IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

WRITTEN CLOSING STATEMENT ON BEHALF OF THE DESIGNATED LAWYER OFFICER CORE PARTICIPANT GROUP

TRANCHE 1: THE SPECIAL DEMONSTRATION SQUAD 1968-1982

ANNEX A: LEGAL FRAMEWORK

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1. Overview

1.1 The Category H core participants have recently submitted that SDS undercover operations were inherently unlawful because they involved trespass to property and breaches of confidence and were incompatible with art.8. In response, CTI's legal framework submissions suggest that, "the legality of tactics such as entering the homes of activists, taking and disseminating confidential information needs to be considered" (§79).

1.2 There can be no objection to the inquiry taking account and notice of the basic legal framework in which the MPS, MPSB and SDS operated during the T1 era *insofar as this is clear and uncontentious* (see the main DL T1 closing statement, pt 2).

1.3 Beyond this, it would be unlawful for the inquiry to find that SDS undercover

officers committed torts (e.g. trespass) or equitable wrongs (e.g. breaches of confidence) for the following reasons:

(1) the lawfulness of undercover policing falls outside the scope of the inquiry's terms of reference and any related findings would breach the Inquiries Act 2005, s.5(5) which obliges the inquiry to exercise its functions within its terms of reference (part 2 below);

(2) a finding that undercover officers committed civil wrongs would constitute a ruling on and/or a purported determination of civil liability (i.e. primary liability on the part of the individual officers personally and vicarious liability on the part of the MPS) and this would offend (see part 3 below):

(a) the Inquiries Act 2005, s.2 which prohibits the inquiry from "ruling on" or "determining" any person's civil or criminal liability;

(b) the principle that acts and decisions of public authorities must be respected as lawful unless and until a court of competent jurisdiction declares otherwise;

(3) the claims that undercover officers committed civil wrongs are misconceived and erroneous and their acceptance or endorsement would constitute an error of law (parts 4-5 below).

1.4 The legal framework submissions of the Category H core participants and CTI both set out overviews of the law relating to police powers, certain torts and breach of confidence, the regulation of investigatory powers and, in the case of CTI, aspects of the criminal law. The submissions below only address the inquiry's terms of reference and related functions and the two specific civil wrongs alleged to have been committed by SDS undercover officers, i.e. the tort of trespass to land (part 4 below) and the equitable wrong of breach of

confidence (part 5 below). In particular, police powers of arrest, entry, search and seizure are not covered because they were exercisable only in the context of overt police activity and were not relevant to SDS operations or purportedly exercised by SDS undercover officers.

2. Terms of reference

2.1 The lawfulness of SDS undercover operations does not fall within the inquiry's terms of reference and the last-minute suggestion that it does as a facet of justification (whether its identification or the assessment of its adequacy) is untenable. See CTI's legal framework submissions, §79:

> *Whether undercover policing was conducted lawfully is relevant to aspects of the Inquiry's terms of reference. The legality of tactics such as entering the homes of activists, taking and disseminating confidential information needs to be considered. The lawfulness of the SDS's methods and operations generally is at least relevant to assessing the adequacy of justification, authorisation, operational governance, training, management and oversight of the undercover operations in Tranche 1. The lawfulness of undercover policing, as it was carried out by the SDS, is also relevant to the statutory and policy regulation of undercover policing (or, more specifically, the lack thereof) in the Tranche 1 era.*

2.2 In the seven years between institution of the inquiry and the T1P3 hearings, lawfulness was not identified as a freestanding issue in any of the inquiry's issues lists or r.9 requests (at least to T1 DL officers) or in any statement made or oral question put by the Chairman or CTI.[1] No T1 undercover officer was asked if they understood themselves to have committed trespass or a breach of confidence or given an opportunity to explain why they did not.

2.3 So far as the DL is aware, disclosure and evidence relating to the availability or provision of legal advice within or to MPS, MPSB or the SDS or their consideration of the lawfulness of undercover policing methods have not been sought and they would have been subject to LPP in any event. In this regard, it

[1] For completeness: HN155's r.9 asked about the lawfulness of reporting a traffic accident in a false name (Q29.4); and HN218's r.9 asked about the lawfulness of using information about deceased children in the creation of undercover identities (Q65).

will be remembered that a Parliamentary Select Committee approved the use of undercover policing - including the methods of the SDS - as long ago as 1833 (*Report from the Select Committee on the Petition of Frederick Young and Others (Police)* (HC 627, 6 August 1833), see DL T1P1 opening statement, §4.3.2).

2.4 The inquiry's terms of reference direct it to do the following "in particular" (§1):

> *iv. identify and assess the adequacy of the:*
>
> *a. justification, authorisation, operational governance and oversight of undercover policing;*
>
> *b. selection, training, management and care of undercover police officers;*
>
> *v. identify and assess the adequacy of the statutory, policy and judicial regulation of undercover policing.*

2.5 So far as concerns "justification", the inquiry is to (1) "identify" what the justification was and (2) "assess" its "adequacy". This raises <u>factual</u> questions as to the objectives of those involved and whether, how and why they considered that the ends justified the means, not <u>legal</u> questions as to whether the ends or means were lawful or unlawful. There is an important difference between "identifying" and "assessing the adequacy of" the "justification" held at the time - which those involved gave to themselves and each other - and determining whether what they did was "justified" as a matter of fact or law. As with narrative conclusions in inquests, the use of "adequacy" is deliberate because it is a neutral and factual term which is not overly judgemental. Evidential questions aside, the terms of reference in principle permit a reasoned finding that the justification was not adequate, but they make clear that the inquiry should not go further than that.

2.6 This was the approach signalled by Sir Christopher Pitchford - almost eight years ago - in his opening remarks of 2015: "This inquiry will examine… (vi) the <u>stated</u> justification for undercover policing both in general and in particular instances; (vii) the systems from time to time in place for the authorisation of undercover police operations, their governance and political oversight" (§12 (emphasis added) and see §§21-22).

2.7 Consistently with this, the explanatory notes accompanying the inquiry's M1 issues lists for the SDS and NPOIU went out of their way to make clear, "Proposed issues were not adopted… if they invited the determination of a question of law best left to the courts (whether the deceit by undercover officers as to their identity vitiated the consent of the other person to sexual activity)" (see §4 of both notes respectively dated 5 July 2018 and 21 February 2019). So far as the DL is aware, none of the core participants had submitted that any such issues of lawfulness should be included in the relevant issues lists.

2.8 The above approach accords with:

(1) the differentiation between fact and law in the Inquiries Act 2005, s.2;

(2) the prior references in the terms of reference to the "role", "contribution", "scope" and "effects" of undercover policing;

(3) the appearance of "justification" as one item in a list also featuring "authorisation", "operational governance" and "oversight";

(4) the inclusion of "statutory, policy and judicial regulation" within a different limb.

2.9 If the Home Secretary had wished to include "lawfulness" as an issue, she would have done so - its omission was obviously deliberate.

2.10 CTI's T1P1 opening statement of 2020 addressed "justification" in the following terms at Pt 1, §12 and Pt 2, §§1, 13:

> *… Was infiltration of the groups concerned justified? In which cases? If it was, was the extent of reporting and the duration of the deployments justified? In what circumstances, if any, might the use of the undercover tactic to infiltrate political and activist groups be justified? If so, subject to what boundaries, management and oversight?*
>
> *… Was undercover policing to gather intelligence about the October Demonstration justified? How and why did the SDS' existence become*

> *long-term? Were the long-term deployments which evolved justified? Did the SDS become political police? We suggest that these are the central, high-level questions, in this era. They are supplemented by numerous other questions about how the unit operated, what it did and why.*
>
> *… We will be examining whether the influence of such groups, or the methods of protest used by civil rights activists, were capable of justifying undercover officers spying upon them. If so, did they justify the undercover policing that actually took place?*

2.11 This is not inherently objectionable provided "was it justified?" is understood to mean "was there a justification?", "what was it?" and "was it adequate?"

2.12 The logic underpinning CTI's legal framework submissions, §79 and some of the remarks of the Chairman at the first T1P3 hearing on 9 May 2022 appears to go further into forbidden territory. In this regard, the Chairman said:

> *I find it, at the moment, difficult to conceive that something that was not lawful under the common law could be justified as a police operation, hence my worries about the two specific aspects to which I drew everybody's attention.*

2.13 It is one thing to say that a police operation could only have been justified if the methods used were lawfully available or, put another way, could not have been justified if the methods used were not lawfully available. However, this is a different enquiry to whether the justification held at the time was adequate and, in any event, the determination of lawfulness is an entirely separate matter which is beyond the powers of the inquiry.

2.14 Furthermore, there *were* occasions when the police did deliberately trespass on land in order to plant surveillance devices (acting pursuant to Home Office Guidelines issued in 1977 and 1984) and the courts nevertheless admitted the evidence thereby obtained (*R v Khan* [1997] AC 558 (HL); *Khan v United Kingdom* (2001) 31 EHRR 45 (ECtHR); Police Act 1997, Pt III).

2.15 If it were permissible for the inquiry to make findings about the application of the law of trespass to property or breach of confidence to undercover policing in the T1 era, which it is not, the same would be true of other branches of the

civil and criminal law and, in the T3 era, the application of the HRA and RIPA.

3. Powers of the inquiry

3.1 The Inquiries Act 2005, s.2 means what it says and no issue is taken with the propositions summarised at §78 of CTI's legal framework submissions.

3.2 That said, it is important to bear in mind that s.2 is not the subject of any decided cases: *Re an application by Steven Davis* [2007] NIQB 126 is a permission decision - not an authority with precedent value - and it says only that it was not arguable that the Billy Wright inquiry was proposing to approach its terms of reference - which referred to wrongful acts or omissions - in a way that would be incompatible with s.2 (per Weatherup J at §21).

3.3 Furthermore, statements made and approaches taken by previous inquiries inevitably reflect their particular circumstances, including concessions and submissions made on behalf of those designated as core participants. They certainly do not create authoritative precedents and it would be wrong to conclude that because factual ingredients of civil or criminal liability have been the subject of unchallenged inquiry findings in the past, it is open to this inquiry to find that particular conduct involved a tort or breach of confidence.

3.4 The relevance of previous inquiries into incidents involving fatalities (e.g. Bloody Sunday, Billy Wright, David Kelly, Azelle Rodney or Alexander Litvinenko) should be treated with caution, particularly when held in lieu of an inquest in accordance with (a) the Coroners Act 1988, s.17A and the Coroners Rules 1984, r.37A or (b) the Coroners and Justice Act 2009, Sch.1, §§3-4 and 9 and the Coroners (Inquests) Rules 2013, r.24. Such inquiries can be called upon to determine facts which match well-established and uncontroversial ingredients of homicide offences in the same way as inquests. See the Coroners and Justice Act 2009, Sch.1, §9:

> *(1) This paragraph applies where an investigation is suspended under paragraph 3 on the basis that the cause of death is likely to be adequately investigated by an inquiry under the Inquiries Act 2005 (c. 12).*

> *(2) The terms of reference of the inquiry must be such that it has as its purpose, or among its purposes, the purpose set out in section 5(1) above (read with section 5(2) where applicable); and section 5 of the Inquiries Act 2005 has effect accordingly.*

3.5 Furthermore, the conferral on coroners and their juries of an express power to determine questions of criminal liability, and to return conclusions of unlawful killing, *on the part of unnamed persons* differentiates inquests (and inquiries held in lieu of inquests) from public inquiries not concerned with fatalities.

3.6 It also means that authorities on the former Coroners Rules 1984, r.42 and the current Coroners and Justice Act 2009, s.10(2) shed less light on the Inquiries Act 2005, s.2 than has been suggested.[2] In particular, and contrary to CTI's legal framework submissions, §18 and category H core participant T1P3 oral opening statement, *R (Pounder) v HM Coroner for the North and South Districts of Durham and Darlington* [2009] EWHC 76 (Admin) sheds no light whatsoever on the meaning or effect of the Coroners Rules 1984, r.42, let alone the Inquiries Act 2005, s.2.

3.7 In *Pounder*, the coroner had refused to rule on or leave to the jury the lawfulness of the restraint used on 14 year old Adam Rickwood some six hours before he took his own life. This was <u>not</u> because the coroner considered that either step was precluded by the Coroners Rules 1984, r.42 or any other statutory provision. In fact, he treated the appropriateness of the force used and the impact on Adam as matters falling within the scope of the inquest and for the jury to determine, but decided that a ruling or jury determination on lawfulness was unnecessary (per Blake J at §§19-21, 24). (Note that r.42 did not prohibit coronial rulings or directions as to the law which are and were commonplace in jury cases and *cf.* the reference to rulings in the Inquiries Act 2005, s.2(1).)

3.8 CTI's legal framework submissions, §18 are wrong to assert, "The Court

[2] For the avoidance of doubt, CTI's legal framework submissions, §17 misquotes r.42 which provided that, "No verdict shall be framed in such a way as to appear to determine any question of (a) criminal liability on the part of a named person, or (b) civil liability". Apart from the move from away the language of "verdicts", the same formulation was retained in the Coroners and Justice Act 2009, s.10(2).

quashed the inquest verdict because the legality of restraint used on the deceased had not been properly investigated and was necessary because a verdict of unlawful killing was possible".

3.9 Rather, Blake J found that the coroner had erred because: it was "crystal clear" and "flagrantly apparent" that the restraint of Adam had been unauthorised and unlawful, i.e. there had been no power to use force against him in the relevant circumstances (§§46, 62); the jury could not have enquired into the appropriateness or proportionality of the force used without a ruling or clear guidance on its unlawfulness (§61); the impact of the restraint and its legality were both capable of having contributed to Adam's decision to take his own life (§§70-71); and a proper inquiry into factors that might have contributed to Adam's death required consideration of whether the force used on him was legitimate (§73).

3.10 CTI's legal framework submissions, §18 also place inappropriate emphasis on the statement in §62 of the judgment in *Pounder*, "It is to be noted that such a verdict is not a breach of Rule 42 of the Coroners Rules because no criminal liability of an individual is attributed and such a verdict does not determine or purport to state any question of civil liability". This was purely obiter: r.42 does not appear to have played any part in the decisions of the coroner or the court or even been the subject of submissions before Blake J; and the judgment does not comment at all on whether unlawful killing might have been a possible verdict in Adam's case or how it could have been given the lapse of time between his restraint and death and the effect of suicide as a *novus actus*.

3.11 Indeed, Blake J's passing reference to r.42, first, was made in the context of a general observation that self-incrimination warnings cannot and do not preclude questions about legality just because they may inhibit witnesses and, secondly, followed on from the related fact that:

> *There are many cases where juries may be considering possible verdicts of unlawful killing in one form or another, where warnings may have to be given to individuals but that does not prevent or deter inquiry into the legality of the force used in all the circumstances of the case.*

3.12 Away from the context of public inquiries dealing with homicides and suicides, where the law is "crystal clear" and "flagrantly apparent", the Inquiries Act 2005, s.2 plainly prohibits purported findings as to the state of the law or its application to particular facts. Furthermore, this prohibition must operate with especial force in connection with highly speculative legal arguments - which have never been directly tested in a case about undercover policing - of the kind underlying the allegation that SDS undercover officers routinely committed civil wrongs.

3.13 As set out in *De Smith's Judicial Review* (18th ed., 2018), §4-063 (see also §§3-132, 5-058):

> *All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent jurisdiction… Decisions are thus presumed lawful unless and until a court of competent jurisdiction declares them unlawful. There is good reason for this: the public must be entitled to rely upon the validity of official decisions and individuals should not take the law into their own hands. These reasons are built into the procedures of judicial review, which requires for example an application to quash a decision to be brought within a limited time. A decision not challenged within that time, whether or not it would have been declared unlawful if challenged, and whether or not unlawful for jurisdictional error, retains legal effect. So does a decision found to be unlawful but where a remedy is, in the court's discretion, withheld.*

3.14 Contrary to the Category H core participant T1P3 oral opening statement, it will be seen that the above principle is of general application and not confined to the presumed validity of secondary legislation. The point here is that the establishment and operation of the SDS was and must be presumed to have been lawful - this inquiry is not a court, let alone a court of competent jurisdiction, it has no power to determine otherwise and purporting to do so would be a wholly futile and unlawful gesture.

4. Trespass

Introduction

4.1 The Category H core participant legal framework submissions, §§14-16 make a number of points about consent or licence as a defence to claims of trespass to

the person (§14) and trespass to land or goods (§§15-16). Without reference to any of these points in particular, their T1P3 opening statement submitted that SDS undercover officers committed "multiple unjustified torts, including trespass to land and goods" (§§4, 27(1)).

4.2 Leaving aside a reference to consent obtained by force - which is not relevant - the points made in the Category H core participant legal framework submissions were as follows:

(1) consent induced by fraud does not provide a defence to trespass to the person "where the fraud goes to the identity of the person or the nature of the act done" (§14);

(2) a person acting outside the scope of a licence to enter private property commits trespass to land (§15(1));

(3) a licence to enter private property "could be negatived" where obtained by a "trick" (§15(2));

(4) the principles applicable to trespass to land also apply to trespass to goods (§16).

4.3 Consistently with the substantive focus of the Category H core participant submissions, CTI's legal framework submissions address trespass to land, but not trespass to the person or goods, and these submissions follow suit.

4.4 A proper understanding of the law in this area requires analytical rigour and conceptual clarity:

(1) The law treats and protects the human body and real and personal property differently and the law relating to trespass to land and trespass to the person are correspondingly different and must be considered separately.

(2) In connection with both torts, the focus of attention is always on whether the relevant person permitted the relevant physical act - this requires a two-stage analysis: (a) what was the physical act; and (b) was this permitted?

(3) In connection with trespass to land, there is no authority for the proposition that fraud or deception is capable of invalidating, negating, nullifying or vitiating a licence to enter - the enquiry is always and only as to the scope of any express or implied licence and whether this was exceeded by the visitor.

(4) In connection with trespass to the person, fraud or deception do not necessarily invalidate, negate, nullify or vitiate consent, but are treated as capable of producing a situation where the relevant physical act was not in reality permitted.

Trespass to land

4.5 SDS undercover officers entered private premises under licences permitting them to attend meetings and presentations held in or on those premises. They inevitably acquired information about what they saw and heard when they did so and the fact they later recorded and reported some of this to others does not mean they did not have or exceeded their permission to enter. The fact that some occupiers might have refused permission had they known an undercover officer's true identity does not affect the scope of the licence expressly or impliedly granted.

4.6 In this regard, the caselaw allows for licences which impose express or implied limits or conditions on where a licensee may *go* or what they may *do* while in or on private premises, but not as to their identity, motivation or objectives. See *Harvey v Plymouth CC* [2010] EWCA Civ 860, [2010] PIQR P18, per Hughes LJ at §27:

> *In deciding whether the claimant was a licensee, the question was, not whether his activity or similar activities might have been foreseen, but*

whether they had been impliedly assented to by the Council. In my view there was no evidence to support such a finding. When a council licenses the public to use its land for recreational purposes, it is consenting to normal recreational activities, carrying normal risks. An implied licence for general recreational activity cannot, in my view, be stretched to cover any form of activity, however reckless.

4.7 Importantly, all the decisions referring to the *purposes* for which entry may be permitted are concerned with overt objective purposes manifested in physical acts of the licensee, not their true or ulterior subjective intentions. In other words, the purpose and the act done are treated as synonymous and, in these terms, undercover officers can be said to have entered premises for the purpose of attending meetings and presentations:

(1) *Taylor v Jackson* (1898) 62 JP 424, 19 Cox CC 62, 78 LT 555 - hunting rabbits permitted, hunting hares not permitted;

(2) *Strang v Russell* (1904) 24 NZLR 916 - proceeding along a lagoon in a boat in order to demonstrate a presumed legal right adverse to the owner not permitted;

(3) *Hillen and Pettigrew v ICI (Alkali) Ltd* [1936] AC 65 (HL) - standing on "out of bounds" hatch covers when loading cargo not permitted;

(4) *Farrington v Thomson & Bridgland* [1959] VR 286 - entering a hotel bar in order to commit a tort not permitted;

(5) *Byrne v Kinematograph Renters Society Ltd* [1958] 1 WLR 762 (Ch) - private investigators did not trespass in a cinema when they bought tickets and attended performances not to watch the film, but for the ulterior purpose of checking the numbers on the tickets and the number of patrons (per Harman J at p.776);

(6) *R v Smith & Jones* [1976] 1 WLR 672 (CA) - stealing occupier's televisions not permitted;

(7) *Barker v R* (1983) 57 ALJR 426 - stealing occupier's furniture not permitted.

4.8 The majority judgments in *Barker* in the Australian High Court analyse the above authorities and correctly direct attention to the scope of the relevant licence as the key consideration.

4.9 Mason J thus explains why the ulterior purpose of the private investigators in *Byrne* was irrelevant and emphasises the width of many licences. See his judgment at §§21 and 29 respectively:

> *The submission that the inspectors were trespassers was rejected on the ground that their motives were immaterial and they did nothing that they were not invited to do… No doubt the invitation by the lessee of the cinema to the public to enter the cinema was in very general terms and could on no view be said to be limited in the way in which it was contended.*
>
> *…*
>
> *In many instances it will be difficult, if not impossible, to establish that the accused entered as a trespasser. His intention to steal may have arisen after entry or it may have been accompanied by another intention or purpose which brought the accused's entry within the ambit of the shopkeeper's implied invitation. There is a strong element of generality in the shopkeeper's invitation to the public to enter his premises. It is not an invitation to enter only for the purpose of doing business or with a view to doing business. The invitation ranges more widely, though it certainly does not amount to an invitation to steal. It will always be necessary to make a close analysis of the implied invitation held out by the shopkeeper and of the belief of the offender as to his right to enter the premises.*

4.10 Similarly, Brennan and Deane JJ made clear at §7 of their judgment that specific permissions to enter land may or may not be subject to "express or implied limitations regarding the time, place, manner or purpose of entry" and then say:

> *A specific permission to enter land need not, however, be limited as regards all or any of those matters. In particular, it need not be limited (in its character as an authority to enter land) by reference to the things which the person whose entry is permitted may legitimately do after he has entered or to the range of purposes which were or might have been in the contemplation of the grantor of the permission. If it is a general permission to enter in the sense that it is not limited, either expressly or*

> *by necessary implication, by reference to the purpose for which entry may be effected, it is not legitimate to cut back the generality of the permission to enter merely because it is probable that the grantor would, if the matter had been raised, have qualified it by excluding from its scope any entry for the purpose of committing an unauthorized act. When the permission is not in fact so limited, an unanticipated or illegitimate purpose on the part of the entrant does not, at common law, affect the status of his entry or make him a common law trespasser.*

4.11 See also at §§9 and 13:

> *Unless the consent to enter is limited by reference to purpose, an entry which is otherwise lawful does not become trespassory because it is effected for a purpose of which the person giving the consent is ignorant and of which he would not have approved.*
>
> *…*
>
> *As has been said, a permission to enter land need not be confined by reference to the purpose of the entry and, except in the case where it is so confined, a purpose of subsequently doing an unlawful act will not, under the common law, convert entry which was otherwise within the permission into entry as a trespasser. In particular, to take the example on which most reliance was placed, the implied invitation to enter which a shopkeeper extends to the public may ordinarily be limited to public areas of the shop and to hours in which the shop is open for business: it is not, however, ordinarily limited or confined by reference to purpose. Indeed, in the context of the importance of "impulse buying", the mere presence of the prospective customer upon the premises is itself likely to be an object of the invitation and a person will be within the invitation if he enters for no particular purpose at all. The fact that a person enters with the purpose or some thought of possibly stealing an item of merchandise or of otherwise behaving in a manner which is beyond what he is authorized to do while on the premises does not, in the ordinary case where the invitation to enter is not confined by reference to purpose, result in the actual entry being outside the scope of the invitation and being trespassory.*

4.12 As already mentioned, when SDS undercover officers entered private property, they did so under express or implied licences permitting their attendance at meetings and presentations and so on. In exactly the same way, the private investigators in *Byrne* were permitted to enter the cinema foyer in order to buy tickets and, having done so, to sit in the auditorium while films were shown. Their true purpose was irrelevant.

4.13 So far as concerns the relevance or effect of fraud:

(1) Deception and misrepresentation are not synonymous with fraud, dishonesty or bad faith or inherently unlawful and any suggestion that undercover officers commit fraud, are fraudsters or defraud those they interact with is legally unsustainable.[3]

(2) Even if "fraud" were a relevant term in this context, which it is not, there is "no general principle that fraud vitiates consent" (*Whittaker v Campbell* [1984] 1 QB 318 (DC), per Goff LJ (giving the judgment of the court) at pp.326G, 328D; *Archbold Criminal Pleading, Evidence and Practice 2023*, §21-151). See also *R v Clarence* (1888) 22 QBD 23, per Wills J at p.27, "That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law".

(3) Consistently with the above, in the context of the Theft Act 1968, s.12 and the offence of "taking vehicles without consent", the existence of the owner or keeper's objective agreement to part with possession is sufficient to establish consent irrespective of whether this was obtained by fraud (*Whittaker v Campbell*; *Archbold Criminal Pleading, Evidence and Practice 2023*, §21-151).

(4) None of the authorities referred to by the Category H core participants or CTI supports the proposition that permission to enter private premises requires or depends upon disclosure of a visitor's true identity or purpose or is invalidated, negated, nullified or vitiated by a visitor expressly or impliedly misrepresenting their true identity or purpose.

4.14 In this regard, the Category H core participants submit that "a trick" can negative a licence to enter premises, but the authorities then referred to do not bear this out:

[3] See the Fraud Act 2006 and Law Com No.276, *Fraud* (Cm.5560, July 2002) on "fraud" and "defraud" prior to the Fraud Act 2006 and "dishonest" and "dishonesty" generally.

(1) *R v Smith & Jones* [1976] 1 WLR 672 (CA), per James LJ (giving the judgment of the court) at p.674H - the relevant passage does no more than recite a submission about the distinguishability of a "trickery case" - *R v Boyle* [1954] 2 QB 292 (CA) - which was concerned not with trespass, but with "constructive breaking" for the purposes of the Larceny Act 1916, s.26.

(2) *Archbold Criminal Pleading, Evidence and Practice 2023*, §21-117:

> ***Entry for a purpose that exceeds right of entry***
>
> *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: Taylor v Jackson (1898) 78 L.T. 555; Hillen and Pettigrew v ICI (Alkali) Ltd [1936] A.C. 65; Farrington v Thomson and Bridgland [1959] V.R. 286; Strong v Russell (1904) 24 N.Z.L.R. 916. A fortiori, it would seem that where a consent to entry is obtained by fraud, the entry will be trespassory; whether or not the consent can be said to be vitiated by the fraud, situations such as that where a person gains entry by falsely pretending he has come to read the gas meter can clearly be brought within the principle for which the foregoing cases are authority.*

Although the "abundant authority" limb of the above is uncontroversial, the "a fortiori" limb is not supported by any authorities and is simply the opinion of the editors as to what seems to them to follow from the "abundant authority" proposition. Furthermore, their opinion is expressly qualified by an acceptance, first, that fraud may not vitiate consent and, secondly, that "fake gas man" cases fall within the "abundant authority" proposition in any event. This acceptance fits with the fact that the "abundant authority" cases are about the scope of the relevant licence and not its vitiation by fraud. In other words, what matters with "fake gas men" is not that they gain entry by pretending to be gas men, thereby vitiating their permission to enter. Rather, their purpose and the physical act they *do* is to steal and this falls outside the scope of that permission.

4.15 The passages in *Smith, Hogan & Ormerod's Criminal Law* (16th ed., 2021) referred to in CTI's legal framework submissions, §§52-53 do not take this any further:

(1) p.1050: The statement "Mistake as to identity, where identity is material, generally vitiates consent" is unsupported by authority, does not explain what is meant by "where identity is material" and is plainly concerned with what is described as "the crucial question" of *mens rea* in cases where a defendant charged with burglary is invited into premises by someone who was mistaken as to who they were.[4] The context is a discussion of *R v Collins* [1973] QB 100 (CA) where a woman invited the defendant through her bedroom window for sex on the mistaken assumption that he was her boyfriend. The conviction for burglary was quashed as unsafe because the "crucial" and "pivotal" question whether the defendant was on the outside or inside of the window sill when invited in was not left to the jury (per Edmund-Davies LJ at pp.102B, 104H-105A, 107D). The mistake as to identity was treated as irrelevant, "If she in fact appeared to be welcoming him, the Crown do not suggest that he should have realised or even suspected that she was so behaving because, despite the moonlight, she thought he was someone else" (p.106G).

(2) p.1051: There is no inconsistency between the English decision in *Byrne v Kinematograph Renters Society Ltd* and the Australian decisions in *Farrington* and *Barker* - they all turned on the scope of the relevant licence and whether it was exceeded. Indeed, the majority of the Australian High Court in *Barker* expressly referred to and followed *Byrne*: see per Mason J at §21 (quoted above); and Brennan and Deane JJ at §9 (describing *Byrne* as a case "where it was held that entry by a licence for a purpose alien to the purpose contemplated by the licensor did not render the entry trespassory").

[4] Note also that the statement refers to "mistake" and not fraud, let alone deception.

4.16 Furthermore, the established justifications for entry into or onto private land without permission all have a public interest or public policy basis and cannot be seen as an exhaustive list. The question whether undercover police officers, undercover members of MI5, MI6 or the armed forces or civilian agents or informants can lawfully enter private premises if an occupier purports to exclude them has never been tested. In this regard, it could not be in the public interest for criminal or terrorist groups to be able to exclude such individuals from their premises, or force them to commit a tort, simply by making it expressly clear that covert human intelligence sources were not welcome. Were this the law during the T1 era, any and every SDS target could have put up "no police officer" signs and thereby thwarted a large part of its operations and/or outed its undercover officers.

4.17 Finally, importing more sophisticated notions of "informed consent" or conditions about visitor identity or purpose into the law of trespass to land is not only unsupported by the caselaw, it would immediately open up huge vistas of legal uncertainty and liability for no good reason and in circumstances where the criminal and civil law already provide adequate remedies. In this regard, it is not only undercover police officers who overtly enter private premises with the occupier's permission, but under a false identity or with an ulterior purpose. The same is true of other covert human intelligence sources, including members of MI5, MI6 and the armed forces and civilian agents and informants operating in their true identities and as role-players. It is also true of numerous others:

(1) an online date invited into someone's home after telling lies or being economical with the truth about their age, health, income, interests, martial status, name, nationality, occupation, politics or religion or whether they are interested in a relationship or just sex;

(2) an undercover journalist working in a care home or meeting a corrupt MP at their home or office;

(3) an environmental activist infiltrating an oil company suspected of pollution;

(4) an undercover journalist or activist infiltrating a far right group, e.g. someone working on behalf of *Searchlight* or a member of the WRP tasked to infiltrate the NF, as happened with HN303;

(5) a private investigator looking into whether a client is being defrauded or wronged or undersold;

(6) a social worker or health visitor calling round to a family home on a pretext when their real purpose is to follow up a concern or suspicion;

(7) a builder come to inspect defective works who has no intention of fixing them and is just stalling for time;

(8) a plumber come to fix a boiler who does not have a gas safe registration, falls asleep or wastes time on their phone or accidentally cuts a pipe and causes a leak;

(9) a nosey parker, busybody or time-waster viewing a home they have no intention or means of buying or renting.

4.18 Have all the above committed trespass - a tort which is actionable *per se* and without proof of loss or damage - simply because they would not have been permitted to enter if the occupier had known the truth? Obviously not. It may also be noted that, if they were all trespassers, they would not be visitors for the purposes of and so would lose the protection afforded by the Occupiers Liability Act 1957.

Trespass to the person

4.19 The Category H core participant legal framework submissions, §14 refer to the following in support of the proposition that consent induced by fraud does not

provide a defence to trespass to the person:

(1) *Bowater v Rowley Regis Corporation* [1944] KB 476 (CA) at p.479 - a negligence case where the Court of Appeal held that the maxim *volenti non fit injuria* should be applied with extreme caution in the master and servant context (tangential relevance to trespass to the person considered in *Freeman v Home Office (No 2)* [1984] 2 WLR 130);

(2) *Chatterton v Gerson* [1981] QB 432 at p.442 - a case about consent to medical treatment - no trespass to the person as doctor explained the nature of the operation in broad terms and so consent was real, no negligence as claimant failed to prove explanation was inadequate or that she would not have had the operation in any event.

4.20 In the context of medical treatment: "real consent" precludes liability in trespass to the person and requires only an explanation of what is intended in broad terms; "informed consent" precludes liability in negligence, but a lack of "informed consent" does not invalidate, nullify or vitiate "real consent" in the absence of fraud or bad faith (*Shaw v Kovac* [2017] EWCA Civ 1028, [2017] 1 WLR 4773, per Davis LJ at §68).

4.21 For an example of the requisite type of fraud or bad faith, see *Appleton v Garrett* [1996] PIQR P1 where Dyson J found trespass to the person and awarded aggravated damages (at P7) after finding the defendant dentist was "a disgrace to his profession" who had been responsible for "an appalling catalogue of events" (at P2). In particular, the defendant had performed large scale unnecessary treatments which he knew to be unnecessary, withheld information deliberately and in bad faith and had done so for financial gain and Dyson J found that, "none of the plaintiffs consented at any rate to the treatment of those teeth that required no treatment" (at P4).

4.22 The Category H core participants qualify the claim that consent induced by fraud does not provide a defence to trespass to the person with the words "at

least where the fraud goes to the identity of the person or the nature of the act done". Although this proposition cannot be found in *Clerk and Lindsell on Torts* (23rd ed., 2020), §§14.96 to 14-97, it can be found in the cases referred to in footnotes 446-447 thereto: *R v Richardson* [1999] QB 444 (CA); *R v Tabassum* [2000] 2 Cr App R 328 (CA); and *R v Melin* [2019] EWCA Crim 557, [2019] QB 1063. While these cases and those mentioned below do treat fraud and deception as synonymous, neither is treated as necessary or sufficient to negate consent - what matters is that they can be part of a factual picture whereby the person affected gives their consent to a physical interference with their body which is not the same as the physical interference which then takes place and is therefore outside the scope of that consent. Furthermore, all these cases give the concepts of "identity" and "the nature of the act" very narrow ambits.

4.23 All three of *Richardson*, *Tabassum* and *Melin* draw on *R v Clarence* (1888) 22 QBD 23 where it was held that fraud as to the nature of the act itself or the identity of the person who does the act vitiates consent to sexual intercourse. However, these two types of fraud were narrowly circumscribed: "identity" meant whether the man was the person he was believed to be or someone impersonating him, not whether he was a bigamist or had lied about himself in some other way; and the "nature of the act" meant whether the act was medical or carnal in character, not whether the man was free from disease or intended to pay as promised (see the summary in *R v Richardson*, per Otton LJ (giving the judgment of the court) at pp.446F-449G).

4.24 In *R v Richardson*, the defendant was a qualified dentist who performed operations without disclosing that she had been suspended from practising and the Crown contended that the consent of her patients had been negated not by fraud as to the nature of the procedures, but as to her identity. The Court of Appeal rejected this and held that for these purposes identity does not include professional qualifications and attributes:

> *There is no basis for the proposition that the rules which determine the circumstances in which consent is vitiated can be different according to whether the case is one of sexual assault or one where the assault is non-sexual. The common element in both these cases is that they involve an assault, and the question is whether consent has been negatived. It is*

> *nowhere suggested that the common law draws such a distinction. The common law is not concerned with the question whether the mistaken consent has been induced by fraud on the part of the accused or has been self induced. It is the nature of the mistake that is relevant, and not the reason why the mistake has been made.*

4.25 In *R v Tabassum*, it was held that it had been open to the jury to find that there had been no consent to breast examinations because the women only consented in the mistaken belief the examinations had a medical purpose when they did not (per Rose LJ at p.337A-B). In *R v Melin* it was held that deception as to a person's status as a doctor could vitiate consent where such status was "inextricably bound up with" their identity and an individual's consequent consent to Botox injections (per Simler J (giving the judgment of the court) at §§30-33).

4.26 In *R (Monica) v DPP* [2018] EWHC 3508 (Admin) (DC), [2019] QB 1019 - concerning sex between undercover police officers and activists - the Divisional Court stressed that "consent" to sexual intercourse in the context of rape is now a statutory and not a common law concept (§84) and that it is only vitiated by frauds or deceptions which are as to the fundamental identity of the perpetrator, e.g. their gender or impersonation of a spouse or partner (§§72, 77-78) or closely connected to the nature or purpose of the sexual act, rather than the broad circumstances surrounding it. This approach was approved by the Court of Appeal in *R v Lawrance* [2020] EWCA Crim 971, [2020] 1 WLR 5025, per Lord Burnett CJ (giving the judgment of the court) at §34:

> *However, the "but for" test is insufficient of itself to vitiate consent. There may be many circumstances in which a complainant is deceived about a matter which is central to her choice to have sexual intercourse. Monica was an example, but they can be multiplied: lies concerning marital status or being in a committed relationship; lies about political or religious views; lies about status, employment or wealth are such examples. A bigamist does not commit rape or sexual assault upon his or her spouse despite the fundamental deception involved. The consent of the deceived second spouse, even if it would not have been forthcoming had the truth been known, does not vitiate consent for the purposes of sexual offending. Neither is the consent of a sex worker vitiated if the client never intends to pay.*

4.27 It is inconceivable that the common law of tort could provide greater protection

to private land when it comes to entry by an undercover police officer using a false identity than the criminal and civil law do to the human body when it comes to sexual intercourse with such an officer.

5. Breach of confidence

5.1 The Category H core participant T1P3 opening statement, §27(1) asserts that SDS operations, "involved… unjustified breaches of confidence (for example in the sharing of bank details by UCOs who took positions as Treasurers)". This is not correct.

5.2 All police officers - whether in uniform, plain clothes or undercover - acquire confidential information in the course of their duties and hold most, if not all, of this subject to obligations of confidence. In the language of Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at p.47, these obligations are "imported by the circumstances" (see also *Attorney General v Guardian Newspapers (No.2)* [1990] 1 AC 109 (HL), per Lord Keith at p.260A and per Lord Goff at p.281B-F).

5.3 Importantly, obligations of confidence generally arise upon and do not prevent or prohibit acquisition or receipt of confidential information and they operate to regulate its subsequent use and prevent "unconscionable" misuse (*Toulson & Phipps on Confidentiality* (4th ed., 2020), chs 3 and 5). In this regard, "It is an essential ingredient of the action for breach of confidence that confidential information has been or is threatened to be misused… The principle is self-evident, but determining what is misuse can present difficult questions" (*ibid.*, §§5-001 to 5-002).

5.4 Forms of "use" can include acquisition, review, disclosure to another, publication to the world at large or retention. The key question is whether the relevant "use" did or would constitute "misuse" and this will depend on the scope and terms of the obligation in question and the application of the public interest defence which allows uses which are "unauthorised", but nevertheless fair and reasonable.

5.5 Some more recent caselaw - post-dating the operation and closure of the SDS - has confirmed that the surreptitious and improper acquisition of confidential information can itself be a form of "misuse" and constitute a breach of confidence. See *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] Fam 116, per Lord Neuberger MR (giving the judgment of the court) at §68:

> *If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. It would seem to us to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence.*

5.6 However, this does not mean that obtaining confidential information is in and of itself or necessarily unconscionable or a breach of confidence and there is no support for the proposition that the equitable doctrine of confidence somehow prescribes the public law powers of the police to collect confidential information or intelligence.

5.7 In *Imerman v Tchenguiz*, it was relevant that the information in question had been acquired unlawfully:[5]

> *144. It is also right to bear in mind that this was an extreme case of wrongful access to confidential material. Not only does it seem quite possible that the accessing of Mr Imerman's documents involved breach of statutory duty and statutory crimes under the 1990 and 1998 Acts, but it took place on nine occasions outside the family home, at his place of business, and it involved a vast number of documents (the majority of which will have had no bearing on the ancillary relief proceedings, let alone the Leconfield House issue), which were then electronically copied, and, in many cases, copied onto paper. Moylan J described the case in his judgment of 13 January 2010 [2010] 2 FLR 802, para 43 as being "at the extreme end of the range of behaviour which I have seen during the course of the last 30 years". What happened in this case was an invasion of privacy in an underhand way and on an indiscriminate scale.*

[5] Offences under the Computer Misuse Act 1999 and Data Protection Act 1998 and other breaches of that Act variously described as a "real possibility" (§94), "powerful case" (§100), "realistic prospect" (§104) and "substantial possibility" (§141).

5.8 Furthermore, the Court of Appeal made clear that the absence of any defence was an important consideration at §69 (emphasis added):

> *It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return (or destruction) of any such document or copy.*

5.9 Consistently with this, the following point was made in *Abbey v Gilligan* [2012] EWHC 3217 (QB), [2013] EMLR 12, per Tugendhat J at §63:

> *A journalist considering whether or not to publish information must, in many cases, have an opportunity to read the information to make that decision. It cannot be right that the court should in such cases too readily find that the obtaining or reading of the information is a breach of confidence.*

5.10 Accordingly, the key question for present purposes is not whether SDS undercover officers acquired and reported confidential information, but whether doing so and disseminating this within MPSB and MI5 constituted a misuse of that information and/or was in the public interest.

5.11 In *Malone v MPS (No.2)* [1979] Ch 344 - decided during the T1 era - it was held that telephone intercepts were lawful and confidential information obtained through them was not subject to an obligation of confidence (per Megarry VC at p.376G-H). While the latter finding has been overtaken by subsequent caselaw, Sir Robert Megarry VC went on to find that, even if an obligation of confidence was engaged, the relevant activity was justified on public interest grounds. See at pp.377C-378B:

> *I think that one has to approach these matters with some measure of balance and common sense. The rights and liberties of a telephone subscriber are indeed important; but so also are the desires of the great bulk of the population not to be the victims of assault, theft or other crimes. The detection and prosecution of criminals, and the discovery of projected crimes, are important weapons in protecting the public. In the nature of things it will be virtually impossible to know beforehand whether any particular telephone conversation will be criminal in*

nature. The question is not whether there is a certainty that the conversation tapped will be iniquitous, but whether there is just cause or excuse for the tapping and for the use made of the material obtained by the tapping.

If certain requirements are satisfied, then I think that there will plainly be just cause or excuse for what is done by or on behalf of the police. These requirements are, first, that there should be grounds for suspecting that the tapping of the particular telephone will be of material assistance in detecting or preventing crime, or discovering the criminals, or otherwise assisting in the discharge of the functions of the police in relation to crime. Second, no use should be made of any material obtained except for these purposes. Third, any knowledge of information which is not relevant to those purposes should be confined to the minimum number of persons reasonably required to carry out the process of tapping. If those requirements are satisfied, then it seems to me that there will be just cause or excuse for carrying out the tapping, and using information obtained for those limited purposes. I am not, of course, saying that nothing else can constitute a just cause or excuse: what I am saying is that if these requirements are satisfied, then in my judgment there will be a just cause or excuse. I am not, for instance, saying anything about matters of national security: I speak only of what is before me in the present case, concerning tapping for police purposes in relation to crime.

5.12 The above was applied in *Hellewell v CC Derbyshire Police* [1995] 1 WLR 804 where it was held that the police (1) are entitled to make reasonable use of confidential information they obtain in the discharge of their functions and (2) will have a public interest defence to any claim for breach of confidence when they do so (per Laws J at p.811A-B and E-G).

5.13 This principle is of general application to policing and not limited to the exercise of functions relating to the detection or prevention of crime. For example, it has been reiterated in the context of general public protection:

(1) *R v CC North Wales Police, ex p. AB* [1999] QB 396, per Lord Bingham CJ at pp.409H-410C and 410F-G and Buxton J at p.415B-C (DC):

> *I accept the first of these principles as an important and necessary principle underlying such a policy. When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save*

for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty… This principle does not in my view rest on the existence of a duty of confidence owed by the public body to the member of the public, although it might well be that such a duty of confidence might in certain circumstances arise. The principle, as I think, rests on a fundamental rule of good public administration, which the law must recognise and if necessary enforce…

It seems to me to follow that if the police, having obtained information about an individual which it would be damaging to that individual to disclose, and which should not be disclosed without some public justification, consider in the exercise of a careful and bona fide judgment that it is desirable or necessary in the public interest to make disclosure, whether for the purpose of preventing crime or alerting members of the public to an apprehended danger, it is proper for them to make such limited disclosure as is judged necessary to achieve that purpose.

…

More generally, however, information acquired by the police in their capacity as such, and when performing the public law duties that Lord Bingham C.J. has set out, cannot be protected against disclosure in the proper performance of those public duties by any private law obligation of confidence. That is not because the use and publication of confidential information will not be enjoined when such use is necessary in the public interest, though that is undoubtedly the case. Rather, because of their overriding obligation to enforce the law and prevent crime the police in my view do not have the power or vires to acquire information on terms that preclude their using that information in a case where their public duty demands such use…

(2) *R v CC North Wales Police, ex p. AB,* per Lord Woolf MR (giving the judgment of the court) at p.429C (CA):

> *Both under the Convention and as a matter of English administrative law, the police are entitled to use information when they reasonably conclude this is what is required (after taking into account the interests of the applicants), in order to protect the public and in particular children.*

(3) *Woolgar v CC Sussex Police* [2000] 1 WLR 25, per Kennedy LJ at p.36H:

> *… if the police come into possession of confidential information which, in their reasonable view, in the interests of public health or safety, should be considered by a professional or regulatory*

> *body, then the police are free to pass that information to the relevant regulatory body for its consideration.*

5.14 So far as concerns public order matters, the Supreme Court found in *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9, [2015] 1 AC 1065 that the collection by the police of public order intelligence was not only lawful, but also strongly in the public interest (see per Lord Sumption JSC at §§29-31, quoted in DL T1 closing, §2.3.1).

5.15 The above is reinforced by the fact that the public interest defence itself operates to allow non-police persons and bodies to disclose confidential information *to the police* when it may be relevant to the exercise of their functions. See *Attorney General v Guardian Newspapers (No.2)*, per Lord Griffiths at pp.269A-C (see also Lord Goff at pp.282G-283B):

> *In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry. If it turns out that the suspicions are without foundation, the confidence can then still be protected: see Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892…*

5.16 Following on from this, it is relevant to keep in mind the very limited "use" to which SDS intelligence was put through dissemination within the MPSB and MI5 - for assessment in connection with the discharge of their functions - and as a basis for sanitised advice to the MPS Public Order Branch.

5.17 The acquisition and reporting of SDS intelligence plainly did not involve any breach of confidence and, had it done so, this would not have been connected with the use of the undercover method and the same would necessarily follow for similar intelligence obtained by MPSB, other special branches and MI5. In this regard, the inquiry has seen that other non-SDS MPSB registered files contained precisely the same sort of information, whether derived from other covert human intelligence sources, surveillance, eavesdropping or interception operations or other "enquiries".

6. ECHR

6.1 The United Kingdom ratified the ECHR in 1951, the Convention entered into force in 1953, the European Court of Human Rights was constituted in 1959 and the United Kingdom accepted the right of individual petition to the Court in 1966. However, "For two decades after its entry into force, the ECHR remained a largely symbolic document" (Equality and Human Rights Commission, *Research Report 83: The UK and the European Court of Human Rights* (2012), p.9) and the Court did not give any judgments in cases involving the United Kingdom until 1975 (*Golder v United Kingdom* (1979-80) 1 EHRR 524).

6.2 During the remainder of the T1 era, the European Court of Human Rights gave only nine substantive judgments in cases against the United Kingdom - six were concerned with England and Wales matters[6] and three were concerned with Northern Ireland and Isle of Mann matters not relevant to England and Wales.[7] None of these judgments related to policing in England and Wales - the decision in *Malone v United Kingdom* (1985) 7 EHRR 14 was given post-T1 on 2 August 1984. Furthermore, it should be borne in mind that the Court's jurisprudence was at an early stage in its development during this period, e.g. it gave judgment in *Klass v Germany* (1979-80) 2 EHRR 214 on 6 September 1978.

6.3 Subsequent decisions of the European Court and Commission of Human Rights established beyond doubt that the United Kingdom arrangements for covert interception, surveillance and intelligence gathering by the state during the T1 era were not "in accordance with the law" for the purposes of the developing art.8(2) jurisprudence such that any related interference with art.8 rights could not be justified. Responsibility for this lay with successive Parliaments and

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[6] *Golder* (1979-80) 1 EHRR 524, 21 February 1975 (arts 6 and 8 and prisoner access to solicitors) (breach); *Handyside* (1979-80) 1 EHRR 737, 7 December 1976 (art.10 and "The Little Red Schoolbook") (no breach); *Sunday Times (No.1)*, (1979-80) 2 EHRR 245, 26 April 1979 (art.10 and Thalidomide) (breach); *Young, James & Webster* (1982) 4 EHRR 38, 13 August 1981 (art.11 and right to not join a trade union) (breach); *X* (1982) 4 EHRR 188, 5 November 1981 (art.5 and mental health detention) (breach); *Campbell & Cosans* (1982) 4 EHRR 293, 25 February 1982 (art.3 and corporal punishment in state schools) (breach).

[7] *Ireland* (1979-80) 2 EHRR 25, 18 January 1978 (art.3 and "The Hooded Men") (breach); *Tyrer* (1979-80) 2 EHRR 1, 25 April 1978 (art.3 and birching) (breach); *Dudgeon*, (1982) 4 EHRR 149, 22 October 1981 (art.8 and criminalisation of homosexuality).

governments and (ultimately) those who elected them and the remedy came in legislation including the Interception of Communications Act 1985, Security Service Act 1989, Intelligence Services Act 1994, Police Act 1997 and Regulation of Investigatory Powers Act 2000.

6.4 CTI's legal framework submissions, §75 contend that the statutory framework for undercover policing in the T1 era was "plainly inadequate" because it did not exist and so did not meet the "in accordance with the law" limb of art.8(2).

6.5 Other than as a statement of the obvious, this observation has little purpose and its characterisation as "plain" can only be supported with the benefit of hindsight and applying contemporary standards and understandings. The absence of statutory regulation for undercover policing during the T1 era was consistent with and reflected attitudes, customs and practices which prevailed across the public and private sectors and British society as a whole. It is pointless to suggest that this could or should have been seen as inadequate when public law and the ECHR played such different and lesser roles in legal and political discourse and public consciousness at that time.

6.6 Furthermore, it should be remembered that the Strasbourg caselaw endorsed the proportionality of MPSB's collection and transmission to MI5 of information about individuals. In the art.8 case of *Esbester v United Kingdom* (1994) 18 EHRR CD72, the applicant was a member of the CPGB, had been active in CND and anti-apartheid and anti-deportation campaigns, had been arrested and fined at Grunwick and arrested and cautioned at a CND demonstration. He applied for and was a offered a job at the Central Office of Information "subject to the satisfactory completion of our enquiries into your age, health and other matters", but the offer was withdrawn because "having completed our inquiries… we are unable to offer you an appointment."

6.7 The Commission considered the terms of the 1984 *Home Office Guidelines on Special Branch Work*, the Police (Discipline) Regulations 1985, Sch.1, §6(a) and the Police (Discipline) (Senior Officers) Regulations 1985, reg.4(1) and

noted:

> *The special functions which most commonly fall to be undertaken by the Special Branch of a police force include the provision of assistance to the Security Service in carrying out its task of the protection of national security. As is further noted, a large part of this effort is devoted to the study and investigation of terrorism, including the activities of international terrorists and terrorist organisations and, in this regard, the police Special Branches provide information to the Security Service about extremists and terrorist groups.*

6.8 The Commission found that there had been an interference with the applicant's art.8(1) rights because:

> *… the applicant's assertion that a security check was carried out and involved reference to information concerning matters falling within the sphere of "private life" is a reasonable inference from the facts. Such a check would appear to fall within the ambit of the Security Service and/or police Special Branches. There is nothing to indicate any possible involvement by GCHQ or the Police National Computer.*
>
> *… the existence of practices permitting secret surveillance has been established and that the applicant has established a reasonable likelihood that the Security Service and /or police Special Branches have compiled and retained a file concerning his private life, which was referred to in the course of the security check.*

6.9 However, the Commission also found the complaint that this interference was not justified under art.8(2) manifestly ill-founded and unarguable following the enactment of the Security Service Act 1989:

> *… in the present case the law is formulated with sufficient precision to enable the applicant to anticipate the application of vetting procedures and to the likely nature of the involvement of the Security Service and police Special Branches with regard to the collection, recording and release of information relating to himself.*
>
> *…*
>
> *The aim pursued by the interference in the present case was the "interests of national security". The Court has acknowledged the necessity for states to collect and store information on persons and to use this information when assessing the eligibility of persons for posts of importance for national security.*
>
> *…*
>
> *As regards any possible involvement of the police special branches, the Commission recalls that their role is to support the Security Service and that they pass on to the Service any relevant information. The use of such*

information would then appear to fall within the ambit of supervision of the Tribunal and Commissioner.

6.10 The Commission followed its decision in *Esbester* in the similar cases of *Hewitt & Harman v United Kingdom (No.2)* (App. No. 20317/92, 1 September 1993) and *Redgrave v United Kingdom* (App. No. 20271/92, 1 September 1993) where it found a reasonable likelihood that MI5 had collected and retained private information about the applicants but also found this was justified under art.8(2).

6.11 In any event, neither the MPS nor MI5 was responsible for or had any power to enact legislation governing their activities and neither of them was under any legal obligation to have regard to or act compatibly with the ECHR or any other international treaty that had not been incorporated into domestic law. Some T1 SDS undercover activity would not have interfered with art.8 rights at all and much that did would have been proportionate (albeit not "in accordance with the law"), but there is no point the inquiry retrospectively judging this activity by reference to standards which did not apply at the time and which those involved were not required, and were not attempting, to meet.

OLIVER SANDERS KC

1 Crown Office Row, Temple

10 February 2023