**IN THE INVESTIGATORY POWERS TRIBUNAL**

**B E T W E E N:**

**(1) PRIVACY INTERNATIONAL**

**(2) REPRIEVE**

**Claimants**

**- and -**

**(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS**

**(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS**

**(4) SECURITY SERVICE**

**(5) SECRET INTELLIGENCE SERVICE**

**Defendants**

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# STATEMENT OF GROUNDS

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## INTRODUCTION

1. These proceedings concern a direction issued by the Prime Minister, requiring the Intelligence Services Commissioner (the "IS Commissioner") to oversee unspecified covert activities by one or more of the Government Communication Headquarters ("GCHQ"), the Secret Intelligence Service ("SIS") and the Security Service (together the "Agencies"). The contents of the direction, even its subject matter, are secret. The secret activities are sufficiently serious that the Prime Minister considers they require statutory oversight.

2. The Secretary of State for Foreign and Commonwealth Affairs is the minister responsible for GCHQ and SIS. The Secretary of State for the Home Department is the minister responsible for the Security Service. The IS Commissioner provides oversight of certain functions of the Agencies. The commissioners are retired members of the senior judiciary. The current commissioner is Sir John Goldring. The immediate past commissioner was Sir Mark Waller.

3. Privacy International is a UK charity. It seeks to ensure the right to privacy is properly protected by law. Privacy International has a long-standing interest in the proper governance and oversight of the Agencies' activities.

4. Reprieve is a UK charity. It seeks to secure human rights throughout the world, with a focus on the rights to life, liberty, and freedom from torture, cruel, inhuman and degrading treatment or punishment. It has a long-standing interest in the Agencies' compliance with the ECHR in the context of counter-terrorism operations overseas.

5. The issue is whether the conduct overseen under the secret direction is in breach of the ECHR. As the content and scope of the direction is secret, the Claimants plead their case by reference to all the potentially relevant Articles of the Convention.

6. Issues concerning the compatibility of the secret activity with Convention rights will arise if the direction provides for the IS Commissioner to oversee:

   6.1. lethal operations (Article 2) or interrogations or harsh treatment (Article 3) carried out by British forces abroad;

   6.2. applying pressure to persons detained abroad to work for or supply intelligence to the Agencies (Article 4);

   6.3. detention of persons, in particular if such detention is incommunicado, without judicial supervision and/or carried out for the purpose of gathering intelligence (Article 5);

   6.4. delivery of persons to the custody of foreign states where they may suffer mistreatment (Articles 2, 3, 4, 5);

   6.5. surveillance (Articles 8, 10);

   6.6. activities which interfere with the right of freedom of religion (Article 9);

   6.7. censorship or interfering with publication (Article 10);

   6.8. freezing or confiscating property (Article 1 of the First Protocol).

7. These grounds accompany the form T1 filed by the Claimants and set out the grounds relied upon.

## FACTUAL AND STATUTORY BACKGROUND

*The Agencies*

8. The Agencies' statutory functions are, in summary:

   8.1. The **SIS** (Intelligence Services Act 1994 ("ISA"), s 1):

      (a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and

      (b) to perform other tasks relating to the actions or intentions of such persons;

   8.2. **GCHQ** (ISA, s 3):

(a) to monitor, make use of or interfere with electromagnetic, acoustic and other emissions;

(b) provide information derived from or related to such emissions or equipment and from encrypted material; and

(c) to provide advice and assistance about languages, including technical terminology, and cryptography; and

8.3. The **Security Service** (Security Service Act 1989 ("SSA"), s 1):

(a) to protect national security including against espionage, terrorism and sabotage, the activities of agents of foreign powers and actions intended to overthrow or undermine parliamentary democracy;

(b) to safeguard the economic well-being of the United Kingdom; and

(c) to act in support of law enforcement agencies in the prevention and detection of serious crime.

*The IS Commissioner*

9. The IS Commissioner is appointed under s 59 of the Regulation of Investigatory Powers Act 2000 ("RIPA"). His duty is to keep certain activities of the Agencies under review. He or she must be or have been a judge of the Supreme Court, Court of Appeal, High Court, Court of Session or Privy Council: s 59(4) RIPA and Constitutional Reform Act 2005, s 60(2).

10. The IS Commissioner operates alongside the Interception of Communications Commissioner (the "IC Commissioner"), who reviews the exercise of powers in relation to interception, acquisition and disclosure of communications data (s 57).

11. The intelligence activities reviewed pursuant to s 59 include:

11.1. warrants issued to the Agencies for the interference with property or with wireless telegraphy, under ss 5-6 of the Intelligence Services Act 1994 ("ISA");

11.2. the Secretary of State's authorisation of acts done outside the British Islands that would otherwise attract criminal or civil liability, under s 7 ISA;

11.3. the functions of the Secretary of State and the Agencies in relation to surveillance and covert human intelligence sources and the investigation of electronic data protected by encryption under Pt II and III of RIPA.

12. In addition, the Prime Minister has a relatively new power under s 59A(1)(a) of RIPA (inserted by the Justice and Security Act 2013 with effect from 25 June 2013) to direct the IS Commissioner to "*keep under review the carrying out of any aspect of the functions of*" the Agencies. Such a direction may relate to any function other than those reviewed by the IC Commissioner under s 57 or the IS Commissioner under s 59 (s 59A(2)). It

may, for example, require the IS Commissioner to keep under review "*policies of the head of an* [Agency] *regarding the carrying out of any of the functions of the* [Agency]" (s 59A(4)).

13. The Prime Minister is required to publish, in a manner which she considers appropriate, any direction given under s 59A. The exception to that requirement is insofar as (s 59A(5)):

> *it appears to the Prime Minister that such publication would be contrary to the public interest or prejudicial to –*
>
> *(a) national security,*
>
> *(b) the prevention or detection of serious crime,*
>
> *(c) the economic well-being of the United Kingdom, or*
>
> *(d) the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the* [IS] *Commissioner.*

*The "Third Direction"*

14. To date, two s 59A directions have been published:

14.1. The Intelligence Services Commissioner (Additional Review Functions) (**Consolidated Guidance**) Direction 2014 came into force on 28 November 2014. It requires the Commissioner to review compliance with the "Consolidated Guidance" that governs UK involvement the detention and interviewing of persons overseas, and the passing and receipt of intelligence relating to detainees.[1]

14.2. The Intelligence Services Commissioner (Additional Review Functions) (**Bulk Personal Datasets**) Direction 2015 came into force on 13 March 2015, at the same time as it was avowed that the Agencies were engaged in the collection and retention of Bulk Personal Datasets ("BPDs"). That Direction requires the Commissioner to review the use of BPDs by the Agencies and the adequacy of safeguards against their misuse.

15. In the course of the proceedings in this Tribunal in *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* (IPT/15/110/CH), the Agencies disclosed that the Prime Minister had issued a further, hitherto secret, direction (the "Third Direction"). That disclosure was made by an extract from the Confidential Annex to the IS Commissioner's Report for 2014, which stated at p 4:

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[1] Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (July 2010).

> *Under paragraph 59A of RIPA, inserted by the Justice and Security Act, the Prime Minister may direct me to keep under review the carrying out of any aspect of the functions of the intelligence services. The Prime Minister has now issued **three** such directions placing all of my oversight on a statutory footing. Two of the directions are set out in my open report:*
>
> - *The acquisition, use, retention, disclosure, storage and deletion of bulk personal datasets including the misuse of data and how this is prevented*
> - *Compliance with the Consolidated Guidance.*
>
> *[**redacted**]* (emphasis added)

16. The Prime Minister has therefore made three oversight directions under s. 59A of RIPA. The existence of those three directions is now public. And the content of two of those directions is public. But even the subject matter and date of the Third Direction is secret.

17. Accordingly, the Prime Minister has by a secret legal instrument conferred on the IS Commissioner a secret statutory function to oversee secret activities of an unspecified Agency or Agencies. Those secret activities are serious enough to require oversight, but the nature of the activities and terms of the oversight remain undisclosed, even in the most general terms.

**LEGAL FRAMEWORK**

18. By s 6 of the Human Rights Act 1998 (the "HRA"), it is unlawful for a public authority to act in a way which is incompatible with one of the rights set out in Schedule 1 to the Act, which incorporates the European Convention on Human Rights ("ECHR").

19. A claim may be brought against a public authority for contravention of s 6 under s 7(1)(a) HRA in the appropriate court or tribunal by a "*victim of the unlawful act*". The "*only appropriate tribunal*" for the purposes of proceedings under s 7(1)(a) against the Agencies or in respect of their conduct is the IPT (RIPA, s 65(2)(a), (3)(a), (b)).

*Victim status*

20. A person is a "victim" for the purposes of s 7 HRA if "*he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights*".

21. Article 34 ECHR sets out eligible applicants before the ECtHR, namely "*any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation*".

22. Since the decision in *Klass v Germany* (1979) 2 EHRR 214, it has been clear that a "victim" of secret measures may rely on their existence without having to demonstrate that they had been in fact applied to him. This is because in such circumstances a person's rights may be infringed "*without his being aware of it*", and it is "*unacceptable*

*that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation*": at §36.

23. In Zakharov v Russia (2016) 63 EHRR 17, the ECtHR clarified the law on standing in the context of secret conduct by intelligence agencies. It noted the need for an approach "*tailored to the need to ensure that the secrecy of surveillance measures does not result in measures being effectively unchallengeable*". It accepted that "*an applicant can claim to be the victim of a violation occasioned by the mere existence of*" of secret measures provided that "*the applicant can possibly be affected by*" them: §§169-171; citing Kennedy v UK (2011) 52 EHRR 4 at §124.

24. An applicant is not deprived of victim status merely because he cannot show, by reason of government secrecy, that a particular executive activity has been applied to him or her. A State cannot insulate itself from claims by concealing the exercise or nature of the infringing powers. Secrecy cannot render measures "*effectively unchallengeable*".

25. Given that the nature of the powers to which the Third Direction relates are unknown and are such as to require oversight, the Claimants, indeed any person, "*can possibly be affected by*" them. The functions cannot be rendered effectively unchallengeable by secrecy.

*Article 2 ECHR*

26. Article 2 of the Convention provides:

> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
>
> *(a) in defence of any person from unlawful violence;*
>
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
>
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

27. This provision imposes three duties on the Government of the United Kingdom:

    27.1. The negative duty to refrain from taking life other than in the exceptional circumstances set out in Article 2(2).

    27.2. The protective duty to take steps to protect the lives of those in their jurisdiction in certain circumstances such as detained prisoners: Osman v United Kingdom (1998) 29 EHRR 245.

27.3. The positive duty properly and openly to investigate deaths for which the state might be responsible, since "*There is not much point in prohibiting police and prison officers … from taking life if there is no independent investigation of how a person in their charge came by her death*": *Savage v South Essex Partnership NHS Foundation Trust* [2009] 2 WLR 115 (HL).

28. **The negative duty** may be breached, for example, if the secret activity to which the Third Direction relates involves, for example:

28.1. killing terrorism suspects: *McCann v United Kingdom* (1995) 21 EHRR 97;

28.2. killing in the course of or incidental to secret operations, such as hostage rescue: *Andronicou and Constantinou v Cyprus* (1997) 25 EHRR 491; or

28.3. delivering someone to foreign authorities in circumstances where there was a real risk of that person being killed in the recipient state: *MAR v United Kingdom* (1996) 23 EHRR CD120; *Bahddar v Netherlands* (1998) 26 EHRR 278.

29. The exceptions in Article 2(2) are strictly construed in light of the fundamental nature of the right at stake and the use of the words "*absolutely necessary*" indicate a stricter test of necessity than under other Convention rights: *McCann* at §§147-149. When the circumstances which lead to death are fully within the control of the State, strong presumptions of fact arise and the burden of proof rests on the authorities to provide a satisfactory and convincing explanation: *Jordan v United Kingdom* (2003) 37 EHRR 52 at §105.

30. **The protective duty** may be breached, for example, if the secret activity overseen by the IS Commissioner involves detention of persons who die or suffer serious injury in custody, or who require medical attention: see e.g. *Kats v Ukraine* (2008) 51 EHRR 1066 at §104. The duty extends to all those in the custody of the State, including in administrative detention: *Savage v South Essex Partnership NHS Foundation Trust* [2009] AC 681 (HL).

31. **The positive investigative duty** may be breached if by the Third Direction the IS Commissioner is responsible for that investigation. The duty continues to apply in difficult security conditions, including in a context of armed conflict: *Al-Skeini v United Kingdom* (2011) 53 EHRR 589 at §164. It can arise:

31.1. even if there is no breach of Article 2 in the death itself — because the killing was "*absolutely necessary*" or the death occurred despite reasonable protective steps; and

31.2. not only in the case of deliberate killing by state agents but also, for example, where an attempted suicide in custody results in long-term injury: *R (JL) v Secretary of State for Justice* [2009] AC 588 (HL) at §§37-41 per Lord Phillips, 54-59 per Lord Rodger.

32. This positive duty requires a thorough and effective investigation so that the cause of any death "*can be determined and those responsible made accountable*": Vo v France (2005) 40 EHRR 12 at §89. An Article 2 investigation must, *inter alia*, be:

32.1. independent;

32.2. effective, i.e. capable of leading to a determination of whether the force used was justified and to the identification and punishment of those responsible;

32.3. reasonably prompt;

32.4. involve "*a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts*"; and

32.5. involve "*[i]n all cases … the next of kin of the victim … in the procedure to the extent necessary to safeguard his or her legitimate interests*".

See Jordan v United Kingdom (2001) 37 EHRR 2 at §§103-121; R (Amin) v SSHD [2004] 1 AC 653 (HL) at §25 per Lord Bingham.

33. Any investigation carried out in secret will fail at least the fourth and fifth of those requirements. Any investigation carried out pursuant to the Third Direction involves no public scrutiny and, presumably, does not involve the next of kin. Even where "*publication of … investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations*", the lack of a "*reasoned decision available to reassure a concerned public that the rule of law had been respected … cannot be regarded as compatible*" with Article 2: Jordan v UK at §§121-124.

34. These obligations do not only apply in the UK. They also apply "*whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction*", including for example "*when, as a consequence of lawful or unlawful military action, a contracting state exercises effective control of an area outside that national territory*": Al-Skeini v UK (2011) 53 EHRR 18 at §§134-138. In those circumstances the Article 2 protections apply both to the State's armed services and to local inhabitants: Smith v Ministry of Defence [2014] AC 52 (SC) at §§45-55.

35. Accordingly, the obligations under Article 2 may be breached if the secret activities supervised under the Third Direction involve lethal operations or detainees at risk of death or serious injury. That is so whether those operations are at home or abroad. Total secrecy of the activities and of any mechanisms for investigation is not compatible with the positive obligations under Article 2.

*Article 3 ECHR*

36. Article 3 of the Convention provides:

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

37. Torture is any act by which severe pain or suffering intentionally inflicted for such purposes as obtaining information or a confession, punishing or intimidating, at the instigation of or with the consent or acquiescence of a public official: see Article 1(1) of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

38. The distinction between 'torture' and 'inhuman or degrading treatment' is found in the intensity of the suffering, although torture also has a purposive element and is an intentional act: *Gäfgen v Germany* (2010) 52 EHRR 1 at §90. As standards progress, treatment that has previously been held not to reach the threshold of severity required to constitute torture could be classified differently now: *Selmouni v France* (1999) 29 EHRR 403 at §§99-100.

39. As with Article 2, Article 3 imposes:

    39.1. a negative obligation not to torture;

    39.2. a protective obligation to take steps to avoid torture;

    39.3. a positive obligation to conduct an effective official investigation capable of leading to the identification and punishment of those responsible: *Labita v Italy* (2008) 46 EHRR 1228 at §131.

40. **The negative or protective obligations** may be breached, for example, if the secret activity to which the Third Direction relates involves delivering detainees to another state where there were substantial grounds for believing that he would face a real risk of being subjected to torture or other prohibited treatment: *Chahal v United Kingdom* (1997) 23 EHRR 413 and *Saadi v Italy* (2009) 49 EHRR 30.

41. **The investigative obligation** would arise, for example, if the secret activity involves or could involve allegations of:

    41.1. Ill-treatment by agents of the State or by private individuals in areas under its control: see *Premininy v Russia* (2011) 31 BHRC 9 at §74.

    41.2. Mistreatment by another State to which a person has been delivered, under the direction or at the instigation of the state which handed him over, or with a sufficient level of involvement in the mistreatment to amount to complicity: see *Al-Saadoon v Secretary of State for Defence* [2017] 2 WLR 219 (CA) at §§138-139.

42. The "*same essential ingredients apply to an Article 3 investigation*" as under Article 2: *R (AM) v SSHD* [2009] EWCA Civ 219 at §§32, 86. In particular, the investigation must secure the "*right to the truth*". In *El Masri v Macedonia* (2013) 57 EHRR 25, the applicant

had been detained incommunicado and rendered to Afghanistan for interrogation. Having found that the investigation undertaken by the authorities was not effective for the purposes of Article 3, the Court went on to "*address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth*". It stated at §§191-192:

> *… it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of "extraordinary rendition" attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations … some of the states concerned were not interested in seeing the truth come out. The concept of "state secrets" has often been invoked to obstruct the search for the truth. …*
>
> *… there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory …*

43. As set out above in relation to Article 2, that requirement cannot be fulfilled by secret oversight by the IS Commissioner. The Strasbourg Court was precisely concerned to avoid determination in secret of (i) whether particular activities constituted torture or inhuman or degrading treatment and (ii) if so, what responsibility should be attributed for those activities.

*Article 4 ECHR*

44. Article 4 of the Convention provides:

> *1. No one shall be held in slavery or servitude.*
>
> *2. No one shall be required to perform forced or compulsory labour.*
>
> *3. For the purpose of this Article the term "forced or compulsory labour" shall not include:*
>
> > *(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;*
> >
> > *(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;*
> >
> > *(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;*
> >
> > *(d) any work or service which forms part of normal civic obligations.*

45. The matters prohibited by Article 4 are:

45.1. Slavery. That is, "*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*": *Siliadin v France* (2005) 20 BHRC 654 at §122. This includes "*contemporary slavery*" such as debt bondage, child slavery, sexual slavery, forced or early marriages, and the sale of wives:

see *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 at §§142-143, 280; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Art 1.

45.2. Servitude. That is, an obligation to work and to live on another's property without being actually owned by another person: *Siliadin* at §123. It included, in that case, a situation where a person was brought from abroad and forced to work without any freedom of movement or free time: at §129.

45.3. Forced or compulsory labour. That is, labour under the threat of a penalty, and for which he has not voluntarily offered himself: *Van der Mussele v Belgium* (1983) 6 EHRR 163 at §37. Whether the labour qualifies as forced or compulsory depends on whether it is disproportionate or excessive in the circumstances.

45.4. Trafficking. Although not expressly mentioned by the Article, trafficking has been treated by the ECtHR as a separate head of prohibited conduct: *Rantsev* at §282.

46. For example, if the secret conduct covered by the Third Direction involves pressuring a person to work for MI6 by providing intelligence it may infringe Article 4.

47. As with Articles 2 and 3, Article 4 also imposes a protective duty to avoid persons being subjected to slavery and a positive duty to investigate such situations. That investigation must be:

47.1. effective; that is, capable of leading to the identification and punishment of the individual or individuals responsible;

47.2. carried out promptly;

47.3. independent; and

47.4. open to the victim or next of kin to participate in the procedure to the extent necessary to safeguard their legitimate interests.

48. The "*scope of the investigative duty arising under art 3 is identical to the scope of the duty under art 4*": *OOO v Metropolitan Police Commissioner* [2011] EWHC 1246 (QB) at §162. The investigative duty does not require a complaint: if potentially prohibited conducted comes to the attention of the State, it is obliged to investigate of its own motion: *Rantsev* at §§232, 288. Where the matter involves the transfer of an individual, Member States are also subject to a duty "*to co-operate effectively with the relevant authorities of other states concerned in the investigation of events which occurred outside their territories*": *Rantsev* at §289.

49. For the same reasons set out above in relation to Articles 2 and 3, the secret oversight of the IS Commissioner cannot ensure an effective investigation.

*Article 5 ECHR*

50. Article 5 of the Convention provides:

> *1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> > *(a) the lawful detention of a person after conviction by a competent court;*
> >
> > *(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
> >
> > *(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
> >
> > *(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
> >
> > *(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
> >
> > *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
>
> *2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*
>
> *3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
>
> *4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*
>
> *5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

51. Deprivation of liberty for the purposes of Article 5 need only be for a short time, for example in while transit in a vehicle: *Bozano v France* (1986) 9 EHRR 297. It does not require that the person be kept in a locked cell if it is clear that he would be prevented from leaving: *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at §§41-42. It may include confinement to a particular area such as an island: *Guzzardi v Italy* (1980) 3 EHRR 333. It is irrelevant that the detaining authority had a benevolent purpose: *Cheshire West and Chester Council v P* [2014] AC 896 at §34.

52. Article 5 applies to arrests or detention by agents of the contracting state outside its territory where the contracting state:

52.1. exercises control over the territory: *Al-Jedda v United Kingdom* (2011) 53 EHRR 789 at §§74-86 (where an Iraqi civilian was detained in British military facility); or

52.2. has acted inconsistently with the sovereignty of the host state: e.g. *Őcalan v Turkey* (2003) 37 EHRR 238 at §§90-93 (where the applicant was arrested by Turkish forces at Nairobi Airport).

53. A number of potential issues arise under Article 5 if the secret activity to which the Third Direction relates involves the deprivation of liberty.

54. **First**, deprivation of liberty may only be in accordance with a procedure prescribed by law (Article 5(1)). This requires not only lawfulness as a matter of domestic law, but compliance with Convention requirements of adequate procedural safeguards sufficiently accessible and precise laws regulating the detention: *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19 at 38.

55. For example, the Strasbourg Court has determined that deprivation of liberty was not prescribed by law where:

55.1. In *HL v United Kingdom* (2005) 40 EHRR 32, admission to and retention in hospital by an executive body under the common law of necessity had a "*striking the lack of any fixed procedural rules*" and left "*effective and unqualified*" control in the hands of the health care professionals: at §§120-121.

55.2. In *Shtukaturov v Russia* (2012) 54 EHRR 27, a procedure for the applicant's detention was available at the discretion of the executive and did not attract procedural safeguards.

56. Any detention effected in secret under the Third Direction is likely to be governed by executive decision. Any guidelines are by their nature unlikely to be published and accessible. Further, inadequate safeguards are not remedied by the secret oversight of the IS Commissioner. Deprivation of liberty on these terms is not in accordance with a procedure "*prescribed by law*". (See further below at §64ff.)

57. **Secondly**, deprivation of liberty is permitted only for certain enumerated purposes. If the secret activity involves detention for some other purpose, it will breach Article 5. For example, the Supreme Court has recently noted that "*detention for the sole purpose of intelligence exploitation is incompatible with article 5.1 of the Convention in a domestic context, even in the face of a significant terrorist threat*": *Mohammed v Secretary of State for Defence* [2017] 2 WLR 327 (SC) at §80 per Lord Sumption (with whom Lady Hale DPSC agreed).

58. **Thirdly**, Article 5 also imposes a positive obligation to "*conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since*": *Imakayeva v Russia* (2008) 47 EHRR 4 at §171. For the reasons explained above in relation to Articles 2, 3 and 4, a review by the IS Commissioner will not satisfy that requirement.

59. **Fourthly**, secret or incommunicado detention supervised only by the IS Commissioner could not satisfy the procedural rights in Article 5. Judicial control of detention is "*implied by the rule of law*": *Brogan v United Kingdom* (1988) 11 EHRR 117 at §58. "*The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Art.5*": *Imakayeva* at §171.

60. In particular, Article 5 requires judicial oversight for two purposes.

    60.1. A person arrested under Article 5(1)(c) must be "*brought promptly before a judge or other officer authorised by law to exercise judicial power*" (Article 5(3)). In the case of arrests in a foreign territory where sovereignty is not exercised, Article 5(3) may require that a person suspected of a crime be brought before local authorities: *Mohammed* at §§96-98.

    60.2. For any deprivation of liberty, procedures be available to have the lawfulness the detention "*decided speedily by a court and his release ordered if the detention is not lawful*" (Article 5(4)). The right must be practical and effective, not merely theoretical or illusory: e.g. *R (Walker and James) v Secretary of State for Justice* [2008] EWCA Civ 30. For example, *habeas corpus* is theoretically available to any person detained by British agents overseas, but it will not satisfy Article 5(4) if such an application is practically impossible: *Mohammed* at §§101-103.

61. This judicial oversight imports the minimum standards associated with judicial power. For example:

    61.1. It must be independent, impartial and capable of giving a binding judgment requiring release.

    61.2. The procedure adopted must "*ensure equal treatment*" and be "*truly adversarial*": *Toth v Austria* (1991) 14 EHRR 551 at §84.

    61.3. The applicant must be afforded adequate legal assistance, disclosure and time to prepare: *Weeks v United Kingdom* (1987) 10 EHRR 293 at §66.

    61.4. Often the circumstances are such as to make it "*essential … that the applicant be present at an oral hearing*": *Waite v UK* (2002) 36 EHRR 1001 at §59. In appropriate circumstances, a public hearing may be required: *Reinprecht v Austria* (2007) 44 EHRR 797 at §41.

    61.5. The judicial authority must have the power to order, rather than merely to recommend, the person's release: *X v UK* (1981) 4 EHRR 188.

62. The Strasbourg Court has expressly stated that national security concerns cannot be invoked to dispense with these procedural requirements: "*National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved*": Al-Nashif v Bulgaria (2003) 36 EHRR 655 at §94.

63. Secret oversight by the IS Commissioner could not satisfy these procedural requirements, even if there were a substantive basis for the detention.

*Article 8 ECHR*

64. Article 8 of the Convention provides:

> *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.*

65. Any interference with private and family life must be "*in accordance with the law*" (Article 8(2)). It is not sufficient that such interference be lawful as a matter of English law. The domestic legal regime under which it is conducted must also be "*compatible with the rule of law*": Gillan v United Kingdom (2010) 50 EHRR 45 at §76; and provide "*the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society*": Malone v UK (1985) 7 EHRR 14 at §79.

66. The rule of law requires "*a measure of legal protection against arbitrary interferences by public authorities*", and that public rules indicate "*with sufficient clarity*" the scope of any discretion conferred and the manner of its exercise: Gillan at §77. In particular, it must clearly indicate "*the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference*": Malone at §67 (emphasis added).

67. One such condition is the oversight and supervision of surveillance activities. The ECtHR has repeatedly affirmed that "*in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for a democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge*": Kennedy v UK (2011) 52 EHRR 4 at §167. Those supervision procedures "*must follow the values of a democratic society as faithfully as possible, in particular the rule of law*": Rotaru v Romania [2000] ECHR 192 at §59. In several cases the Court has noted that, without any or any adequate supervision, surveillance regimes do not "*indicate with reasonable clarity the scope and manner of exercise of the relevant discretion*" as required by Article 8: e.g. Rotaru at §61; Kopp v Switzerland (1999) 27 EHRR 91 at §§73-75.

68. Secret supervision of an entirely secret system does not provide that "*reasonable clarity*" required by the rule of law and Article 8, any more than an absence of supervision:

68.1. If the fact of supervision of a particular function is secret, it can furnish no clarity to the public in relation to the conditions on which the authorities may undertake their activities.

68.2. If the terms and nature of supervision are secret, it can furnish no assurance that it is an adequate safeguard against abuse.

69. Domestic and Strasbourg jurisprudence indicates that safeguards do not pass the rule of law criterion if they are entirely secret:

69.1. In Liberty/Privacy International [2015] HRLR 2 ("*Liberty 1*") and Liberty/Privacy International v SSFCO [2015] HRLR 7 ("*Liberty 2*"), the Tribunal held that the Agencies' receipt of intercepted material from the US National Security Agency was lawful only once safeguards governing that receipt were made public. Even if the full details of the oversight cannot be revealed for national security reasons, it is necessary that "*what is described above the waterline is accurate and gives a sufficiently clear signpost to what is below the waterline*" (§50). It was "*of course itself not sufficient*" that "*arrangements below the waterline*" were adequate, but necessary that they be "*sufficiently signposted*". This was necessary to satisfy the "*vital interests of all citizens to know that the law makes effective provision to safeguard their rights*" (§157). Accordingly, in Liberty 2, the Tribunal held that the regime was unlawful until the procedures were made public, since without that disclosure there was no "*sufficiently accessible indication to the public of the legal framework and any safeguards*" (§19). That is to say, the rule of law sees secret safeguards as no safeguards at all.

69.2. Likewise, in Liberty v UK (2009) 48 EHRR 1, a Commissioner was charged with overseeing unspecified "*arrangements*" made by the Secretary of State to safeguard against abuse of interception powers. The Court stated that this oversight, "*while an important safeguard against abuse of power, did not contribute towards the accessibility and clarity of the scheme, since he* [i.e. the Commissioner] *was not able to reveal what the 'arrangements' were*": at §67. The procedures adopted by the Secretary of State, and therefore the nature of the oversight exercised by the Commissioner, were undisclosed. Accordingly, that oversight was not sufficient to comply with Article 8.

70. Accordingly, an interference with rights under Article 8 must be conducted under a regime that has adequate protections, and clear laws must give a sufficient indication of that regime and those protections. Secret activities under a secret regime with secret protections will not do so.

*Article 9*

71. Article 9 provides:

> *1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
>
> *2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

72. Article 9 provides, amongst other things, a guarantee against indoctrination of religious beliefs by the state: *Angelini v Sweden* 51 DR 41 (1986). While manifestations of religious beliefs may be subject to restrictions, freedom of thought, conscience and religion are absolute rights which may not be subject to any form of limitation.

73. The secret activity the subject of the Third Direction may interfere with Article 9(1) rights, for example, if it involves:

73.1. indoctrination in matters relating to religious belief: *Angelini*; or

73.2. "*interference with the internal organisation of the Muslim community*", by orchestrating the replacement of religious clerics in a particular community with the State's preferred leaders, as occurred in *Hasan and Chaush v Bulgaria* (2000) 34 EHRR 55 at §85.

74. To the extent that this interference only impairs the *manifestation* of religion, it may be justified. However, such an interference must be "*prescribed by law*". This imports the same requirements of the rule of law discussed above and is not satisfied by undisclosed procedures that provide for no substantive criteria and secret oversight that provides no meaningful safeguard against abuse.

*Article 10*

75. Article 10 provides:

> *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.*

76. Article 10 confers a right to communicate information, opinions and argument. Protected speech includes expression which would offend, shock or disturb the state or any sector of the population: *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at §65.

77. The secret activity reviewed under the Third Direction may interfere with this right if, for example, it involves censorship or confiscation of material.

78. Any such interference may be justified, but only if it is "*prescribed by law*". This imports the same requirement for compliance with the rule of law as Article 8: *Liberty v GCHQ* [2015] HRLR 2 at §§149-152. It is not satisfied by covert procedures and secret surveillance.

*A1P1*

79. Article 1 of the First Protocol ("A1P1") relevantly provides:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

80. A1P1 guarantees the right to property. As explained by the ECtHR in *Sporrong v Lonnroth v Sweden* (1982) 5 EHRR 35 at §61, it protects against (i) interference with the peaceful enjoyment of possessions, and (ii) deprivation of property.

81. An interference of either kind must satisfy the requirement of lawfulness. This condition, as under Articles 5, 8, 9 and 10 derives from "*the rule of law, one of the fundamental principles of a democratic society*": *Iatridis v Greece* (1999) 30 EHRR 97 at §58. If the interference with or deprivation of property fails this criterion, it is unlawful without any inquiry into the legitimacy of its aim or proportionality.

82. Accordingly, interferences with property rights were unlawful where:

    82.1. The pre-emption of property by revenue authorities operated arbitrarily and selectively and was not attended by basic procedural safeguards: *Hentrich v France* (1994) 18 EHRR 440 at §42.

    82.2. The authorities failed to adopt a "*reasonably consistent approach [to] the market value of the land*" on which taxation was levied: *Jokela v Finland* (2003) 37 EHRR 26.

83. The secret activity the subject of the Third Direction may interfere with rights under A1P1 if, for example, it involves confiscating or freezing assets of citizens for national security reasons. Such an interference could be justified but must comply with the minimum requirements of lawfulness. Secret procedures and secret oversight does not do so.

**GROUNDS**

84. The secret activities supervised by the IS Commissioner pursuant to the Third Direction are unlawful pursuant to s 6 HRA because they are incompatible with Convention rights.

85. The obligations under the Convention apply whether the secret function is exercised and the infringement occurs within the United Kingdom or in a territory or place over which the United Kingdom exercises effective control: *Al-Skeini v UK* (2011) 53 EHRR 18 at §§134-138.

*Ground 1: Secret activity not in accordance with law*

86. The carrying on of the secret activities by one or more of the Agencies, supervised by the IS Commissioner under the Third Direction, is not "*in accordance with law*" or "*prescribed by law*" as required by Articles 5, 8, 9, 10, and/or A1P1. The regime governing that function does not contain adequate safeguards, sufficiently accessible to the public, to provide proper protection against arbitrary conduct:

86.1. The Prime Minister, by the Third Direction, has conferred a statutory power and duty under s 59A(1)(a) RIPA on the IS Commissioner to "*keep under review the carrying out of*" a particular function.

86.2. The fact but not the content of the Third Direction is public. That is to say:

(a) the nature and scope of the function is secret;

(b) the Agency or Agencies carrying out the function is secret; and

(c) the terms on which the IS Commissioner keeps that Agency's exercise of that function under review are secret.

86.3. The secret activities of the Agency are, however, of such a character that the Prime Minister has considered it necessary to have a former Lord Justice of Appeal monitor them to avoid abuse of power. The Prime Minister has presumably reached that view because that secret activity carried out by the Agencies interferes with fundamental rights.

86.4. All such interferences must be "*in accordance with law*". It requires a legal regime that complies with the rule of law by providing both (i) adequate safeguards against abuse of executive power, including judicial or quasi-judicial oversight and (ii) sufficient clarity to enable individuals to appreciate the existence and nature of those powers.

86.5. A procedure or function that interferes with rights cannot comply with that principle of legal certainty if it is entirely secret.

86.6. Further, safeguards, including oversight, only aid compliance with the rule of law if they are publicly known. A regime cannot comply with the rule of law

and by reason of safeguards that are "*below the waterline*" and not adequately "*signposted*".[2]

86.7. The nature of the activity conducted under the Third Direction, the legal regime governing that activity, the identity of the Agency carrying out that activity, and the terms of its oversight are all "*below the waterline*". They are not "*signposted*" adequately or at all. Only the existence of the Third Direction is publicly known. That is insufficient.

87. Further, prior to the date on which the Third Direction was made, the exercise of that secret function was not "*in accordance with law*" or "*prescribed by law*" as required by Articles 5, 8, 9, 10, and A1P1 of the ECHR:

87.1. The Third Direction must by definition have been made on or after the coming into force of s 59A on 25 June 2013.

87.2. Prior to that date, the secret activity was not subject to any statutory oversight at all.

88. In the premises, to the extent that the secret activity involves:

88.1. deprivation of liberty within the meaning of Article 5;

88.2. interference with private or family life or correspondence within the meaning of Article 8;

88.3. limitation of the freedom to manifest religion or beliefs within the meaning of Article 9;

88.4. restriction of the freedom of expression within the meaning of Article 10;

88.5. deprivation of possessions within the meaning of A1P1;

the Agencies in conducting that activity are acting incompatibly with those Article(s).

*Ground 2: Breaches of procedural rights*

89. Any deprivation of liberty effected by the secret activity, carried out under the supervision of the IS Commissioner under the Third Direction, is in breach of Articles 5(3) and/or (4).

89.1. Under Articles 5(3), a person arrested for an offence must be brought promptly before a judge.

89.2. Under Article 5(4), any person detained must have access to judicial procedures to challenge the lawfulness of his detention.

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[2] The Claimants reserve their position as to the correctness of the test applied in *Liberty 1* and *Liberty 2*, but even on that test, the activities overseen under the Third Direction do not comply with the requirement of foreseeability.

89.3. Under both provisions, the judicial process must be independent, impartial, adversarial, ensure equal treatment and adequate hearing rights, afford adequate time, disclosure and legal assistance and involve an oral and where appropriate public hearing. In particular, the detained person must have the opportunity to make representations.

89.4. Any secret deprivation of liberty effected by the Agencies is necessarily incommunicado detention without access to courts.

89.5. Secret review by the IS Commissioner of an individual's detention does not provide the judicial oversight required by Article 5.

89.6. Further, prior to the coming into force of the Third Direction, there was no system of statutory oversight.

*Ground 3: Breaches of investigative duties*

90. The supervision by the IS Commissioner under the Third Direction of the exercise of the secret function by one or more of the Agencies does not satisfy the positive investigative duty imposed by Articles 2, 3, 4 and/or 5 ECHR:

90.1. Each of those Articles imposes on Contracting States a positive duty to properly and openly investigate conduct infringing those Articles, namely conduct causing death or serious injury (Article 2), torture or inhuman and degrading treatment (Article 3), slavery, servitude, forced or compulsory labour or trafficking (Article 4), or deprivation of liberty (Article 5).

90.2. Although the specific activity the subject of supervision under the Third Direction is not known, it is sufficiently serious to warrant monitoring by the IS Commissioner. Other activities supervised by the IS Commissioner include the authorisation by the Secretary of State under s 7 ISA of actions that would otherwise attract criminal liability: s 59 RIPA.

90.3. The investigative duty is not fulfilled by an investigation by the IS Commissioner, including because:

(a) it is not capable of leading to identification and punishment of those responsible;

(b) it does not involve a sufficient element of public scrutiny, or any public scrutiny at all;

(c) it does not involve the victim or the next of kin to the extent necessary to safeguard their legitimate interests, or at all.

91. In the premises, the secret activities to which the Third Direction relates are in breach of Article 2, 3, 4 and/or 5 to the extent that they might involve arguable instances of breaches of those Articles.

*Ground 4: Breaches of negative or preventative obligations*

92. The secret activity to which the Third Direction relates is in breach of:

92.1. Article 2, to the extent that it involves deprivation of life that is not absolutely necessary for the defence from unlawful violence, lawful arrest, prevention of unlawful escape or quelling a riot or insurrection; for example:

(a) targeted killings,

(b) killings in the course of secret operations, or

(c) delivering a person to foreign authorities where there is a real risk that they will be killed.

92.2. Article 3, to the extent that it involves torture or inhuman and degrading treatment, or delivering a person to foreign authorities where there is a real risk that they will be subjected to torture or inhuman or degrading treatment.

92.3. Article 4, to the extent that it involves slavery, servitude, forced or compulsory labour or trafficking.

92.4. Article 5, to the extent that it involves the deprivation of liberty of any person for a purpose other than that enumerated; for example, for the obtaining of intelligence.

92.5. Article 8, to the extent that it involves a disproportionate interference with private and family life or the right to privacy of correspondence.

92.6. Article 9, to the extent that it:

(a) Interferes with the freedom of thought, conscience or religion.

92.7. Article 10, to the extent it disproportionately interferes with the freedom of expression; for example by unjustified censorship.

92.8. A1P1, to the extent that it involves an deprivation of property that is disproportionate or other than in the public interest; for example unjustified freezing of or interference with assets of persons of interest to the Agencies.

**CONCLUSION**

93. The Claimants therefore seek the following orders:

93.1. A declaration that the Respondents' secret conduct is unlawful;

93.2. An injunction restraining further unlawful conduct;

93.3. Such further or other relief as the Tribunal thinks fit.

**BEN JAFFEY QC**

**23 June 2017**