, and the undercover officer must maintain his credibility and avoid any risk of having his cover blown. In these circumstances, we find the Code and the reminder that it continued to apply of very limited relevance to the question of the adequacy of the training on the specific subject of sexual relations with those under surveillance.

182. EN-980 has also said that the training course, in a formal lecture and a series of role play exercises, "covering the issue of avoiding sexual relationships". By "avoid" it seems likely is meant fending off unwanted advances. It is said to have been a "major subject" and "constant theme". Thus, it is said that it was brought home to the trainees that sexual relationships were forbidden, and they were taught how to avoid them.

183. MK's principal cover officer has also said that UCOs were informed in their training that there was a total prohibition on sex and drugs.

184. The Respondents also wanted to introduce MK's evidence to the Home Affairs Select Committee, but that evidence has had to be excluded for the reasons given in Annex 5.

185. (a) The Respondents argue that it was so obvious that sexual relationships were taboo that it was unnecessary to state it explicitly in writing. They point out that MK signed the National Code of Conduct for Undercover Officers on 9 December 2002. The following provisions are relevant:

> "1 An officer employed in an undercover (UC) role remains bound by the laws, rules and regulations governing the conduct of law enforcement agencies in general.
>
> 2 An officer employed in a UC role remains bound by their respective discipline codes. Whilst no general exemptions are granted to UC officers, it is recognised that behaviour in role (emphasis in Code) will of necessity reflect the requirements of an operation: even then, conduct must be consistent with the spirit of the regulations and the fundamental aims of their respective organisations.
>
> …

12 A UC officer must not embark on a course of action which unnecessarily risks their physical or mental wellbeing.

13 An Undercover officer must inform the head of the undercover unit to which he/she is attached of any factors which may affect his/her credibility as a witness. This will include details of any ongoing disciplinary enquiries."

All UCOs are required to sign a certificate that they have read and understood the National Code of Conduct, declare that they will be bound by the Code, and acknowledge that any breach may result in their removal from the National Index of Undercover Officers.

(b) As Mr Perry submits, "the absence of written guidance 'explicitly' prohibiting such relationships . . . is not . . . an omission (or failure to take measures) of such gravity as to give rise to a breach of the positive obligation under Art 3". That may be so, but the question for us is whether the training, taken as a whole, was adequate to meet the Respondents' positive obligation. We are nevertheless pleased to note that experience has now led the College of Policing to issue such written guidance. Mr Perry also points out that every UCO would be aware that a sexual relationship would very likely compromise his ability to give evidence in court should that be necessary and would therefore realise that it was forbidden conduct. We deal with this point at para 205 below.

186. The Claimant points out that EN-980 has not been called as a witness and their evidence has not therefore been subject to cross-examination.

187. Similarly, EN-31, the principal cover officer, who has referred to the "integrity talk" during the course in which it was made clear that sexual relationships with members of the public were not permitted, has also not been called as a witness.

188. We have been referred by the Respondents to a document entitled *Tradecraft Manual* written in 1995 by a relatively low-ranking officer and issued within the Special Demonstration Squad. Its precise status is obscure, but it is plainly a serious attempt to capture best practice and give sound advice to UCOs within the SDS. The opening words of its Introduction state:

> "1.1 This manual of tradecraft for the Special Demonstration Squad is designed both for new members of the squad and also as a guide to best practice for members of the squad during their posting. The guide gives an insight into the differing techniques used to set up and live a false identity and ploys used to deal with situations which may arise. Current and former field operatives have identified areas of difficulty and some suggestions have been made as to effective solutions. However, the nature of the work is so varied that, while it is important to highlight those practices which should be avoided at all costs, it is not possible to give comprehensive instructions on every problem. . . . it must be remembered that each officer is a separate individual whose own character determines his or her proper approach to a specific issue."

189. Section 5.6 of the Manual is headed "Sexual Liaisons" and the whole of the slightly redacted section reads as follows:

> "5.6.1 The thorny issue of romantic entanglements during a tour is the cause of much soul-searching and concern. In the past emotional ties to the opposition have happened and caused all sorts of difficulties, including divorce, deception and disciplinary charges. While it is not my place to moralise, one should try to avoid the opposite sex for as long as possible.
>
> 5.6.2 The 'free love' attitudes of the sixties and seventies have largely disappeared in the minds of the extremists following herpes, hepatitis and AIDS. However, if you are doing your job properly men and women in the field will experience occasional approaches from males and females, straight and gay. Avoiding the straight/gay problem is relatively simple but one should never use the excuse of homosexuality to avoid a heterosexual partner.

> Not only will your behaviour be wholly inconsistent but you may well find the closet and out homosexuals making a beeline for you. In a similar vein, don't use the excuse of being HIV positive as a reason for avoiding sexual contact. You simply cannot maintain the attitudes of a person with HIV unless you know someone with the condition and you may still face propositioning from wearies [sic] who are genuinely afflicted.
>
> 5.6.3 While you may try to avoid any sexual encounter there may come a time when your lack of interest may become suspicious. [The text that follows, providing advice on how to deflect suspicion, has been redacted.] [These] options are fraught with difficulty and you must make your own mind up about how to proceed. If you have no other option but to become involved with a weary, you should try to have fleeting, disastrous relationships with individuals who are not important to your sources of information. One cannot be involved with a weary in a relationship for any period of time without risking serious consequences."

190. We derive little assistance from this Manual. Its status is uncertain, but we accept that it has an authentic quality in representing the thinking and practice of the SDS at the time it was written. But MK was not attached to the SDS, which was separate from the NPOIU, although there was some overlap (as noted in para 51 above). We cannot be sure whether the NPOIU made use of the Manual, whether the understanding and practice within the NPOIU was similar, whether it was used during MK's training or whether MK had ever come across it.

191. As to its content, we observe that it clearly deprecates sexual relationships with targets, and warns against them, but there is no absolute prohibition. "Fleeting, disastrous relationships" may be necessary, and ultimately discretion must lie with the UCO. Its emphasis is on deflecting romantic or sexual overtures rather than confronting the issue of the UCO who sees the deployment as an

opportunity to seek out sexual relationships, whether in order to advance the operation or purely for the purposes of personal gratification. It offers, at best, only limited support to the Respondents' case.

192. The fact that MK almost from the beginning of the deployment entered into a series of sexual relationships does not in itself demonstrate the inadequacy of the training, though the fact that many other UCOs did the same thing certainly prompts the question.

193. Our conclusions on training are as follows. There was a formal prohibition on forming sexual relationships which was communicated to trainee UCOs, including MK, orally but not in writing. The emphasis in training was on deflecting unwanted sexual advances. It did not take seriously enough, if at all, the possibility that the advances might be made by the UCO. As a result, male UCOs, though aware of the formal prohibition, appear to have regarded it as a minor matter and one which they did not have to take too seriously. Given the serious consequences of disobeying this prohibition – including the possibility of violating Art 3 of the ECHR – we have no hesitation in saying that the training provided was grossly inadequate and failed to meet the Respondents' positive obligations under Arts 3 and 8.

(xiii) The Respondents' submissions on the factual issues (Issues One and Two)

194. We summarise here, with appropriate comment, the bulk of the 21 submissions on the factual issues in Mr Perry's skeleton argument. Mr Perry relies on the fact that the SOCA report concluded that there was no evidence that any sexual

relationship was identified by the cover officer or the NPOIU, and that it was never considered or authorised as a tactic.

195. He relies on the fact that MK did not expressly notify senior officers of the sexual relationship with the Claimant. Mr Perry argues that the fact that MK would have been removed from the deployment if the relationship had been known about provided an incentive for him to keep it secret from senior officers. However, we note that there is no evidence that any UCO was removed from a deployment because of such a relationship. This fact makes the weight to be given to any such incentive very difficult to determine.

196. Mr Perry refers to the fact that MK did, by contrast, report two occasions when he was the subject of a sexual advance from an activist. However, this appears to have been because the woman in question was the girlfriend of one of the subjects of interest, a man with a history of violence. There may therefore have been particular reasons why this particular sexual advance was a matter of report and interest. Mr Perry argues that EN-31 could reasonably rely on this incident to reassure him that MK would report sexual advances. We find it impossible to draw this conclusion without evidence from EN-31 as to the background to this particular incident.

197. Reference is made to the fact that engaging in a sexual relationship whilst deployed would be a breach of professional conduct by MK which he well knew. Mr Perry says that MK was well aware that such conduct was not tolerated. Moreover, such conduct would have been contrary to MK's authorisation and management instructions.

198. These arguments, however, are materially undermined by the sheer frequency with which MK (and other UCOs) did conduct sexual relationships without either questions being asked or action being taken by senior officers. As we explain in more detail below, we are driven to the conclusion that either senior officers were quite extraordinarily naïve, totally unquestioning, or chose to turn a blind eye to conduct which was, certainly in the case of MK, useful to the operation.

199. The contemporaneous documentation does not suggest that the conduct of sexual relationships was regarded as acceptable. We agree.

200. The environment in which MK was operating included male and female activists and it was inevitable that he would associate with activists of both genders. Of course, this is correct, but does not deal with the appreciation of the risk that MK would engage in sexual relationships with women. Related to this is Mr Perry's point that MK associated with women with whom he did not have sexual relationships. There was, says Mr Perry, operational benefit in MK's gaining the trust of the Claimant and so senior officers would not have read into his reports that the relationship had become an intimate sexual one. It is difficult to see how this is a point in the Respondents' favour. The fact that the Claimant was so useful to the operation may well have given considerable incentive to senior officers not to ask difficult questions. In any case, the evidence is strongly suggestive of an intimate relationship.

201. MK was a trusted officer and, as such, trusted to tell the truth. However, Mr Perry also relies on the fact that MK was not always honest with EN-31.

Ultimately, these points come down to the degree of oversight, and the likelihood of the risk, points to which we return below.

202. Mr Perry points to the fact that MK regarded the sexual relationships he conducted as being by a different persona, that of Mark Stone, his UCO alias, and thus involved no deception and was conducted outside his job. Since Stone was his UCO alias and the relationship came about only because of his deployment, it is difficult to make any sense of this or accord it any relevance.

203. Mr Perry refers to the fact that none of the other UCOs deployed in the activist arena raised concerns about MK's conduct. In our view, this point is one that weighs against the Respondents' case. The Claimant, and other female activists who have given evidence, all say that MK and the Claimant acted in public at all times as a couple. This evidence was not challenged. The fact that none of the other UCOs raised any concerns about MK's conduct (with the Claimant but also the other women, in particular "Lisa") implies that such conduct was tolerated. It seems close to inconceivable that the Claimant and MK were acting as a couple, that the activists saw them as such, but the other UCOs such as Lynn Watson and Marco Jacobs did not notice. There is nothing about MK's conduct over a period of around seven years which would suggest that he sought to hide his sexuality, or his desire for sexual relationships.

204. O-20 and EN-31 suggested that such conduct would not have been tolerated and senior officers have denied knowing about MK's sexual relationships. As we have explained above, it is not possible to put material weight on this evidence given that no officer has given evidence to the Tribunal and the

inferences from the documents which we draw below. We return to the individual officers' evidence below.

205. Mr Perry argued strongly in oral submissions that the conduct of a sexual relationship whilst deployed would have undermined the integrity of the operation and prevented reliance on MK as a witness in criminal proceedings. There are two difficulties with this argument. First, MK's deployment was not intended as being for the gathering of evidence for prosecutions. Rather, as is clear from the authorisations, its purpose was intelligence-gathering. Secondly, when MK did become involved in a criminal prosecution at Ratcliffe-on-Soar in 2009, it was clear that the NPOIU choice was to end the prosecutions rather than lose MK as a UCO.

206. Finally, Mr Perry urged the Tribunal to approach circumstantial factors with caution, and to place little weight on MK's relationships with other women, who according to SSH feature less in the cover logs than does the Claimant.

207. In relation to the issue of whether or not the use of sexual relationships was a tactic employed by the Respondents, whether expressly or tacitly, Mr Perry points to the SOCA report at para 10.3.34 where they say there was no evidence to support such a conclusion. We accept that submission.

(xiv) Conclusions on the factual issues (Issues 1 and 2)

208. We deal with the factual issues together because they are so closely inter-linked. We first observe that the evidence on the factual position is unsatisfactory. As we observed above, there is no reason that we can see why we were not provided with a statement from a witness with direct knowledge of these matters.

209. So far as whether O-24 knew of the nature of the relationship between MK and the Claimant, the question of whether he saw the cover officer logs is only one part of the picture. Looking at the totality of the evidence, we have come to the conclusion that O-24 knew or turned a blind eye (*i.e.* constructive knowledge) to the fact that the relationship with the Claimant was a sexual one.

210. O-24 was the SIO responsible for the health and safety of MK as a UCO and the operation as a whole. It seems highly likely that he will have had a week-by-week knowledge of the operation and will at least on occasion have seen the cover logs. Some of the specific matters he was involved with include approving the purchase of the bike in Dublin; allowing MK and the Claimant to remain in Ireland; necessarily knowing that MK and the Claimant were living in the same house; the extensive arrangements for reintroducing MK following the trip to Thailand; the events at Christmas 2004; and the contact between MK and the Claimant's family.

211. We note that a number of officers were involved in planning the trip to Dublin and both O-71 and O-74 met MK whilst in Dublin.

212. It seems to us inconceivable that an officer with this knowledge would not at the very least have become suspicious of whether MK was having a sexual relationship with the Claimant. If O-24 had been genuinely concerned about this possibility, he would have investigated further, and the truth would have quickly emerged. In our view, the logical conclusion is that he either knew or did not want to know.

213. Mr Perry argues that O-24 and more senior officers were entitled to rely on MK's having signed the Code of Conduct and having undergone training which

said UCOs should not have sexual relationships. We have no evidence that O-24 or senior officers did in fact think they could rely on the Code. In any event, we note that there is no evidence that any officer was ever subject to any disciplinary action for having a sexual relationship when acting as a UCO. The Code can only be relied upon if there is evidence that compliance was monitored and, where appropriate, enforced. There is no such evidence here.

214. Mr Perry also submits that MK was himself not reliable and did on occasion mislead his cover officer. However, there is no evidence that he actively sought to mislead EN-31, or any other officer, about his relationship with the Claimant. Nothing suggests that MK was trying to actively hide the relationship, so the fact that he was not always honest with more senior officers does not assist the Respondents' case.

215. In reaching this conclusion we have taken into account O-24's reported denial that he knew of the sexual nature of the relationship and Mr Perry's submission that, simply because MK and the Claimant were good friends, it does not follow that the relationship must have been sexual. Naturally we accept that a close friendship is not necessarily sexual. However, there were more than enough indicators in this relationship to raise very obvious questions as to whether it was sexual. Two particular examples were the involvement of MK with the Claimant's family and the arrangements around the trip to Thailand. These events are far more consistent with a close, long-term, sexual relationship than of two people who were simply friends. We also accept Ms Kilroy's point that the sheer density of reference to the Claimant in the logs would have alerted any

reader (including one who only saw the logs on a weekly or monthly basis) to the possibility that she and MK were having a sexual relationship.

216. So far as other senior officers are concerned, we cannot be sure about what they knew or suspected in relation to MK's having a sexual relationship with the Claimant, or with any of the other women concerned. However, first, as we have already set out, the Respondents chose not to call evidence from any of these more senior officers to explain either what they personally knew, or the flow of information within the NPOIU in a more general manner. Secondly, we have had close regard to the evidence of the dissemination of information within the NPOIU, which strongly suggests that more senior officers were sufficiently "in the loop" to have had reason to believe MK and the Claimant were in a sexual relationship. Thirdly, we have regard to the training in respect of sexual relationships, which appeared to ignore the possibility that male UCOs might have sought sexual relationships within the community they were infiltrating. Fourthly, it is in our view important that MK stayed in his undercover role for six years and throughout that period his cover officer remained the same in what seems to have been a breach of established practice. This indicates a failure to ensure proper oversight by senior officers and in our view a lack of concern about what MK was doing. Fifthly, MK was plainly considered to be a very valuable officer providing extremely useful information (see the SOCA report, para 10.2.14). There was therefore a considerable incentive on senior officers not to ask awkward questions.

217. Sixthly, there is also the evidence from MK's relationship with "Lisa". That went on for six years, yet the Respondents claim they were equally unaware that

that was a sexual relationship. According to "Lisa", and this is unchallenged, that relationship was also a public one which was known about in the community.

218. Seventhly, there is the evidence of other UCOs conducting sexual relationships, although the Respondents claim that senior officers were not aware of these either.

219. There is no direct evidence that any other officer actually knew of the sexual relationship between MK and the Claimant. Accordingly, the issue for us is what proper inferences can be drawn from the material before us. In considering this matter we have regard not only to the evidence in OPEN but also to that narrated in our CLOSED judgment. We are satisfied on the basis of this evidence that MK's cover officer, EN-31, must have known of the existence of the relationship. We are also satisfied that the SIO, O-24, would also have been aware of the existence of the sexual relationship. The Claimant says that other senior officers must also have been aware of the nature of the relationship. We take the phrase "senior officers" to mean those of similar rank to the SIO (Detective Chief Inspector) and above who had operational and managerial responsibility within the NPOIU for MK's deployment. We find the imputation of knowledge to this group more difficult given the fact that they would necessarily have less day-to-day contact with MK, and sight of the cover logs and other material would have been more occasional. It may also be that some knew and some did not; there is then the difficulty for us in identifying who within that cohort may have had knowledge of the relationship.

220. It is not possible for us to conclude with any degree of certainty that other senior officers responsible for MK's deployment knew of the relationship. It is certainly possible to draw the inference that senior officers did know or chose not to know. There are significant indications that senior officers should, at the very least, have been alerted to the possibility that MK was involved in a close personal relationship with a target. The Respondents chose not to call evidence on the operation of the NPOIU or the dissemination of information within it.

221. We deal the Art 3 breach in further detail below but so far as the responsibility of senior officers is concerned we draw the following conclusions. First, senior officers failed in their duty to provide adequate and sufficient training which addressed the risks that MK would face given the nature of the operation to which he was assigned. This was inadequate for an intelligence operation designed to last for a significant period in which it was expected that MK "would establish and maintain personal relationships" with persons in the Sumac Centre.

222. We consider that the risk of putting MK into a group of young adults of both sexes, for a long period, created an obvious risk of sexual relationships forming.

223. Secondly, senior officers failed to take steps to mitigate the risk by providing any false romantic attachment or other legend that might have obviated the risk of such relationships forming.

224. Thirdly, they failed to put in place and maintain sufficient oversight.

225. Fourthly, senior officers either knew of the relationship, chose not to know of its existence, or were incompetent and negligent in not following up on the clear

and obvious signs that MK had formed a close personal relationship with the Claimant which might be sexual in nature.

226. There is, however, no evidence to support a finding that UCOs having sexual relationships was a deliberate tactic of the NPOIU. There is no documentary evidence which suggests or hints that this might be the case, and it would therefore be wrong to make an inference in that regard. In our view, the true position is closer to being one of "Don't ask don't tell".

E. THE ALLEGED BREACH OF POSITIVE OBLIGATIONS UNDER ARTS 3 AND 8 (ISSUES 4 AND 6)

227. The Respondents have conceded breaches of Art 3 to the extent set out at para 14 above and in Annex 2A. However, the Claimant argues that the Respondents breached their positive obligations under Arts 3 and 8 by failing to take adequate steps to obviate the risk of breach by UCOs, including MK, engaging in sexual relationships whilst acting undercover. In respect of the positive obligation under Art 3, the Respondents concede that there was a clear failure by MK's cover officer to provide adequate supervision, but they do not concede any wider failure. In respect of Art 8 they concede that the monitoring and supervision by more senior officers of the risks of excessive interference was inadequate and they failed to obviate the risk of excessive intrusion, but again concede no wider breach.

228. The obligation on States to take operational measures to protect victims, or potential victims, of breaches of the Convention was considered in *Rantsev v Cyprus* (2010) 51 EHRR 1. Although *Rantsev* concerns Art 4 (slavery), it is clear that what is said below applies equally to Art 3 cases:

> "286. As with Arts 2 and 3 of the Convention, Art 4 may, in certain circumstances, require a state to take operational measures to protect victims, or potential victims, of trafficking. In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the state authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Art 3(a) of the Palermo Protocol and Art 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Art 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.
>
> 287. Bearing in mind the difficulties involved in policing modern societies and the operational choices which must be made in terms of priorities and resources, the obligation to take operational measures must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. It is relevant to the consideration of the proportionality of any positive obligation arising in the present case that the Palermo Protocol, signed by both Cyprus and the Russian Federation in 2000, requires states to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking. States are also required to provide relevant training for law enforcement and immigration officials."

229. The need for careful planning and control of police operations which may lead to an interference with a Convention right, in that case Art 2 (right to life), was considered in *Makaratzis v Greece* (2005) 41 EHRR 49:

> "59. . . . in keeping with the importance of Art 2 in a democratic society, the Court must subject allegations of breach of this provision to the most careful scrutiny, taking into consideration not only the actions of the agents of the state who actually administered the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination. In the latter connection, police officers should

> not be left in a vacuum when exercising their duties, whether in the context of a prepared operation or a spontaneous pursuit of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect.
>
> 60. Against this background, the Court must examine in the present case not only whether the use of potentially lethal force against the applicant was legitimate but also whether the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk to his life."

230. It follows from the case-law that the State has a positive obligation to protect potential victims from breaches of Art 3. An important factor in determining whether such a positive obligation is breached is the degree to which the authority is, or ought to be, aware of the risk of such ill-treatment. It hardly needs repeating that Convention rights are intended to be practical and effective and not theoretical and illusory.

231. The Respondents do not contest the legal principles set out above. The contest lies on the facts rather than the legal approach.

232. We have set out above at para 209 *et seq* our conclusions on the state of knowledge by officers within the NPOIU of MK's sexual relationship with the Claimant. In terms of breach of the positive obligations, the fact that there is uncontested evidence that multiple UCOs were having such relationships and no evidence that any disciplinary action was ever taken is strong evidence of the failure to put in place sufficient safeguards and protections. It is also notable that nowhere in the logs is there any evidence of officers asking questions about any sexual relationships of MK. Given that he was undercover for six years, the

very lack of curiosity or investigations indicates either a complete failure of imagination, or more probably a lack of interest in protecting women from breaches of Arts 3 and 8.

233. It is also important that MK was not provided with any false romantic attachment throughout any part of those six years. There is simply no evidence of the Respondents thinking about, planning, or taking any steps to mitigate the obvious risk of MK's entering into sexual relationships with activists.

234. In terms of supervision, the Respondents have accepted that EN-31 failed properly to supervise MK, leading to a breach of Art 3. However, in our view the evidence points clearly to more senior officers also failing to supervise. The fact that EN-31 remained the cover officer for so long, as well as our findings on knowledge, lead to a conclusion that there was a breach of the positive obligation to protect those subject to surveillance (whether as direct subjects or indirectly) from interference in their Art 3 rights.

235. The same points also go to breach of the positive obligation under Art 8. However, there is also the additional matter that there was a failure to protect against collateral intrusion. This is particularly highlighted by the HMIC report. The scope of the authorisations was extremely broad with many people who were not themselves named subjects being caught up in the information gathered and then disseminated by MK and the NPOIU. However, almost no thought was given, and no structures were put in place, to limiting this intrusion into people's Art 8 rights to a proportionate extent. MK went to private events of the Claimant's family and sent back information about their connections, as well as those events. To some extent that may be an inevitable facet of any

undercover operation. However, the vice here is that it went on for so long, was in the context of an intimate relationship, and appears to have been subject to virtually no boundaries set by the NPOIU, its senior officers and ultimately the Respondent public authorities. It must also be remembered that the reason the Claimant was caught up in this surveillance and the consequential breaches of Arts 3 and 8 was because she was exercising her human rights under Arts 10 and 11 – to express herself freely and to protest. The failure of the Respondents to meet their positive obligations is made more egregious by this wider context.

F. WHETHER THE RIPA REGIME WAS IN ACCORDANCE WITH THE LAW (ISSUE 5)

236. The Claimant's first and most fundamental argument regarding Art 8 is that the legal provisions under which the undercover police operation involving interference with her private life took place cannot be justified under Art 8(2) and accordingly her Art 8 right has been infringed (Issue 5).

237. This is because the legal provisions governing the use of covert human intelligence sources (the CHIS regime) failed to meet the requirements of Art 8(2) and accordingly *any* use of the powers it confers cannot be justified under Art 8(2). The result of that argument, if it is correct, would be that any action taken pursuant to that regime would, if it interfered with a person's right to private life, inescapably amount to a violation of Art 8(1). This fundamental challenge by the Claimant if successful would automatically entitle her to a declaration of a breach of her rights under Art 8(1) simply by virtue of the use of an undercover officer. It would be an interference with her Art 8 right with the Respondents being unable to justify it under Art 8(2).

238. The legal proposition is simply put and uncontroversial: no interference by a public authority with the right under Art 8(1) of the ECHR to respect for private and family life is permissible unless it complies with Art 8(2). This provides that any interference must be "in accordance with the law" and "necessary in a democratic society" in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

239. There are several reasons which might justify the Tribunal in declining to consider this issue. First, in view of the Respondents' concessions that the Claimant's Art 8 rights have been breached, no purpose is served by a further finding of breach by virtue of the fact that the CHIS regime fell foul of Art 8(2). Secondly, the CHIS regime in force at the time has since been amended, so any finding that the regime was not ECHR-compliant would be purely academic. Thirdly, this is an issue better left to the Undercover Policing Inquiry (UCPI).

240. However, the Tribunal is of the view that its special role and public duty in relation to the covert powers granted to public authorities by RIPA and the intrinsic importance of the Claimant's challenge argue strongly in favour of our considering the point. Moreover, a judicial determination on the point, even though the regime has been amended, may still be of assistance to the UCPI in its deliberations and in formulating its recommendations. We also note the Claimant's argument that it was the shortcomings in the regime that gave rise to the various breaches of her human rights that have inspired this litigation.

241. Ms Kilroy says that the CHIS provisions do not meet the standards demanded by the expression "in accordance with the law", a term which has been the subject of much Strasbourg jurisprudence. It is common ground that it is not enough merely for the power to be rooted in law; that law must attain the required quality. It is also common ground that in evaluating the regime, "the law" for this purpose comprises all relevant components: primary legislation, secondary legislation, statutory guidance and case-law. The Respondents say that in this context this includes the Police Conduct Regulations since they govern the behaviour of police officers in all circumstances.

242. There is no disagreement between the parties on the meaning of "in accordance with the law" as delineated in the case-law. The disagreement arises in applying the relevant principles to the CHIS regime. The jurisprudence requires the scheme or regime to have a basis in domestic law, to be compatible with the rule of law, and to be accessible, and those potentially affected by it must be able to foresee its consequences (though the concept of foresight in this context is rather technical or notional).

243. These principles and observations are derived from the Strasbourg case-law (and helpfully drawn together in the recent Court of Appeal decision concerning facial recognition technology: *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058): *Silver v UK* (1983) 5 EHRR 347, paras 86-88; *Huvig v France* (1990) 12 EHRR 528, paras 26 and 54-55; *RE v UK* (2016) 63 EHRR 2, para 120; *Weber & Saravia v Germany* (2008) 46 EHRR SE5, para 93; *Malone v UK* (1985) 7 EHRR 14, para 67; *Gillan & Quinton v UK* (2010)

50 EHRR 45, para 77; and *Telegraaf Media Nederland Landelijke Media BV v The Netherlands*, ECtHR, Judgment of 22 November 2012, para. 90.

244. More specifically, Ms Kilroy submits (and again these propositions are not disputed) that there must be a measure of legal protection against arbitrary interferences by public authorities, and public rules must indicate with sufficient clarity the scope of any discretion and the manner of its exercise.

245. Ms Kilroy points out that, as with the interception of communications, the law "must be sufficiently clear . . . to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence" (*Malone* at paras 67-68; *Leander v Sweden* (1987) 9 EHRR 433, para 51; and *Valenzuela v Spain* (1999) 28 EHRR 483, para 46(ii)-(iv)).

246. She argues that the statutory scheme must set out the nature of the offences which may give rise to an interception order; the definition of categories of persons liable to interception; a limit on the duration of the interception; the procedure for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed (*Weber* at para 95; *Valenzuela* at para 46). We note at this point that these principles govern the interception of communications and may not be apt in all or some respects in relation to undercover police operations.

247. Ms Kilroy points to the principle enunciated in the *Telegraaf* case (para 90) that in a surveillance context, where the power is exercised in secret and thus not

open to scrutiny by those affected or the public at large, it is contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope and manner of the exercise of any such discretion with sufficient clarity.

248. Ms Kilroy submits that the CHIS scheme lacked the rigour, clarity and safeguards that these propositions call for and thus failed to meet the requirements of Art 8(2). She contrasts the CHIS provisions with those for other RIPA arrangements for covert intrusion which are compliant with Art 8(2) and argues that the less rigorous CHIS regime renders it vulnerable to challenge. The use of covert human sources comes at the bottom of the hierarchy of RIPA powers whereas the truth is that undercover police operations (even absent the egregious excesses involved in this case) constitute an invasion of privacy at least as grave as that involved in other RIPA-authorised interferences such as telephone-tapping or the placing of a listening device in a car. Yet the safeguards are considerably less rigorous, as observed by HMIC (see para 263 below).

249. Ms Kilroy, citing the Court of Appeal in *AKJ v Commissioner of Police of the Metropolis* [2013] EWCA Civ 1342, para 32, points to the relatively low level of official who can authorise the intrusion; the one-year duration of an authorisation; the wide range of bodies able to use this power; the much wider grounds for authorising the action than under other RIPA interventions, including non-serious crime and public health; and the absence of any requirement to consider whether the information could reasonably be obtained by other means.

250. Ms Kilroy advances the following arguments based on the above considerations:

- The relevant RIPA provisions do not indicate with sufficient clarity the scope of the power conferred and the circumstances in, and conditions on, which it will be used. They fail to protect against arbitrary interference and are not sufficiently foreseeable.
- The legislation fails to distinguish between a brief acquaintanceship and a lengthy intimate relationship and fails to make any explicit provision for a CHIS to engage in a sexual relationship. The wide range would permit a most intrusive surveillance for the most trivial of purposes.
- The RIPA provisions provide inadequate safeguards and have no limit on the number of times an authorisation may be renewed.
- The statutory Code of Practice does not make good the deficiencies in the legislative provisions.
- It is relevant that it has been thought necessary to make changes to the CHIS arrangements, arguably to secure compliance with Art 8(2).

251. Mr Perry resists these arguments. He submits that the minimum standards expected of the domestic law in respect of secret surveillance measures comprised the nature, scope and duration of the measures, the grounds for ordering them, the authorities empowered to permit and supervise them, and the remedies available (*Shimovolos v Russia* (2014) 58 EHRR 26, para 68). Stricter standards came into play where there was a high degree of intrusion, including consideration of the nature of the offences, definition of the people liable to be subject to the intrusion, a time limit and procedures for examining, using and storing the data obtained (*Valenzuela*, para 52; *Weber*, para 95).

252. Mr Perry relies on *Kennedy v UK* (2011) 52 EHRR 4 in support of the proposition that it is unnecessary to set out exhaustively the specific offences which may give rise to surveillance (para 159) as well as what is required in regard to specifying the categories of person who might be subject to the interference (para 160). *Kennedy* also dealt with duration and renewal (para 161).

253. In our judgment, although we acknowledge the cogency of some of Ms Kilroy's criticisms, we conclude that the CHIS regime was "in accordance with the law" as required by Art 8(2). Neither the sexual relationships entered into by Mark Kennedy nor the other features of this operation that give rise to its illegality require or lead us to infer that these were primarily attributable to deficiencies in the regime at the time so as to render it not "in accordance with the law". Nor does non-compliance follow from the fact that other RIPA powers have more stringent safeguards. Our analysis of the statutory and related provisions lead us to the conclusion that they were compliant with Art 8(2).

254. Until RIPA 2000 there was no legal regime governing the use of covert human intelligence sources or the other surveillance powers defined in the Act. The deployment of undercover officers was governed by a Home Office circular. The enactment of the HRA, importing the ECHR into domestic law, necessitated legislation so that all the various covert investigatory powers satisfied the requirements of Art 8(2). Of course, the mere fact that RIPA was passed for this purpose does not mean that it necessarily succeeded since the courts do not give deference to the decision-maker's view as to whether a

provision is in accordance with the law *(R (T) v Chief Constable of Greater Manchester* [2014] UKSC 35, [2015] AC 49, para 115, per Lord Reed).

255. The full text of the relevant RIPA provisions discussed here is set out in Annex 4. Section 26(8) defines a CHIS and s. 26(9) defines various aspects of "covert". Section 29(1) provides that the persons designated to grant authorisations shall have the power to do so and such persons are designated by Order made pursuant to s.30(1). In the case of the police, this was an officer of the rank of Superintendent or above. While this contrasts with the status required for other intrusive powers, we do not accept that this level of rank was such as to take it outside the requirements of Art 8(2). By s. 29(2), a person shall not grant an authorisation unless he believes it is "necessary" on the grounds specified in s. 29(3), including the interests of national security, for the purpose of preventing or detecting crime or of preventing disorder, or in the interests of public safety. It is true that the level of criminality is not indicated and that other grounds, including the economic well-being of the country, collecting taxes and protecting public health, afford a wider basis than for other intrusive powers, but we do not regard these as impermissible so as to fall short of Art 8(2) on a systemic challenge, especially as an authorisation must also be proportionate to what is sought to be achieved (s. 29(2)(b)). This requirement is particularly important in view of the scope of the power: the lower the level of criminality, the more difficult it will be to justify a particular CHIS authorisation as proportionate. There are also provisions relating to the welfare of the CHIS (s. 29(5)(a)), although none for the subject of the surveillance, an omission of significance on the facts of this case. An authorisation expires after 12 months (s. 43(3)(b)), which admittedly is longer than in the case of other intrusive

powers, and may be renewed (s. 43(4)), but only after a review (s. 43(6)) covering the use made of the source, the tasks given to the source, and the information obtained (s. 43(7)). An authorisation must be cancelled if it no longer meets the criteria for authorisation (s. 45(1)).

256. The public authorities empowered to exercise these provisions are listed in Part I of Schedule 1. In addition to any police force and related law enforcement bodies, the intelligence services and the tax authorities, the list extends to several government departments, all local authorities, and a number of agencies such as the Environment Agency, the Food Standards Agency and the Intervention Board for Agricultural Produce. We do not consider that the wide range of these bodies itself leads to a failure of compliance with Art 8(2) given that any exercise of the power will be constrained by the other provisions described above.

257. The Secretary of State is required to issue a Code of Practice (s. 71) and the first Code came into force on 1 August 2002. This is an important part of the overall scheme and for assessing whether it conforms to the requirements of Art 8(2). The Code covered necessity and proportionality, collateral intrusion, record keeping, retention and destruction of intelligence product, authorisation procedures, management of sources, oversight by the Surveillance Commissioner and complaints to this Tribunal.

258. Necessity and proportionality are carefully explained and emphasised. It stresses that less intrusive measures should be employed if they will suffice and that the source should be carefully managed to meet the objective in question and ensuring that the source is not used in an arbitrary or unfair way. The

dangers of collateral intrusion are discussed; these dangers must be assessed in an application; and it is stated that measures should be taken wherever practicable to avoid unnecessary intrusion into the lives of those not connected with the operation. Guidance is given on confidential information, legally privileged communications, vulnerable individuals and juvenile sources. The authorisation procedures are fully described, including a warning that authorising officers should not be responsible for authorising their own activities or operations. The Code deals fully with the management of sources, including their proper oversight, security and welfare, and there is also recognition of the foreseeable consequences to others:

> "Any public authority deploying a source should take into account the safety and welfare of that source when carrying out actions in relation to an authorisation or tasking, and to foreseeable consequences to others of that tasking" (para 4.36).

259. In the Tribunal's view, all these provisions when considered together satisfy the requirements set out in the case-law adumbrated above for being "in accordance with the law". Surveillance and interference with the right to private life take many forms and we recognise that the broad principles enunciated by the ECtHR must be sensitive to these differences. For example, a warrant for a telephone tap can in significant respects be much more precise than an authorisation of an undercover operation, and the latter is likely to present particular challenges in respect of collateral intrusion.

260. The CHIS regime is rooted in domestic law and accessible and the exercise of the powers is "foreseeable" in the particular sense in which that term is used in the Strasbourg jurisprudence. The law taken as a whole provided protection

against arbitrary interference: the grounds were prescribed (albeit in broad terms), a relatively senior officer was required to authorise it, necessity and proportionality were required, and both the Surveillance Commissioner and this Tribunal had retrospective roles. These same considerations control the exercise of the discretion inevitably involved in a power of this nature. The law is clear, albeit necessarily broad given the wide circumstances it must cover. The discretion was certainly not unfettered. The legislation does not set out specific offences, but that is neither necessary nor possible if the power is to serve its purpose. The categories of person subject to this particular form of surveillance cannot be defined with any precision, but the regime contains sufficient detail for reasonable inferences to be drawn as to who might be subject to it. Other points in the case-law about handling the data are more relevant to other forms of intervention, such as telephone-tapping, but we are satisfied that the authorities were required to handle the material with care and sensitivity.

261. It is important to remember that we have pronounced the authorisations in this case unlawful. They did not comply with the requirements of RIPA. Had we found otherwise, there would be greater force in Ms Kilroy's argument that the regime was not ECHR-compliant.

262. Ms Kilroy suggests that the failure to make explicit provision for a source's entering into a sexual relationship with a person under surveillance is a serious omission. The Respondents, however, insist that sources are not permitted, still less authorised, to behave in that way and that MK's conduct was not only unlawful but amounted to a breach of Art 3, although any such prohibition was not to be found in writing. The issues in this case do not require us to consider

whether it is ever permissible for a source to have a sexual relationship or legitimate for it to be explicitly authorised, or when the threshold for a breach of Art 3 is reached. We note that Tugendhat J in *AJK v Commissioner of Police of the Metropolis* [2013] EWHC 32 (QB) at para 165 *et seq* (the original proceedings that have now culminated in this case before the Tribunal) held that, as a matter of statutory interpretation, intimate sexual relationships were encompassed within the words "personal or other relationship" in s. 26(8)(a), that not every such relationship would necessarily involve a violation of Art 3, that it was not inconceivable that such conduct might be authorised under RIPA and that any challenge under the HRA would fall within the exclusive jurisdiction of this Tribunal; and on appeal the Court of Appeal endorsed his views as to the scope of the expression "personal or other relationship" and the jurisdiction of the Tribunal ([2013] EWCA Civ 1342, paras 32 and 37-43; [2014] 1 WLR 285 at 298-299 and 300-301). These issues do not arise for consideration in these proceedings, and we express no view, but we have no hesitation in saying that the failure to deal with sexual relationships in the legislation is not fatal to the contention that the regime was in accordance with the law. We observe that the regime was similarly silent on the issue of sources committing crimes (see para 1.4 of the Code of Practice) – now governed by the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 – but we do not think that omission either would vitiate the claim that the regime met the Art 8(2) standard.

263. In pronouncing the regime compliant with Art 8(2) and rejecting Ms Kilroy's assault on its adequacy, however, we are not dismissive of her critique. Ms Kilroy pointed out that the legal provisions failed to distinguish between an

undercover deployment that involved a fleeting relationship, say over a weekend, and one as in the present case that went on for seven years with few, if any, explicit boundaries. We note that distinction but would go further and suggest that the legal regime's weakness is even more fundamental in its failure to distinguish adequately between a source who is an informant and one who is an undercover officer. The former is for the most part, in our view, a relatively mild form of intervention or intrusion by comparison with the other covert powers provided by RIPA, whereas the latter can in no way be characterised as such. This case demonstrates beyond question, even disregarding the sexual misconduct, that an undercover police operation may be as intrusive as any other form of intrusion. We draw attention to the views of HMIC in 2012 (p. 22) regarding the anomalous nature of the CHIS provisions:

> "It appears surprising to HMIC that prior authority from the [Office of the Surveillance Commissioner] is required for the deployment of a listening device in the car of a suspected drug dealer, but not for the deployment of an undercover officer. This is a consequence of [RIPA] treating undercover officers in the same way as ordinary [CHIS].
>
> The test for authorisation for an undercover officer, who may overhear a conversation because they have formed a relationship with the speaker and is participating in the conversation, is lower than would apply if the same officer had concealed themselves in premises and overheard the conversation because their presence was unknown. Placing a hidden listening device or human listener in premises or a vehicle is 'intrusive surveillance'; placing an undercover officer in the same location by false pretences is not (even if they have recording equipment on them). The practical consequences for this are:
>
> • The test for the deployment is lower, in that intrusive surveillance requires the authorising officer to find that the deployment was necessary for the prevention or detection of serious crime, while for the deployment of a[n] undercover

officer the crime at which the deployment is aimed does not have to be serious. . . .

- Intrusive surveillance requires the prior approval . . . of a Surveillance Commissioner. . . . The deployment of an undercover officer does not require prior approval and will be subject only to the random sampling of cases by the Surveillance Commissioners."

264. We appreciate that the regime has undergone significant amendment in recent years: there is now a requirement to inform the Judicial Commissioner of an authorisation for the use of a UCO; long-term authorisations are subject to approval by the Judicial Commissioner; the authorisation for a UCO has now been raised to the level of Commander/Assistant Chief Constable, and with long-term authorisations an Assistant Commissioner/Chief Constable; and the Investigatory Powers Commissioner is required to keep the use of CHIS under review.

265. It is not, in any case, for us to propose detailed reforms in the system but we make two observations: first, that undercover operations should be seen as major and not minor interferences with privacy rights and are at least as intrusive as those RIPA powers with much more stringent safeguards; and secondly, that it might be helpful if undercover activities were not accommodated within the same legal framework as the use of informants. It seems to us that they have very little, if anything, in common and the differences are profoundly significant. We respectfully invite the UCPI to consider these observations.

266. Finally, in relation to the legality of the CHIS scheme as a whole, we must consider whether it can also be said to be "necessary in a democratic society",

where "necessary" means a "pressing social need", on which we are called upon to make a value judgment *(R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, per Lord Bingham of Cornhill):

> "31. Four questions fall to be answered in making this assessment: Is the legislative objective sufficiently important to justify limiting a fundamental right? Are the measures which have been designed to meet it rationally connected to it? Are they no more than are necessary to accomplish it? Do they strike a fair balance between the rights of the individual and the interests of the community? (*Huang v Home Secretary* [2007] 2 AC 167, para 19, per Lord Bingham of Cornhill; cited with approval in *R (Aguilar Quila) v Home Secretary* [2011] UKSC 45, para 45 [2012] 1 AC 621, 643, per Lord Wilson.)

267. While we have acknowledged that there are imperfections in the CHIS scheme, we would nevertheless answer all four questions affirmatively. We accept that the powers available to use covert human sources, whether informants or undercover officers, meet "a pressing social need" in gathering intelligence and evidence in combating terrorism, crime and disorder and in promoting public safety and health and for the other reasons listed in s. 29(3). That does not, however, mean that the most severe intrusion is available in minor cases: it means only that the regime taken as a whole satisfies the requirements of Art 8(2).

G. FACTUAL INTERFERENCE IN THE CLAIMANT'S ART 8 RIGHTS (ISSUE 8)

268. The final issue under Art 8 is whether the interference with the Claimant's Art 8 rights occasioned by the deployment of MK and/or the other UCOs was justified as necessary in a democratic society and proportionate, based on the

need for intelligence on the protest movement as a whole, or the Claimant's own activities (Issue 8).

269. The Respondents have accepted that there was no authorisation in place purporting to permit MK to conduct a sexual relationship with the Claimant. They therefore accept that to that degree the deployment was not in accordance with the law and could not comply with Art 8(2).

270. The Respondents have also conceded that the conduct of MK's deployment and that of the other UCOs amounted to a breach of Art 8, in addition to the breach occasioned by the sexual relationship: see Annex 2. The Respondents concede that the risk of excessive intrusion and the intrusion in fact were increased by reason of the length of the deployment; the presence in the Claimant's life of the other UCOs; the nature of the groups, including individuals who intended to pursue their objectives by legitimate means without any intention to engage in criminality; the fact MK cohabited with the Claimant in shared premises with no consideration to the intrusion into the Claimant's life this necessarily entailed; the nature and extent of the information MK gathered on the Claimant; and the lack of independent corroboration of MK's accounts of his activities. These factors all aggravated the conceded breach of Art 8.

271. However, the Respondents argue that the deployment, and the consequential interference with the Claimant's Art 8 rights, did meet the requirement of necessity. We therefore need to consider the concept of necessity as a consideration separate from, and additional to, that of overall proportionality. In *Piechowicz v Poland* (2015) 60 EHRR 24 at para 212, the ECtHR said:

> "As to the criterion 'necessary in a democratic society', the Court would reiterate that the notion of 'necessity' for the purposes of Art 8 means that the interference must correspond to a pressing social need, and in particular must remain proportionate to the legitimate aim pursued. Assessing whether an interference was 'necessary' the Court will take into account the margin of appreciation left to the state authorities but it is a duty of the respondent State to demonstrate the existence of the pressing social need behind the interference."

272. In *R (Quila) v Home Secretary* [2012] 1 AC 621 at paras 44-47, Lady Hale set out the stages of the analysis in determining whether an interference was justified under Art 8(2). The burden is on the respondent to establish justification (para 44). The amendment, or in this case the action, must have a legitimate aim (para 45). She continued:

> "But was it 'necessary in a democratic society'? It is within this question that an assessment of the amendment's proportionality must be undertaken. In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, Lord Bingham of Cornhill suggested, at para 19, that in such a context four questions generally arise, namely: (a) is the legislative objective sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community? In the present case the requisite inquiry may touch on question (b) but the main focus is on questions (c) and (d)."

273. She then said that the Court must make a value judgment on the material by reference to the circumstances pertaining at the time (para 46). Lord Reed in *Bank Mellatt v HM Treasury (no 2*) [2014] AC 700 at para 74 returned to the same list of considerations, but somewhat expanded the fourth stage as follows:

> "(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *de Freitas*, and the fourth reflects the additional observation made in *Huang*. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

274. Ms Kilroy relied on *Klass v Germany* (1979-80) 2 EHRR 214, para 42 for the proposition that powers of surveillance by the State are only tolerable as "strictly necessary for safeguarding the democratic institutions". Further, the Court must be satisfied that there are adequate and effective guarantees against abuse: *Weber v Germany* (2008) 46 EHRR SE5 at para 96.

275. Mr Perry argued that the "necessity" test at stage (c) of *Huang* was met so long as the deployment was for the purpose of preventing crime or public disorder. He argued that the "pressing social need" test was met by the statute, which allowed surveillance for the relevant purposes. He argued that the deployment of MK was "in accordance with the law" and that the court should consider only the issue of proportionality, which had been conceded.

276. In our view, if the deployment involved a breach of Art 8 because the authorisations failed to properly balance the long-term risk of interference into the Claimant's (and others') private lives, then it follows that the authorisations

did not meet the requirements of RIPA and as such were not "in accordance with the law". However, the matter goes further than that.

277. When it comes to considering Issue 8, as set out in para 16 above, it is necessary to consider whether the deployment that gave rise to the interference was itself "necessary" and was done to meet a "pressing social need". It is clear from *Quila* at para 45 that this is a separate stage of the overall proportionality analysis to that of balancing the level of interference with the overall objective. It may be that in many cases the stages elide. However, here Ms Kilroy argues lack of necessity for the operation and therefore the interference in the Claimant's private life separately from the alleged lack of proportionality of the specific intrusion into the Claimant's private life. Importantly, the necessity for the operation, in Art 8 terms, raises wider issues than the matters that go largely to the intrusion into the Claimant's private life.

278. Mr Perry argued that, when considering whether the deployment met a pressing social need, we should accord deference to the views of the Respondents who were responsible for policing and, as we fully accept, have expertise and special knowledge in that field. We accept that it is appropriate to accord more deference to the Respondents on the question of meeting a pressing social need than on the balance inherent in proportionality. However, the question of whether an interference is justified on the grounds of pressing social need must itself still be a matter for the court.

279. Mr Perry argues that MK's deployment satisfied the requirement of necessity. MK was deployed by the NPOIU against domestic extremism targets engaged in criminality related to protecting the public. He relies on the fact that the

SOCA report found that MK's engagement in sexual relationships was contrary to both his authorisations and line management instructions and therefore the accepted breach went to failures in respect of MK rather than any wider matters. He relies on SOCA's conclusions at paras 7.2.16, 10.2.4 and 10.2.5 on MK's ability to provide "significant intelligence relating to planned activity within both the national and international extremist arena". Mr Perry submits that MK had successfully infiltrated a tight-knit community of activists and the intelligence he provided allowed the police to provide a proactive and measured response to prevent crime and public disorder and to ensure the safety of the public and those engaged in legitimate peaceful protest.

280. In our view the conclusions of the HMIC report in 2012 are highly relevant to this issue. We put particular weight on this report, both because HMIC is an independent body and also because its members have a particular expertise in issues concerning the police. There are a number of passages in the conclusions which are pertinent to both necessity and proportionality.

281. HMIC refer to the courts usually providing the most intense scrutiny of surveillance operations when the evidence is presented to a court. This level of scrutiny provided a strong incentive for the police to ensure that any surveillance operation met the requirements of Art 8. However, this incentive to implement the system of control rigorously did not exist for the NPOIU because the UCOs were deployed to provide general intelligence for the purpose of preventing crime or disorder rather than gathering material for prosecutions (HMIC, p.7). To some degree the force of this point is made by the fact that MK's deployment ended shortly after the Ratcliffe-on-Soar incident, and the

problems that arose by reason of MK's engagement with the criminal justice system. That incident showed that the Respondents placed the protection of MK as a UCO above the need to secure convictions.

282. In relation to the seriousness of crimes tackled, HMIC accepted that the NPOIU was involved in collecting intelligence on violent individuals, intent on perpetrating acts of a serious and violent nature on the public. However, they said:

> "The NPOIU gathered intelligence both on serious criminality, and intelligence that enabled forces to police protests effectively. While the former might well justify some intrusion into people's lives, the latter would be much more arguable. Conflating these two objectives into one unit makes it difficult to assess objectively whether undercover deployments were proportionate."

283. HMIC highlighted the distinction between domestic extremism and public order policing. In relation to domestic extremism they said:

> "The deployment of undercover officers in response to a threat of serious disruption from criminal activity will always require both a very careful assessment of the proportionality of the proposed deployment and close control of the undercover officer when it is underway. Deployments in this category should occur only in exceptional circumstances in which the level of disruption anticipated is very high, and the level of intrusion carefully calibrated to the threat."

284. They contrasted domestic extremism and public order policing as follows:

> "Public Order Policing
>
> Domestic extremism is (in accordance with ACPO's current definition) unlawful and potentially serious. Therefore methods to

> deal with it need to involve consideration of intrusive, covert tactics. The capabilities, controls and security of units that deal with covert policing should be designed to manage the high risk that such deployments incur.
>
> By way of contrast, protest is a democratic right (whilst not unconditional), and the role of the police is to work with communities to facilitate safe and peaceful protests. Whilst effective planning depends on accurate intelligence, much public order policing capability relies on less intrusive tactics. The preparation and policing of such events is carried out by mainstream officers using everyday policing tactics, such as 'open-source' and other intelligence gathering processes.
>
> On occasions, serious crime is committed during protests, and this must be tackled. However, the deployment of undercover officers to tackle serious criminality associated with domestic extremism should not be conflated with policing protests generally, as it was unlikely that the tests of proportionality and necessity would be readily satisfied in the latter case."

285. In considering proportionality and necessity, HMIC said:

> "The sample of records of all NPOIU undercover operations examined by HMIC should have been much more detailed in relation both to the necessity of using the undercover tactic, and to how the risks of collateral intrusion were considered and managed. These records do not provide assurance that necessity and intrusion were being considered and managed."

286. We accept SOCA's view that MK was able to provide significant intelligence which may have led to the police being able to provide a measured response to prevent crime and public disorder. However, as HMIC said, there is an important distinction between intelligence-gathering in respect of domestic extremism and that of public order issues. That distinction is simply not reflected in the contemporaneous NPOIU documentation. Further, there is no consideration of how to balance the extreme levels of intrusion into individuals'

private lives and the presumed "pressing social need" for the surveillance. We certainly would not conclude that the use of UCOs, where there is reason to believe that domestic extremism is in existence, cannot be found to be necessary and meet a pressing social need even where there is very great intrusion into people's lives, and where some of those people will have no involvement whatsoever in criminality. However, on the facts of this case, the evidence produced by the Respondents does not show such a pressing social need.

287. It is relevant in this regard that the Claimant herself has no criminal convictions, and the Respondents have not provided evidence that serious criminality was common amongst those subject to surveillance under Operation Pegasus. The 25 May 2005 authorisation, which is the first time the Claimant is herself named as a subject of the surveillance, wrongly states that she was at Cornerstone in Leeds and on a fair reading indicates that the principal justification for the surveillance was public disorder rather than serious criminality:

> "DISSENT and their associated groups, who have strong links to the SUMAC Centre will however look to carry out actions within the United Kingdom during the Summit. To this end a group calling themselves TRAPESE are travelling throughout the United Kingdom giving presentations in order to 'drum up' support for protest. If successful and unchecked, it is likely that disruption could be caused at enormous cost to the United Kingdom, great inconvenience to the public in general and severe embarrassment to HMG.
>
> The very nature of anarchist protest activity may well lead [MK] into other areas of action and further authorisation is requested for [MK] to be able to respond to other matters of a similar nature in order to gain pre-emptive intelligence as required."

288. The RIPA renewal form dated 24 May 2006 shows that the real justification for naming the Claimant as a subject was her connections within the movement and therefore her usefulness to MK:

> "WILSON is well educated (Oxford) and comes from a well 'connected' family in Putney London. She travels the world attending camps and conferences on environmental issues. She speaks several languages fluently and has just returned from Venezuela where amongst other activities she translated the words of the Venezuelan President Hugo CHAVEZ at a conference. She is travelling to Africa in the summer to act as a translator.
>
> WILSON was identified by [MK] as an influential person in the world of activism almost at the beginning of this operation. As such the operation has utilised her reputation, knowledge, energy and contacts (both national and international) to progress and promote [MK's] own standing. Her trust of [MK] has allowed her to 'reference' [MK] into many leading individuals and organisations."

289. Overall, we conclude that the Respondents have failed to show that the intrusion into the Claimant's Art 8 rights, quite apart from the admitted breach arising from MK's sexual relationship, was necessary to meet a pressing social need. It is clear from *Piechkowicz* at para 212 that the burden is on the State to demonstrate that need. The evidence of a pressing social need is, in our view, thin and fails to distinguish between domestic extremism potentially involving serious criminality and public order issues. The safeguards to ensure that the surveillance was, and continued to be, focused on a pressing social need were without doubt inadequate. There was no rigorous assessment of continuing necessity; wholly inadequate (or ineffective) oversight; and in practice the operation and its intrusion into the Claimant's life continued for years without proper scrutiny or oversight. We agree with SOCA that the authorisations were

over-broad. Further, there were wholly inadequate attempts to balance the highly intrusive nature of the surveillance, and the very obvious potential for, and reality of, collateral intrusion into the lives of those around the Claimant.

290. For all these reasons we find that MK's deployment, and the consequent interference with the Claimant's Art 8 rights, was not necessary in a democratic society and not proportionate based on the need for intelligence on the protest movement, let alone on the Claimant's own activities.

H. ART 14 (ISSUE 9)

291. The Claimant argues that the Respondents' failure to comply with their positive obligations under Arts 3 and 8 also amounts to a breach of Art 14. The failure to establish a system which adequately guarded against the risk of UCOs entering into sexual relationships when undercover was discriminatory against women because it had a disproportionately adverse impact on women.

292. The Respondents' position is first, that it is not necessary for the Tribunal to deal with this issue given that it has made findings in respect of Arts 3 and 8; and secondly, that there was in any event no breach of Art 14.

293. Art 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

294. The first question, then, is whether we should deal with the Art 14 issue. The Strasbourg Court does not always deal with all the Articles which it is alleged are breached in a particular case. Further, the Tribunal made clear in its judgment of 3 October 2018 that it would not necessarily deal with all the issues that the parties had identified if it considered that it was not proportionate to do so.

295. Ms Kilroy argues that the discrimination issue is central to the Claimant's case and her concerns about the Respondents' conduct. She relies, by analogy, on the approach of the Strasbourg Court in *Volodina v Russia,* App no 41261/17, 9 July 2019, where the Court found a breach of Art 3 by reason of Russia's failure to take adequate steps to investigate and prosecute domestic violence, but also went on to consider the Art 14 claim. The Court said:

> "132. In the Court's opinion, the continued failure to adopt legislation to combat domestic violence and the absence of any form of restraining or protection orders clearly demonstrate that the authorities' actions in the present case were not a simple failure or delay in dealing with violence against the applicant, *but flowed from their reluctance to acknowledge the seriousness and extent of the problem of domestic violence in Russia and its discriminatory effect on women*. By tolerating for many years a climate which was conducive to domestic violence, the Russian authorities failed to create conditions for substantive gender equality that would enable women to live free from fear of ill-treatment or attacks on their physical integrity and to benefit from the equal protection of the law [emphasis added]."

296. We consider that the discrimination argument in this case is an important one and needs to be analysed and determined. The issue as to whether the Claimant would have experienced similar treatment, and similar breaches of Arts 3 and

8, if she had not been a woman is central to her case and to her experience. The Respondents' alleged failure to protect against the impact on women who were subject to intrusion into their lives by UCOs is an important part of the case. Given the nature of the case, a male UCO having a sexual relationship with a woman, and evidence of such conduct being widespread, it is not possible to disregard the fact that the impact of the unlawful action fell disproportionately on women. As such we consider it is appropriate that the Tribunal should determine the issue.

297. Turning to the substantive issue, the case-law has now established that Art 14 prohibits indirect as well as direct discrimination. Discrimination can occur not only where those with prohibited characteristics are directly targeted, *i.e*. direct discrimination, but also if the measure has a disproportionately discriminatory effect upon them. As the Court said in *DH v Czech Republic* (2008) 47 EHRR 3:

> "175. The Court has established in its case law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, Art 14 does not prohibit a Member State from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a *de facto* situation."

298. The approach to statistical evidence of differential treatment was considered in *Volodina v Russia* (App no 41261/17, 9 July 2019):

> "112. As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, the Court reiterates that in proceedings before it there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. In cases in which the applicants allege a difference in the effect of a general measure or a *de facto* situation, the Court has relied extensively on statistics produced by the parties to establish a difference in treatment between two groups – men and women – in similar situations (see *Zarb Adami v. Malta*, no. 17209/02, §§ 77-78, ECHR 2006-VIII, and *Di Trizio v. Switzerland*, no. 7186/09, § 66, 2 February 2016)."

299. In establishing differential treatment, the Court may draw inferences from all the evidence; as was said in *DH v Czech Republic*:

> "178. As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, the Court stated in *Nachova* that in proceedings before it there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake."

300. The Strasbourg Court also explains that once a party has presented *prima facie* evidence of a difference in treatment, then the burden shifts to the respondent to establish justification.

301. Ms Kilroy relies on the statistical evidence as to the differential impact on women subject to undercover surveillance as compared to men. Harriet Wistrich, the Claimant's former solicitor, gave uncontested evidence that 27 women had been granted Core Participant status in the UCPI on the basis that they had been deceived into having sexual relationships with male undercover officers. There are two male Category H Core Participants, but neither of them was deceived into a sexual relationship. One female UCO had a one-night stand with a male. We refer to the breakdown between the SDS and the NPOIU in our CLOSED judgment, based on evidence from SSH. There is nothing in those figures which affects our conclusions on Art 14. Therefore, the differential impact on women, demonstrated by a statistical analysis, is incontrovertible.

302. Further, the Claimant says that the impact on women is greater than that on men because of the risk of pregnancy and ultimately the impact of having a child as a result of such a relationship, and the potential impact on a woman's opportunity to raise a family. In the case of "Lisa", she spent six of her child-bearing years in a relationship with MK during which time she did not have a child. The Claimant says that the discovery of MK's true identity undermined her trust and confidence in having another committed relationship.

303. Despite the fact that the risk of women being affected by such behaviour should have been obvious to the Respondents, Ms Kilroy argues that the Respondents failed to take adequate steps to minimise the risk. She relies on the same factual issues as arise above in terms of inadequate training, supervision, oversight and control, but with a particular focus on the impact on women of the failure to

take adequate steps to prevent sexual relationships. She argues that lying behind this failure to protect women were discriminatory attitudes.

304. Mr Perry argues that there was no systemic deficiency which would establish a breach of Art 14. He relies first on the existence of training and instruction of officers within the NPOIU that sexual relationships undercover were not permitted. We have dealt with the issue of the adequacy of the training and supervision to meet the positive obligations under Arts 3 and 8 above, and the same conclusions apply in respect of Art 14.

305. Mr Perry submits that to find a breach of Art 14 it would be necessary to show that there was a difference in treatment with those in analogous situations (i.e. men subject to surveillance) which was attributable to the policy, training or guidance. He says that the Claimant has to show that although the training etc was in gender-neutral terms, there was a disproportionate impact upon female subjects of interest. However, he then argues the Claimant must show that the male subject of interest (the comparator) did not face the same risk of inappropriate sexual relationships from a female undercover officer (assuming that all those in issue were heterosexual).

306. Mr Perry argues that the Tribunal must be careful not to make gender-based assumptions about the likely sexual behaviour of men and women. He argues that the male comparator would have been at the same risk as females who were subjects of interest. He relies on comments made by the Lord Chief Justice in *R (Monica) v Director of Public Prosecutions* [2019] 2 WLR 722. In that case it was suggested that women were more considered in their decision-making about sexual relationships than men. At para 82 the Lord Chief Justice said:

> "There is obviously force underlying the contention that many embark upon sexual relationships for reasons unconnected with or at least well beyond the physical attractions of the intended partner. That is a reflection of human nature and the reality that different things are important to different people. But we would not want to adopt the stereotypical view advanced on behalf of the claimant that men and women are necessarily different in this respect. In our view, the CPS lawyer was correct in approaching her decision on the basis that the claimant's case involves not just a step but a leap in the way in which consent is interpreted. In our judgment, she was entitled to reach the conclusion that 'consent' could be not interpreted by a court in a way which undertook that leap applying, as she put it, 'current legal principles'."

307. We consider that Mr Perry's argument rather misses the point. If there had been equal numbers of female UCOs, and there was evidence that they engaged in sexual conduct similar to that of MK and many of the other male UCOs, then Mr Perry's argument might well be correct. However, our conclusions about the discriminatory impact of the Respondents' failure to provide adequate training or supervision do not rest on any assumptions about male and female sexuality: they rest on the statistical evidence. That evidence shows that there were significantly more male than female UCOs, and that a significant number of those male UCOs engaged in sex with women. The impact on women was very much greater than the impact on men, and that was a direct consequence of the Respondents' failures in respect of training and supervision. This has nothing to do with how men or women choose to conduct sexual relationships, but rather was a function of the fact that there were far more male UCOs than female ones, and a significant number of the male UCOs chose to engage in sexual relationships with women. Even if the Respondents had thought exactly the same risk would have arisen with female UCOs, the reality was that the risk

arose in respect of women not men. The risk of such impact was known to the Respondents, as can be seen from the Tradecraft Manual, but there was a notable failure to take any appropriate steps to prevent such intrusion into the lives of women.

308. Further, apart from the evidence of the much greater likelihood of impact on women from the statistical evidence, the impact on women was likely to be greater than that on men given that women were at risk of becoming pregnant, which would have undoubtedly further exacerbated the impact from the conduct of the UCOs. However, despite this obvious risk, the Respondents still failed to provide adequate training and supervision of male UCOs. We therefore find there was a differential impact which falls within Art 14.

309. Ms Kilroy also argues that discriminatory attitudes were apparent in the acts and omissions of the UCOs and the Respondents. This includes their willingness to manipulate the emotions and most intimate private lives of the women with whom UCOs entered sexual relationships; the failure to take any steps to protect them; and the language sometimes used about women in the logs.

310. We are not convinced that these matters materially advance the Claimant's case. The failure to take adequate steps to prevent male UCOs from having sexual relationships has already been dealt with. At paras 207 and 226, we stated that there was no evidence of a deliberate tactic of encouraging UCOs to have sexual relationships with women, and that the most likely interpretation of events was that the more senior officers were either negligent or prepared to tolerate the relationships because it was useful to the operation rather than that they sought to actively encourage discriminatory treatment of women. The occasional use

in the cover logs of disparaging language about some of the women involved is depressing, but is not in itself evidence of discriminatory conduct. We therefore do not consider that the evidence establishes a case of direct (*i.e.* targeted) discrimination. There is, however, evidence of a lack of care about the impact on women of introducing male UCOs into their lives on a long-term basis.

311. Once *prima facie* evidence of discrimination is found, the burden shifts to the Respondent to establish justification for the conduct complained of: see *DH* at paras 186-188. The Respondents here do not advance any justification. A finding of breach of Art 14 must, therefore, follow. We do, however, consider it worth emphasising the importance of the finding of discrimination in this case, and the relationship between the breaches of Art 3 and 8, and the discrimination that occurred. It appears from the evidence that the Respondents had very little concern about the impact of the highly intrusive surveillance by MK, and others, on women in particular. Given the very obvious risk of placing heterosexual male UCOs, for long periods, into the lives of young women, including the Claimant, the failure to take adequate steps to protect them from breaches of their human rights is particularly stark.

I. ARTS 10 AND 11 (ISSUES 10 AND 11)

312. Art 10 reads:

> *"Freedom of expression*
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

313. Art 11 reads:

"Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

314. We must first consider whether the Tribunal should consider these claims of breach of Arts 10 and 11. Mr Perry suggests it is neither necessary nor proportionate, referring to the practice of the ECtHR and reminding us of the remark of the President of this Tribunal, Singh LJ, at an earlier stage in these proceedings that the Tribunal might not adjudicate on all aspects of the Claimant's ECHR claim (Judgment of 3 October 2018 at para 23).

315. The Strasbourg Court, Mr Perry tells us, frequently declines in surveillance cases to consider breaches of Arts 10 and 11, once it has found a breach of Art 8, on the ground that it is "unnecessary" to do so (e.g. *Hewitt & Harman v UK* (1992) 14 EHRR 657, paras 48-49; *Cyprus v Turkey* (2002) 35 EHRR 30, paras 262-263), though Ms Kilroy cites examples to the contrary (*Segerstedt-Wiberg v Sweden* (2007) 44 EHRR 2; *Telegraaf Media v The Netherlands*, supra). In this case, Mr Perry submits, the admitted breaches of Arts 3 and 8 make any further findings in respect of Arts 10 and 11 unnecessary to vindicate the Claimant's grievances.

316. The Claimant, however, is keen for the Tribunal to consider these aspects of her claim. She argues that the failure to do so would leave the findings in relation to Arts 3 and 8 an incomplete and imperfect response to her claim and the human rights violations she has suffered. First, the motivation for her surveillance was the desire to monitor, gather intelligence on and control protests through policing. The *Telegraaf Media* case is an example of a case where the Strasbourg Court considered Art 10 because the questions raised by the surveillance measures under Art 8 were so intertwined with Art 10 (para 88). Secondly, bodies such as HMIC were critical of the Respondents' use of these highly intrusive methods for the policing of legitimate political activity and protest. Thirdly, the interference with the Arts 10 and 11 rights was extremely serious: her political activities were monitored and recorded for over 10 years and the discovery of MK's true identity had a chilling effect on her subsequent political activities. Fourthly, the findings on Arts 3 and 8 do not mark the full extent of the Respondents' violation of her rights. Finally, the concession on Art 10 (to which we refer below) is difficult to reconcile with the Respondents'

argument that there should be no further consideration of these aspects of the case.

317. We see force in the cumulative thrust of these arguments.

318. We accept that the Strasbourg Court often declines to consider Arts 10 and 11 where it has already found a breach of Art 8, but the practice is uneven and we cannot discern a coherent principle let alone the "clear and consistent jurisprudence" that would require us to adopt the practice in this case (*R (Aguilar Quila) v Home Secretary* [2011] UKSC 45, para 43, [2012] 1 AC 621, 642, per Lord Wilson, citing *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2003] 2 AC 295, para 26, per Lord Slynn of Hadley). There is certainly nothing in the jurisprudence purporting to preclude a domestic court's consideration of Arts 10 and 11 once breaches of Art 8 have been established.

319. A particular difficulty for Mr Perry is the Respondents' admission that the actions of MK in conducting a sexual relationship with the Claimant breached her rights under Art 10, an admission Mr Perry seems to regret but which has not been withdrawn. This concession would seem to undermine his argument.

320. In our view, this difference between the parties should, in the interests of justice, be resolved in the Claimant's favour. The relevant evidence is before us and we have had full submissions and argument. We therefore turn to the merits.

321. Ms Kilroy argues that the two Articles should be considered together as they stand or fall as one. We are not convinced that this is necessarily so and prefer,

therefore, to treat them separately, although many of the points made in relation to Art 10 will also apply to Art 11.

322. Art 10 guarantees the right to freedom of expression. At first sight it would not appear that the conduct of which the Claimant complains had any impact on her freedom of expression. Thus, we must first examine whether there has been an interference and then, if there has been, whether the Respondents can justify it under Art 10(2).

323. Ms Kilroy stresses that the concept of interfering with freedom of expression under Art 10 is a broad one, quoting Clayton & Tomlinson, *The Law of Human Rights* (2nd ed., 2010, para 15.267, p 1451): "Interferences with the right to freedom of expression can take a wide variety of forms and the Court has generally considered that anything which impedes, sanctions, restricts or deters expression constitutes an interference."

324. Interference with the Claimant's freedom of expression is said to have arisen in two ways: first, by the extensive, highly intrusive and long-term surveillance of her political activities and expression; and secondly, by the effect on her political expression of discovering the surveillance to which she had been subjected.

325. With regard to the former, it is said that detailed information about her political activities over seven years was gathered, recorded, stored and transmitted in contact logs, pocket notebooks and intelligence reports both during the period of the sexual relationship with MK and thereafter, when the Claimant was specifically named in the RIPA authorisations; and her political and protest activities were tracked. Moreover, there were occasions when MK actively

changed the course of the Claimant's activities by virtue of the close and intimate relationship he had nurtured. He influenced her decision whether to go to Dublin in 2004; he dissuaded her from participating in a trip to support the pro-democracy movement in Myanmar; he lent her money to attend an event in Hamburg; and more generally he used his position to influence her political decisions. As Ms Kilroy put it, she felt "deprived of her political agency".

326. With regard to the latter, the Claimant has described how she has found it difficult to engage in group protest and organising; been unable to engage with the people who reminded her of MK, with the result that she has been cut off from a significant part of her political activity; been deterred from attending large political gatherings, and when she has attended, her anxiety has compelled her to leave; and been anxious about taking part in protest for fear that the police would seek retribution for bringing these proceedings. It is also suggested that many of the political groups with which she had been involved were damaged by the police operation and some have ceased to exist as a result (though it is not clear that this factor is relevant). Her evidence has not been challenged.

327. Ms Kilroy cites *Segerstedt-Wiberg* as an authority firmly establishing that the Claimant's rights under Art 10 (and indeed 11) have been violated. Although not a surveillance case as such, it shares similarities with the instant case. The applicants complained that the secret police held files on them detailing their political activities. The Court held that their Art 8 rights had been infringed and went on to consider Arts 10 and 11.

328. The respondent government argued that the applicants' belief that the police held information on them appeared to have had no impact on the exercise of

their rights under Arts 10 and 11: "They had at all times been free to hold and express their political or other opinions. It was not supported by the facts . . . that their opportunities to enjoy freedom of association had in any way been impaired" (para 106). The Court acknowledged that the applicants had not adduced any evidence enabling it to assess how the storage of the information by the police could have hindered the exercise of their rights under Arts 10 and 11. It went on to say (at para 107):

> "Nevertheless, the Court considers that the storage of personal data related to political opinion, affiliations and activities that is deemed unjustified for the purposes of Art 8(2) *ipso facto* constitutes an unjustified interference with the rights protected by Arts 10 and 11."

329. This decision provides powerful support for the Claimant's case: similar information was stored; there was interference with her Art 8 right; and that interference could not be justified under Art 8(2). It would follow that the Claimant was also a victim under Arts 10 and 11.

330. However, we have difficulty with this judgment. We must, of course, "take [it] into account" (HRA, s.2(1)(a)) and we have. We note that it is not a decision of the whole Court (the Grand Chamber), but more important than that is the fact that the reasoning in support of the conclusion is, as Mr Perry put it, "spare and unclear". We would go further and say it was devoid of the judicial reasoning that is necessary to support such a conclusion, especially one which is not self-evidently sustainable. No attempt is made to explain how the complete absence of evidence showing the impact on the rights protected by Arts 10 and 11 is irrelevant apparently on the basis that the breaches of Arts 10 and 11 follow

inexorably from the findings under Art 8. It may well be that on some future occasion the Court will take the opportunity to develop its thinking on this point and confirm or reject the proposition. But for now, we remain sceptical and would hesitate to find in favour of the Claimant on the strength of this authority.

331. However, it is not, in our judgement, necessary to found a decision in favour of the Claimant on Art 10 solely on the basis that the storage of information about her political opinions and activities, collected in violation of Art 8, automatically implicated Art 10. In this case, unlike *Segerstedt-Wiberg*, there is evidence available to us that there has been interference with the right under Art 10.

332. The first aspect to which we draw attention is the second sentence of Art 10(1) itself. The first sentence proclaims the right to freedom of expression; the second reads: "This right shall include freedom to hold opinions and to receive and impart information and ideas *without interference by public authority*" (emphasis added). We attach significance to this for the purpose of this issue.

333. The right to hold opinions and exchange information and ideas must, in our view, include the right to do so without attracting the attention of the police and being monitored and placed under surveillance. The Respondents would say that their interest in the Claimant was not on account of her opinions but because of her role in being able to provide intelligence regarding potential public disorder. But it was her opinions that underpinned her association with like-minded individuals and placed her in a situation where she became the object of an undercover police operation found to be without justification under Art

8(2). We conclude, therefore, that her right guaranteed by the second sentence of Art 10(1) has been infringed.

334. Moreover, we are satisfied that other evidence presented by the Claimant establishes an interference under the first sentence of Art 10(1). We refer to the unchallenged evidence summarised at para 325 above. Mr Perry maintains that this evidence does not constitute a free-standing violation of the Convention, "still less a violation of Art 10". In his submission, it is rather the consequence of the earlier violations of Arts 3 and 8.

335. It is admittedly possible to analyse it in that way, but it is no less possible to see it as a direct consequence of the unjustified and unlawful interference fully described in relation to Arts 3 and 8 and held to be without justification under Art 8(2). Suppose the Claimant had simply claimed breaches of Arts 10 and 11. Would her claims have to fail because they also involved breaches of Arts 3 and 8? We think not.

336. The only remaining question is whether the invasion of her rights under Art 10(1) can be justified under Art 10(2). Art 10(2) parallels Art 8(2) with some additional grounds that are not relevant for present purposes. The term "prescribed by law" bears exactly the same meaning as "in accordance with the law" in Art 8(2) (indeed, the French text of the Convention uses the same wording in both Arts 8(2) and 10(2), but oddly the English text has used different formulations, despite the fact that different terminology within a single document usually implies different meanings). Our reasons for finding that the Respondents' conduct could not be justified under Art 8(2) apply equally here. Accordingly, we conclude that the Claimant's rights under Art 10 have been

infringed to the extent that she has claimed, and beyond that already conceded by the Respondents.

337. So far as Art 11 is concerned, many of the points canvassed in relation to Art 10 apply. It is still necessary to ask specifically whether the Claimant can show that her right to freedom of peaceful assembly and to freedom of association with others has been infringed.

338. Mr Perry submits that Art 11 is the *lex specialis* for assemblies and where freedom of expression is exercised by taking part in a peaceful assembly, as in *Ezelin v France* (Judgment of 26 April 1991), it is the guarantees in Art 11 which apply. But we note that in that case, concerning an avocat who was disciplined for participating in a demonstration, the Court said (at para 37): "Notwithstanding its autonomous role and sphere of application, Art 11 must, in the present case, also be considered in the light of Art 10 . . . The protection of personal opinions, secured by Art 10, is one of the objectives of freedom of peaceful assembly as enshrined in Art 11."

339. Mr Perry submits that, as a matter of principle, it is important to analyse the Convention rights separately and with due regard to their underlying rationale. They are intended to operate in a distinct way. Our acceptance of this principle is confirmed by our separate treatment of Arts 10 and 11, but it does not mean that evidence relevant to the breach of one Article cannot be used in relation to another.

340. It is true, as Mr Perry submits, that during and subsequent to the police operation, the Claimant has at all times been free and able to take part in assemblies without restriction: there were no restrictions on her ability to pursue

her activities. There was, he says, no separate measure taken or imposed which restricted the Claimant's ability to exercise her freedom of assembly, such as those identified in *Kudrevicius v Lithuania* (2016) 62 EHRR 34, para 100, a case arising out of the convictions of farmers who had demonstrated and obstructed the highway in a protest concerning the fall in prices for agricultural products and the lack of subsidies: a prior ban, prevention of travel to a meeting, dispersal of the rally, arrest of the participants and imposition of penalties for having taken part were cited as examples of measures that would interfere with the right under Art 11 and that would need to be justified under Art 11(2). However, there is no suggestion that the Court was intending to formulate a comprehensive and exhaustive statement of the measures that could constitute a breach of Art 11. Mr Perry is right when he says that no such features are present in the Claimant's case, but we do not see that as any impediment to our assessing whether the facts advanced by the Claimant in evidence are capable of being construed as an interference with her rights under Art 11. Interestingly, Ms Kilroy relies on the same paragraph of this judgment in support of her argument.

341. It is clear from the evidence that, during the Claimant's relationship with MK, he directly influenced not only her political opinions but also her movements. See para 325 above. To that extent he directly interfered with her right to assembly and association with others and we therefore find a violation of Art 11.

342. In view of this finding, it is unnecessary to make any further finding of a violation of Art 11 based on the additional facts advanced by the Claimant and summarised in para 326 above.

J. CONCLUDING REMARKS

343. There is no denying the significance of this case, and not just for the Claimant. Even before this hearing began, the Respondents had conceded that the Claimant had been subjected to degrading treatment, contrary to Art 3 of the ECHR, that her right to respect for her private and family life under Art 8 had been violated and so too her right to freedom of expression under Art 10. The Respondents resisted the other claims but we have mostly found in the Claimant's favour, holding that the Respondents were in breach of their positive obligations under Arts 3 and 8, that her right to freedom of assembly and association under Art 11 had also been infringed, and that there had been discrimination against women in respect of these Convention guarantees, which is prohibited by Art 14.

344. This is a formidable list of Convention violations, the severity of which is underscored in particular by the violations of Arts 3 and 14. This is not just a case about a renegade police officer who took advantage of his undercover deployment to indulge his sexual proclivities, serious though this aspect of the case unquestionably is. Our findings that the authorisations under RIPA were fatally flawed and the undercover operation could not be justified as "necessary in a democratic society", as required by the ECHR, reveal disturbing and lamentable failings at the most fundamental levels. We recognise that the authorities viewed their conduct through the lens of public order, but that is not

how it was experienced by the Claimant, whose bodily integrity, privacy and political activities were invaded without lawful justification.

345. It is to be hoped that these events of some years ago are no longer features of policing in this country and we take comfort from the fact that the UCPI is examining past events with a view to ensuring that higher standards will prevail in the future. Meanwhile, we hope the Respondents will learn lessons from these proceedings.

346. Were it not for the tenacity and perseverance of the Claimant, often in the face of formidable difficulties, much of what this case has revealed would not have come to light. Moreover, she has conducted herself throughout with restraint, courtesy and dignity in what must have been extremely difficult circumstances for her.

347. This case has involved vast quantities of material and complex points of law. We are indebted to counsel for the parties and Counsel to the Tribunal for their invaluable assistance.

348. We shall hold a separate remedies hearing to decide the appropriate remedies flowing from our findings.

349. In accordance with s.67A(2) of RIPA, we specify the Court of Appeal in England and Wales as the relevant appellate court in the event of an appeal.

Annex 1

METROPOLITAN POLICE TOTAL POLICING

DIRECTORATE OF PROFESSIONALISM

30 March 2017

Ms Kate Wilson
c/o Birnbergs Pierce & Partners
DX 57059 Camden Town

By E-mail and DX

Fiona Taylor
T/Assistant Commissioner

7th Floor
New Scotland Yard
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Dear Ms Wilson,

Yourself -v- The Commissioner of Police of the Metropolis

I write in furtherance of the settlement of your claim.

I wish to re-iterate in this letter the apology previously provided to you by Assistant Commissioner Martin Hewitt.

I am grateful for your patience in the legal proceedings which have recently concluded.

As you are aware the Metropolitan Police has recently settled your claim, together with seven claims previously, arising out of the totally unacceptable behaviour of a number of undercover police officers working for the now disbanded Special Demonstration Squad, an undercover unit within Special Branch that existed until 2008 and for the National Public Order Intelligence Unit (NPOIU), an undercover unit which was operational until 2011.

Thanks in large part to the courage and tenacity of you and others in bringing these matters to light it has become apparent that some officers, acting undercover whilst seeking to infiltrate protest groups, entered into long-term intimate sexual relationships with women which were abusive, deceitful, manipulative and wrong.

I acknowledge that these relationships were a violation of your human rights, an abuse of police power and caused significant trauma. I unreservedly

apologise on behalf of the Metropolitan Police Service. I am aware that money alone cannot compensate the loss of time, hurt or the feelings of abuse caused by these relationships.

This settlement follows a mediation process in which AC Hewitt and I heard directly from the women concerned including you.

I wish to make a number of matters absolutely clear.

Most importantly, relationships like these should never have happened. They were wrong and were a gross violation of personal dignity and integrity.

Let me add these points.

Firstly, none of the women with whom the undercover officers had a relationship brought it on themselves. They were deceived pure and simple. I want to make it clear that the Metropolitan Police does not suggest that any of these women could be in any way criticised for the way in which these relationships developed.

Second, at the mediation process the women spoke of the way in which their privacy had been violated by these relationships. I entirely agree that it was a gross violation and also accept that it may well have reflected attitudes towards women that should have no part in the culture of the Metropolitan Police.

Third, it is apparent that some officers may have preyed on the women's good nature and had manipulated their emotions to a gratuitous extent. This was distressing to hear about and must have been very hard to bear.

Fourth, I recognise that these relationships, the subsequent trauma and the secrecy around them left these women at risk of further abuse and deception by these officers after the deployment had ended.

Fifth, I recognise that these legal proceedings have been painful, distressing and intrusive and added to the damage and distress. Let me make clear that whether or not genuine feelings were involved on the part of any officers is entirely irrelevant and does not make the conduct acceptable.

One of the concerns which the women strongly expressed was that they wished to ensure that such relationships would not happen in future. They referred to the risks that children could be conceived through and into such relationships and I understand that.

These matters are already the subject of several investigations including a criminal and misconduct inquiry called Operation Herne; undercover policing will also be subject to a judge-led Public Inquiry later this year. Even before those bodies report, I can state that sexual relationships between undercover police officers and members of the public should not happen. The forming of a sexual relationship by an undercover officer would never be authorised in

advance nor indeed despite this (for example if it was a matter of life or death) then he would be required to report this in order that the circumstances could be investigated for potential criminality and/or misconduct. I can say as a very senior officer of the Metropolitan Police Service that I and the Metropolitan Police are committed to ensuring that this policy is followed by every officer who is deployed in an undercover role.

Finally, the Metropolitan Police recognises that these cases demonstrate that there have been failures of supervision and management. The more we have learned from what the Claimants themselves have told us, from the Operation Herne investigation and from the recent HM Inspectorate of Constabulary report the more we accept that appropriate oversight was lacking. Supervising officers must also take responsibility. By any standards, the level of oversight did not offer protection to the women concerned against abuse. It is of particular concern that abuses were not prevented by the introduction of more stringent supervisory arrangements made by and pursuant to Regulation of Investigatory Powers Act 2000. The Metropolitan Police recognises that this should never happen again and the necessary steps must be taken to ensure that it does not.

Undercover policing is a lawful and important tactic but it must never be abused.

In light of this settlement, it is hoped that you will now feel able to move on with your life. The Metropolitan Police believes that you can now do so with your head held high. You and the other women have conducted yourselves throughout this process with integrity and absolute dignity.

Yours sincerely,

Fiona Taylor
T/Assistant Commissioner

Annex 2A

Annex A to the Respondents' Note on Preliminary List of Issues dated 28 May 2020: Matters Not in Dispute

In relation to MK's own actions, by reference to Articles 3, 8 and 10 ECHR:

(1) Between October 2003 and February 2005, MK engaged in a sexual relationship with KW using a false identity provided to him by the Respondents for the purposes of carrying out his duties as an undercover officer. MK played a significant role in the Claimant's life in that period, following which the Claimant moved abroad.

(2) MK's decision to deceive KW into a long-term intimate and sexual relationship amounted to inhuman and degrading treatment of her under Article 3 ECHR, and a gross violation of KW's right to respect for private and family life under Article 8 ECHR.

(3) In addition, MK's actions, in conducting a sexual relationship with KW as a means of obtaining intelligence, constituted an unlawful interference with her right to freedom of expression under Article 10 ECHR.

(4) By (a) commencing a sexual relationship with the Claimant on the basis of the false identity which had been provided to him by the Respondents for the purposes of carrying out his duties as an undercover officer, (b) actively maintaining that sexual relationship based on this deceit over a considerable period of time, (c) doing so in order to either maintain his "cover" or "legend", or to obtain intelligence or for his own personal gratification and (d) by sustaining the relationship using resources and facilities provided to him by the Respondents for intelligence purposes and relying on a covert NPOIU team constantly on
hand to ensure that his undercover identity was not exposed, MK invaded the Claimant's bodily integrity, debased her, showed complete disregard and disrespect for her human dignity, deeply degraded and humiliated her, and caused her mental suffering.

(5) MK obtained the Claimant's consent to sexual intercourse based on his undercover identity. In doing so, MK grossly interfered with her sexual autonomy.

(6) That identity had been constructed for him by the Respondents for the purpose of obtaining intelligence on the activities of "certain groups".

(7) MK knew that the Claimant's consent to sexual intercourse had been fraudulently obtained on this false basis and that her consent would never have been given if the Claimant had known his true identity. He also knew that he had the full support of the Respondents in maintaining that false identity. MK ought to have realised that the chances that the Claimant would discover that he was an undercover police officer were small.

(8) By exploiting the imbalance of power the Respondents had created between him and the Claimant to develop an intimate sexual relationship with the Claimant and to

deeply infiltrate her social and family life in the role of her lover, he debased, degraded and humiliated her.

(9) MK went on holidays with the Claimant and attended family events with her. When he was not with her, MK kept in regular contact with the Claimant. He encouraged the Claimant to maintain a close emotional bond with him. The close personal relationship between MK and the Claimant would have been known to her family and friends.

(10) Whether the purpose of the intimate sexual relationship was to maintain his "cover" or "legend", to obtain intelligence or for his own personal gratification while performing his undercover role MK's decision to use the Claimant in this way signalled a profound lack of respect for her bodily integrity and human dignity.

(11) MK was acting outside the scope of his authority when he conducted a sexual relationship with the Claimant.

(12) The conducting of a sexual relationship with the Claimant by MK was neither necessary nor proportionate under Article 8 of the ECHR.

(13) The nature of the interference in the Claimant's private life by MK was of the most substantial and gravest kind. By having a long-term, intimate sexual relationship with her, he invaded the core of her private life.

(14) The abuse of trust was of the highest order: as a police officer and an agent of the state, MK was someone specifically responsible for upholding the law.

(15) The use of sexual relationships to obtain the intelligence in question was out of all proportion to the prevention and detection of crime or of preventing disorder or any legitimate objective being pursued by the Defendants.

(16) Insofar as MK entered into a relationship with the Claimant for his own sexual gratification, there was no rational connection between the aim and the means employed.

In relation to the extent and gravity of the Article 3 ECHR breach:

(17) MK's principal cover officer was aware that MK was conducting a close personal relationship with the Claimant and that he ought to have made enquiries to ascertain whether that relationship was sexual in nature.

(18) The relationship is likely to have persisted owing to a failure to make such enquiries and therefore MK's principal cover officer acquiesced in that sexual relationship and this aggravated the gravity of the Article 3 breach.

In relation to the Respondents' positive obligations under Articles 3 and 8 ECHR:

(19) The Respondents were under a positive obligation under Articles 3 and 8 ECHR to take reasonable measures to obviate the risk that MK would engage in a sexual relationship whilst deployed undercover.

(20) The Respondents were in breach of their positive obligation under Articles 3 and 8 ECHR in that MK's principal cover officer failed in his duty to supervise MK.

(21) MK was not removed from his undercover role despite the fact that his principal cover officer ought to have been aware that MK was conducting a sexual relationship with the Claimant.

Annex 2B

IN THE INVESTIGATORY POWERS TRIBUNAL **Case No. IPT/11/167/H**

Before the Vice President, Lieven J and Professor Zellick QC

B E T W E E N:

KATE WILSON

Claimant

-and-

(1) THE COMMISSIONER OF POLICE OF THE METROPOLIS

(2) NATIONAL POLICE CHIEFS' COUNCIL

Respondents

PARTICULARS OF RESPONDENTS' CONCESSIONS AS TO ISSUES 6-8 OF THE LIST OF ISSUES

Introduction

1. By letter dated 7 October 2020, the Respondents communicated to the Claimant, the Tribunal, and Counsel to the Tribunal, their intention to concede issues 6 to 8 of the List of Issues dated 6 February 2020. Those issues refer to the Claimant's case, pursued by reference to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). At the directions hearing on 13 October 2020, the Respondents indicated an intention to provide further particulars of their concession, to enable the Claimant and the Tribunal fully to understand the basis on which the concession had been made. That indication formed the subject of paragraph 9 of the Tribunal's Order dated 19 October 2020[1], pursuant to which this document is now provided.

Concession of Issues 6-8

2. For ease of reference, Issues 6 to 8 are in the following terms:

[1] The Order provides, at paragraph 9: 'The Respondents shall file and serve further particularisation of the admissions detailed in the 7 October 2020 letter from the Respondents to the Tribunal by 4:30 pm on 9 November 2020.'

(6) Whether the Respondents breached the positive obligation under Article 8 ECHR to take reasonable measures to obviate the risk of excessive intrusion by UCOs whilst deployed undercover.

(7) Whether (but for the carrying out of a sexual relationship by MK) the Claimant's right to respect for private and family life under Article 8 ECHR was breached by the deployment of MK and/or other UCOs.

(8) If so, was that interference in accordance with the law, necessary and proportionate either when each deployment is considered individually or cumulatively taking into account the following factors:

- the total length of the Claimant's exposure to interference
- the number of interferences by different UCOs
- the nature and severity of the interference
- the justification for the interference

1. The terms in which the concession was communicated by the Respondents in their letter dated 7 October 2020 were as follows:

(6) The Defendants did not obviate the risk of excessive intrusion into the Claimant's life by UCOs (Kennedy and the UCOs named at paragraph 103 of the Claimant's Amended Grounds of Claim) whilst deployed undercover.

(7) Article 8(1): There was (in addition to the carrying out of a sexual relationship by Kennedy) a breach of the Claimant's right to respect for private and family life under Article 8 of the Convention by the deployment of Kennedy and, to the extent they may have come into contact with the Claimant, by the deployment of other UCOs (named at paragraph 103 of the Claimant's Amended Grounds of Claim).

(8) Although the interference (referred to immediately above in relation to Issue 7) was in accordance with law, namely RIPA and the Codes of

Practice, it was not proportionate, whether considered individually or cumulatively, taking into account the following factors:

•The length of the Claimant's exposure to interference
•To the extent they may have come into contact with the Claimant, the extent of the interference by different UCOs (Kennedy and the UCOs named at paragraph 103 of the Claimant's Amended Grounds of Claim)
•The nature and severity of the interference and the absence of sufficient justification in the particular circumstances of the Claimant's case

Particulars of Concessions

2. The Respondents accept the nature of the deployment of Kennedy in particular created a risk of significant interference with the Claimant's right to respect for private life under Article 8 of the Convention:

    a. Operation Penguin/Pegasus was an operation to gather intelligence, rather than to obtain evidence to support a prosecution. In order to be accepted by the groups into which he was deployed, it was necessary for Kennedy to secure the trust and confidence of those groups. The need to secure the trust and confidence of those groups created the risk of Kennedy spending significant time establishing and fostering relationships with individuals in those groups,[2] and interacting with both (i) identified subjects of Kennedy's deployment ("subjects") and (ii) others who were not identified subjects of the deployment ("third parties") but were directly or indirectly associated with such subjects.

    b. The consequence of spending significant time interacting with, and establishing and fostering relationships with, individuals in those groups was that a related risk arose of Kennedy receiving information from and

[2] See SOCA Report at paragraph 2.3.3: 'The ideological motivation of most activists and the close knit community within which they operate means that for any infiltration to be successful there must be high levels of trust and a perception of shared values. This type of infiltration inevitably results in significant amounts of intrusion into the privacy of subjects, far beyond their criminal activities, and collateral intrusion into the privacy of others not subject of the deployment.' See also paragraph 9.2.8: 'The ideological motivation of most activists, and the close knit community within which they operate, means that for any infiltration to be successful there must be high levels of trust and a perception of shared values. This type of infiltration inevitably results in significant amounts of intrusion into the privacy of others not subject of the deployment. This was evident within Operation PENGUIN/PEGASUS.'

in relation to subjects and third parties which exceeded information of a kind that would be relevant to the objectives or purposes of his deployment.

3. The Respondents further accept that in order to make an informed assessment of the risk of intrusion into the Claimant's life by deployed undercover officers, it was necessary for authorising officers:

    a. To consider, as part of the assessment of the proportionality of the deployment for the purposes of Article 8 of the Convention, the risk of intrusion into privacy of subjects and third parties (i.e. collateral intrusion).[3] It was necessary for authorisation applications to include an assessment of the risk of collateral intrusion. The Respondents accept that the assessment in authorisation applications that there was no risk of collateral intrusion was wrong.

    b. To ensure that measures wherever practicable were taken to avoid collateral intrusion i.e. to avoid unnecessary intrusion into the lives of those not directly connected with the operation. The Respondents accept that insufficient regard was given to avoiding collateral intrusion.

    c. To be aware of the information obtained[4] and the other undercover officers who were in fact deployed and any risks of interference with the Claimant's right to respect for private and family life raised by those deployments. The Respondents accept that no single authorising officer was fully aware of the overall intelligence picture, the full range of

[3] See SOCA Report at paragraph 9.3.5: 'Within all of the RIPA authorisation documents for Operation PENGUIN/PEGASUS both groups, campaigns and individuals were identified as being subject of the deployment. The targeting of groups and campaigns as well as individuals makes assessment of collateral intrusion extremely difficult. Some of the groups identified are loose coalitions of people with some degree of shared values who may come together on occasion for a common purpose with no formal criteria for membership. This may include individuals with no intention to engage in anything other than lawful protest.'

[4] See SOCA Report at paragraph 9.3.7: 'For an authorising officer to be satisfied that collateral intrusion is being managed there must be sufficient information to identify what material has been obtained, if any is considered to be the result of collateral intrusion and how this has been managed. Whilst a plan was identified within the authorisation process for Operation PENGUIN/PEGASUS it does not appear to have been effectively implemented.' Paragraph 9.3.8: 'The risks of such significant levels of intrusion were not articulated nor does it appear they were considered in the context of the whole operation for its duration. The measures in place at an operational level to monitor and control the extent of intrusion into the privacy of individuals were inadequate.'

intelligence sources or other intelligence opportunities that may have been available to negate the requirement for additional intrusive covert activity.[5]

4. That risk of intrusion included the risk of intrusion by other UCOs (named at paragraph 103 of the Claimant's Amended Statement of Grounds, to the extent that they may have come into contact with the Claimant).[6]

5. The Respondents accept that, in addition to the risks identified and admitted in the preceding paragraphs, the conduct of Kennedy's deployment and the deployment of the other UCOs, in fact, amounted to a breach of the Claimant's right to respect for private and family life under Article 8 of the Convention. For the avoidance of doubt, this admission is made in addition to Kennedy's conduct of a sexual relationship with the Claimant. Both the risk of excessive intrusion, and the intrusion in fact caused by Kennedy's and the other UCOs' deployment, were increased by the following features of the deployment:

    a. The length of Kennedy's deployment, over the course of 6 years from 2003 until 2009. The length of Kennedy's deployment was almost unique and should have prompted particularly careful consideration of the risk of collateral intrusion on an ongoing basis[7] both generally and in relation to the particular circumstances of the Claimant's case. The Respondents accept that the Claimant was exposed to long term

[5] See SOCA Report at paragraph 9.1.11: 'It has been identified that KENNEDY provided a significant quantity of intelligence that allowed for policing intervention on a national and international basis. Whilst this was identified within the application process there is no evidence that individual authorising officers were aware of alternative sources of intelligence, including a number of other undercover officers who were deployed by the NPOIU.' See also paragraph 10.1.27: 'There was a lack of strategic co-ordination in the authorisation process for undercover officers deployed against domestic extremism. This activity would have benefited from authorisation within a single command.'

[6] This is a matter to be considered at the substantive hearing.

[7] See SOCA Report at paragraph 10.1.3: 'The initial deployment of KENNEDY under Operation PENGUIN was at the behest of the East Midlands consortium of forces with responsibility of operational head being given to a detective inspector within Nottinghamshire Special Branch. The deployment was in support of an existing intelligence requirement in relation to a resource centre used by domestic extremists in the Nottingham area. The deployment was intended to be on a long term
basis and was to allow the provision of intelligence to deal with the threat of public order offences and criminal damage.' See also paragraph 9.2.5: 'It is questionable, considering all of the attendant circumstances, that the deployment of KENNEDY over a period of six years remained a proportionate tactic.' Paragraph 9.3.2: 'The deployment of KENNEDY in such circumstances, especially on a long term basis, would inevitably lead to significant instances of collateral intrusion with individuals involved in legitimate activity. This risk was recognised within the authorisations with an accompanying management plan based upon the undercover officer's training and a strategy not to report upon activity considered to be collateral intrusion.'

interference with her right to respect for private and family life of varying degrees of intrusiveness by Kennedy over a period of 6 years. The impact of the length of Kennedy's deployment was, however, not articulated in the RIPA authorisations and no proper consideration appears to have been given to its implications for the proportionality of the deployment generally, or in the particular circumstances of the Claimant's case.

b. The presence in the Claimant's life of the other UCOs. The cumulative impact of the deployment of Kennedy and the presence of the other undercover officers in the Claimant's life increased the risks of interference with the Claimant's right to respect for private and family life raised by those deployments. The Respondents accept that no proper consideration was given to the proportionality of the overall or cumulative impact on the Claimant's Article 8 rights.

c. The nature of the groups into which Kennedy was deployed. The groups included individuals whose intentions were to pursue their objectives by legitimate means and without engaging in criminal activity or intending to pursue their objectives through criminal activity.[8]

d. The fact that Kennedy was co-habiting with the Claimant.[9] Kennedy cohabited with the Claimant in shared premises from June 2004 until February 2005 (Wiverton Road, Nottingham). No consideration was given to the risk of intrusion of Kennedy living in shared premises with the Claimant. Indeed the decision to permit Kennedy to live in shared

[8] See SOCA Report at paragraph 9.3.1: 'Extremist elements of protest can mask their activity by associating closely with legitimate campaigners. Whilst the authorities for KENNEDY requested use and conduct against specific individuals and groups there is also a recorded focus on the SUMAC centre in Nottingham as well as, on occasion, the Cornerstone Co-operative in Leeds. Both are resource centres utilised by campaigners and activists that openly advertise in the media and on the internet. No intelligence has been seen to indicate that use of these centres were the sole preserve of domestic extremists.' See also paragraphs 9.2.2-9.2.3: '9.2.2 The intelligence provided by the NPOIU in support of the applications focused heavily on the seriousness of the criminal activity that the identified individuals and groups were involved in. Predominantly this can be categorised as damage and attacks on infrastructure in Europe, public disorder at major demonstrations and activity at key sites in the United Kingdom designed to cause disruption and damage. 9.2.3 There is no question that some activists and protesters do engage in serious crime including violence and serious disorder. Such criminality linked to protest can have a significant impact on the rights of others including the general public, business, wider United Kingdom interests and indeed those engaged in legitimate, peaceful protest.'

[9] and three others.

premises with the Claimant was not the subject of specific authorisation.[10] There was no consideration of the proportionality of the interference with the Claimant's right to respect for private and family life under Article 8 of the Convention.

e. The nature and extent of the information in fact recorded by Kennedy and imparted to his principal cover officer. The information, which included sensitive and personal information in relation to third parties, including the Claimant and the Claimant's family members, should not have been obtained or recorded. There was no consideration of the implications of the obtaining and recording of such information for the proportionality of the interference with the Claimant's right to respect for private and family life under Article 8 of the Convention.

f. The lack of independent corroboration of the activities undertaken by Kennedy. There was a very high degree of reliance on Kennedy's account of his activities and interactions. In the circumstances, and insofar as Kennedy did not disclose the full extent of his activities to more senior officers, the Respondents accept that the collateral intrusion that was in fact occurring was greater than that which Kennedy reported.

6. The Respondents accept that neither (a) the inherent risk of excessive intrusion arising from these above features of Kennedy's deployment nor (b) information that would demonstrate the intrusion in fact arising from the conduct of Kennedy's deployment[11] was articulated in the RIPA authorisations.

7. In the circumstances, the Respondents accept that there was no proper assessment of collateral intrusion and no sufficient justification of the

[10] See in this regard the Respondents' reply to the Claimant's requests/application for disclosure at Annex 2, #1.
[11] See SOCA Report at paragraph 9.2.6: 'In considering proportionality it is not evident that the authorising officer was made fully aware of the extent and nature of intrusion that occurred during the course of the operation. The type and level of intrusion does not appear to have been routinely or completely articulated to the authorising officer.' Paragraph 9.2.7: 'The authorising officer was only ever asked to consider the question of proportionality in relation to the deployment of an undercover officer within a narrow context; that of infiltration of named groups, subjects and associates identified within individual authorisation documents.'

proportionality of the interference with the Claimant's right to respect for private and family life under Article 8 of the Convention.[12]

8. Further, the Respondents accept that the monitoring and supervision by more senior officers of the risks of excessive interference with the Claimant's right to respect for private and family life under Article 8 ECHR was inadequate,[13] and that the Respondents failed to obviate the risk of excessive intrusion.

[12] See SOCA Report at paragraph 9.3.3: 'Despite this recognition there is little evidence that collateral intrusion was actively considered or managed. KENNEDY fully integrated himself within the local activist arena. He established a large circle of acquaintances and established close personal relationships outside of those individuals named as subjects of the infiltration. Apart from the publicised personal relationships that KENNEDY eventually became involved in, he associated with a number of individuals throughout his deployment and co-habited with activists on an ad-hoc and more permanent basis at various times.' See also paragraph 9.3.4: 'Whilst such peripheral association may have been operationally necessary at the start of the infiltration it is debatable that this would have remained an ongoing requirement for the six years that KENNEDY was deployed. The reasoning has not been captured within the relevant authorities. A number of authorisation documents assert that there was no collateral intrusion in the relevant reporting period notwithstanding the existence of such relationships.'

[13] See SOCA Report at paragraph 9.3.8: 'The risks of such significant levels of intrusion were not articulated nor does it appear they were considered in the context of the whole operation for its duration. The measures in place at an operational level to monitor and control the extent of intrusion into the privacy of individuals were inadequate.' (emphasis added). See finally the recommendation contained within the SOCA Report: 'Recommendation 4: Collateral intrusion into the privacy of persons other than those directly subject of the authorisation should be identified, recorded and reported to the authorising officer to form part of their consideration of proportionality.'

Annex 3

CONSOLIDATED LIST OF ISSUES 19 FEBRUARY 2021

ARTICLE 3 - (SOG §88-91 and §94 (i)-(vi))

What was the purpose of the relationship MK had with the Claimant and was it used for operational ends?

Whether (other than as admitted) MK's relationship with the Claimant was conducted with the express or tacit acquiescence of cover officers (or other relevant officers) of the Defendants.

How widespread was knowledge, awareness or suspicion of the nature of MK's relationship with the Claimant in particular and/or other women he had intimate relationships with whilst undercover?

Whether (other than as admitted) the Defendants breached the positive obligation under Article 3 ECHR to take reasonable measures to obviate the risk to the Claimant and others that UCOs including MK would engage in a sexual relationship whilst deployed undercover.

ARTICLE 8 - (SOG §94(i)-(vi), §97(2), §99-100 and §102-104)

Whether the RIPA regime in operation at the material time (in either statute or guidance) was sufficient to satisfy the "in accordance with the law" requirement of Article 8(2) ECHR.

Whether (other than as admitted) the Respondents breached the positive obligation under Article 8 ECHR to take reasonable measures to obviate the risk of excessive intrusion by UCOs whilst deployed undercover.

[*Not Used*].

Was the interference with the Claimant's Article 8 ECHR rights occasioned by the deployment of MK and/or the other UCOs in accordance with the law, and was it justified as necessary in a democratic society and proportionate based on the need for intelligence on the protest movement as a whole or the Claimant's own activities?

ARTICLES 3&8 READ WITH ARTICLE 14 - (SOG §105-108)

Was the Claimant subjected to unjustified discrimination under Article 14 ECHR? Specifically:

Was the Claimant, as a woman involved in the communities and political groups infiltrated by the Defendants using RIPA powers, at increased risk of exposure to intimate or sexual relationships with UCOs?

Was the Claimant, as a woman involved in the communities and political groups infiltrated by the Defendants using RIPA powers, at increased risk from failure to establish systems to guard against UCOs entering into intimate or sexual relationships?

Did the Claimant, as a woman, suffer increased risk from UCOs entering into intimate or sexual relationships in terms of pregnancy, birth control and her subsequent ability to enter into a relationship and/or raise a family?

Were sexual relationships with women used by the Defendants as a tactic in undercover operations?

Did discriminatory attitudes towards the Claimant in particular and/or women in general and/or the communities and political groups she was involved in play any part in the conduct of MK and the other UCOs whose infiltrations affected the Claimant and/or in the conduct of those responsible for authorising, training and supervising MK and other UCOs and/or those responsible for providing systems to guard against these risks?

ARTICLES 10 & 11- (SOG §109-110)

Whether (other than as admitted) the infiltration of the groups with which the Claimant was associated (whether by MK or any other UCO) amounted to an unlawful interference with her rights under Article 10 and/or Article 11 ECHR as a result of:

MK's intimate and sexual relationship with the Claimant; and/or

the infiltration of the Claimant and the communities and political groups of which she was a part by MK and/or the other UCOs identified at §103 and/or other surveillance of which the IPT has been made aware; and/or

the impact on her of discovering the true identities of MK and/or the other UCOs.

If so, was the interference with the Claimant's Article 10 and 11 rights in accordance with the law, necessary and proportionate either when each deployment is considered individually or cumulatively taking into account the following factors:

the total length of the Claimant's exposure to interference;

the number of interferences by different UCOs;

the nature and severity of the interference;

the justification for the interference.

Annex 4

The Legislation: Regulation of Investigatory Powers Act 2000

We set out below, the principal statutory provisions at issue in these proceedings.

An undercover police operation takes place under Part II of the Regulation of Investigatory Powers Act 2000, "Surveillance and Covert Human Intelligence Sources", since an undercover officer in these circumstances is a covert human intelligence source (CHIS). The relevant provisions are found in ss. 26, 29, 43 and 45, and Part I of Schedule 1, and are reproduced below, so far as relevant, in the form which they took at the time of the events in issue.

s.26 – Conduct to which Part II applies.

(1) This Part applies to the following conduct –

(c) the conduct and use of covert human intelligence sources

26(7) In this Part –

(a) references to the conduct of a covert human intelligence source are references to any conduct of such a source which falls within any of paragraphs (a) to (c) of subsection (8), or is incidental to anything falling within any of these paragraphs; and

(b) references to the use of a covert human intelligence source are references to inducing, asking or assisting a person to engage in the conduct of such a source, or to obtain information by means of the conduct of such a source.

26(8) For the purposes of this Part a person is a covert human intelligence source if –

(a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);

(b) he covertly uses such a relationship to obtain information or to provide access to any information to another person; or

(c) he covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.

26(9) For the purposes of this section –

(a) surveillance is only covert if, and only if, it is carried out in a manner that is calculated to ensure that persons who are subject to the surveillance are unaware that it is or may be taking place;

(b) a purpose is covert, in relation to the establishment or maintenance of a personal or other relationship, if and only if the relationship is conducted in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the purpose; and

(c) a relationship is used covertly, and information obtained as mentioned in subsection (8)(c) is disclosed covertly, if and only if it is used or, as the case may be, disclosed in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the use or disclosure in question.

26(10) In this section "private information", in relation to a person, includes any information relating to his private or family life.

s.29 – Authorisation of covert human intelligence sources.

(1) Subject to the following provisions of this Part, the persons designated for the purposes of this section shall each have power to grant authorisations for the conduct or the use of a covert human intelligence source.

(2) A person shall not grant an authorisation for the conduct or the use of a covert human intelligence source unless he believes –

(a) that the authorisation is necessary on grounds falling within subsection (3);

(b) that the authorised conduct or use is proportionate to what is sought to be achieved by that conduct or use; and

(c) that arrangements exist for the source's case that satisfy the requirements of subsection (5) and such other requirements as may be imposed by order made by the Secretary of State.

(3) An authorisation is necessary on grounds falling within this subsection if it is necessary –

(a) in the interests of national security;

(b) for the purposes of preventing or detecting crime or of preventing disorder;

(c) in the interests of the economic well-being of the United Kingdom;

(d) in the interests of public safety;

(e) for the interests of protecting public health;

(f) for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; or

(g) for any purpose (not falling within paragraphs (a) to (f) which is specified for the purposes of this subsection by an order made by the Secretary of State.

(4) The conduct that is authorised by an authorisation for the conduct or the use of a covert human intelligence source is any conduct that –

(a) is comprised in any such activities involving conduct of a covert human intelligence source, or the use of a covert human intelligence source, as are specified or described in the authorisation;

(b) consists in conduct by or in relation to the person who is so specified or described as the person to whose actions as a covert human intelligence source the authorisation relates; and

(c) is carried out for the purposes of, or in connection with, the investigation or operation so specified or described.

(5) For the purposes of this Part there are arrangements for the source's case that satisfy the requirements of this subsection if such arrangements are in force as are necessary for ensuring–

(a) that there will at all times be a person holding an office, rank or position with the relevant investigating authority who will have day-to-day responsibility for dealing with the source on behalf of that authority, and for the source's security and welfare;

(b) that there will at all times be another person holding an office, rank or position with the relevant investigating authority who will have general oversight of the use made of the source;

(c) that there will at all times be a person holding an office, rank or position with the relevant investigating authority who will have responsibility for maintaining a record of the use made of the source;

(d) that the records relating to the source that are maintained by the relevant investigating authority will always contain particulars of all such matters (if any) as may be specified for the purposes of this paragraph in regulations made by the Secretary of State; and

(e) that records maintained by the relevant investigating authority that disclose the identity of the source will not be available to persons except to the extent that there is a need for access to them to be made available to those persons.

(6) The Secretary of State shall not make an order under subsection (3)(g) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

(7) The Secretary of State may by order–

(a) prohibit the authorisation under this section of any such conduct or uses of covert human intelligence sources as may be described in the order; and

(b) impose requirements, in addition to those provided for by subsection (2), that must be satisfied before an authorisation is granted under this section for any such conduct or uses of covert human intelligence sources as may be so described.

(8) In this section “relevant investigating authority” , in relation to an authorisation for the conduct or the use of an individual as a covert human intelligence source, means (subject to subsection (9)) the public authority for whose benefit the activities of that individual as such a source are to take place.

(9) In the case of any authorisation for the conduct or the use of a covert human intelligence source whose activities are to be for the benefit of more than one public authority, the references in subsection (5) to the relevant investigating authority are references to one of them (whether or not the same one in the case of each reference).

43.— General rules about grant, renewal and duration.

(4) Subject to subsection (6), an authorisation under this Part may be renewed, at any time before the time at which it ceases to have effect, by any person who would be entitled to grant a new authorisation in the same terms.

(5) Sections 28 to 41 shall have effect in relation to the renewal of an authorisation under this Part as if references to the grant of an authorisation included references to its renewal.

(6) A person shall not renew an authorisation for the conduct or the use of a covert human intelligence source, unless he–

(a) is satisfied that a review has been carried out of the matters mentioned in subsection (7); and

(b) has, for the purpose of deciding whether he should renew the authorisation, considered the results of that review.

(7) The matters mentioned in subsection (6) are–

(a) the use made of the source in the period since the grant or, as the case may be, latest renewal of the authorisation; and

(b) the tasks given to the source during that period and the information obtained from the conduct or the use of the source.

45.— Cancellation of authorisations.

(1) The person who granted or, as the case may be, last renewed an authorisation under this Part shall cancel it if–

(a) he is satisfied that the authorisation is one in relation to which the requirements of section 28(2)(a) and (b), 29(2)(a) and (b) or, as the case may be, 32(2)(a) and (b) are no longer satisfied; or

(b) in the case of an authorisation under section 29, he is satisfied that arrangements for the source's case that satisfy the requirements mentioned in subsection (2)(c) of that section no longer exist.

Schedule 1 Relevant Public Authorities

Part I RELEVANT AUTHORITIES FOR THE PURPOSES OF SS. 28 AND 29

Police Forces etc.

1. Any Police Force.

2. The National Criminal Intelligence Service.

3. The National Crime Squad.

4. The Serious Fraud Office.

The intelligence services

5. Any of the intelligence services.

The armed forces

6. Any of Her Majesty’s forces.

The revenue departments

7. The Commissioners of Customs and Excise.

8. The Commissioners of Inland Revenue.

Government departments

9. The Ministry of Agriculture, Fisheries and Food.

10. The Ministry of Defence.

11. The Department of the Environment, Transport and the Regions.

12. The Department of Health.

13. The Home Office.

14. The Department of Social Security.

15. The Department of Trade and Industry.

The National Assembly for Wales

16. The National Assembly for Wales.

Local authorities

17. Any local authority (within the meaning of section 1 of the Local Government Act 1999).

Other bodies

18. The Environment Agency.

19. The Financial Services Authority.

20. The Food Standards Agency.

21. The Intervention Board for Agricultural Produce.

22. The Personal Investment Authority.

23. The Post Office.

Annex 5

Reasons for excluding Mark Kennedy's evidence to the Home Affairs Select Committee:

1. In para 165 of the judgment, we indicated that we could not admit or have regard to the evidence given by MK to the House of Commons Home Affairs Select Committee on 5 February 2013 and published on 1 March 2013 on which Mr Perry QC, for the Respondents, wished to rely. We give our reasons in this Annex for that conclusion.

2. Although the Tribunal "may receive evidence that would not be admissible in a court of law" (Investigatory Powers Tribunal Rules 2018, SI 2018 No 1334), in common with all courts and tribunals we are subject to Art 9 of the Bill of Rights 1689 (which is set out below).

3. In the closing moments of the seven-day hearing in this case, a member of the Claimant's legal team spotted a potential problem with regard to the Select Committee evidence. It was in the bundles prepared for the hearing and it had been referred to in the Respondents' skeleton argument and during oral argument. Extracts were also included in the witness statement of the Deputy Commissioner of the Metropolitan Police on behalf of the Respondents.

4. Ms Kilroy QC pointed out that it was thought there might be a problem under Art 9 of the Bill of Rights 1689. No one had previously realised this, but all counsel and the Tribunal recognised that it was an issue that needed to be explored. We therefore asked counsel to prepare written submissions and also extended a similar invitation to Counsel to the Speaker of the House of Commons. We said we would reach our decision without oral argument.

5. We are grateful to counsel for their written submissions, including the observations of Counsel to the Tribunal, and especially to Mr Speaker's Counsel.

6. Art 9 forms the basis for freedom of speech in Parliament, perhaps the most important aspect of what is known as the law and custom of Parliament or parliamentary privilege. It reads:

> "That the freedom of speech and debates in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

The scope of Art 9 is wider than the words at first sight suggest and it goes well beyond conferring absolute immunity, civil and criminal, on anything said in the course of parliamentary proceedings. In particular, it is well established that it extends to the use made of reports of parliamentary proceedings in the courts, even though those reports are in the public domain.

7. The Respondents admit that the law in relation to the admissibility of the evidence of non-MP witnesses before Select Committees "is not without difficulty". They suggest that merely to point out any material inconsistency between what the witness said in Parliament and what he said outside would not constitute an impermissible questioning or impeaching of statements made in Parliament and would thus not weaken the essential purpose of the protection conferred by Art 9, offend against the constitutional rationale for the protection, or stray into forbidden territory.

8. The Claimant expresses a contrary view as to the application of Art 9 and submits that the Respondents' reliance on the Select Committee material is impermissible.

9. However, the Respondents propose an alternative approach which would obviate the need to refer to the Select Committee evidence and thus no issue of parliamentary privilege would need to be addressed. If the Claimant had been willing to accept that approach, the Art 9 issue would have disappeared along with the request to have regard to the Select Committee evidence. In the event, the Claimant does not agree. This leaves the Tribunal with two issues to consider. The first is the Respondents' alternative approach, to which the

Claimant objects. If we uphold the Respondents' proposal, there will be no need to address the Art 9 issue. If we reject it, we must then deal with Art 9. We therefore deal first with the alternative approach proposed by the Respondents.

10. The Respondents say that everything of relevance said by Kennedy to the Select Committee has also been said and reported elsewhere and a detailed schedule has been provided. They contend that this is consistent with the approach adopted by the Divisional Court in the *Heathrow Hub* case where the court referred to statements made by the Secretary of State outside Parliament to the same effect as statements made in Parliament so as to avoid the dispute between the parties as to the admissibility of the parliamentary statements: *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] 4 CMLR 17, para 144. This might seem a straightforward and pragmatic solution.

11. The difficulty here, however, is the admissibility of the alternative sources at this late stage in the proceedings. It might resolve the problem if the Claimant were content for the new material to be introduced, but she is not. Ms Kilroy argues that some of the proposed material consists of a radio interview and a documentary that have not previously been relied on by the Respondents, have not been served and are not before the Tribunal. There has been no opportunity to consider this material and so reliance on it after the conclusion of the hearing is unfair and inappropriate. Ms Kilroy also submits that this new material does not support the Respondents' submissions on the Select Committee material and further that the quotations from the new material do not support the points made, and indeed much of the material from the new sources undermines the Respondents' case and supports the Claimant's case.

12. In view of this fundamental difference between the parties, we conclude that at this stage in the proceedings it cannot be right to introduce fresh material. We have concluded a seven-day hearing, which is the culmination of years of discovery and many previous hearings. At that hearing we had over 20 bundles in OPEN (ignoring the six authorities bundles). There is no shortage of material on which to base our findings. The Respondents take a relaxed view. Mr Perry says: "*To the extent that the Tribunal may consider it necessary* to refer to facts

or statements referred to in the HASC minutes in determining the issues in this case" (emphasis added), there are alternative sources on which we can draw. He also points out that "to the extent that the material before HASC is relevant only to the credibility of [MK], there is ample evidence before the Tribunal, wholly separate from evidence before HASC, in relation to that issue".

13. Our conclusion is that it would not be fair to the Claimant at this stage to permit the introduction of new material. Moreover, the Tribunal does not feel it necessary to have access to this material or indeed to the HASC evidence: it is of limited probative value and unlikely to have any impact on our conclusions.

14. Nevertheless, despite that latter point, as the Respondents have not withdrawn their wish to rely on the Select Committee evidence, we must consider whether Art 9 means that we must exclude the HASC material.

15. The Respondents, as noted above, consider that Art 9 does not apply while the Claimant takes the contrary view. Speaker's Counsel also submits that Art 9 prohibits the use of the material.

16. It is of course for the courts to determine the boundaries of parliamentary privilege and, in this case, for us to determine whether the Respondents may make use of the HASC evidence. We are required to pay careful regard to any views expressed by or on behalf of Parliament (*R v Chaytor* [2011] 1 AC 684, para 16), including the Speaker (*FCO v Warsama* [2020] AC 1076, para 24), and the observations of Speaker's Counsel are entitled to the highest respect (*Shaw v Secretary of State for Education* [2020] EWHC 2216 (Admin), para 149).

17. In her written submission, Speaker's Counsel set out six exceptions to the rule prohibiting courts from considering parliamentary material. These exceptions are the result of a considerable body of case-law and they were explicitly endorsed by the Court of Appeal in the *Heathrow Hub* case [2020] 4 CMLR 17 (at para 158) to which she had made a similar submission. The six circumstances

where evidence of parliamentary proceedings may be admitted without infringing Art 9 are as follows:

> (a) The courts may admit evidence of proceedings in Parliament to prove what was said or done in Parliament as a matter of historical fact where this is uncontentious: *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 337.
>
> (b) Parliamentary material may be considered in determining whether legislation is compatible with the European Convention on Human Rights: *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, para 65.
>
> (c) The courts may have regard to a clear ministerial statement as an aid to the construction of ambiguous legislation: *Pepper v Hart* [1993] AC 593, 638.
>
> (d) The courts may have regard to parliamentary proceedings to ensure that the requirements of a statutory process have been complied with.
>
> (e) The courts may have regard to parliamentary proceedings in the context of the scope and effect of parliamentary privilege, as concordance between Parliament and the courts on this is desirable: *Office of Government Commerce v Information Commissioner* [2010] QB 98, para 61.
>
> (f) An exception has also been identified for the use of ministerial statements in judicial review proceedings, but the scope and nature of this exception has yet to be the subject of detailed judicial analysis.

18. The six circumstances were again approved and considered by the Court of Appeal in the very recent case of *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2021] 1 WLR 3049, paras 84-110, in which the Home Secretary sought to rely on numerous parliamentary debates to demonstrate that she had complied with a statutory duty, there being no other evidence to that effect. In holding that it was not covered by any of the six circumstances and that to do so would contravene Art 9, the Court looked specifically at (b) (compatibility of legislation with the

ECHR) and (f) (use of ministerial statements in judicial review proceedings) (at paras 91-109). As this is a human rights case and we are enjoined to apply judicial review principles (RIPA, s. 67(2)), we briefly explain why neither exception applies here. The Select Committee evidence which Mr Perry wishes to use has nothing to do with assessing the compatibility of legislation with the ECHR; nor does it involve a statement by a minister in relation to a challenge by way of judicial review to a decision by that minister.

19. In *Office of Government Commerce v Information Commissioner* [2010] QB 98, Stanley Burnton J (as he then was) said, in relation to evidence given to a Select Committee:

> "What the tribunal must not do is refer to evidence given to a parliamentary committee that is contentious . . . or to the opinion or finding of the committee on an issue that the tribunal has to determine."

20. Reference to the HASC evidence purely as uncontentious background material setting out agreed facts would not transgress Art 9, but that is not the case here. We mentioned above the Respondents' reference to "material inconsistency" (see para 7). As Speaker's Counsel asks in her submission, what could this amount to other than "impeaching and questioning" proceedings in Parliament or putting the Claimant in the position of either accepting what was said in Parliament or risking a breach of parliamentary privilege by questioning it (see *Kimathi v FCO* [2018] 4 WLR 48, para 20, per Stewart J)?

21. In the light of the above, it is clear that the proposed use of Kennedy's evidence to the HASC by the Respondents does not fall within any of the six established exceptions. It is therefore impermissible for us to have regard to it in the way and for the purpose proposed.