IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

CAT H CORE PARTICIPANTS

OPENING STATEMENT

TRANCHE 1, PHASE 3

I: Summary

1. This is the Opening Statement on behalf of all Category H core participants (Cat H CPs) for Tranche 1, Phase 3 of the Inquiry. The Cat H CPs are women who were deceived into intimate sexual relationships with undercover police officers (UCOs), together with the child of one of those relationships, and one man who was deceived into a close long-term friendship.

2. Phase 3 addresses the role of and evidence from managers within the SDS between 1968- 1982. The Inquiry has already heard open evidence from SDS undercover officers between 1968-1970 (Phase 1) and between 1970-1979 (Phase 2), and closed evidence from those officers (Phase 4). Evidence from more senior Special Branch managers outside the SDS, meanwhile, and from other agencies and departments, will be heard in Tranche 6.

3. Opening statements have been made for Cat H CPs at the start of the Inquiry and in Phase 2.[1] Those submissions are not repeated. It is important to note, however, that Phases 1 and 2 overlap with Phase 3 in terms of events, chronology, and interaction of officers and managers. There will also be a chronological overlap with Tranche 6, in particular the role of the Home Office and the Security Service, in what occurred

[1] Opening Statement on Behalf of Category H CPs https://www.ucpi.org.uk/wp-content/uploads/2020/11/20201026-Opening_Statement-CAT_H_Birnbergs-PKQC-AMENDED_09.11.20.pdf; Opening Statement on behalf of Category H CPs T1P2 https://www.ucpi.org.uk/wp-content/uploads/2021/04/20210414_Opening-Statement-Category-H.pdf.

during this period. These submissions are thus directly relevant to Phases 1 and 2 as well as Phase 3.

4. More broadly, these submissions are relevant to later Tranches too. That is for two reasons. First, as will become apparent, the seeds of what went wrong with undercover policing in the next three decades were sown between 1968-1982. Second, the evidence that has emerged in Tranche 1, assessed against the applicable legal framework (see attached Legal Framework), including the unappealed conclusions in the recent case of *Kate Wilson v Commissioner of the Metropolis and National Police Chiefs Council* (NPCC) [2021] UKIPTrib IPT 11 167 H, demonstrates that the operations of the SDS failed to comply with numerous basic requirements of common law, international human rights law and administrative law. The SDS's operations involved multiple unjustified torts, including trespass to land and goods, and breached numerous fundamental rights of a wide range of individuals. They significantly exceeded longstanding parameters set for the use of police powers, and broke the public trust inherent in the nine Peelian policing principles. As explained below, that indisputable unlawfulness has implications for the enquiries to be made in all Tranches.

5. This statement thus addresses the following:
   (1) The position taken by Category H Core Participants in this Inquiry;
   (2) The evidence in Tranche 1 Phase 3;
   (3) Key Issues arising as a result of the evidence;
   (4) Rule 9 questions.

II: The position of Category H CPs

6. Although this Inquiry is precluded by section 2 of the Inquiries Act 2005 from <u>determining</u> any person's civil or criminal liability, the extent to which both the common law and international and domestic human rights law has always imposed limits on the exercise of police power is the essential backdrop to the Inquiry.

7. The common law has for centuries zealously protected the sanctity of people's homes and the freedom and security of their persons and possessions, and consequently imposed limits on police interference with those fundamental rights (*Privacy International v Investigatory Powers Tribunal* [2021] QB 936 at §39-48). The police officer,

like any other citizen, is liable in tort for invasions of those rights, and must be able to justify their actions in accordance with common law doctrines (*IRC v Rossminster* [1980] AC 952 at 1008; *Entick v Carrington* (1765) 95 ER 807 at 817-8). Equally at all material times the UK had international and (when incorporated) domestic human rights obligations under the European Convention on Human Rights. The UK ratified the ECHR in 1951 and, after its creation in 1960, signed up to the right of individual petition to the Strasbourg Court in 1966. That common law and human rights legal framework is explored in more detail in the attached Annex.

8. It is a striking feature of the evidence from Tranche 1 (see further below), however, that the common law and human rights of individuals, and the impact on those rights of long-term undercover policing, was rarely if ever considered. Unfortunately, as the *Kate Wilson* case shows, that disregard for the impact on individual rights persisted even after the Regulation of Investigatory Powers Act 2000 (RIPA) formalised undercover policing methods, and made express the obligation to give detailed authorisations for conduct, and to meet the tests of necessity and proportionality (see sections 26-29 RIPA).

9. This wholesale disregard for common law rights and human rights not only rendered the SDS's operations unlawful, but also undermined the legitimacy of their activities and broke the public trust. In a democracy, governments are elected by the people, and serve the people. By this process of election the people confer extensive powers on their governments, but have high expectations of how these extensive powers are used. Those high expectations include that the powers conferred are used lawfully, accountably and transparently.

10. Secrecy in the use of these extensive powers is long recognised to be the enemy of democratic values (see *Klass v Germany* (1979-80) 2 E.H.R.R. 214 §41, §42 and §49; *Malone v UK* (1985) 7 E.H.R.R. 14 §81). That is not least because it interferes with the people's ability to ensure that powers are used lawfully, and it also interferes with accountability when they are not so used. Over time, this absence of transparency and accountability is capable of corrupting those who use it and damaging the democratic process itself (*Klass* at §49). That is one reason why, in democracies, the state is

expected, and permitted, to use secret powers of surveillance of its own people only where absolutely necessary to do so, and with strict safeguards.

11. As explained in more detail below, the use of undercover policing by the SDS and, more recently, the National Public Order Intelligence Unit (NPOIU) was unjustified, profoundly anti-democratic and seriously violated fundamental rights. In these circumstances Cat H CPs wish to make plain that they do not accept that the wrongdoing they suffered when undercover officers entered into sexual relationships with them was an exception to an otherwise lawful and justified operation. On the contrary it is their position that this wrongdoing flowed from the serious systemic flaws in the conception and implementation of the SDS and NPOIU's entire undercover policing operation.

12. In particular, inserting undercover police officers for long-term deployments into the protest and social, environmental and political groups of which they were a part:

    (1) Meant the state was closely monitoring, recording and influencing the lawful exercise of fundamental democratic rights, including freedom of expression and political thought, freedom of assembly, and political association of members of the public. The public's ability to exercise these rights without state interference is the lynchpin of Britain's democratic system, as well as a constitutional and international human right (see *Wilson* §§322 – 333; *Handyside v UK* (1979-80) 1 E.H.R.R. 737 §49). The SDS's extensive unregulated interference with these rights thus posed a threat to democracy itself.

    (2) Trespassed into areas of citizens' private lives in which constitutionally and as a matter of human rights law ordinarily the state has no proper business. In their false identities, police spies invaded the sanctuary of private homes, violated the intimacy of private family lives and inveigled their way into the personal and private dealings of members of the public. And they passed all the information they gathered out, to be recorded in police files, and shared it with the Security Service. Both at common law and under human rights law, state action of this type must be strictly justified and tightly controlled to be lawful: *Ghani v Jones* [1970] 1 QB 693 at 706G-H; *Wilson* §289; *Malone v Commissioner of Police* [1979] Ch. 344, 377; *Klass v Germany* §50, §55. It is already

clear that the SDS and NPOIU's activity fell far short of these essential standards.

(3) Exposed women to inherent and discriminatory risks of degrading and abusive sexual relationships when it was the state's obligation to protect them from such risks (*Wilson* at §228-230). The police planted strange men into private homes and private lives. These men were instructed to lie and to create a false personal history which disguised their true identities, including their marital status, and obscured their real natures. The involvement of the state in concealing these men's identities and creating new ones disabled women from making informed choices about their bodily autonomy and removed ordinary measures of protection against abuse and deceit which are available in social groups. And yet the police did not compensate for that disability by taking any additional protective measures of its own: *Wilson* §§221-225.

(4) Corrupted the police force, and betrayed the public's trust. Planting police spies in people's lives involved the police lying repeatedly to individual members of the public and the public at large. The public expected and had the right to expect that the police would uphold law and order and the values of truth, integrity and honesty which underpin law and order: *R v Luckett* [2020] EWCA Crim 565, [2020] 2 Cr. App. R. (S.) 43 §18. Instead the police undermined those values. The extent of that corruption is illustrated by the repeated willingness of the police over decades to lie to the courts and undermine legal professional privilege. The police were attacking the very institutions which it was their duty to support.

13. It is clear that the need to maintain public order at demonstrations could not conceivably justify the inroads into democratic values and private common law rights caused by this type of extensive undercover surveillance. In the sphere of human rights obligations that was the conclusion in *Wilson* at §282-290 endorsing the 2012 conclusion of Her Majesty's Inspectorate of the Constabulary (HMIC) in its report "*An inspection of undercover policing in England and Wales*" (2014, referenced in NPCC O/S T1/P1 §14). As for the common law, there is no case which comes close to suggesting invasive powers like these could be used to police public order more effectively, still less that this could be done covertly; quite the contrary (see *Privacy International* at §§39-48, *Ghani v Jones* at 706G-H, *Entick v Carrington* pp.817-818). Indeed it is a striking

feature of the opening submissions of the MPS, NPCC and NCA for T1 P1/2 (see MPS O/S T1/P1 at §§61-79; NPCC O/S T1/P1 at §§20-21; NCA O/S T1/P1 at §§20-21) that the examples they give of where undercover policing is essential to society all concern crimes, and not only crimes but serious crimes: child abuse, drug trafficking, weapons smuggling, terrorism, and where those spied on are those suspected of committing these crimes. Notably in the case of crimes like these:

(1) The unlawful conduct and the severity of the risk to particular individuals, often death, or serious bodily or mental harm, is far more likely to be capable of justifying inroads into fundamental rights from undercover policing.
(2) The clarity of the identified risk means the operation can be closely targeted on those suspected of involvement in serious crime.
(3) The operation is likely to be self-limiting, with most operations aimed at capturing and prosecuting those involved in the crimes.
(4) The involvement of the court process significantly enhances accountability.

14. In fact the evidence indicates that the kind of long-term undercover placements which were commonplace in the surveillance of protest and political groups by the SDS and NPOIU, and which are so particularly invasive of individual rights, are **less** commonplace in relation to serious crimes such as terrorism.[2] In the investigation of such crimes, the combination of the risks to police officers from dangerous and violent individuals in criminal enterprises,[3] and the end-point of a criminal prosecution, means similar long-term infiltration is relatively rare.[4] The lesser danger to officers in the SDS and NPOIU, together with lack of internal boundaries and external oversight, seems by contrast to have engendered widespread complacency and indiscipline in the use of UCOs.[5]

15. In tacit recognition of the difficulties in justifying the SDS's activities on the basis of upholding public order, both the MPS (T1/P1 O/S §§84-5) and the Designated Lawyers (T1/P1 O/S §7.2) rely on the fact that intelligence gathered by SDS UCOs

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[2] HMIC, *A review of national police units which provide intelligence on criminality associated with protest*, p.19
[3] Geoffrey Craft HN34 **{MPS-0747446/11, 29}; {MPS-0730719/1}; {MPS-0728980/3}.**
[4] HMIC, A review of national police unites which provide intelligence on criminality associated with protest, p.20; Geoffrey Craft HN34 **{MPS-0747446/11, 29}**.
[5] See the Operation Herne Report 3 dated July 2014 at §1.14.

was shared with the Security Service (MI5). While Cat H CPs agree that examination of the role of MI5 in what went so badly wrong with undercover policing in 1968-1983 is a critical aspect of this Inquiry (see further *'Themes'* below), they do not agree that the sharing of information with MI5 could justify the police engaging in undercover operations which did not serve a clear policing purpose,[6] nor that it could render lawful conduct which violated fundamental rights at common law and under the ECHR. Notably the Security Service itself was then (see Maxwell Fyfe Directive at §3)[7] and remains (see sections 2-3 Security Service Act 1989) subject to a strict necessity requirement in respect of its own activities and the information it collects. It also had to justify its common law torts, and invasions of fundamental rights, in the ordinary way. The Security Service has not adduced evidence capable of justifying the inroads into common law and fundamental rights occasioned by the SDS's actions, and the Inquiry's Terms of Reference expressly preclude examining covert operations by bodies other than an English or Welsh police force.

16. In the case of the Cat H CPs, the invasiveness of the undercover policing method used by the SDS and NPOIU was extreme. The invasion extended from their homes and private lives, to their bodies and the intimacy of romantic relationships. The MPS now disavows this as *'wrong'* (see MPS O/S §18), but the position of the police has not always been so clear (see HC 837 Written evidence submitted by Birnberg Peirce & Partners and Tuckers Solicitors).[8] In 2012, the then Commissioner told the Home Affairs Select Committee that the fact that sexual relationships may sometimes happen in undercover work was *'almost inevitable'*. The Cat H CPs agree abusive sexual relationships are an inevitable risk of long-term infiltration by undercover police officers; these and the other serious risks to democratic values and individual rights identified above is why the undercover tactic should be reserved for the most serious crimes. Further, the high level of risk means every safeguard should be in place to prevent risks like sexual abuse from occurring, and infiltration should only be

[6] See Home Office *Consultation on the Special Branch* terms of reference in 1980 querying whether there was a lawful basis for police officers to investigate 'subversion' if the activities subject to investigation were lawful; **{UCPI0000004715/4}**.
[7] **{UCPI0000034262}**.
[8] https://publications.parliament.uk/pa/cm201213/cmselect/cmhaff/837/837we02.htm (Available on 12.04.2022).

permitted under the tightest supervision. The evidence indicates none of this occurred for the duration of the SDS and NPOIU.

17. The inevitability of the risk, alongside the lack of any meaningful safeguards, raises serious questions about the direct and/or indirect involvement, knowledge and awareness of managers and other more senior police officers and Home Office officials in what happened to the Cat H CPs. Put simply, it is inconceivable that the risk of sexual relationships in long-term deployments was not appreciated by managers and senior officers; since no meaningful steps were taken to avert that risk, the inference must be, at least, that the risk was considered tolerable. The evidence supports this position. The implications for Phase 3 of Tranche 1 are explored further below.

18. But it is important to understand the true significance of the wrongdoing perpetrated on the Cat H CPs. It was the inevitable by-product of an approach to undercover work which was ill conceived in policing terms, because the end could not justify the risks entailed: which through lack of boundaries and supervision quickly spiralled out of control; which operated unaccountably in secret; and in which at all stages minimal regard was had to the rights of and impact on members of the public. The evidence shows that the maintenance of the secrecy and integrity of the SDS and NPOIU's undercover operations swiftly became an end in itself, with constitutional principles, the justice system,[9] and the rights of members of the public coming a poor second.[10] The only people whose rights and welfare were ever considered were the UCOs.[11]

III: Evidence: Tranche 1 Phase 3

19. The Inquiry has already heard oral evidence from 20 UCOs[12] deployed between 1968-1979 and from 12 non-state witnesses (including 2 risk assessors of UCO HN155). Evidence from a further 21 witnesses was read out.

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[9] Michael Scott HN298 was prosecuted, convicted and fined in his cover name with the full knowledge of his managers. He did not inform the prosecutor or the Court staff that he was an undercover officer during his trial **{MPS-0746258/27-28}; {MPS-0526782/1}** and **{MPS-0526782/2}**.

[10] Richard Clark ('Rick Gibson') HN297 was withdrawn when members of the Big Flame confronted him with copies of his birth and death certificates in his cover name **{MPS-0732910}**.

[11] Angus McIntosh HN244 **{MPS-0747578/10,16}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797/15,32}**; Geoffrey Craft HN34 **{MPS-0747446/8}** and **{MPS-0748041/5-6}**; Richard Walker HN368 **{MPS-0747527/11}**; 1980 SDS Annual Report **{MPS-0728962/5-6}**.

[12] Five in closed session.

20. In summary, their evidence together with other documentation disclosed in T1/P1-P2 shows that:

    (1) The SDS was initially established to gather intelligence on a forthcoming demonstration on 27 October 1968 by the Vietnam Solidarity Campaign (VSC) for the stated purpose of avoiding a repeat of violence and disorder which had occurred at an earlier demonstration on 17 March 1968.[13]

    (2) Until then Special Branch had used a variety of sources to gather evidence on impending demonstrations, including sending plainclothes officers to open meetings.[14] The SDS was instructed to use undercover officers with false identities to pose as group members and achieve deeper integration, with a view to gathering more intelligence about intentions.[15]

    (3) The October 1968 demonstration passed off without serious incident, and yet the SDS was not disbanded.[16] Instead it expanded, and began gathering information on a large variety of political and campaign groups.[17]

    (4) Although the ostensible purpose of the SDS remained the maintenance of public order, many UCOs apparently considered their role was to counter subversion and assist MI5.[18]

    (5) There was little or no guidance or training on any aspect of the undercover role, including what *'subversion'* meant.[19]

    (6) There was no guidance or training on privacy concerns or intimate relationships.[20]

    (7) UCOs were given free rein to decide how to run their own surveillance.[21] Tasking was usually broad-brush. There was no restriction on entering homes,

[13] **{MPS-0724120/3}**; Roy Creamer HN3093 **{MPS-0747215/4-5}; {MPS-0728973/4}**.
[14] Roy Creamer HN3093 **{MPS-0747215/4-5}.**
[15] **{MPS-0728973/4}; {UCPI0000030045}.**
[16] **{MPS-0730093/11}**.
[17] 1969 SDS Annual Report **{MPS-0728973}.**
[18] Stewart Goodman HN339 **{MPS-0736910/17}**; HN155 **{MPS-0747546/31}**; HN299/342 **{MPS-0745773}**; HN351 **{MPS-0740332/14}**; Alex Sloan HN347 **{MPS-0741697/15}**.
[19] John Graham HN329 **{MPS-0738576/5}; {Day9T1P1/10:13-18}; {Day9T1P1/16:13-14}**; Alex Sloan HN347**{Day5T1P2/92:20-93:21}**; Michael Scott HN298 **{Day9T1P2/22:6}-{Day9T1P2/24:16}**, **{MPS-746258/3}**; Vince Harvey ('Vince Miller') HN354 **{Day14T1P2/24:11}-{Day14T1P2/25:7}**.
[20] Vince Harvey ('Vince Miller') HN354 **{Day14T1P2/14:12}-{Day14T1P2/15:14}**.
[21] Stewart Goodman HN339 **{MPS-0736910/10-11}**; HN351 **{MPS-0740332}**; HN333 **{MPS-0740329/14}**; HN299/342 **{MPS-0745773/19}**; HN106 **{MPS-0745735/15}**; HN155 **{MPS-0747546/15}**; Barry Moss ('Barry Morris') HN218 **{MPS-0740354/12}**; Graham Coates HN304 **{MPS-0742282/17}**; John Graham HN329 **{MPS-0738576/12}**; Vince Harvey ('Vince Miller') HN354 **{MPS-0747657/16}.**

and no restriction on surveillance of any groups or individuals or on recording information. On the contrary, officers were expected to record as much information as possible about the groups they infiltrated. They *'hoovered everything up'* and no scrap of information was ever rejected as irrelevant.[22]

(8) No consideration was given to the welfare or privacy of those under surveillance.

(9) Officers met regularly with managers in twice-weekly meetings in two safe houses which were sometimes followed by a visit to the pub. They also had regular contact with managers by phone. Many officers said they felt well supported.[23]

(10) There was sexual banter about women at these meetings and some officers were known to have engaged in sexual relationships with those spied on.[24]

(11) Officers were given a very wide remit and a wide discretion on how to conduct their operations.[25] It was normal practice to use infiltration of one group or individual to gather information about another group or individual.

(12) UCOs had no role in considering the usefulness of their operations.[26]

(13) There was overall very little crime, disorder or intelligence about real risks to democracy.[27] The National Front used far more violence than the SWP.[28] Often the intelligence gathered showed an absence of any serious threats to public order.[29]

21. In Phase 3 a series of documents including Special Branch Annual Reports to the Home Office and discussions in the Home Office about the Special Branch Terms of Reference have been disclosed. This documentation is accompanied by a series of witness

[22] Alex Sloan HN347 **{Day5T1P2/93:22}-{Day5T1P2/94:11}**; Michael Scott HN298 **{Day9T1P2/24:6-13}**.
[23] **{UCPI0000034307/2}**; HN106 **{MPS-0745735/48}**; HN155 **{MPS-0747546}**; HN351 **{MPS-0740332}**; Stewart Goodman HN339 **{MPS-0736910}.**
[24] HN21; HN155; Richard Clark ('Rick Gibson') HN297; HN300; Vince Harvey ('Vince Miller') HN354; **{UCPI0000034307/2}**; HN354 {Day14T1P2/70:7-14}; Graham Coates HN304 **{Day12T1P2/36:1}-{Day12T1P2/42:18}**.
[25] Vince Harvey ('Vince Miller') HN354 **{Day14T1P2/14:19}-{Day14T1P2/15:4}**.
[26] Alex Sloan HN347 **{Day5T1P2/135:6-23}**.
[27] HN334 **{MPS-0746257/24}**; Graham Coates HN304 **{Day12T1P2/113:2-16}**, **{Day12T1P2/119:8-15}**; John Graham HN329 **{MPS-0738576/43}**; HN330 **{MPS-0740328/13}**; Barry Moss ('Barry Morris') HN218 **{MPS-0740354/22}.**
[28] Special Branch Annual Report 1978 **{MPS-0747791/3}.**
[29] Roy Creamer HN3093 **{MPS-0747215/39}**; Graham Coates HN304 **{MPS-0742282/44}**.

statements from managers and SDS administrative officers in post during 1968-1983, some of whom are being called to give oral evidence.

22. That evidence confirms the themes arising in Phases 1 and 2. It shows:
    (1) Managers within the SDS had little to no involvement in decision making on targeting and tasking of the undercover officers;[30]
    (2) There was confusion about who (if anyone) was responsible for such targeting and tasking, with a range of possibilities suggested including the individual UCOs themselves,[31] senior officers in Special Branch,[32] and the Security Service;[33]
    (3) Managers did not conduct any assessment of the necessity for, or benefit of, the surveillance either in advance of it occurring or after the event. The recipients of intelligence, described as *'customers'*,[34] did not provide feedback to the SDS about the information they were gathering,[35] nor were Special Branch and managers able to assess the benefit of intelligence gathered by the SDS.[36] *'We acted on behalf of other persons with no oversight of the broader purpose of the information.'*[37]
    (4) Nor was there any proper review of the SDS's operations as a whole. A Working Party set up in 1976 agreed to continue SDS operations in order to ensure adequate police arrangements were made for demonstrations, without considering their necessity in the light of decreased public disorder.[38]
    (5) UCOs were given little or no guidance by managers about the conduct of their surveillance and what to report, were expected to know what to report

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[30] Derek Brice HN3378 **{MPS-0747802/12,22}**; Angus McIntosh HN244 **{MPS-0747578/13,28}**; Richard Scully HN2152 **{MPS-0747155/16}.**

[31] Barry Moss ('Barry Morris') HN218 **{MPS-07403554/10-11}**; HN218 **{MPS-0747797/12-13}**; Trevor Butler HN307 **{MPS-0747658/18}**; Richard Walker HN368 **{MPS-0747527/6}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797/12}.**

[32] Geoffrey Craft HN34 **{MPS-0748041/16}**; HN34 **{MPS-0747446/11}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797/30}.**

[33] David Smith HN103 **{MPS-0747443/10, 33}**; David Bicknell HN357 **{MPS-0726608/6}**; Angus McIntosh HN244 **{MPS-0747578/18}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797/18}.**

[34] Christopher Skey HN308 **{MPS-0747528/14}**; Geoffrey Craft HN34 **{MPS-0748041/7}**; 1983 SDS Annual Report **{MPS-0730903/10}**; Richard Walker HN368 **{MPS-0747527/12}.**

[35] David Smith HN103 **{MPS-0747443/14}**; Richard Walker HN368 **{MPS-0747527/50}**; Geoffrey Craft HN34 **{MPS-0748041/6}.**

[36] Derek Brice HN3378 **{MPS-0747802/14}**; Angus McIntosh HN244 **{MPS-0747578/69}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797/17}.**

[37] Christopher Skey HN308 **{MPS-0747952/44}**.

[38] Geoffrey Craft HN34 **{MPS-0747446/26}** and **{MPS-0730745}**.

'instinctively'[39] and were encouraged to report as broadly as possible, including personal information, with no filter.[40] Personal information was thought to be recorded for the benefit of the Security Service rather than the police.[41]

(6) There was confusion too about the purpose of the SDS's operations. Some managers suggested it was confined to policing and others recorded a dual purpose which involved assisting the Security Service in investigating subversions.[42] One said Security Service and SDS interests overlapped in terms of the people they were monitoring; but the Security Services were monitoring matters from a subversive point of view and the SDS was interested in the impact on public order.[43]

(7) In terms of its benefit to policing, managers identified more efficient allocation of police resources.[44] As Barry Moss HN218 put it; it '*enabled a suitable number of officers to be deployed or assisted in enabling policing in a given circumstances thereby avoiding the waste of public money or insufficient policing*'.[45]

(8) Managers made clear that SDS intelligence on demonstrations was not the only source of information. Special Branch would also cover meetings at the same time as SDS undercover officers and some intelligence could be obtained by Special Branch outside of SDS undercover officers.[46] SDS reports were relied upon to support information gathered from other Special Branch sources.[47]

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[39] David Smith HN103 **{MPS-0747443/12-13}**; Richard Scully HN2152 **{MPS-0747155/15}**; Barry Moss ('Barry Morris') HN218 **{MPS-07403554/10-11}**.

[40] Anthony Greenslade HN2401 **{MPS-0747760/22}**; Richard Walker HN368 **{MPS-0747527/6}**; Angus McIntosh HN244 **{MPS-0747578/64}**; Christopher Skey HN308 **{MPS-0747952/44}**; Trevor Butler HN307 **{MPS-0747658/12}.**

[41] Geoffrey Craft HN34 **{MPS-0747446/57}**.

[42] Derek Brice HN3378 **{MPS-0747802/21}**; Richard Walker HN368 **{MPS-0747527/32}**; Angus McIntosh HN244 **{MPS-0747578/24, 26}**; Christopher Skey HN308 **{MPS-0747952/28}**; Trevor Butler HN307 **{MPS-0747658/19}**; 1975 SDS Annual Report **{MPS-0730099/1}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797, 28}**; Geoffrey Craft HN34 **{MPS-0747446/26,32}.**

[43] David Smith HN103 **{MPS-0747443/29}**.

[44] David Smith HN103 **{MPS-0747443/9-10}**; David Bicknell HN357 **{MPS-0726608/4}**; Geoffrey Craft HN34 **{MPS-0747446/58}**; Angus McIntosh HN244 **{MPS-0747578/29-30,70-71}**; Richard Scully HN2152 **{MPS-0747155/25}**; Paul Croydon HN350 **{MPS-0747192/15}**; Trevor Butler HN307 **{MPS-0747658/40}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797/56}**; David Smith HN103 **{MPS-0747443/28}**; Christopher Skey HN308 **{MPS-0747952/49}.**

[45] Barry Moss ('Barry Morris') HN218 **{MPS-0747797/56}** at §103; David Smith HN103 **{MPS-0747443/3}**; see also Anthony Greenslade HN2401 **{MPS-0747760/42,22}**; **{MPS-0730745}**; Richard Scully HN2152 **{MPS-0747155/7}**.

[46] Geoffrey Craft HN34 **{MPS-0747446/11}**; Roy Creamer HN3093 **{MPS-0747215/4}.**

[47] Trevor Butler HN307 **{MPS-0747658/39}**.

(9) From the very start of the SDS's operations managers described limited evidence of unlawful conduct,[48] with organisations that did have violent or criminal tendencies considered too dangerous to infiltrate.[49]

(10) There was an acknowledged emphasis on left-wing organisations and the SDS did not cover far-right organisations although it *'remained ready'* to do so.[50]

(11) All managers said there was no training for managers or undercover officers at the SDS, and no formal written SDS procedures or policies during this period.[51] The expectation was that the managers and officers would *'learn on the job'*,[52] although some managers say they provided undercover officers with informal guidance, such as not to be an agent provocateur or not to become involved in serious crime.[53]

(12) Managers were aware there was a risk of undercover officers engaging in sexual relationships. Some described a preference for married men because there would be less *'temptation'* for them to enter into inappropriate relationships.[54] Another described discussions within the SDS about undercover officers deflecting suspicion from their target groups about not having a girlfriend, but denied knowledge of officers under his supervision admitting they had intimate relationships with women.[55] Despite this there was no guidance on intimate relationships as UCOs were treated "*as mature adults*" who knew not to bring the police force into disrepute.[56] All managers

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[48] Roy Creamer HN3093 **{MPS-0747215/40}**.
[49] Geoffrey Craft HN34 **{MPS-0747446/11, 29}**.
[50] Geoffrey Craft HN34 **{MPS-0747446/28-34}; {MPS-0730745/1}**; Angus McIntosh HN244 **{MPS-0747578/31}**; 1975 Annual Report **{MPS-0730099/1}**; Trevor Butler HN307 **{MPS-0747658/11,20}.**
[51] Roy Creamer HN3093 **{MPS-0747215/30}**; David Smith HN103 **{MPS-0747443/18}**; Anthony Greenslade HN2401 **{MPS-0747760/23}**; Derek Brice HN3378 **{MPS-0747802/32}**; Geoffrey Craft HN34 **{MPS-0747446/59}**; Richard Walker HN368 **{MPS-0747527/52}**; Angus McIntosh HN244 **{MPS-0747578/73}**; Christopher Skey HN308 **{MPS-0747952/50}**; Trevor Butler HN307 **{MPS-0747658/42}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797/59}.**
[52] Roy Creamer HN3093 **{MPS-0747215/12}**; David Smith HN103 **{MPS-0747443/6}**; Anthony Greenslade HN2401 **{MPS-0747760/6, 19-20}**; Derek Brice HN3378 **{MPS-0747802/7,10, 26-30}**; Geoffrey Craft HN34 **{MPS-0747446/7, 11, 50-54}**; HN34 **{MPS-0748041/5}**; Richard Walker HN368 **{MPS-0747527/6}**; Angus McIntosh HN244 **{MPS-0747578/8, 12-13}**; Christopher Skey HN308 **{MPS-0747952/5}**; Paul Croydon HN350 **{MPS-0747192/5}**; Trevor Butler HN307 **{MPS-0747658/7, 30-31}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797/8,12}**.
[53] David Smith HN103 **{MPS-0747443/18}**; Angus McIntosh HN244 **{MPS-0747578/59-60}.**
[54] David Bicknell HN357 **{MPS-0726608/4}**; Angus McIntosh HN244 **{MPS-0747578/12}.**
[55] Angus McIntosh HN244 **{MPS-0747578/29}; {T1P2Day12/40:15-22}**; Gist of T1 witness statements received by UCPI **{UCPI0000034307/5}.**
[56] David Smith HN103 **{MPS-0747443/6}**; Angus McIntosh HN244 **{MPS-0747578/57-59}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797/44-46}**; HN218 **{MPS-07403554/6}.**

described exercising close supervision and monitoring over undercover officers to ensure their welfare and provide support during the deployment, but denied knowledge of undercover officers engaging in intimate relationships.[57]

(13) None of the managers refer to any consideration of the legality of their actions, or any concern for the legal rights of the activists subject to surveillance or the impact on their lives, with some explaining variously that '*There was never a thought in my mind that we were doing anything wrong. It was quite the reverse: we were protecting the public and, on a more philosophical higher level, protecting our country and our democracy*'[58] and '*I do not believe that individuals finding their names on a Special Branch or Security Service file is too high a price to pay for comprehensive intelligence coverage, providing that those individuals were not unlawfully discriminated against because of this.*'[59]

(14) Managers described a practice of undercover officers maintaining their cover and misleading the court if arrested and prosecuted.[60]

IV: Issues arising in Tranche 1, Phase 3

23. When considered against the backdrop of the applicable law (see above and attached Legal Framework), it is plain from the evidence that the SDS's undercover operations in the Tranche 1 period were incompatible with all the applicable contemporaneous standards of law, whether those standards were common law, administrative law or international human rights law. All sources of law spoke then and speak now with one voice on three basic principles:

(1) No general authorisation may be given to the police or the Security Service to search individuals or property for evidence of wrongdoing.

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[57] Richard Walker HN368 **{MPS-0747527/6,11,19, 38-40,43-45}**; Geoffrey Craft HN34 **{MPS-0748041/5-6, 14-15}**; HN34 **{MPS-0747446/8, 15, 41,46-51}**; Roy Creamer HN3093 **{MPS-0747215/39}**; David Smith HN103 **{MPS-0747443/27}**; Anthony Greenslade HN2401 **{MPS-0747760/18}**; Derek Brice HN3378 **{MPS-0747802/13,26}**; Angus McIntosh HN244 **{MPS-0747578/10,16,46,51,56}**; Richard Scully HN2152 **{MPS-0747155/24}**; Christopher Skey HN308 **{MPS-0747952/31,39-40,42}**; Trevor Butler HN307 **{MPS-0747658/26,27,29}**; Barry Moss ('Barry Morris') HN218 **{MPS-0747797/15,32, 38-41,43-44}**; Trevor Butler HN307 **{MPS-0747658/22}**; 1980 SDS Annual Report **{MPS-0728962/6}.**

[58] Richard Scully HN2152 **{MPS-0747155/7}**.

[59] Trevor Butler HN307 **{MPS-0747658/35}**.

[60] David Smith HN103 **{MPS-0747443/33}**; Geoffrey Craft HN34 **{MPS-0748041/12}**; Richard Walker HN368 **{MPS-0747527/36}.**

(2) Police powers to trespass on land, property, and the person, and interfere with private and personal lives, will only be lawful where necessary and proportionate to meet a pressing social need, such as prevention or investigation of serious crime or an imminent breach of the peace.

(3) The use of covert powers by the police and the security service is itself a danger to democracy, and is therefore subject to a particularly strict necessity test, both in terms of the seriousness of the threat said to justify their use, and the lack of any alternative method of meeting it.

24. The SDS's operations breached all of these basic principles:

(1) The authorisations to conduct the operations were broad brush, speculative and relied on the discretion of officers to decide which groups to infiltrate, which individuals to conduct surveillance on, and what to report.

(2) There was no pressing social need: maintaining public order could rarely if ever justify the use of highly intrusive powers and certainly not where the main purpose was effective allocation of police resources; as for investigating subversive activity, the political activities reported on were lawful, no criminal offences were being committed, and no serious threats to the realm were ever identified.

(3) The fact that the intrusive powers were being used covertly rather than overtly made it **more** not less important that they could be strictly justified as the only available method to prevent serious crime or in defence of the realm. There is no evidence at all of any such strict justification.

25. In addition, the SDS's operations:

(1) appear to have had no clear basis in any law at all, so that they fell drastically short of the requirement that they be *'in accordance with the law'* (*Malone v UK* at §79; *Khan v UK* (2001) 31 E.H.R. 45 §§27-28),

(2) were the subject of minimal oversight and supervision with no or minimal attempts to assess their necessity either at the start or on an ongoing basis,

(3) were plainly wholly disproportionate to the aim pursued.

26. Both the MPS and the NPCC have already effectively accepted the SDS's operations were unlawful; first, they made a series of concessions about the lack of

proportionality of their similar actions in the forthcoming Tranche 4 period of this Inquiry in *Wilson;* and second, they did not appeal any of the IPT's conclusions in *Wilson* about lack of necessity of undercover surveillance of protest groups for parallel public order situations in the Tranche 4 period (see Legal Framework at §62). Nor have they challenged the findings of the IPT of breaches of Articles 3, 8, 10, 11 and 14 ECHR in relation to acts and intrusions by UCOs which were substantially similar to those carried out in Tranche 1. Their Opening Statements for this Inquiry furthermore make no claim to need undercover policing to police public order; on the contrary, they identify only serious crime or terrorism as requiring it (see MPS O/S T1/P1 at §§61-79 and NPCC O/S T1/P1 at §§20-21; see also NCA O/S T1/P1 at §§20-21).

27. In these circumstances, the Cat H CPs respectfully suggest that the starting point for the investigations for this Phase of Tranche 1, and for those that follow in Tranches 2-4, must be that unless the pattern of undercover policing substantially deviates from that apparent in the evidence for Tranche 1 (already before the Inquiry) and Tranche 4 (as already considered in *Wilson*), the SDS's activities were unlawful and unjustified and involved:

    (1) multiple breaches of the most hallowed principles of the common law, including the prohibition on general searches, unjustified trespasses to land and to goods, and unjustified breaches of confidence (for example in the sharing of bank details by UCOs who took positions as Treasurers);
    (2) numerous violations of fundamental rights under Articles 3, 8, 10, 11 and 14 ECHR;
    (3) a serious breach of the public trust reflected in the Peelian principles, in particular the requirement to work co-operatively with the public and the principle that the police are the public and the public are the police, and finally;
    (4) a serious threat to democracy itself, in the secret infiltration, detailed recording and extensive monitoring of people's private lives and political views.

28. Cat H CPs suggest that the overarching questions which thus arise for examination in all Tranches are:

    (1) How and why these serious inroads into hallowed principles of British democracy were allowed to occur in the first place, approved by senior police officers and

ministers who must have known that the SDS's practices conflicted with centuries of law and practice concerning the interactions of the police with private citizens, private homes and private communications, and

(2) Why the unlawful conduct persisted for so long, and survived reforms to police practices like PACE, and the introduction of the HRA and RIPA.

29. Although the unlawfulness and lack of proper justification for the SDS's activities in Tranche 1 are now clear, it remains essential in order to fulfil the Inquiry's Terms of Reference, that the **full extent** of the wrongdoing in Tranche 1 is established and explored in the evidence of the managers (Phase 3) and more senior officials (Tranche 6). To this end they suggest the following themes for exploration in Phase 3.

30. **<u>First</u>, the appreciation within the SDS and Special Branch of the extent to which their operations interfered with common law and individual rights and transgressed usual limits on lawful police conduct.** The evidence suggests scant recognition of the extent to which the tactic of long-term undercover policing jeopardised fundamental rights at common law and international human rights law, and undermined ordinary standards of policing and criminal justice.

31. **<u>Second</u>, the reasons for the lack of focus in targeting.** The essential element of all lawful police interactions with the public, whether it is searches of property or surveillance, is strict and proper targeting to meet a policing purpose. A striking feature of the managers' evidence, however, is that: (a) their role in targeting of organisations appears to have been minimal; and (b) the targeting was incredibly broad brush with UCOs often able to choose their own targets within a very wide remit, infiltrate organisations/individuals as stepping stones to others, or simply take a dragnet approach in the belief that something useful could appear in the midst of the mass of information collected.

32. **<u>Third</u>, managerial understanding of the purpose of the SDS**. There is clear confusion and conflict about the extent to which the SDS's function was a pure policing one, namely the preservation of public order, or included servicing Security Service requirements as a *'customer'* of intelligence. That confusion appears to have led to extraordinary inroads into people's private lives, and huge amounts of private

information being collected which could not be justified in pure policing terms. The usefulness of all this to Special Branch and MI5 was assumed because they accepted the intelligence without demur.

33. **Fourth, the absence of effective review of ongoing need for SDS undercover operations.** Neither managers nor UCOs within the SDS seem to have had any significant role in reviewing the ongoing need for, and scope of, their operations. There is evidence of one review in the period, with the input of one manager, but it failed to address need in the light of decreased public disorder.[61] Managers say in evidence that they assumed Special Branch, the Home Office or MI5 would assess ongoing need, but don't seem to know who exactly would conduct such a review, or to have been asked to give input.

34. **Fifth, knowledge and awareness of sexual relationships.** There is implicit and explicit evidence that managers were aware of the risk of sexual relationships, and also aware that they took place. The extent of the steps taken to avert the risk, and the response to the sexual relationships and the banter, is relevant to the complicity and awareness of managers in the SDS. There is evidence that the continuation of the SDS became an end in itself, which trumped all other considerations. Thus, the police viewed perjury in court as a benefit which enhanced the credibility of the UCO, rather than as a serious departure from proper policing standards, an attack on justice and the rule of law, and a criminal offence.[62] It is (at the least) possible in these circumstances that the benefits of UCOs enhancing their legend, credibility, and penetration of target groups through sexual relationships was viewed through the same lens.

35. **Sixth, the significance of the absence of proper guidance, training and supervision.** UCOs' *'instincts'* were relied on, they were expected to work out what to do themselves and supervision consisted of informal debriefs, often conducted in the pub. This deficit is not just causative of the problems which resulted but also evidence of

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[61] HN34 **{MPS-0747446/26}** and **{MPS-0730745}**.

[62] The Deputy Assistant Commissioner and Commander HN585 approved Michael Scott HN298 maintaining his cover and misleading the court rather than withdrawing him from the field because of the perceived benefits of gathering further intelligence for the SDS **{MPS-0526782/1}** and **{MPS-0526782/2}**.

the lack of any clear goals, boundaries or regard for democratic principles or individual rights. There was no guidance or training because there were few limits which needed to be adhered to. The main function of supervision and management appears to have been to receive the intelligence, ensure the operation was not compromised, and check on UCOs welfare, rather than ensure adherence to any standards.[63]

36. **<u>Seventh</u>, the extent of and reasons for any departure from the requirement for political neutrality.** Left-wing groups, the majority of whose members were profoundly non-violent, were prioritised for infiltration when the National Front, which was genuinely dangerous and provocative, was not. Groups demanding radical change to the *status quo* were wrongly labelled *'subversive'*, so that movements for racial equality, improved employment rights and women's liberation were treated as proper subjects for surveillance even when it was clear they were seeking to use democracy, not overthrow it. Left-wing groups were treated as suspect *en masse*, even once it became abundantly clear that the revolution they espoused was metaphorical, and to be achieved through persuasion not armed conflict.

37. **<u>Eighthly</u>, red flags and missed opportunities.** In the early days of the SDS there were a series of occasions where some of the various problems identified above became apparent. One clear example was the review of the Special Branch Terms of Reference in 1980 which expressed the same concern about the lack of discipline and accountability which HMIC was to identify four decades later[64] and in which significant concerns were expressed about the relationship with the Security Service.[65] Equally, managers became aware that some officers were having sexual relationships, at serious risk of identity compromises, and/or taking up positions of trust and responsibility within target groups, enabling them to have access to sensitive information about activists and to improperly influence group actions and directions. UCOs were on occasion arrested and had interaction with the courts,[66] and some

[63] The 1974 SDS Annual Report suggested that close supervision was necessary to prevent exposure and a Chief Superintendent and Superintendent were allocated to supervise the SDS operations to provide a further degree of control: 1974 Annual report **{MPS-0730906/3}**. Every Annual Report thereafter referred to close supervision as essential to maintain the security of the SDS.
[64] **{UCPI0000004715}**.
[65] **{UCPI0000004437/6}**.
[66] See e.g. **{MPS-0722618/4}**.

engaged in clear acts of violence.[67] These opportunities to take stock, improve and focus practices, and assess the lawfulness and necessity of the SDS were not taken up. The pattern of red flags and missed opportunities was ultimately to include the introduction of RIPA, and the advent of the Human Rights Act 1998. As the *Kate Wilson* case shows (see IPT judgment *Wilson* at §§343-345 and Order and Declarations dated 24 January 2022), many of the deficits set out above persisted long after the coming into force of those statutes and led to the multiple breaches of her ECHR rights found by the IPT.

VII: Rule 9 questions and disclosure

38. Cat H CPs are aware that NSCPs have, in Tranche 1, been asked a series of questions about their political activities and views, and their family arrangements.

39. While they have every intention of assisting the Inquiry and are approaching it in a spirit of co-operation, they wish to highlight that:

    (1) Their political views and family arrangements are private and no business of the state. Neither the police, nor the Security Service, nor this Inquiry have any right to know or investigate their views, or to record them (see above and attached Legal Framework). Their right to their views untrammelled by surveillance or interference by the state, secret or otherwise, is a lynchpin of a democratic system, and a key distinguishing feature between democracy and totalitarianism.

    (2) The police's surveillance of them was wholly unjustified, as explained above. The police had no right to be in their homes and were trespassing there; there was no crime to investigate and they had no lawful authority. They had no right to infiltrate or record details of their family lives or their views expressed in the privacy of their own home or the homes of others; there was no pressing need to do so. In particular they had no right, whether for intelligence or for any other purpose, to violate the intimacy of women's bodies and emotions.

    (3) In the course of this Inquiry ordered by the Home Secretary into the circumstances in which this unlawful conduct of the police came to occur, it is

[67] For example, HN298 admitted to punching Gerry Lawless unprovoked after he found out that Mr Lawless had told activists at a meeting that he suspected HN298 was a police officer **{MPS-0746258/49}**. To this day, HN298 is unrepentant about this crime of violence: see **{Day9T1P2/142}**.

essential that the police's breaches of the Cat H CPs' rights at common law and under the HRA are not compounded by questioning, or by the further unnecessary investigation and recording of their political views and private family and personal affairs. The Inquiry is a public authority and has its own obligations under the HRA.

40. Finally, Cat H CPs wish to emphasise the importance of full and early disclosure to them of the documents which record the activities of the UCOs with whom they had sexual relationships, and more broadly the police's surveillance of them and the groups of which they are members. They must live every day with the knowledge that not only did the police misuse their bodies and emotions, and treat them with the utmost contempt, but that as a result of and alongside these unlawful activities it is likely that the police recorded, shared and stored a large volume of information about them, their appearances, private lives, families, political beliefs and campaigning activities. These reports sometimes spanned decades of the Cat H CPs lives. Some UCOs took intimate photographs of the women they had relationships with. Some reports mention the women or their families by name; others do not but relate to addresses, events and organisations with which they were involved and/or other individuals who were part of their private lives.

41. The long wait to find out (i) what was recorded by UCOs, and often as important, what wasn't, before during and after these unlawful and abusive relationships, (ii) what was shared, and (iii) the extent of awareness and complicity beyond the UCOs themselves, is exacerbating the harm done by the original violation of their rights. The Cat H CPs consider that disclosure to them should be prioritised both by the police themselves and by the Inquiry, as part of the state's positive and procedural obligations under Articles 3, 8 and 14 ECHR. Failure to do so to risks seriously aggravating the breaches of those rights.

42. Full and early disclosure has another significant benefit. It is already clear that the Inquiry is going to be called upon to make a range of findings of fact where there are factual disputes. It is also already clear that not all written police reports are accurate and that not all police officers can be relied on to tell the whole truth (see eg. *Wilson* at §§209-215). Cat H CPs' contemporaneous understanding of events means they are

uniquely able to assist the Inquiry in sorting fact from fiction; they can best do so if they receive, in good time and ideally before Rule 9 questions are sent to police witnesses, the full range of police reporting on them, including the reporting from UCOs who spied on them and the groups of which they were members.

CHARLOTTE KILROY QC
SHANTHI SIVAKUMARAN
TOM LOWENTHAL
25 April 2022

ANNEX TO CAT H CPS OPENING STATEMENT T1/P3
LEGAL FRAMEWORK

A. POLICE POWERS AND THE COMMON LAW

Common law rights

1. The common law has for centuries zealously protected the sanctity of people's homes and the freedom and security of their persons and possessions. That protection primarily takes effect through the law of trespass, which is actionable *per se*. Thus:

   (1) "[O]*ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law*" (*Entick v Carrington* (1765) 95 ER 807 at 817-8).

   (2) "*The fundamental principle, plain and incontestable, is that every person's body is inviolate*" (*Collins v Wilcock* [1984] 1 WLR 1172 at 1177-8; any interference with it, '*however slight*', constitutes a trespass '*in the absence of lawful excuse*' (*F v West Berkshire HA* [1990] 2 AC 1 at 73 per Lord Goff).

   (3) "*The right to personal liberty and to freedom from arbitrary detention is deeply embedded in the common law. It is a fundamental constitutional principle traceable to clause 39 of Magna Carta (1215) which provides that "no freeman shall be seized or imprisoned … except by the lawful judgment of his equals or by the law of the land…At common law any deprivation of liberty is thus* prima facie *unlawful, but it may be justified according to law*" (*Detention Action v SSHD* [2014] EWCA Civ 1634 §11 per Lord Justice Beatson).

(4) "*The act of handling a man's goods without his permission is prima facie tortious*" and must be justified in law (*IRC v Rossminster Ltd* [1980] AC 952 at 1011 per Lord Diplock).

2. Trespasses to the person, to land, and to property must therefore be justified, either by common law or statute (see *Entick v Carrington*; *IRC v Rossminster*, at 1008).

3. The high value which the common law places on the rights to personal security, liberty and property (see *GG v SSHD* [2010] QB 585 at §11, quoting Blackstone's Commentaries on the Laws of England, 23rd ed (1854), vol 1, p 129), and the corresponding requirements for lawful justification, have resulted in muscular limits being placed on the exercise of police (or other state) powers which interfere with these fundamental rights. As the courts have explained:

   (1) "*It is a bedrock of our liberties that a citizen's freedom of person and of movement is inviolable except where the law unequivocally gives the state power to restrict it…Nobody is required in this country to satisfy a police officer that he or she is not committing an offence. The power to detain and search arises only where conditions prescribed by law…can be shown to exist*" (*Hepburn v Chief Constable of Thames Valley Police* [2002] EWCA Civ 1841 at §§14-15).

   (2) "*It is….axiomatic that the common law rights of personal security and personal liberty prevent any official search of an individual's clothing or person without explicit statutory authority*" (*GG* §12).

   (3) "*It is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle…*" (*R(Gillan) v Commissioner* [2006] 2 AC 307 §1 per Lord Bingham).

(4) "*The common law does not permit police officers, or anyone else, to ransack anyone's house, or to search for papers or articles therein, or to search his person, simply to see if he may have committed some crime or other. If police officers should so do, they would be guilty of a trespass*" (*Ghani v Jones* [1970] 1 Q.B. 693, 708).

(5) "*The aversion to general warrants" "which requires the exercise of judgment or discretion by the official executing the warrant as to which individuals or which property should be targeted" "is one of the basic principles on which the law of the UK is founded* (*Privacy International v Investigatory Powers Tribunal* [2021] QB 936 at §§39-48).

4. These common law limits have shaped for centuries the development of police powers, i.e. powers of arrest, entry to property, search and seizure. A police officer who fails to comply with these limits will not only be committing torts but will also be acting unlawfully in the exercise of police powers, as the House of Lords made plain in *Morris v Beardmore* [1981] AC 446. There the police officer was trespassing on the property of an individual in order to demand a breath sample from him under the Road Traffic Act 1972. Lord Diplock stated that he found it *"quite impossible to suppose that Parliament intended that a person whose common law right to keep his home free from unauthorised intruders had been violated in this way, should be bound under penal sanctions to comply with a demand which only the violation of that common law right had enabled the constable to make to him"* (p. 456A-B). Lord Edmund-Davies regarded it as *"unthinkable that a policeman may properly be regarded as acting in the execution of his duty when he is acting unlawfully, and this regardless of whether his contravention is of the criminal law or simply of the civil law"* (p. 458G-H). The police could not be seen to "*flout the law*" and yet "*be regarded as lawfully exercising powers granted to them*" (p. 462A-B). Lord Scarman cited *Entick,* as well as Art. 8 ECHR, and held that the right to privacy in the home *"has for centuries been recognised by the common law"*, and that were Parliament to remove or qualify that right, it would do so expressly (p. 465B).

Powers of arrest, entry, search and seizure

5. Between 1968-1983, the period covered by Tranche 1, powers of arrest for criminal offences whether pursuant to warrants, or without, could normally only be exercised in relation to criminal offences which reached a certain threshold of

seriousness, and where there was at least a reasonable suspicion that the individual had either committed or was about to commit such an offence (see in relation to arrest without a warrant s.3 Criminal Law Act 1967).

6. The common law power to arrest to prevent actual or apprehended breaches of the peace (i.e. violence or threatened violence – see *Laporte v Commissioner* [2007] 2 AC 105 §27) meanwhile was confined to three situations (see *Laporte* §29): "*any breach of the peace occurring in his presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is about to occur.*" In the latter situation the breach of the peace had to be "*imminent*" (*Laporte* §30).

7. As for entry, search and seizure, *"[t]he purposes for which entry [into private property could] be effected include[d] the arrest of offenders, search for and seizure of illegally possessed property, discovery of evidence, and the prevention of breach of the peace"*.[1] These powers appeared at statute and common law, both with or without warrants, but there was no general power to enter or remain on premises simply for the purposes of making enquiries (*Great Central Railway v Bates* [1921] 3 KB 578 at 581-2 per Atkin LJ).

8. The common law powers to enter without a warrant were described by the Royal Commission on Criminal Procedure as follows:[2]

> *The common law powers to enter, without consent or a warrant, seem to us essential to deal with the situations for which they exist: […], to deal with or prevent a breach of the peace, to save life or limb or prevent serious damage to property, and in fresh pursuit of a person who has escaped after a lawful arrest.*

9. Police officers also had a common law power to seize (but not search for – they must *"come across"* the property in question) the *"fruits, evidence, or instruments"* of serious (or *"grave"*[3]) crime from anyone *"implicated"* in the crime of who unreasonably refuses to hand them over:[4] *Ghani* 708-709; *Reynolds v Commissioner* [1985] QB 881, 895, 898, 904. *Ghani* accordingly required reasonable grounds for believing:[5]

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[1] *Report of the Royal Commission on Criminal Procedure*, Cmnd 8092 §3.34.
[2] *Report of the Royal Commission on Criminal Procedure*, Cmnd 8092 §3.38.
[3] Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) p425.
[4] Clayton & Tomlinson, *The Law of Human Rights* (2nd ed., 2009) §12.132.
[5] Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) p426.

(1) That a serious crime had been committed;

(2) That *each* (*Reynolds* 890, 897) item seized was the fruit of the crime, the instrument by which it was committed, or material evidence;

(3) That the person in possession had committed or was implicated in the crime, or (perhaps – it is doubted by commentators[6]) their refusal to surrender the item is unreasonable.

10. Where entry, search and seizure could be achieved by warrant, the target of the warrant had to be identified in advance and clearly specified. The common law's aversion to general warrants is long established: *Privacy International v Investigatory Powers Tribunal* [2021] QB 936 §§39-48. The aversion is "*one of the basic principles on which the law of the UK is founded"*. It cannot be overridden even by statute except with clear words (§48). It protects property and privacy, including the "*secret nature*" of private papers (*Privacy International* at §46, referring to *Entick v Carrington*). No warrant can be lawful "*which requires the exercise of judgment or discretion by the official executing the warrant as to which individuals or which property should be targeted*" (§45). Were such a power to exist it would be "*totally subversive of the liberty of the subject*" (*Wilkes v Wood* (1763) 19 State Tr 1153, Lord Camden CJCP).

Common law defences to trespass

11. General defences to trespass might also be available to a police officer, such as consent or licence, self-defence or necessity.

12. The threshold for the defence of necessity was high, requiring a relatively high degree of both potential harm and immediacy: *"whether in all the circumstances at the time when [the defendant] acted it would appear to a reasonable man to be necessary to act to avoid a real and imminent danger"*.[7]

13. Equally, *"every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack"*: *Ashley v Chief Constable of Sussex* [2008] UKHL 25, [2008] 1 AC 962 §18. This principle extends to the protection of others: *R v Duffy* [1966] 2 WLR 229. There is *"a general liberty even as between*

[6] Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) p426.
[7] *Clerk and Lindsell on Torts* (13th ed., 1969) §111; (23rd ed., 2020) §3-148.

strangers to prevent a felony…in circumstances of necessity". The force permissible is limited to what is reasonable in the circumstances. As it was put in *Gilchrist v Chief Constable of Greater Manchester* [2019] EWHC 1233 (QB) §37:

> *Intentional use of force must be justified in law, that is, the use of any force must be justified, the nature of the force used must be justified and the extent of force used must be justified.*

14. As for consent, while it is a general defence to trespasses to the person that the claimant consented to the alleged tort,[8] consent obtained by force affords no defence.[9] Nor does consent induced by fraud (see *Bowater v Rowley Regis Corporation (1944*) K.B. 476, 479; *Chatterton v Gerson* [1981] QB 432, 442) at least where the fraud goes to the identity of the person or the nature of the act done; see *Clerk & Lindsell on Torts* (23rd ed., 2020) at §14.96-97, charting the state of flux in the law on this issue. The law in relation to consent to sexual assault where that consent has been obtained by deception has been the topic of frequent discussion and revision in the criminal context, where interpretation of criminal statutes and criminal policy considerations have played a significant part in the courts' complex reasoning (see *R (Monica) v DPP* [2018] EWHC 3508 [2019] QB 1019 §52 and §§83-86).

15. Trespass to land may be justified by an express or implied licence given by the occupier, but:

    (1) A licensee who exceeds his licence is a trespasser;[10] as is a person acting with lawful authority who exceeds that authority.[11] In particular, where a licensee is admitted for a particular purpose (be their licence express or implied), it will be a trespass to exceed their licence by going beyond that purpose.[12] *"So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly"*: *Hillen v ICI* [1936] AC 65, 69.

[8] *Winfield on Tort* (8th ed., 1967) p740; *Salmond on the Law of Torts* (15th ed., 1969) p664; *Clerk and Lindsell on Torts* (23rd ed., 2020) §14-93.
[9] *Clerk and Lindsell on Torts* (13th ed., 1969) §678; (23rd ed., 2020) §14-98.
[10] *Clerk and Lindsell on Torts* (13th ed., 1969) §1345; (23rd ed., 2020) §18-49.
[11] Clayton & Tomlinson, *The Law of Human Rights* (2nd ed., 2009) §12.120.
[12] *Harvey v Plymouth City Council* [2010] EWCA Civ 860, §27.

(2) The licence could be negatived where *"consent was obtained by a trick" R v Jones* [1976] WLR 672, 674H (see also *Archbold Criminal Pleading Evidence and Practice* (2022) §21-117: *"There is abundant authority for the proposition that a person who has the right of entry on the land of another for a specific purpose commits a trespass if he enters for any other purpose: […] A fortiori, it would seem that where a consent to entry is obtained by fraud, the entry will be trespassory…"*).

16. It is *"generally assumed"* that the same approach applies to trespass to goods as to land.[13]

Surveillance powers

17. In the Tranche 1 period, neither the police nor the Security Service had any statutory powers to conduct surveillance or undercover operations. The common law rights and limits on police powers set out above thus applied in full to these operations.

18. These limits were more or less reflected in the approach taken to planting listening devices or intercepting communications, albeit that the lack of statutory underpinning and clarity on the applicable law led to them being declared unlawful by the European Court on Human Rights (**"ECtHR"**) for failure to meet the '*in accordance with the law*' provisions of Art. 8 ECHR (see below).

19. Thus, prior to 1997, there was no statutory regulation of the placing of listening devices in private properties by the police (in *R v Khan* [1997] AC 558, counsel for the Crown conceded that there had been a civil trespass when a bug was placed on the outside of a person's house). Authorisation for the placing of listening devices could be granted by Chief Constables (or in certain circumstances Assistant Chief Constables) pursuant to Home Office guidelines first issued in 1977 and updated in 1984 which[14] provided (see *Khan v UK* (2001) EHRR 45 §§16-17 and *PG v UK* (2008) 46 EHRR 51):

> *4. In each case, the authorising officer should satisfy himself that the following criteria are met:*

[13] Clayton & Tomlinson, *The Law of Human Rights* (2nd ed., 2009) §18.13.
[14] *"The Guidelines on the Use of Equipment in Police Surveillance Operations"* 19 Dec 1984, Dep NS 1579.

> *(a) the investigation concerns serious crime;*
>
> *(b) normal methods of investigation must have been tried and failed, or must from the nature of things, be unlikely to succeed if tried;*
>
> *(c) there must be good reason to think that use of the equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism;*
>
> *(d) use of equipment must be operationally feasible.*
>
> *5. In judging how far the seriousness of the crime under investigation justifies the use of a particular surveillance technique, authorising officers should satisfy themselves that the degree of intrusion into the privacy of those affected is commensurate with the seriousness of the offence.*

18. The regime was not, however *"in accordance with the law"* for the purposes of Art. 8 ECHR (see *Khan v UK* at §§27-28):

> *At the time of the events in the present case, there existed no statutory system to regulate the use of covert listening devices, although the Police Act 1997 now provides such a statutory frame- work. The Home Office Guidelines at the relevant time were neither legally binding nor were they directly publicly accessible……There was… no domestic law regulating the use of covert listening devices at the relevant time.*

20. As for interception of communications by the police, this was also unregulated by statute.[15] Nonetheless, the police conducted surveillance, pursuant to warrants issued by the Home Secretary. This power was without statutory foundation, and its origins *"obscure"*, but was acknowledged and exercised from time to time: *Malone v UK* (1985) 7 EHRR 14 §24, §28.

21. The practice was that the Home Secretary would issue such warrants only for the purposes of national security or the detection of serious crime, and in the latter case, only where the following conditions were satisfied:[16]

> *(a) the offence must be really serious;*
>
> *(b) normal methods of investigation must have been tried and failed or must, from the nature of things, be unlikely to succeed;*
>
> *(c) there must be good reason to think that an interception would be likely to lead to an arrest and a conviction.*

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[15] Clayton & Tomlinson, *The Law of Human Rights* (2nd ed., 2009) §12.151.

[16] *Malone v UK* §42; *The Interception of Communications in Great Britain (April 1980)*, Cmnd 7873 §3. Slightly different sets of requirements were suggested by police counsel in *Malone*.

22. *"Serious crime"* was defined as an offence for which a sentence of three years custody or more could reasonably be expected.[17] The absence of a clear statutory regime with relevant safeguards led to findings against the UK by the ECtHR on the ground that interferences with Art. 8 rights were not *"in accordance with the law"*, in *Malone v UK* (§80).

Policing by consent and other torts applicable to the police

23. Nine principles (known as the Peelian principles) were set out in the *"General Instructions"* that were issued to every new police officer from 1829.[18] They remain the foundation for the important tradition of *"policing by consent"*. They include the following:

    (1) (Principle 2) To recognise always that the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour and on their ability to secure and maintain public respect.
    (2) (Principle 3) To recognise always that to secure and maintain the respect and approval of the public means also the securing of the willing co-operation of the public in the task of securing observance of laws.
    (3) (Principle 5) To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police, **the police being only members of the public who are paid to give full time attention to duties which are incumbent on every citizen in the interests of community welfare and existence** (emphasis added).

24. The police's status as "*members of the public...paid to give full time attention to duties which are incumbent on every citizen*", is one of the reasons why police powers so closely track the law of tort which applies to all those citizens, and it is also a reason why police officers cannot "*flout the law*" when exercising police powers (see *Morris v Beadmore* at 462A-B).

[17] *The Interception of Communications in Great Britain (April 1980)*, Cmnd 7873 §4.
[18] https://www.gov.uk/government/publications/policing-by-consent/definition-of-policing-by-consent

25. Aside from the law of trespass, other torts are relevant to the conduct of undercover operations.

26. The courts have long recognised, *"the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it"*: *Seager v Copydex Ltd* [1967] 1 WLR 923, 931; *Malone v Commissioner* [1979] Ch 344, 377. The cause of action for breach of confidence was set out by Megarry J in *Coco v AN Clark (Engineers) Ltd* [1968] F.S.R. 415, 419 (paragraphing added):

> *In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed.*
>
> *First, the information itself, in the words of Lord Greene, M.R. in the Saltman case … must 'have the necessary quality of confidence about it'.*
>
> *Secondly, that information must have been imparted in circumstances importing an obligation of confidence.*
>
> *Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."*

27. There is a defence of public interest; in the case of the police, the uses to which confidential information may be put are likely to be limited to the prevention and detection of crime, the investigation of offences and the apprehension of suspects (see *Hellewell v Chief Constable* [1995] 1 WLR 804 at 810-811, referring to *Malone v Commissioner*).

28. The elements of the common law action for deceit were set out in *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All E.R. 205, 211 (paragraphing added):

> *First, there must be a representation of fact made by words, or, it may be, by conduct. […]*
>
> *Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true: Derry v Peek and Nocton v Ashburton (Lord).*
>
> *Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, […], in the manner which resulted in damage to him: Peek v Gurney and Smith v Chadwick, at p 201. […]*
>
> *Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing: Clarke v Dickson.*

29. A representation may be implied from conduct, if the defendant conducts themselves in a particular way with the object of fraudulently inducing another

to believe certain things and act upon that belief.[19] There is, in theory, a public policy defence to deceit, where the victim of the deceit is themselves a wrongdoer, and their wrongdoing is so clearly connected to the defendant's deceit that they should not be permitted to claim damages.[20]

30. A claim against a public officer may lie for misfeasance in public office. *Winfield & Jolowicz on Tort* observes that the tort was a *"creature of two Commonwealth decisions in 1959"*. In *Three Rivers DC v Bank of England* [2001] UKHL 16; [2003] 2 AC 1, 247 §42, the elements of the tort were stated to be (paragraphing and emphasis added):

> ***First***, *there must be an unlawful act or omission done or made in the exercise of power by the public officer.*
>
> ***Second***, *as the essence of the tort is an abuse of power, the act or omission must have been done or made with the required mental element.*
>
> ***Third***, *for the same reason, the act or omission must have been done or made in bad faith.*
>
> ***Fourth***, *as to standing, the claimants must demonstrate that they have a sufficient interest to sue the defendant.*
>
> ***Fifth***, *as causation is an essential element of the cause of action, the act or omission must have caused the claimants' loss.*

31. As to the *"required mental element"* (p. 191, paragraphing and emphasis added)*:*

> *The case law reveals two different forms of liability for misfeasance in public office.*
>
> ***First*** *there is the case of targeted malice by a public officer, i e conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive.*
>
> *The* ***second*** *form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.*

<u>*Surveillance by the Security Service*</u>

[19] *Clerk and Lindsell on Torts* (13th ed., 1969) §1621; (23rd ed., 2020) §17-05.

[20] *Clerk & Lindsell on Torts* (23rd ed., 2020) §17.54.

32. The actions of the Security Service were also intended to be strictly circumscribed, more so than those of the police. The Directive given to the Security Service by Sir David Maxwell Fyfe in 1952 included the following:[21]

> *You will take special care to see that the work of the Security Service is strictly limited to what is necessary for the purposes of this task. …..*
>
> *No enquiry is to be carried out on behalf of any Government Department unless you are satisfied that an important public interest bearing on the Defence of the Realm, as defined in paragraph 2, is at stake.*

33. Sir David Maxwell Fyfe was one of the principal drafters of the European Convention on Human Rights (ECHR) (see further below), which entered into force the following year in 1953 (see Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) p8). The strict necessity test imposed on the Security Service, reflecting both the common law and the qualified rights in the ECHR, was continued in the Security Service Act 1989 which provided at section 2(2):

> *The Director-General shall be responsible for the efficiency of the Service and it shall be his duty to ensure –*
>
> *(a)that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of preventing or detecting serious crime; and*
>
> *(b)that the Service does not take any action to further the interests of any political party.*

34. By section 3, warrants (including those authorising entry onto or interference with property), could only, except in urgent cases, be issued under the hand of the Secretary of State and only if:

> *the Secretary of State –*
>
> *(a)thinks it necessary for the action to be taken in order to obtain information which –*
>
> *(i)is likely to be of substantial value in assisting the Service to discharge any of its functions; and*
>
> *(ii)cannot reasonably be obtained by other means;*

[21] UCPI0000034262/1.

B. HUMAN RIGHTS

35. At all material times covered by Tranche 1, the UK had international and (when incorporated) domestic human rights obligations under the European Convention on Human Rights. The UK ratified the ECHR in 1951 and, after its creation in 1960, signed up to the right of individual petition to the ECtHR in 1966.

36. Although not incorporated into domestic law at the relevant time, the UK was responsible in international law for the actions of police officers under the ECHR.

37. It is clear that the actions of the SDS engaged a wide range of fundamental rights under the ECHR. The text of those rights is reproduced at the end of this Annex.

Freedom of expression: Article 10 ECHR

38. The right to freedom of expression is integral to democracy and is protected both by common law and the European Convention on Human Rights:
    (1) "*In a democracy it is the primary right: without it an effective rule of law is not possible*."
    (2) It is '*valued for its own sake. But it is well recognised that it is also instrumentally important….freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate*" (*R v SSHD ex parte Simms* [2000] 2 AC 115 at 125G-126H).

39. Art. 10(1) ECHR expressly protects the freedom to hold opinions and to receive and impart information and ideas without interference. That freedom from interference includes being able to do so without attracting the attention of the police and without being monitored and placed under surveillance (see *Kate Wilson v Commissioner of Police for the Metropolis and National Police Chiefs Council*, [2021] UKIPTrib IPT_11_167 at §§332-3).

40. To be lawful any interference with the right of freedom of expression by the state must meet a pressing social need, and be no more restrictive or intrusive than required to meet that need. In principle, Art. 10 is subject to the same test of legality and necessity as Art. 8: *Handyside v UK* (1979-80) 1 EHRR 737 §§43-47. However, the special importance of free expression in a democracy must always

be borne in mind when assessing whether limitations on that right are justified (§49):

> *Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.*

41. In this regard there is no difference in principle between English law and Art. 10 (see *Attorney- General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 AC 109, 283- 284 per Lord Goff and *Derbyshire County Council v. Times Newspapers Ltd.* [1993] AC 534, 550-551 per Lord Keith). In *R (Prolife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 §6, the House of Lords held:

> *Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts. The courts, as independent and impartial bodies, are charged with a vital supervisory role.*

The right to respect for the home, family and private life: Article 8 ECHR

42. Art. 8(1) ECHR protects people's families and private lives, homes and correspondence from interference by the state, save where those interferences are in accordance with the law, justified by a pressing social need and no more than strictly necessary to achieve that need.

43. The rigorous standards set in relation to ordinary state interference with Art. 8 ECHR rights are enhanced where the powers exercised are covert. Powers of surveillance are a "*menace*" (*Klass v Germany* (1979-80) 2 EHRR 214 §41) to all citizens, "*characterising…the police state*" (§42) and pose a "*danger …of undermining or even destroying democracy on the ground of defending it*" (§49). Consequently states do not enjoy "a*n unlimited discretion to subject persons within their jurisdiction to secret surveillance"* and "*may not, in the name of the struggle against espionage and*

terrorism, adopt whatever measures they deem appropriate" (§49). Further "*whatever system of surveillance is adopted, there must exist adequate and effective guarantees against abuse*" (§50).

44. The UK's then system (in 1978) of granting police warrants for telephone tapping of those suspected of serious crime did not meet the necessary standard of law (*Malone v United Kingdom*). That was because it did "*not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking*" (*Malone* §79). The system relating to the placing of listening devices inside the home (see *Khan v UK*, above) also failed to meet the "*in accordance with the law*" provisions of Art. 8 ECHR.

The right to freedom from inhuman and degrading treatment: Article 3

45. Art. 3 provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. There is "*no provision for exceptions and […] there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation*": *Ireland v UK* (1979-80) 2 EHRR 25 §163. Treatment may be degrading, and thus absolutely prohibited by Art. 3, even if it does not amount to inhuman treatment or torture (*Tyrer v UK* (1979-80) 2 EHRR 1 §29); and particularly where there is an institutional element to the treatment (see also *East African Asians v UK* (1981) 3 EHRR 76 §196).

Freedom from discrimination: Article 14 ECHR

46. Art. 14 provides that the enjoyment of the rights and freedoms in the Convention shall be enjoyed without discrimination. It has no "*independent existence*" – it is dependent on the case falling within the ambit of another right or freedom: *Belgian Linguistic Case* (1979-80) 1 EHRR 252, 283-284. Any difference in treatment in the exercise of a right laid down in the Convention must be justified as a proportionate means of aching a legitimate aim, just as interferences with (e.g.) Arts. 8 and 10 must be justified.

47. One of the grounds on which the ECHR prohibits discrimination in the exercise of rights, unless it can be justified, is **political affiliation**. The ECtHR has compared difference in treatment on ground of political affiliation to difference in treatment on grounds of race. In *Virabyan v Armenia* (Application no. 40094/05) §§199-200:

> *199. Discrimination is treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see Willis v. United Kingdom, no. 36042/97, § 48, ECHR 2002-IV). The Court has examined previously a number of cases in which the applicants alleged under Article 14 in conjunction with Articles 2 or 3 of the Convention that death or ill-treatment had been inflicted as a result of discrimination, namely racial hatred. It held that racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment […]*
>
> *200. The Court considers that the foregoing applies also in cases where the treatment contrary to Article 3 of the Convention is alleged to have been inflicted for political motives. It reiterates that pluralism, tolerance and broadmindedness are hallmarks of a "democratic society" (see Lindon, Otchakovsky-Laurens and July v. France [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV). Political pluralism, which implies a peaceful co-existence of a diversity of political opinions and movements, is of particular importance for the survival of a democratic society based on the rule of law, and acts of violence committed by agents of the State which are intended to suppress, eliminate or discourage political dissent or to punish those who hold or voice a dissenting political opinion pose a special threat to the ideals and values of such society.*

48. The non-discrimination obligations under Art. 14 apply even in the investigation of serious, politically motivated crime, as between different political groups suspected of involvement in such activities. In *Ireland v UK* §§225 – 232, the Court analysed *"why… Loyalist terrorism was not fought with the same weapons as Republican terrorism"*.

49. As for discrimination of grounds of **sex or gender**, this is particularly offensive to the Convention. In *Markin v Russia* (2013) 56 EHRR 8 §127, the Court held *"the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention"*.

50. Discrimination can occur not only when people with protected characteristics are directly targeted by state action (direct discrimination), but also when a measure

or state of affairs has a disproportionately discriminatory effect on them (indirect discrimination): *DH v Czech Republic* (2008) 47 EHRR 3 §175.

The right to protest; freedom of assembly and association: Article 11

51. Art. 11 protects 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.

52. As with Art. 10, a wide range of state actions can have the effect of interfering with Art. 11 rights. In *Lashmankin v Russia* (2019) 68 EHRR 1 §§404-405, the ECtHR held:

> *The Court reiterates that interference with the right to freedom of assembly does not need to amount to an outright ban, legal or de facto, but can consist in various other measures taken by the authorities. The term "restrictions" in Article 11 § 2 must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards […] For instance, a prior ban can have a chilling effect on those who may intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities. A refusal to allow an individual to travel for the purpose of attending a meeting amounts to an interference as well. So too do measures taken by the authorities during a rally, such as dispersal of the rally or the arrest of participants, and penalties imposed for having taken part in a rally (see Kasparov and Others, cited above, § 84, with further references).*
>
> *405. The right to freedom of assembly includes the right to choose the time, place and manner of conduct of the assembly, within the limits established in paragraph 2 of Article 11…The Court stresses in this connection that the organisers' autonomy in determining the assembly's location, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are important aspects of freedom of assembly. […] Accordingly, in cases where the time and place of the assembly are crucial to the participants, an order to change the time or the place may constitute an interference with their freedom of assembly, as does a prohibition on speeches, slogans or banners…*

53. Like Art. 10, Art. 11 is a fundamental right in a democratic society. Art. 11(2) does not require that a restriction on the right be indispensable, but nor is it enough that it be useful, reasonable or desirable: see *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, [2007] 2 AC 105. In *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408 the Supreme Court set out relevant factors to consider in determining the proportionality of a restriction on Art. 11 rights and held that *"there should be a certain degree of tolerance to disruption to ordinary life,*

including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly" (§68).

C. WILSON v COMMISSIONER

54. The Investigatory Powers Tribunal (**"IPT"**) has considered the application of all these ECHR rights in the context of undercover policing in *Wilson v Commissioner of Police of the Metropolis* [2021] UKIPTrib IPT_11_167_H. *Wilson* concerned an undercover policing operation conducted by the National Public Order Intelligence Unit (**"NPOIU"**) between 2003 and 2010, in which the claimant was the subject of surveillance by several UCOs and was also deceived into a long term sexual and romantic relationship with the undercover police officer Mark Kennedy (**"MK"**). Undercover activities by the NPOIU in this period are due to be assessed by the Inquiry in Tranche 4, but, given the similarity of the operations and conduct of the police throughout the period examined by the Inquiry, the IPT's conclusions are also relevant to the actions of the SDS in earlier Tranches.

55. In *Wilson*'s claim, two of the key State participants in the Inquiry, the Commissioner of the Metropolitan Police ("**CMP"**) and the National Police Chiefs Council ("**NPCC"**) made a number of significant concessions (summarised at §14, §270, and set out in detail in Annex 2A-2B to the Judgment). In relation to the sexual relationship they conceded that:

    (1) The decision of MK to deceive the claimant into a long-term intimate and sexual relationship amounted to inhuman and degrading treatment contrary to **Art. 3 ECHR**. MK invaded the claimant's bodily integrity, deeply degraded and humiliated her, and caused her mental suffering. MK grossly interfered with the claimant's sexual autonomy and debased, degraded and humiliated her. He showed a profound lack of respect for the claimant's bodily integrity and human dignity.

    (2) This breach was aggravated by the fact that the principal cover officer knew of the close relationship between MK and the claimant, but did not make enquiries as to whether it was sexual in nature, for which reason the relationship is likely to have persisted.

(3) The sexual relationship with the claimant constituted a gross violation of her right to respect for her private and family life under **Art. 8 ECHR**.

(4) The sexual relationship as a means of obtaining intelligence also constituted an unlawful interference with the claimant's right to freedom of expression under **Art. 10 ECHR**.

(5) 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.

(6) They had a **positive obligation under Arts. 3 and 8 ECHR** to take reasonable measures to obviate the risk that MK would engage in a sexual relationship whilst deployed undercover, and were in breach of those obligations insofar as 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 he was conducting a sexual relationship with the claimant.

56. In relation to the interference with **Art. 8** caused by the surveillance more broadly the CMP and the NPCC accepted that:

(1) The intelligence gathering nature of the deployment created a risk of significant interference with the claimant's right to respect for private life, because the UCOs needed to establish relationships with people in the groups and there was a risk they would gather information which exceeded information which was relevant to the deployment.

(2) An informed assessment of the risk of intrusion into Art. 8 rights required an assessment of the risk of intrusion into privacy of subjects and third parties. It was necessary to take steps to avoid that intrusion.

(3) It was necessary to be aware of the information obtained, the other UCOs deployed and the overall intelligence picture to assess the level of interference and other alternative intelligence opportunities.

(4) The breach was exacerbated by a number of factors, including the cumulative effect of the number of UCOs present in the claimant's life, the nature of the groups surveilled (which included individuals whose

intentions were to pursue their objectives by legitimate means and without engaging in criminal activity), and the nature and extent of the information recorded, which included sensitive and personal information about the claimant and her family and which should not have been obtained or recorded.

57. The CMP and NPCC nonetheless disputed other significant aspects of the claim including the extent of knowledge and awareness of MK's managers, deficiencies in training, guidance and wider supervision, and the discriminatory impact of these failings. They also maintained that the deployment, while disproportionate, was necessary in a democratic society and met a pressing social need (*Wilson* §271), arguing that "*the intelligence…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*". They denied breaches of Arts. 10 and 11 ECHR, save for the breach of Art. 10 ECHR caused by the sexual relationship.

58. The IPT found against the CMP and the NPCC on all these points.

59. In relation to knowledge and awareness the IPT concluded (see Order of 24 January 2022 (**"Order"**) at Annex A, §1):

    (1) MK's sexual relationship with the claimant was conducted with the knowledge of his principal "*cover officer*";
    (2) MK's deployment manager, who had the rank of Detective Chief Inspector, knew or turned a blind eye to the sexual relationship;
    (3) Other senior officers of the rank of Detective Chief Inspector or above who had operational and managerial responsibility within the National Public Order Intelligence Unit (**"NPOIU"**) for MK's deployment 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;
    (4) There was no evidence to support a finding that UCOs having sexual relationships was a deliberate tactic of the NPOIU. The true position is closer to being one of "*don't ask, don't tell*'.

60. On the CPM and NPCC's positive obligations under Arts. 3 and 8 ECHR the IPT concluded (§§2-3):

    (1) They failed to put in place sufficient systems, safeguards or protections to contain the risk that UCOs placed long-term in protest movements would enter into intimate sexual relationships with those directly or indirectly subject to surveillance;
    (2) The training of UCOs in relation to sexual relationships was grossly inadequate;
    (3) They failed to think about, plan, or take any steps to mitigate the obvious risk of MK entering into sexual relationships while deployed;
    (4) There was a widespread failure of supervision of MK in his undercover role, both by his principal cover officer and more senior officers.

61. On the necessity of the operations it concluded (§3, Annex A) that the deployment of MK (apart from the sexual relationship) and the presence in the claimant's life of other UCOs did not meet a pressing social need and was not necessary in a democratic society and not proportionate based on either the need for intelligence on the protest movement or on the claimant's own activities.

62. Importantly, in so doing the IPT endorsed the conclusions of the HMIC report *"An inspection of undercover policing in England and Wales"* (2014, referenced in NPCC O/S T1/P1 §14) to the effect that while the deployment of UCOs to gather intelligence on serious criminality might justify some intrusion into people's lives, it would be unlikely that the test of proportionality and necessity would be satisfied in relation to policing protests generally (see *Wilson* §§282-284). The IPT accepted that significant intelligence was provided which may have led to the police being able to provide a measured response to prevent crime and public disorder, but highlighted that there was an important distinction between intelligence gathering for domestic extremism, and for public order issues, which was not reflected in the NPOIU's documentation (§286). In *Wilson*, the CMP and the NPCC could not show a pressing social need: the claimant had no criminal convictions and there was no evidence that serious criminality was common amongst those subject to surveillance (§287). A fair reading of the authorisations in her case was that the principal justification for the surveillance was public disorder rather than serious criminality, and the claimant was named as a

subject because of the usefulness of her connections within the movement (§288). The IPT stated (§289):

> *...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.*

63. As for Arts. 10 and 11, the IPT found that the actions of the UCOs in gathering, recording, storing and transmitting information about Wilson's political activities; and separately the occasions when MK had influenced some of her decisions and activities, had interfered with the claimant's Art. 10 and 11 ECHR rights (§§325-6 and §§332-3, *Wilson*, Order, Annex A, §§6-7), and could not be justified, for the same reasons as the Art. 8 ECHR interferences could not be justified (§336).

64. Finally in relation to discrimination, the IPT found (see *Wilson* §§307-8) that the claimant's right under **Art. 14 ECHR** to freedom from discrimination in the enjoyment of her rights under Arts. 3 and 8 ECHR had been violated because (see Order, Annex A, §5):
    (1) The CMP and NPCC's failure to establish a system which protected against the risk that UCOs would enter into sexual relationships with women had an incontrovertible disproportionately adverse impact on women by reason of (a) the numbers of women affected and (b) the greater adverse impact on women's lives through either risk of pregnancy or interference with their child-bearing years;
    (2) They had advanced no justification for the difference of treatment and had shown very little concern about the impact on women of introducing UCOs into their lives on a long-term basis.

65. Neither the CMP nor the NPCC appealed any of the findings in this judgment.

Text of the Relevant Convention Rights

(1) Article 3

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

(2) Article 8

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.

(3) Article 10

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.

(4) Article 11

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.

(5) Article 14

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.