Neutral Citation Number: [2013] EWHC 32 (QB)

Case No: HQ11X03952

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 17/01/2013

Before :
THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

(1) AKJ
(2) KAW
(3) SUR

Claimants

v

(1) COMMISSIONER OF POLICE FOR THE METROPOLIS
(2) ASSOCIATION OF CHIEF POLICE OFFICERS

Defendants

And Between :

(1) AJA

(2) ARB

(3) THOMAS FOWLER

Claimants

-v-

(1) COMMISSIONER OF POLICE FOR THE METROPOLIS

(2) CHIEF CONSTABLE OF SOUTH WALES POLICE

(3) ASSOCIATION OF CHIEF POLICE OFFICERS

Defendants

Phillippa Kaufmann QC & Charlotte Kilroy (instructed by **Birnberg Peirce & Partners**) for the Claimants **AJK, KAW and SUR (The Birnberg Claimants)**
Heather Williams QC & Helen Law (instructed by **Tuckers Solicitors) for Claimants AJA, ARB and Mr Fowler (The Tuckers Claimants)**
Monica Carss-Frisk QC & David Pievsky (instructed by the **Director of Legal Services, Metropolitan Police Service**) for the **1st Defendant in** all claims
Jeremy Johnson QC (instructed by **Force Solicitor, South Wales Police**) for the **2nd Defendant** in the Tuckers Claimants' claims

Monica Carss-Frisk QC & David Pievsky (instructed by **The Association of Chief Police Officers)** for the 2nd Defendant in **the Birnberg Claimants' claims** and for the 3rd Defendant **in the Tuckers Claimants' claims**

Hearing dates: 21, 22, 23 November 2012

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Approved Judgment

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

....

THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. In these two actions the Claimants advance claims under the Human Rights Act 1998 ("HRA") ss. 6 and 7 ("the HRA claims"), together with a number of common law claims in tort ("non-HRA claims" or "the common law claims"). The Defendants in these two actions apply to this court for orders that the claims be struck out; alternatively stayed, on the grounds that this court (the High Court),

    (1) Has no jurisdiction to hear the Claimants' HRA claims because those claims are exclusively the province of the Investigatory Powers Tribunal ("the IPT"); and/or

    (2) Should decline to exercise its jurisdiction over, or should strike out, the Claimants' common law claims, because they can be heard in the IPT and it would be abusive and/or inappropriate for them to be heard in the High Court when the HRA claims arising out of the same facts must be brought in the IPT, alternatively, that it would be unfair to permit the common law claims to be heard in the High Court because, by reason of their "Neither Confirm Nor Deny" ("NCND") policy, the Defendants cannot defend the claims.

2. I shall refer to the three women Claimants in the first action as the Birnberg Claimants and the two women Claimants in the second action as the Tuckers Claimants. There is also a third Claimant in the second action. He does not allege that he was sexually abused. He alleges that one of the women in the second action was his girlfriend, and that he was deceived and abused by the officer who seduced her while pretending to be his friend.

3. The Birnberg and Tuckers Claimants allege that they have been abused by two men who they allege to have been at the material time undercover police officers. The men are referred to respectively as Mark Kennedy ("MK") by the Birnberg Claimants, and as Mark Jacobs ("MJ") by the Tuckers Claimants.

4. Information provided to, or obtained by, the police (and the intelligence services) is commonly referred to as "intelligence". Intelligence obtained from people is referred to as "human intelligence", to distinguish it from intelligence from other sources, such as interception of communications. A person who provides information to the police (or the intelligence services) is referred to as a "source", or an informant.

5. A covert human intelligence source ("CHIS") may be a person in either of two positions. A CHIS may be a member of the public who gives information to a police (or intelligence) officer. But the term is also used to apply to an undercover police (or intelligence) officer who obtains information from a member of the public and then either uses it, or passes the information on to his colleagues or superiors. That is the effect of the definition in the Regulation of Investigatory Powers Act 2000 ("RIPA") s.26, set out below. By that definition what makes the source "covert" is if the information is obtained in the course of a relationship conducted in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the purpose for which the information is being obtained or disclosed.

6. The Claimants have in common that they all describe themselves as political activists. The Birnberg Claimants describe themselves as having been involved in peaceful protests around environmental and related issues. They issued their Claim Form on 20 October 2011.

7. The Tuckers Claimants and Mr Fowler describe themselves as members of the Cardiff Anarchists Network ("CAN"). In the words of Ms Williams, this is a fairly fluid collective of locally based individuals who engaged in direct action and political protest, in relation to domestic and international issues. The group had only about ten to twelve core members during the material period, who met regularly in Cardiff pubs. They issued their Claim Form on 12 January 2012.

8. Neither MK nor MJ has been joined as a defendant, no doubt after careful consideration. The claims are against the Commissioner of Police for the Metropolis ("CPM") in both actions, the Chief Constable of South Wales Police ("CCSWP") in the second action, and the Association of Chief Police Officers ("ACPO") in both actions. The CPM and CCSWP are sued because the Police Act 1996 s.88 ("liability for wrongs of constables") provides that the chief officer of police for a police area shall be liable in respect of any unlawful conduct of constables under his direction and control in the performance or purported performance of their functions, and accordingly shall, in the case of a tort, be treated for all purposes as a joint tortfeasor. It also provides that there shall be paid out of the police fund any damages and costs awarded against the chief officer. It will be necessary to consider the position of ACPO below.

9. The Claimants do not only allege that the Defendants are vicariously liable for the wrongs of MK and MJ, or joint wrongdoers or tortfeasors together with those two men. The Claimants also allege that the Defendants are primarily liable for interference with the Claimants' ECHR rights, Arts 3 and 8, and primarily liable in tort for their own failure to supervise and control MK and MJ, and to stop the conduct complained of.

10. All the women allege that they have been deceived by a person who was, unknown to them at the time, a police officer. They allege that the man in question represented

himself to each of the Claimants to be a fellow activist, and a person with similar interests to their own, and that by this means the man in question induced each of the women to enter into long term and committed sexual relationships with himself which, as he knew, they would not have entered into if they had known that he was an undercover police officer. Likewise Mr Fowler alleges that he was induced to enter into a friendship with the officer in his case.

11. These are civil proceedings in which they claim damages, not criminal prosecutions. I have not seen any suggestion that either MK or MJ was guilty of any sexual offence, but if there is any such suggestion, it forms no part of these civil proceedings. Apparent consent to a sexual act may not count in law as consent for the purposes of the criminal law in two cases which are specified in the Sexual Offences Act 2003 s.76(2). The first is where the defendant intentionally deceived the complainant as to the nature and purpose of the relevant act (e.g. a doctor who deceives a patient into believing the act is for purposes of diagnosis, when in fact it is for the doctor's gratification). The second is where the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant. The Claimants do not allege that they were deceived in circumstances that come within either of these two categories.

12. But the Claimants all allege that the sustained deceptions over a long period, in relation both to the sexual and other matters, were the gravest possible interferences with their right to respect for their private lives, and that as a result they have suffered serious personal injury, including psychiatric illness, distress and other damage.

13. On the basis of their allegations that the two men were police officers acting in that capacity in the course of covert intelligence gathering operations, the women contend that they have claims under the Human Rights Act 1998 s.6 for breach of their rights under Art 3 (prohibition of degrading treatment) and Art 8 (respect for private and family life). They also allege that they have common law causes of action, including for the torts of misfeasance in public office, deceit, assault (trespass to the person) and negligence. The Tuckers Claimants also allege breaches of statutory duty under the Data Protection Act 1998.

14. This court commonly tries actions against the police for assault, false imprisonment and other torts, in circumstances where the same facts give rise to claims for interference with the Convention rights under Art 3 and Art 5 (liberty), whether or not those HRA claims are actually advanced. But no action against the police alleging sexual abuse of the kind in question in these actions has been brought before the courts in the past, so far as I have been made aware. It is to be noted that on this application the court has not been asked to strike out any part of the various claims on their merits. This judgment will therefore proceed on the assumption that all of the claims are good claims in law (that is claims that should succeed as a matter of law, if the alleged facts are proved). But that is only an assumption. I make no finding to that effect. If the Defendants wish on another occasion to submit to the court that some, or all, of these claims cannot succeed as a matter of law (even if the facts alleged be proved), then the court will consider such submissions as may be made on that occasion.

THE ISSUES

15. The issues for the court, as formulated by Ms Kaufmann and Ms Williams are as follows:

> (1) Whether RIPA s. 65 gives the IPT jurisdiction over the Claimants' HRA claims against the police. It is agreed between the parties that, if such jurisdiction is conferred by RIPA s.65, then it is exclusive: see the decision of the Supreme Court in *R (A) v Director of Establishments of Security Service (also referred to as A v B)* [2010] 2 AC 1) ("the first issue");
>
> (2) Whether the IPT can hear the Claimants' common law claims at all ("the second issue");
>
> (3) If the IPT can hear the Claimants' common law claims, whether the High Court should strike those claims out on the basis that they are an abuse of process, either because they should be heard in the IPT, or because the Defendants could not have a fair trial in the High Court ("the third issue").

16. Ms Kaufmann has also made clear that, in so far as the actions of MK as a CHIS did not involve the use of a sexual relationship, there is no challenge made to those actions. The Birnberg Claimants do not allege that he did anything unlawful as an undercover police officer by reason of any of his acts or omissions towards themselves which were not sexual.

17. As far as the alleged facts are concerned, I have to, and do, proceed, in deciding the applications now before me, on the assumption that all the allegations pleaded are true. On that assumption, it cannot be doubted that the claims made in the present action are very serious.

18. There was at one point an issue as to whether the CMP and ACPO had made the present applications in time. But in the event that point has not been pursued, rightly in my view. I have not had to consider that point.

19. The parties have also referred to claims in further actions brought by other Claimants. These include claims in respect of acts and omissions in years preceding the coming into force of RIPA and HRA. There has also been mention of a claim form issued against the CPM by MK. That claim form has not been served, but the CPM has engaged in correspondence with his solicitors. No applications in these other actions are before the court, and any issues that might arise in those actions will have to be decided if and when those issues are raised.

SUMMARIES OF THE CLAIMS BY THE BIRNBERG CLAIMANTS

20. The factual allegations made by the Birnberg Claimants in the first action are summarised by Ms Kaufmann as follows:

    (1) MK, a married police officer with two children, used a false identity provided to him by the CPM and ACPO to deceive all three of the Birnberg Claimants into embarking upon intimate sexual relationships with him while he was performing his duties as an undercover officer;

(2) Over a period of seven years he maintained that deceit in order to continue those intimate sexual relationships while deployed by the CPM and ACPO as an undercover officer;
(3) He knew that none of the Birnberg Claimants would have entered into the most intimate of relationships and consented to sex with him if they had known his true identity and the purpose of his deployment;
(4) He encouraged all three Birnberg Claimants to become emotionally dependent on him and to publicise their intimate relationship with him widely amongst other activists and their own families. He attended intimate family gatherings with all three of the Birnberg Claimants and went on private holidays with them. He discouraged the Birnberg Claimants from terminating the intimate sexual relationships.
(5) He used the extensive resources provided to him by the CPM and ACPO (including money and false documentation) to maintain his false identity and ensure that the Birnberg Claimants did not discover the deceit;
(6) He used his sexual relationships with the Birnberg Claimants to enable him to gather intelligence and/or for personal gratification;
(7) The relationships MK had with the Birnberg Claimants were known about or suspected by other police officers including other undercover officers, his day-to-day handler and his managers in the National Public Order Intelligence Unit ("NPOIU");
(8) Despite this the authorisations provided by the CPM and ACPO to MK under RIPA did not instruct or purport to permit him to embark on intimate sexual relationships with the Birnberg Claimants or with anyone.

21. It is the Birnberg Claimants' case that those facts give rise to the following causes of action under the HRA and in tort: (1) A breach of their rights under Article 3 of the European Convention on Human Rights ("ECHR") (Particulars of Claim ("POC"), paras 35-40); (2) A breach of Article 8 ECHR (POC paras 40-43); (3) Deceit (POC paras 45-6); (4) Misfeasance in public office (POC para 47); (5) Assault (POC paras 48-9); (6) Negligence (POC paras 50-52).

22. The Birnberg Claimants are seeking damages (including aggravated and exemplary damages) for the emotional, psychiatric and financial losses they suffered as a result of having been deceived into entering into intimate sexual relationships with MK, whom they believed was a fellow protester, but subsequently discovered was a police officer collecting intelligence on them, their friends and their acquaintances.

23. The circumstances in which MK's identity and other information about him have become known to the public are most unusual, and unlikely to recur save in the most exceptional cases. They are alleged to be as follows. Certain matters have been made public in the national media and by other means.

24. On 21 October 2010 AKA discovered that MK was an undercover police officer. At that point she had been in a sexual relationship with him for six years. In the months that followed, both his true identity, and details of his undercover operations in the environmental protest movement, were exposed in national media. His undercover activities have been the subject of a range of inquiries by official bodies, some of which have published official reports. These activities have led to the quashing of several convictions by the Court of Appeal, and have been discussed widely in

Parliament. MK has himself appeared on television and in print frequently to discuss his undercover role, and his intimate relationships while in that role.

25. In recognition of the extensive publicity, Her Majesty's Chief Inspector of Constabulary ("HMIC") named him in his report dated 2 February 2012: "*A review of national police units which provide intelligence on criminality associated with protest*" ("the HMIC Report"). HMIC made this observation about the utility of the Defendant's policy to "NCND" undercover activities (at p4):

> "**Protecting undercover officers and the security of police tactics**
>
> Undercover police tactics, by their very nature, include techniques and controls that will be of great interest to criminals who are trying to develop measures to counter them. HMIC has therefore considered it in the public interest to exclude from this report details which might put the safety of individual officers or the effectiveness and efficiency of police operations at risk.
>
> **A note on the use of Mark Kennedy's real name**
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> It is normal practice for the police to neither confirm nor deny the true identity of undercover officers. This is to protect both the officers themselves, and the effectiveness of the tactic. However, the case of Mark Kennedy is one of the exceptional circumstances, including his own public revelations, the media interest in him and the fact that the Court of Appeal named him on 19 July 2011. Because of this, HMIC has chosen on this occasion to use his real name."

26. The Court of Appeal (presided over by the Lord Chief Justice) had named MK on 20 July 2011 in *R v Barkshire* [2011] EWCA Crim 1885. The opening and closing paragraphs of the judgment read:

> "1. These 20 appellants were convicted by a jury at Nottingham Crown Court on 14th December 2010 of conspiracy to commit aggravated trespass. It is a case which has given rise to a great deal of justifiable public disquiet, which we share. Something went seriously wrong with the trial. The prosecution's duties in relation to disclosure were not fulfilled. The result was that the appellants were convicted following a trial in which elementary principles which underpin the fairness of our trial processes were ignored. The jury were ignorant of evidence helpful to the defence which was in the possession of the prosecution but which was never revealed. As a result justice miscarried. Accordingly, at the end of the hearing yesterday the convictions were quashed. These are our detailed reasons.
>
> 2. The convictions arose out of a political protest. The appellants intended to invade a power station at Ratcliffe-on-Soar to protest against climate change. This power station

> discharges about 150,000 tonnes of carbon into the atmosphere each week. That is why it was chosen, and protesters came from all over the country, either in furtherance of or to consider participation in a sophisticated plan to enter and occupy the power station for a week. During the occupation the discharge of carbon would be significantly diminished and the power station possibly shut down. Transport, rations and equipment were organised. Ten vehicles were hired for transportation purposes. Sophisticated climbing equipment, safety helmets, maps, mobile phones and walkie-talkies were arranged. Once entry to the power station was effected, one team was to close down the coal conveyor and immobilise them by securing themselves to the machinery, another team was to climb the chimney and occupy the flue, yet another team was to fence themselves to the base of the chimney to protect the team which was occupying the flue, and yet another team was to occupy the gates and prevent entry to the police and indeed to those with responsibility for the power station.
>
> 3. The prosecution evidence against the appellants was unchallenged. The essential facts were not in dispute. In reality, subject to the specific defences advanced at trial, the ingredients of the conspiracy, and the individual involvement of each of the appellants was not in question. …
>
> 32. In summary, these convictions were quashed because of the failure of the Crown to make proper disclosure of material relating to the role and activities of the undercover police officer, Mark Kennedy, as well as of materials which had the potential to provide support for the defence case or to undermine the case for the prosecution. These materials were pertinent to a potential submission of abuse of process by way of entrapment and in any event they had the capacity to support the defence of necessity and justification. The trial was rendered unfair and the convictions unsafe…"

27. The role of MK was described as follows at paras 10 to 18 of the judgment:

> "10. At the heart of the prosecution's failure to comply with its disclosure obligations was a police officer, PC Kennedy. Under the assumed name, Mark Stone, he was authorised to act undercover and to infiltrate extreme left wing groups in the United Kingdom. Common sense suggests that the object was to enable him to acquire and pass on information about the criminal activities or proposed criminal activities which any of the groups he had infiltrated might intend, with a view, if possible, to prevent the commission of crime. To fulfil this role he made contemporaneous notes and recordings of various meetings which he attended.

> 11. Kennedy was not authorised to take part in any occupation of the power station until 9th April 2009 and the authorisation included the requirement of his handler, DI Hutcheson, to liaise with the Crown Prosecution Service:
>
> > "UCO133 (that is Kennedy) will decline the offer for a solicitor. UCO133 will be engaged in driving and dropping off of activists prior to them committing offences. UCO133 will withdraw from the vicinity of the power station to avoid arrest and avoid becoming a witness to offences. SIO Inspector David Hutcheson will be regularly informed of the situation of UCO133 and in the event of ... arrest will be immediately informed in order to liaise with the Nottinghamshire Senior Management and the Crown Prosecution Service." …
>
> 18. From this material two features are apparent. First, Kennedy was involved in activities which went much further than the authorisation he was given and appeared to show him as an enthusiastic supporter of the proposed occupation of the power station and, arguably, an agent provocateur. Secondly, the recordings made of the meetings on 12th April supported the contentions of the appellants that their intended activities were directed to the saving of life and avoidance of injury, and that they proposed to conduct the occupation in a careful and proportionate manner. None of this information emerged at trial."

28. It will be noted that the sexual conduct of MK complained of in this action was not mentioned in that judgment. And the conduct of MK which is mentioned in that judgment is not complained of in this action.

29. The HMIC Report goes into some considerable, and further, detail as to MK's activities undercover, including his sexual activities. The Report includes (at p25) that:

> "There were indications that Mark Kennedy was becoming resistant to management intervention. He seems to have believed that he was best placed to make decisions about how his deployment and the operation should progress: …
>
> - he has claimed that he had at least two intimate relationships with female protestors (although he did not make these claims to the NPOIU during the seven years of his deployment)".

30. However, it is important to note that that judgment in the Court of Appeal was given in an appeal against conviction. None of the Defendants in these two cases was a party to those criminal proceedings. And the HMIC Report is relied on by the Claimants, not as setting out proven facts (that would be for any trial of this action), but to show what has already been made public about MK.

31. The Defendants have not yet served a Defence. The Defendants' pre-action response is described by the Claimants as follows.

32. The letters before action in each of the Claimants'claims are dated 7 February 2012. Birnberg Peirce & Partners set out the claims of each of the Birnberg Claimants. The Defendants have not commented in any detail on any of the facts alleged by these Claimants.

33. By letter dated 10 February 2012 Mr Pierce, the solicitor for the CPM, confirmed that MK was a Metropolitan Police Officer and that he did not serve with any other force. The solicitor stated that MK left the police service in March 2010, and denied that the CPM was vicariously liable in respect of MK's alleged sexual conduct. He invited the Birnberg Claimants to consider that denial when deciding whether MK should be named as a defendant. He also stated in that letter that he did not have instructions to act for MK, or any person other than the CPM. On 16 February he stated that he was also instructed to act on behalf of ACPO, but (on 27 February) stated that ACPO is not vicariously liable for unlawful conduct of MK.

34. On 15 February 2012 Mr Pierce gave notice that the CPM would apply for summary judgment against the Claimants, or for an order that their claims be struck out for failure to disclose a reasonable cause of action (although, as already noted, he has not so far made either of these applications). The letter goes on to say that the CPM would rely on RIPA s.27, on the basis that MK's conduct had been authorised under that Act. That section provides that conduct which is in accordance with an authorisation under RIPA "shall be lawful for all purposes", as will be discussed below.

35. On 27 February 2012 Mr Pierce referred again to s.27 of RIPA and stated that he intended to disclose, as soon as he was able, any relevant RIPA authorisation for the conduct of MK. He invited the Birnberg Claimants to have regard to s.65 of RIPA, which is the section of the Act now relied on by the Defendants in support of their submission that only the IPT has jurisdiction to try the claims.

36. On 14 March 2012 Mr Pierce modified his position. He confirmed that during almost the entire period from July 2003 to February 2010 MK was authorised under RIPA to engage in conduct of the sort described in s.26(8) of RIPA (acting as a CHIS and establishing or maintaining of any personal relationship for that covert purpose). He stated that this authorisation extended to participation in minor criminal activity. He then said he did not intend to provide inspection of the authorisations prior to service of the Particulars of Claim on the ground that they spanned a number of years and contained a great deal of highly sensitive material. He said redaction would be necessary, but it would not be reasonable or proportionate to do that at this stage.

37. On 3 April 2012 Mr Pierce stated that:

> "Authorisation was granted for Mark Kennedy's deployment as a … CHIS, as defined in s.26(8) of RIPA. He established and maintained 'a personal or other relationship' with your clients which he covertly used to obtain information and he covertly disclosed information obtained 'by the use of such a relationship'… The intimate and sexual relationship which it is

> claimed [MK] formed with your clients was a 'personal or other relationship' covered by RIPA authorisations and his conduct was therefore 'lawful for all purposes' by virtue of s.27(1) of RIPA. As the [CPM] would, potentially, be vicariously liable only for unlawful conduct … it would seem that your clients cannot succeed with their claims".

38. Following service of the Particulars of Claim there was further correspondence. The Claimants contend that at no stage did the CPM rely on the NCND policy to explain his refusal to disclose further information in support of his denial of liability, and they rely on the HMIC Report at p 4 (para 25 above).

39. In response to that point Mr Pierce made a second witness statement for the Defendants. He explained that it would have been pointless to adopt the NCND policy in relation to matters disclosed in the HMIC report. But he maintained that it would be extremely difficult to try these Claimants' claims in the High Court because the CPM would be unable to do any of the following:

> "call witnesses to explain what the authorisations said; advance a case about why they had come into existence; explain what the intentions behind them had been; disclose what intelligence may have predated the making of the authorisations (which might justify the action contemplated); reveal the nature of the supervision by officers that had taken place in relation to any CHIS activity; explain whether any sexual contact between MK and others had ever been authorised, discussed or known about; reveal what information emerged as a result of any surveillance carried out by a CHIS; and so on".

40. The reason why the Defendants submit that these matters might be relevant had emerged in the preceding correspondence. As will appear below, there is an issue between the parties as to whether an authorisation could, as a matter of law, ever authorise the sexual conduct complained of; alternatively, if it could, whether in this case it could satisfy the tests of necessity and proportionality which it would have to satisfy in order to be an authorisation under RIPA (ss.65(7), see below).

41. On 6 December 2011 the Birnberg Claimants each issued Human Rights Claim Forms in the IPT to protect their rights under RIPA. But those proceedings have been stayed by the IPT at the request of the Claimants, pending the determination of the present proceedings.

42. What HMIC states about the background to his Report, and so too about the background to this litigation, is as follows (footnotes are omitted):

> "**Introduction**
>
> In 2010, revelations about the activities of Mark Kennedy, a police officer working undercover for the National Public Order Intelligence Unit (NPOIU), led to the collapse of the trial of six people accused of planning to shut down a large power station in Ratcliffe-on-Soar, Nottinghamshire. ….

> The NPOIU was created in 1999 as part of the Police Service's response to campaigns and public protest that generate violence and disruption. Located within the Metropolitan Police Service (MPS), it was funded by the Home Office to reduce criminality and disorder from domestic extremism and to support forces managing strategic public order issues. The unit gathered and coordinated intelligence that enabled the police to protect the public by preventing crime and disruption…
>
> **The undercover tactic**
>
> The police must be able to use tactics that allow them to prevent and detect those who engage in criminal acts which endanger the public, unduly disrupt people's lives or businesses, or interfere with the critical national infrastructure. There is a long history of using undercover officers as part of law enforcement. Applied correctly, it is a lawful and ethical tactic, as well as being a productive – and at times vital – means of obtaining much-needed intelligence and evidence.
>
> However, the deployment of undercover officers is inherently risky. They can intrude into the lives not just of criminals, but of their associates and other members of the public. There are also various threats to the welfare of the officers, including violence and the psychological impacts that may arise from, for example, maintaining a different persona. As will be discussed, the risks are particularly acute for the kind of work undertaken by the NPOIU.…"

SUMMARY OF CLAIMS BY THE TUCKERS CLAIMANTS

43. Ms Williams summarised the claims of the Tuckers Claimants as follows:

   i) MJ first met members of CAN, including Mr Fowler, in 2004 and began attending meetings of CAN in 2005. He told the Tuckers Claimants that he was a truck driver from Northampton who had previously lived in Brighton and that he was separated from his former partner, who used to physically abuse him.

   ii) Between 2005 and 2009 MJ formed (apparently) close relationships with all three Tuckers Claimants, including intimate sexual relationships with AJA and ARB. MJ instigated a sexual relationship with ARB at a time when she was in a relationship with Mr Fowler. During the course of those relationships, MJ purported to be a confidante, empathiser and source of close support to each of the Tuckers Claimants, including in relation to deeply personal aspects of their lives: he attended, for example, the funeral of ARB's father after his death from cancer. In doing so, he exploited the vulnerabilities of the Tuckers Claimants and sought to encourage them to rely on him emotionally. None of the Tuckers Claimants would have entered into these relationships with MJ had they been aware of his true identity as a police officer. (Further details of the relevant narrative appear at §§10 – 34, Particulars of Claim.)

iii) The Tuckers Claimants allege that MJ was a Metropolitan police officer, who was subsequently seconded to the NPOIU. Until 2006 this Unit came under the auspices of the CPM and thereafter it was the responsibility of ACPO, who shared responsibility for undercover deployments with the Force in whose area the deployment occurred (here, South Wales, in respect of which the CCSWP is the Chief Officer).

iv) MJ used the Defendants' resources to conceal his identity and to further the intimate relationships he had initiated. The Defendants either condoned or ignored those relationships, the intelligence from which was, presumably, passed back to them.

44. The common law claims of the Tuckers Claimants are: (1) deceit (see §35, Particulars of Claim), (2) misfeasance in public office (§§36 – 37), (3) negligence (§§39 – 42) and (4), in the cases of AJA and ARB, iassault/battery (§38). The Tuckers Claimants also advance a claim (5) for breach of the Data Protection Act 1998 (DPA) (§43). This is not strictly speaking a common law claim, but for the purposes of this judgment it will be included in the expression "the common law claims", unless it is clear from the context that it is not included.

45. The HRA claims of the Tuckers Claimants are for breach of s.6 HRA read with Articles 8 and 10 of Schedule 1 (§§49 – 51 & 53 – 54) and, in the case of AJA and ARB, Article 3 (§§44 – 48). The claim in respect of Art 10 is on the basis that, as a result of the acts of MJ, the Tuckers Claimants have felt unable properly to exercise their rights to freedom of expression under Art 10(1), for fear that they will be targeted and harmed again by undercover police officers.

46. There is much less information available to the Tuckers Claimants about MJ than is available to the Birnberg Claimants about MK. The Tuckers Claimants state that it was in January 2011 that they formed a concrete belief that MJ was an undercover police officer. They were told that by a journalist. AJA decided to tell her story publicly, but anonymously, in an article published in *The Guardian* on 14 January 2011. She named him as MJ, not knowing his real name.

47. On 15 July 2011 one of the Tuckers Claimants made a complaint to the Directorate of Professional Standards ("DPS") of the Metropolitan Police that "the police officer known to her as Mark Jacobs" abused his position by developing an inappropriate sexual relationship with her. There was an exchange of correspondence about the terms of reference of an investigation, and to that extent the complaint was entertained. The DPS did not suggest that the complaint should have been directed to another chief officer. Ms Williams submits that the DPS would have been required to do that, if that had been appropriate: Police Reform Act 2002 s.29(1).

48. Tuckers had made a separate complaint about PC Jacobs on behalf of another client from amongst the CAN. On 17 August 2011 the DPS rejected that complaint following an investigation. But the Tuckers Claimants rely on that matter as showing that the Metropolitan Police entertained the complaint. Ms Williams submits they would not have done that if the officer had not been serving with the Metropolitan Police.

49. Ms Williams submits that these two matters amount to an admission by the CPM that MJ was an officer serving with the Metropolitan Police. Ms Carss-Frisk submits that there is no such admission. I note that in their Particulars of Claim para 13, the Tuckers Claimants plead that:

> "The Defendants neither confirm nor deny that MJ was an undercover officer, nor whether any or all of his activities were authorised under … RIPA".

50. On 30 May 2012 Mr Pierce replied to a letter of claim from Tuckers addressed to the CPM. The CPM took the point that the claims should have been brought in the IPT. He also stated that the claims were misconceived, and that nothing in that letter should be taken as accepting any factual or legal allegation made by the Tuckers Claimants.

51. In a brief exchange on paper subsequent to the hearing Ms Williams enlarged on her submission that the CPM had admitted that MJ served with the Metropolitan Police and Ms Carss-Frisk re-iterated the CPM's denial. This is an issue which I cannot resolve in this judgment. I will proceed on the basis of what the Tuckers Claimants have pleaded in para 13 of their Particulars of Claim.

52. On 13 January 2012 these Claimants each issued Human Rights Claim Forms in the IPT to protect their rights under RIPA. But those proceedings have been stayed by the IPT at the request of the Claimants, pending the determination of the present applications.

53. The IPT has also stated to the Tuckers Claimants that it is not able to consider complaints against ACPO.

THE PRINCIPLE OF LEGALITY

54. Ms Kaufmann and Ms Williams rely on the principle of legality. There was no issue between the parties on this principle. But it requires explanation. There is in fact more than one principle of legality. There is one at common law and one under the HRA.

55. The common law principle of legality assumes that the common law recognises fundamental rights, and that it did so before, and independently of, the HRA. The common law principle is that, in the absence of express language or necessary implication to the contrary, the courts presume that even the most general words in a statute were intended by Parliament to be subject to the basic or fundamental rights of the individual.

56. The principle was re-affirmed in *R v Secretary of State for the Home Department, Ex Parte Simms* [1999] UKHL 33, [2000] 2 AC 115. That case was decided after the HRA had been enacted and before it had come into force. The issue was whether a restriction on a prisoner's right to communicate orally with a journalist was an unlawful interference with the fundamental right of freedom of speech which is recognised by the common law. In a much cited passage Lord Hoffmann said at p131:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human

> rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document".

57. The separate principle of legality (see *Simms* p132A) is in the HRA s.3. It relates to those rights enshrined in the ECHR. The two categories (fundamental rights recognised at common law and ECHR rights) overlap, but are not identical. HRA s.11 ("Safeguard for Existing Human Rights") specifically provided that the HRA should not restrict reliance upon any other right or freedom having effect under English law. The HRA principle of legality is:

> "3. Interpretation of legislation
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

58. The submissions in this case largely concerned the rights enshrined in the ECHR Articles 3, 6 (right to a fair trial) and 8. But these are not the subject of the common law principle of legality as explained in *Simms*. It is, however, important to remember the status of human rights at common law and the relevance of the common law despite the enactment of the HRA. These are the words of Beatson J in *Calver, R (On the Application of) v The Adjudication Panel for Wales (Rev 1)* [2012] EWHC 1172 (Admin) at para 40. He was referring to freedom of expression, but I have gratefully adopted and adapted them to this case. He explains the importance, writing extra-judicially in Beatson, Grosz, Hickman, Singh and Palmer *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell 2008) para 1-21. One important practical difference between the HRA claims and the non-HRA claims based on fundamental rights is that the non-HRA claims will not be subject to the HRA s.7(5) one year time limit.

59. Judge LJ (as he then was) had made this point in *R (Bright) v Central Criminal Court* [2000] EWHC 560 (QB); [2001] 1 WLR 662. That was a case decided before the HRA came into force, although after it had been enacted. Referring to the ECHR Judge LJ said:

> "Our attention was drawn to a number of decisions of the European Court of Human Rights. I have considered them with

> care. That said, by now, we surely fully appreciate that the principles to be found in Articles 6 and 10 of the European Convention are bred in the bone of the common law and indeed, in some instances at any rate, the folk understanding of the community as a whole. I do not intend to imply any criticism of the submissions made by any of the counsel in this appeal, each of whom advanced submissions of great clarity and appropriate economy, when I say that generally, the vast and increasingly lengthy number of citations in numerous skeleton and oral arguments of the decisions of the European Court, simply repeating in different language long standing and well understood principles of the common law, suggests that perhaps we do not."

60. In *Bright* the applicant journalists sought judicial review of orders made on the application of the police under Part II of the Police and Criminal Evidence Act 1984 that they produce certain documents, including originals and copies.

Fundamental rights recognised by the common law

61. If the common law principle of legality is to be applied, it is first necessary to identify the fundamental rights which cannot be overridden by general or ambiguous words in a statute. This is not as easy as it ought to be. And the fact that it is not so easy may be one reason why counsel commonly argue their cases primarily, or solely, on the basis of ECHR rights, when they could argue them on the basis of fundamental rights recognised at common law.

62. What are nowadays referred to as "fundamental" rights were referred to in English law long before the eighteenth century. For example, the Bill of Rights 1689 enshrined rights which had been fought over during the previous decades of that and the previous century. Some of these were individual rights, including the prohibition on cruel and unusual punishment. But in a discussion of rights the starting point commonly adopted is Blackstone's *Commentaries on the Laws of England* first published in 1765 (see for example Sedley LJ in *Home Secretary v GG* [2010] QB 585; [2009] EWCA Civ 786 at para 11).

63. There are a number of reasons why it is not as easy as it should be to identify the fundamental rights recognised at common law. The historical reason is that from the beginning of the nineteenth century until after the Second World War fundamental rights were eclipsed by philosophical ideas inconsistent with the idea of natural rights, including utilitarianism and legal positivism, and by the concept of absolute parliamentary sovereignty: Lester & Pannick on *Human Right Law and Practice* 2nd ed paras 1.02 to 1.09. Another reason is that even in the eighteenth century there was never an English codification or declaration of rights. There was never an occasion for such a declaration to be prepared.

64. Blackstone had set out, at the start of his *Commentaries*, a number of natural or basic (nowadays fundamental) rights which he said were recognised by the common law. His work was a major source for the declarations made in the American colonies. But codes or declarations are easier to cite than case law or a text book. When the idea of natural rights was again acknowledged in England in the late 1940s, it was for the

purpose of their being codified in the form of the Universal Declaration and the European Convention. However, there are in the text books lists of fundamental rights recognised by the common law. Clayton & Tomlinson on *The Law of Human Rights* 2nd ed is structured by reference to the ECHR, but each chapter starts with a section headed "The Right in English Law" (meaning English law other than the HRA). See also Beatson et al paras 1-22 ff and Fordham *Judicial Review Handbook* (6th ed) p82ff.

65. A further complication for lawyers in presenting cases based on the fundamental rights recognised by the common law is that the names of the torts by which fundamental rights are protected under the common law bear little relationship to the rights themselves.

66. The rights upon which the Claimants rely most strongly in the present cases are the rights not to be submitted to degrading treatment, the right of access to the court and, to a lesser extent, the right of privacy.

67. The right not to be submitted to degrading treatment has been recognised by the common law from the earliest times. According to Blackstone, amongst the natural rights recognised by the common law were, in the words of Magna Charta:

> "… a prohibition not only of *killing and maiming*, but also of *torturing* to which our laws are strangers…"

68. Ms Kaufmann referred to *Home Secretary v GG* [2009] EWCA Civ 786; [2010] QB 585. In that case Sedley, Dyson and Wilson LJJ included as fundamental rights recognised by the common law a right not to be searched by the police (subject as always to explicit statutory authority): paras12-13. They quoted Lord Donaldson MR in *Lindley v Rutter* [1981] QB (128 at 134, 30 and 46). He had said that it is the duty of the courts to protect the dignity of all those who live in these islands, and searches involve an affront to the dignity of the individual.

69. The right of access to the court is one of the most deeply entrenched of all fundamental rights recognised by the common law: see *R v Boaler* [1915] 1 KB 21 and Beatson et al para 1-22 to 1-25.

70. The right to privacy is also one of the rights which has the longest history of recognition by the common law, although that has not always been appreciated.

71. Lord Judge CJ has on more than one occasion recalled the recognition given by the common law to the right to privacy of the home and correspondence. In *Bright* Lord Judge CJ cited from Lord Camden CJ's judgment in *Entick v Carrington* and from William Pitt, Earl of Chatham. See also in *R v Saw* [2009] 2 All ER 1138, [2009] EWCA Crim 1 para 6.

72. Lord Neuberger of Abbotsbury has recently observed (speaking extra-judicially on 28 November 2012) that a right to privacy in information has long been recognised by English law. He said:

> "12. Privacy was first protected by statute in 1361, when the Justices of the Peace Act made eavesdropping a criminal

> offence, and the offence remained on the statute book until 1967. The first time that the common law was moved to protect privacy was in *Semayne's Case*, which was reported in 1604 by then Attorney-General, Sir Edward Coke. The name of the case may not be all that familiar. The principle it established is well known. The case concerned the entry into a property by the Sheriff of London in order to execute a valid writ. In Coke's words, the principle enunciated by *Semayne* [(1604) 5 Co Rep 91; 77 E.R. 194 at 195] was
>
> > 'That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose . . .'"

73. However, as Beatson et al point out at para 1-15, English law may recognise a fundamental right without according to a victim a remedy in damages for breach of that right. English law has recognised rights to privacy for the purposes of the principle of legality, and under the criminal law, while not, until recently, according a right to damages. Where there is any doubt at all as to whether the common law accords a right to damages for interference with a fundamental right recognised by the common law, a claimant may see an advantage in presenting her case on the basis of the ECHR right. But in a case where the common law does provide a remedy in damages, there is little or nothing that a claimant can gain from advancing a claim under the HRA. And there may be some disadvantages in doing so. In the present cases, if the Claimants had not advanced claims under the HRA, the Defendants would not have had the basis for making all of the applications which are now before the court.

ECHR rights

74. When the Universal Declaration of Human Rights and the ECHR came to be framed after the Second World War, the prohibition on torture, the right of access to the court and the right to private life, (already recognised as fundamental rights by English law), were incorporated into the Convention.

75. ECHR Art 3, the prohibition of torture, is unqualified:

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

76. ECHR Art 8 (the right to respect for private and family life), does permit of abridgement by public law for the good of society. It provides as follows:

> "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."

77. Since the passing of the HRA in 1998 English judges have been bound to have regard to ECHR rights. This arose because in 1950 the UK undertook Treaty obligations to that effect. Whether or not human rights are also natural rights, as Blackstone thought (and not just treaty obligations under the ECHR) remains relevant to the common law, but not, at least not directly, to the HRA.

78. Following the judgment of the ECtHR in *Malone v UK* - 8691/79 [1984] ECHR 10, and judgments in other cases on surveillance, a number of statutes were enacted by which the law on surveillance and investigatory powers was put on a statutory footing. This was done with a view to ensuring that any interference by the UK authorities with the privacy rights of individuals under Art 8 would be prescribed by law, and necessary and proportionate, as required by Art 8(2). These statutes included the Interception of Communications Act 1984, the Data Protection Acts 1984 and 1998, the Security Services Act 1989, the Intelligence Services Act 1994 and RIPA.

79. Before these statutes the legal basis for any claim for damages by an individual on the basis that his privacy rights had been interfered with by the state had to be formulated as a common law tort or a breach of statutory duty, as Mr Entick had done. But following a number of decisions in Strasbourg brought under Art 8 (and other Articles of the Convention) Parliament decided to give to individuals a new right of action under English statute law, in addition to the common law rights in tort.

80. HRA s.6 provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".

81. It is common ground between the parties to the two cases now before the court that the Defendants, and for that matter the individual officers MK and MJ (if he was a police officer) were, when carrying out public functions, public authorities within the meaning of that section.

82. HRA s.7 provides:

> "(1) A person who claims that a public authority has acted … in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings".

83. The result of this wide wording is that in many cases the same facts may give rise both to a claim in tort (for example, trespass to the person or battery, and false imprisonment) and at the same time give rise to a claim under HRA s.7 for interference with Convention rights under Art 5 (right to liberty) and Art 8, or, in a very grave case, Art 3. However, there are differences between common law claims

and claims under HRA s.7. The new remedies under HRA s.7 are not just a series of new statutory torts.

84. One important difference is in the judicial remedies made available by s.8. As the Court explained in *Ala Anufrijeva and Another v London Borough of Southwark* [2003] EWCA Civ 1406 paras 53 to 55:

> "53. Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance. This is reflected in the fact that, when it is necessary to resort to the courts to uphold and protect human rights, the remedies that are most frequently sought are the orders which are the descendents of the historic prerogative orders or declaratory judgments. The orders enable the court to order a public body to refrain from or to take action, or to quash an offending administrative decision of a public body. Declaratory judgments usually resolve disputes as to what is the correct answer in law to a dispute. This means that it is often procedurally convenient for actions concerning human rights to be heard on an application for judicial review in the Administrative Court. That court does not normally concern itself with issues of disputed fact or with issues as to damages. However, it is well placed to take action expeditiously when this is appropriate.
>
> 54. That damages or compensation should play a different role in relation to claims in respect of public law rights from that which it plays in private law proceedings is not confined to the ECHR and the HRA. It also true of claims for infringement of Community Law (see *Dillenkofer v Germany* [1997] QB 259) and, for claims for infringement of human rights, under, for example, the Indian constitution (see *Nilabathbehara v State of Orpassa* [1993] 2 SCC 746 paras.10, 16, 17 and 22).
>
> 55. The code recognises the different role played by damages in human rights litigation and has significant features which distinguish it from the approach to the award of damages in a private law contract or tort action. The following points need to be noted:
>
> a) the award of damages under the HRA is confined to the class of unlawful acts of public authorities identified by section 6(1) - See sections 8(1) and (6).
>
> b) the court has a discretion as to whether to make an award (it must be "just and appropriate" to do so) by contrast to the position in relation to common law claims where there is a right to damages - See section 8(1).

c) the award must be necessary to achieve "just satisfaction"; language that is distinct from the approach at common law where a claimant is invariably entitled, so far as money can achieve this, to be restored in the position he would have been in if he had not suffered the injury of which complaint is made. The concept of damages being "necessary to afford just satisfaction" provides a link with the approach to compensation of the ECtHR under Article 41.

d) the court is required to take into account in determining whether damages are payable and the amount of damages payable the different principles applied by the ECtHR in awarding compensation.

e) exemplary damages are not awarded.

56. In considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole. The requirement to adopt a balanced approach was recognised in the White Paper ("*Rights Brought Home*") where the following comments were made under the heading "Remedies for failure to comply with the Convention":

> 2.6 A public authority which is found to have acted unlawfully by failing to comply with the Convention will not be exposed to criminal penalties. But the court or tribunal will be able to grant the injured person any remedy which is within its normal powers to grant and which it considers appropriate and just in the circumstances. *What remedy is appropriate will of course depend both on the facts of the case and on a proper balance between the rights of the individual and the public interest. In some cases, the right course may be for the decision of the public authority in the particular case to be quashed. In other cases, the only appropriate remedy may be an award of damages..."* (Emphasis added).

56. The court has a wide discretion in respect of the award of damages for breach of human rights. Scorey and Eicke in *Human Rights Damages* do not view this wide discretion as problematic. Instead they consider it to derive from the nature of the new approach created by the HRA: 'Given that it is anticipated that the majority of cases in which civil claims will be brought under the HRA will be by way of judicial review which has always been discretionary, it is appropriate that s.8(1) HRA also has a broad discretionary nature…' Also the language of a 'just and appropriate' remedy is not novel, either to the United Kingdom or to the other human rights instruments" (A4-035). …. In essence this involves determining the "appropriate" remedy in the light of the particular

> circumstances of an individual victim whose rights have been violated, having regard to what would be "just", not only for that individual victim, but also for the wider public who have an interest in the continued funding of a public service (Scorey and Eicke, A4-036). Damages are not an automatic entitlement but, as Scorey and Eicke also indicate, a remedy of "last resort" (A4-040)."

OVERVIEW OF RIPA

85. RIPA is a long and complicated statute. It is in five parts. Part II of RIPA is headed "Surveillance and covert human intelligence sources". This is the Part which is mainly in question in the cases now before the court. It does not create offences. Its purpose is to create a defence for conduct which might otherwise be unlawful. Conduct that would otherwise be unlawful becomes lawful if it is authorised in accordance with RIPA. There are, of course, limits to what can be authorised. But if conduct is otherwise lawful under the general law, it does not need to be authorised. So, for example, there can be no authorisation or license to kill, but an officer can kill if it would be lawful under the general law to do so, for example under the criminal law on self defence.

86. So s.27 provides:

> "(1) Conduct to which this Part applies shall be lawful for all purposes if—
>
> > (a) an authorisation under this Part confers an entitlement to engage in that conduct on the person whose conduct it is; and
> >
> > (b) his conduct is in accordance with the authorisation.
>
> (2) A person shall not be subject to any civil liability in respect of any conduct of his which—
>
> > (a) is incidental to any conduct that is lawful by virtue of subsection (1); and
> >
> > (b) is not itself conduct an authorisation or warrant for which is capable of being granted under a relevant enactment and might reasonably have been expected to have been sought in the case in question."

87. RIPA ss.27A to 32 provide for who is to give the authorisation required if s.27 is to apply, and what conditions must be satisfied.

88. It is s.29 that provides for authorisations for the use of a CHIS. That is a long section, which is drafted to reflect the provisions of Art 8(2). A person may not grant an authorisation for a CHIS unless he believes that it is necessary for one of the purposes specified in Art 8(2), and that the conduct or use is proportionate to what is sought to be achieved (s.29(2)). There must also be in place arrangements for someone to be

responsible for the welfare of the source and other matters. By s.29(7) the Secretary of State may by order prohibit the authorisation of a CHIS for such conduct or use as may be prescribed in the order, or impose additional requirements.

89. As Lord Hope said in *McE v Prison Service of Northern Ireland* [2009] 1 AC 908; [2009] UKHL 15 at para 61:

> "The whole point of the system of authorisation that [RIPA] lays down is to interfere with fundamental rights and to render this invasion of a person's private life lawful".

90. In *McE* the applicants sought declarations that that they were entitled to consult with legal and medical advisers without being subject to covert surveillance. The question was whether such surveillance would be an interference with the applicants' rights under Arts 8 and 6. The court granted the declarations sought. Although RIPA permitted such surveillance in principle, there were insufficient safeguards under the régime for authorisation then in force to ensure that such authorisation was given only when it was necessary and proportionate (in accordance with Art 8(2)).

91. As a result of *McE* the Secretary of State did exercise his powers under s.29(2)(c) in relation to matters subject to legal professional privilege so as to impose additional requirements: [RIPA] [CHIS]: Matters subject to Legal Privilege Order 2010 SI No 123. He has also made an order which restricts the general power to make authorisations in cases where the source is under the age of 16: The [RIPA] (Juveniles) Order 2000 SI No 2793. But no such order has been made in respect of sexual conduct.

92. However, it is plain that an authorisation can only be granted for conduct, or for the use of information, which will interfere with one of the qualified Convention rights, such as Art 8. The unqualified rights, namely Art 2 (right to life) and Art 3 cannot be interfered with for any reason. RIPA can have no application to unqualified rights. There can be no license for torture or for any other inhuman or degrading treatment.

93. Part IV of RIPA is headed "Scrutiny of Investigatory Powers and of the Functions of the Intelligence Services". It provides for safeguards with a view to preventing misuse or abuse of investigatory powers, in addition to the requirements of necessity and proportionality set out in s.29. It is relevant to consider these.

94. As noted in the HMIC Report, ss. 57 to 64 provide for Commissioners to be appointed. By s.62 the Chief Surveillance Commissioner is required to keep under review the exercise and performance, by the persons on whom they are conferred or imposed, of the powers and duties conferred or imposed by or under Part II.

95. There is a further safeguard included in the statute. By ss.71 and 72 provision is made for Codes of Practice to be issued. These must be laid before both Houses of Parliament in draft.

96. Finally, in case of a complaint, there is in addition to these safeguards, provision for judicial review and remedies by the IPT.

97. Part I of RIPA has nothing to do with the two cases before the court. It relates to interception of communications. It creates offences where the interception is not in compliance with the conditions laid down in Part I. Part III of RIPA is headed "Investigation of Electronic Data Protected by Encryption". It too is irrelevant to the issues before the court.

OVERVIEW OF THE INVESTIGATORY POWERS TRIBUNAL

98. The IPT is a statutory tribunal established by RIPA s.65(1) and Sch 3. The President must be a person with high judicial office or a member of the Privy Council (Sch 3 (para 1(a)). The current President is Sir John Mummery, a Lord Justice of Appeal. The current Vice-President is Sir Michael Burton, a judge of this court, the Queen's Bench Division of the High Court.

99. RIPA ss.66 to 70 make provision for the jurisdiction of the IPT, and its rules of procedure. The exercise of the IPT's functions is provided for in s.67, as follows (with emphasis added):

> "67(1) Subject to subsections (4) and (5), it shall be the duty of the Tribunal—
>
> (a) to hear and determine any proceedings brought before them by virtue of section 65(2)(a) or (d); and
>
> (b) to consider and determine any complaint or reference made to them by virtue of section 65(2)(b) or (c).
>
> (2) Where the Tribunal hear any proceedings by virtue of section 65(2)(a), they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review.
>
> (3) Where the Tribunal consider a complaint made to them by virtue of section 65(2)(b), it shall be the duty of the Tribunal—
>
> (a) to investigate whether the persons against whom any allegations are made in the complaint have engaged in relation to—
>
> (i) the complainant,
>
> (ii) any of his property,
>
> (iii) any communications sent by or to him, or intended for him, or
>
> (iv) his use of any postal service, telecommunications service or telecommunication system,
>
> in any conduct falling within section 65(5);

> (b) to investigate the authority (if any) for any conduct falling within section 65(5) which they find has been so engaged in; and
>
> (c) in relation to the Tribunal's findings from their investigations, to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review. …

(5) Except where the Tribunal, having regard to all the circumstances, are satisfied that it is equitable to do so, they shall not consider or determine any complaint made by virtue of section 65(2)(b) if it is made more than one year after the taking place of the conduct to which it relates.

(6) Subject to any provision made by rules under section 69, where any proceedings have been brought before the Tribunal or any reference made to the Tribunal, they shall have power to make such interim orders, pending their final determination, as they think fit.

(7) Subject to any provision made by rules under section 69, the Tribunal on determining any proceedings, complaint or reference shall have power to make any such award of compensation or other order as they think fit; and, without prejudice to the power to make rules under section 69(2)(h), the other orders that may be made by the Tribunal include—

> (a) an order quashing or cancelling any warrant or authorisation; and
>
> (b) an order requiring the destruction of any records of information which—
>
> > (i) has been obtained in exercise of any power conferred by a warrant or authorisation; or
> >
> > (ii) is held by any public authority in relation to any person.

(8) Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

100. The IPT is a successor to Tribunals which were set up under some of the earlier legislation (referred to in para 77 above, and repealed by RIPA). It is a distinctive feature of the IPT, by s.68(4) that:

> "(4) Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either—
>
> (a) a statement that they have made a determination in his favour; or
>
> (b) a statement that no determination has been made in his favour".

101. This is the NCND policy transposed to the IPT. The reason for it is obvious. Those who are planning, or who have committed, serious criminal offences may wish to know if they are the subject of any of the investigatory techniques governed by RIPA. If, by making a complaint to the police, or by bringing proceedings in the IPT, they could obtain a confirmation or denial that they were subject to any investigation, then the purpose of the investigation could well be defeated.

102. So even if there is no investigation relating to a person, neither the investigatory authority nor the IPT can tell that person. If they were required to say so where there was no investigation, then any other response in any other case would imply that there was an investigation under way. A statement that a determination has been made in a complainant's favour will imply that the complainant has been subject to investigation of a kind covered by RIPA. A statement that no determination has been made in a complainant's favour may mean either of two things. It may mean that the complainant has not in fact been the subject of the investigation complained about (e.g. if his telephone has not been intercepted at all, or, if it has been intercepted, that has been done privately and not by a public authority). Or it may mean that the complainant has been the subject of the investigation he suspects and complained of, but that investigation has been found by the IPT to be lawful.

103. But it is important to note that the IPT's NCND policy is not absolute: s.69(4) provides that it is "subject to any rules made by virtue of section 69(2)(i)". And even where the policy applies, it does not prevent the IPT publishing their rulings on matters of law: see IPT/01/62 & 77 (*Kennedy and other Ruling*) on 23 January 2003. This and a number of other published determinations are available on the IPT's website http://ipt-uk.com/. The rules are the Investigatory Powers Tribunal Rules 2000 (SI No 2665).

THE FIRST ISSUE: DOES THE IPT HAVE JURISDICTION OVER THE HRA CLAIMS?

104. There is no dispute that in the circumstances specified in RIPA, the IPT is the only appropriate tribunal for the purposes of the HRA s.7(1)(a) (para 82 above) in relation to proceedings and complaints against the police. Such is the effect of s.65 and s.26. See *R (A) v Director of Establishments of Security Service* [2010] 2 AC 1. The issue is as to whether those circumstances apply in the two cases before the court.

Ms Kaufmann's submissions

105. It is convenient to take Ms Kaufmann's submission first. Ms Williams adopted these submissions. Ms Kaufmann submits that the jurisdiction of the IPT in relation to the police (and to public authorities other than the intelligence services) is carefully circumscribed by RIPA.

106. Their central submission in relation to this first question is that it is clear from the provisions of RIPA, read as a whole, that the development of sexual relationships of the kind alleged in these claims is not conduct to which Part II of RIPA could ever be said to apply. No relationship of that kind could have been contemplated by Parliament in enacting RIPA. In her oral submissions Ms Kaufmann qualified the words "sexual relationship" by an adjective, so it became "intimate sexual relationship".

107. The Birnberg Claimants case is that the authorisations under RIPA did not purport to permit MK to engage in sexual relationships for the purpose of gathering intelligence or facilitating his role undercover (POC para 34(12)), but that he did in fact do so. And the circumstances in which he did so, it is alleged, involved violations by him, and by the Defendants, of the Birnberg Claimants' rights under Art 3 (POC paras 36-40), alternatively of their rights under Art 8 (POC paras 41-43).

108. The case for AJA and ARB (but not for Mr Fowler) is also that MJ and the Defendants interfered with their rights under Art 3 (POC paras 44-48). The case for all three of the Tuckers Claimants is that MJ and the Defendants interfered with their rights under Art 8 (POC paras 49-52) and Art 10 (paras 53-54).

109. The Tuckers Claimants do not specifically plead that the conduct of MJ was outside the scope of any authorisation. What they allege (in POC para 13) is that they do not know what specific authorisations were granted, nor their scope, but that the conduct complained of could not have fallen within the scope of any lawful RIPA authorisation.

110. Ms Kaufmann invited the court to read RIPA as a whole, and in particular the following sections. These set out the circumstances in which all parties agree that the IPT does have exclusive jurisdiction in relation to HRA proceedings and complaints against the police. But, submits Ms Kaufmann, they also set out, or demonstrate, the limits of the exclusive jurisdiction.

111. The relevant parts of s.65 are (with emphasis added):

> "65(2) The jurisdiction of the Tribunal shall be—
>
> (a) to be <u>the only appropriate tribunal</u> for the purposes of section 7 of the Human Rights Act 1998 in relation to any <u>proceedings</u> under subsection (1)(a) of that section … which fall within subsection (3) of this section;
>
> (b) to consider and determine any <u>complaints</u> made to them which, in accordance with subsection (4), are complaints for which the Tribunal is the appropriate forum;

> *(c) [not presently in force] to consider and determine any reference to them by any person that he has suffered detriment as a consequence of any prohibition or restriction, by virtue of section 17 [which restricts the use of warranted intercept in legal proceedings], on his relying in, or for the purposes of, any civil proceedings on any matter; and*
>
> *(d) [not presently in force] to hear and determine any other such proceedings falling within subsection (3) as may be allocated to them in accordance with provision made by the Secretary of State by order.*
>
> (3) Proceedings fall within this subsection if— …
>
> (d) they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5).
>
> (4) The Tribunal is the appropriate forum for any complaint if it is a complaint by a person who is aggrieved by any conduct falling within subsection (5) which he believes—
>
> (a) to have taken place in relation to him, …; and
>
> (b) to have taken place in challengeable circumstances …
>
> (5) Subject to subsection (6), conduct falls within this subsection if (whenever it occurred) it is— …
>
> (d) conduct to which Part II applies;…
>
> (6) For the purposes only of subsection (3), nothing mentioned in paragraph (d) … of subsection (5) shall be treated as falling within that subsection unless it is conduct by or on behalf of a person holding any office, rank or position with— …
>
> (c) any police force;…

112. So, what makes a claim or complaint against the police one which has to be brought in the IPT is if the claim or complaint relates to conduct which takes place in "challengeable circumstances" (s.65(3)(d), (4)(b), (5)(d), (6)(c), (7) and (8)(c)).

113. Challengeable circumstances are defined in s.65(7) and (8):

> "(7) For the purposes of this section conduct takes place in challengeable circumstances if—
>
> (a) it takes place with the authority, or purported authority, of anything falling within subsection (8); or
>
> (b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the

> conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought;…
>
> (8) The following fall within this subsection— …
>
> (c) an authorisation under Part II of this Act …"

114. And s.65(8)(c) refers back to s.26, which defines an authorisation under Part II. The parts of s.26 (Conduct to which Part II applies) which are relevant are (with emphasis added):

> (1) This Part applies to the following conduct— …
>
> (c) the conduct and use of covert human intelligence sources…
>
> (7) In this Part—
>
> (a) references to the conduct of a covert human intelligence source are references to any conduct of such a source which falls within any of paragraphs (a) to (c) of subsection (8), or is incidental to anything falling within any of those paragraphs; and
>
> (b) references to the use of a covert human intelligence source are references to inducing, asking or assisting a person to engage in the conduct of such a source, or to obtain information by means of the conduct of such a source.
>
> (8) For the purposes of this Part a person is a covert human intelligence source if—
>
> (a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);
>
> (b) he covertly uses such a relationship to obtain information or to provide access to any information to another person; or
>
> (c) he covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.
>
> (9) For the purposes of this section— …
>
> (b) a purpose is covert, in relation to the establishment or maintenance of a personal or other relationship, if and only if the relationship is conducted in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the purpose; and

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

115. As was noted by HMIC in his Report (at p22), RIPA treats undercover officers in the same way as it treats any other CHIS. So a CHIS may be a person who is not a public authority within the meaning of the HRA, or he or she may be a police officer or other agent of the state.

116. The dispute between the parties focussed on what sort of personal relationships could be covered by s.26(8)(a).

117. Ms Kaufmann notes that s.65 draws an important distinction between "proceedings" (dealt with in s.65(3) and "complaints" (dealt with in s.65(4)). These provisions have the effect that proceedings against public authorities other than the intelligence services and the police do not go to the IPT, even if they relate to a CHIS (and so must be tried in the High Court or a County Court), whereas complaints against these same public authorities arising out of the same conduct do go to the IPT.

118. Ms Kaufmann also notes that Part II does not apply to conduct that is otherwise lawful (whether it is sexual or not): see s.80 (para 153 below). If the conduct is lawful, no defence under s.27 of RIPA is needed, and so no authorisation is needed under Part II in order to render that conduct lawful.

119. Ms Kaufmann submitted that there are a number of reasons why s.26(8)(a) to (c) cannot be understood as encompassing a sexual relationship, or at least an intimate sexual relationship. Her reasons in support of this submission follow substantially those which the Court accepted in *McE*. I would consider these reasons as falling generally under two headings. First, so to read RIPA would offend against the principle of legality. Second, so to read RIPA would fail to have regard to the legislative purpose, as manifested in the categorisation made in the Act of investigatory techniques according to the degree of intrusion, or interference with Convention rights, that they represent.

120. Ms Kaufmann submits the principle of legality requires the court to interpret the general words in s.26(8) as being limited by the fundamental rights of the individual. Sexual relations are (as is not in dispute) a most intimate aspect of the right to privacy. Although the general words of s.26(8)(a) are capable, when read in isolation, of encompassing every kind of human relationship, they cannot do so when read in the light of the principle of legality and the context of RIPA as a whole.

121. Ms Kaufmann cited *Secretary of State for the Home Department v GG* [2009] EWCA Civ 786; [2010] QB 585. In that case the question was whether the Prevention of Terrorism Act 2005 obliged a person under a control order to submit to a personal search. The question turned on the words of s.1(3). In s.1(3) there was the general provision that

> "The obligations that may be imposed by a control order made against an individual are any obligations that the Secretary of State or (as the case may be) the court considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity".

122. In s.1(4) there were specified a number of specific obligations. These did not include submission to a personal search. So that obligation would have had to have arisen, if at all, under s.1(3). The Court of Appeal held that the common law principle of legality precluded such an interpretation of that section.

123. Under the heading of the legislative purpose, Ms Kaufmann produced a very detailed and informative Table as an attachment to her Skeleton argument. It sets out in summary form the provisions of RIPA on authorisation. In relation to each of Interception of Communications, Acquisition of Communications Data, Demands for decryption Directed Surveillance and CHIS, the Table shows the type of authorisation that may be granted, the purpose for which it may be granted, the test for the grant, the level of official entitled to grant authorisation, the permitted content of the authorisation, the organisation to which authorisation may be given, and other matters.

124. What she submits this Table shows is that RIPA establishes a hierarchy of investigatory powers, with powers considered most intrusive available in far more limited circumstances, to fewer public bodies, and subject to significantly more stringent requirements than those applicable to the least intrusive powers.

125. The requirements set out in RIPA for CHIS authorisations are not, she submits, as stringent as the requirements that Parliament would have specified if it had contemplated that a CHIS might be authorised to engage in an intimate sexual relationship. This is because an authorisation for a CHIS that involved an intimate sexual relationship would be so very grave an interference with the rights of the party to the relationship who was to be deceived.

126. The requirements for an authorisation for interception of communications include that the grant must be in the form of a warrant by the Secretary of State (RIPA s.7(1)(a)). RIPA also provides that the organisations to which the authorisation may be granted are few in number, such as the Police and the intelligence services (s.6(2)). Further, in so far as such an authorisation may be given for the prevention or detection of crime, it is only for the prevention or detection of serious crime (s.5(3)).

127. Ms Kaufmann contrasts that with the provisions relating to the authorisation for a CHIS. The persons entitled to grant authorisation for a CHIS are not specified in RIPA. Instead, s.30(1) provides that they are to be prescribed by statutory instrument. The [RIPA] (Directed Surveillance and [CHIS]) Order 2010 SI No 521 was made pursuant to s.30(1). It prescribes that a Superintendent of police may grant the authorisation for the police. And RIPA Sch 1 Pt 1 provides that the organisations to which an authorisation may be granted include not just the police and the intelligence services, but a wide range of government departments, including the Food Standards Agency and fire and rescue authorities, for a wide range of purposes.

128. Ms Kaufmann submits that a Superintendent of police is a relatively low rank compared to a Secretary of State, and that the offences which the Food Standards Agency and a number of the other specified government departments or agencies might be investigating are unlikely to be so serious as to make it proportionate to use methods as intrusive as the authorisation of a CHIS.

129. Further, Ms Kaufmann recalls that the Codes of Practice made under RIPA contain no mention of sexual relationships. She submits that they would do if Parliament had contemplated such relationships might be authorised.

130. Ms Kaufmann contrasts the position of CHIS with that of other surveillance which had in the past been provided for in the Police Act 1997. In *McE* Lord Phillips (at para 18) and Lady Hale (at para 69) noted that the Police Act 1997 s.97(2) was a prior enactment, and that it had expressly contemplated that authorised surveillance might result in the police obtaining matters subject to legal privilege.

131. In that case Lord Carswell also noted (at para 103) that the applicable Code of Practice made detailed provision for obtaining authorisation for monitoring consultations covered by legal privilege. He said this at para 100:

> "I commence with the wording of RIPA. In its natural and ordinary sense it is capable of applying to privileged consultations and there is nothing in its wording which would operate to exclude them. The reason given by Lord Hoffmann in the passage which I have quoted from *Ex parte Simms* is that the full implications of the unqualified meaning of the statutory words may have passed unnoticed in the democratic process. It seems to me unlikely that the possibility of RIPA applying to privileged consultations could have passed unnoticed. On the contrary, it is an obvious application of the Act, yet no provision was put in to exclude them."

132. Ms Kaufmann submits that none of these points can be made in relation to the establishment of intimate sexual relationships in order to obtain intelligence. There are no prior enactments to indicate that Parliament was aware of the possible use of sex as an undercover investigatory technique, and both the statute and the Code of Practice are completely silent on this issue.

133. In a witness statement dated 8 June 2012 for the CPM and ACPO Mr Pierce had commented on this issue. He said that he believed that it was possible to think of scenarios in which authorisation for a CHIS or a member of the security services to engage in sexual conduct could be proportionate and justified. He gives the example of a case where such conduct was for the purpose of maintaining cover. In her skeleton argument Ms Carss-Frisk had made the same point. She gives an example of a CHIS who had successfully gained the trust of a known terrorist and developed a close friendship, at a time when there was reason to believe that an attack was imminent. If the CHIS would risk losing that trust or friendship by declining some form of sexual contact, then the person asked to grant an authorisation to engage in such conduct might believe that it was necessary and proportionate to do so, in order to save life.

134. Ms Kaufmann submitted in response that even if that were right, it would be irrelevant to whether such conduct could be authorised under RIPA, because if it were lawful conduct, there would be no need of authorisation (see s.80 and para 154 below). She submitted that that is not comparable with the authorisation of an undercover officer to engage in sex for the purpose of gathering intelligence.

135. In relation to the saving of life, again Ms Kaufmann submitted that authorisation would not be required under RIPA, because necessity is a defence at common law. That defence could be invoked, where consent to sexual had been obtained by deceit in order to save life. It would then be lawful.

136. If, as she submits, sexual conduct is outside the scope of any possible authorisation under RIPA, then the question whether such conduct took place within challengeable circumstances (s.65(7)) does not arise. She cites the decision of the IPT in *C v Police* IPT/03/32/H, 14 November 2006. In that case the IPT gave one of its public and fully reasoned decisions. The IPT decided the question of whether it had jurisdiction over alleged 'directed surveillance' by analysing whether the conduct in question fell within Part II, and not by reference to section 65(7). It held that the police in that case were acting as employers, for the purpose of obtaining evidence as to whether the claimant was disabled, as he had complained, in connection with service benefits claimed by him. That investigation was not within Part II of RIPA. It followed that the IPT had no jurisdiction.

137. Ms Kaufmann's final submission on this point is that s.65 should be construed, in accordance with the principle of legality, so as to limit to the minimum the type of cases in respect of which the IPT is the only appropriate tribunal for the purposes of HRA s.7. The court must have regard to the extent to which the IPT's procedures depart from the ordinary procedures of adversarial justice necessary in most cases if the right to a fair trial under Art 6 is to be respected: see *Al Rawi v Security Services* [2012] 1 AC 531 at paras 10-13.

138. Ms Carss-Frisk had prepared her submissions in anticipation of an argument based on what are "challengeable circumstances" within the meaning of RIPA s.65(7). But in the event Ms Kaufmann advanced no argument on those words in s.65(4)(b) and (7). In other words, she did not dispute that if (contrary to her submission) a sexual relationship with a CHIS could be authorised under Part II, then it could be in "challengeable circumstances".

Ms Williams' submissions

139. Ms Williams adopts the submissions of Ms Kaufmann on the first issue. In addition she submits that, while Mr Fowler himself does not have a claim under Art 3, his claim arises out of, and is inextricably linked to the Art 3 claims of AJA and ARB. And conduct within Art 3 cannot be conduct within Part II of RIPA, or, therefore, within the jurisdiction conferred on the IPT by s.65.

140. Further, she submits that the claims against ACPO are in any event outside the jurisdiction of the IPT. The IPT has stated in letters dated 17 January and 14 March 2012 that ACPO does not have powers under RIPA, and so the IPT cannot consider a claim against that organisation.

Ms Carss-Frisk's submissions

141. Ms Carss-Frisk submitted that Part II could apply in principle to any relationship, whether sexual or not, subject, of course, to the various safeguards specified in RIPA. She submitted that this is the plain and unambiguous meaning of the relevant sections of the Act (most notably s.26(8)(a)).

142. Ms Carss-Frisk submits that, if the Claimants are right, then the IPT has no power to hear a claim under HRA s.7 in which an individual alleges that a CHIS has acted outside the scope of any permissible authorisation. That is not a result which Parliament can have intended, given that the IPT is the only appropriate tribunal in respect of a case in which a CHIS has acted within the scope of a permissible authorisation. The Claimants' approach would require that, at the jurisdiction stage, facts would have to be established. A judgment would have to be made as to what conduct took place, and whether it could be authorised. That could not be right.

143. She submits that there is such a range of possible personal relationships that might also be sexual that it is impossible to say that none of them could be authorised under Part II of RIPA. So Ms Kaufmann's test for what must be excluded from any possible authorisation under Part II is too vague to be adopted.

144. One point canvassed in the course of submissions is that a CHIS included informants who might not be agents of the state. The wife or partner of a terrorist, who had been in a long term sexual relationship with a terrorist, could be a CHIS. She could wish to deceive the terrorist into believing that she remained loyal to him, when in fact she was informing on him, and only willing to remain in her relationship with him for the purpose of informing on him. She might know that he would not be willing to remain in a sexual relationship with her if he knew she was informing on him. So even an authorisation for the maintenance of a physical sexual relationship might not amount to a serious interference with the rights of a member of the public who was a CHIS.

145. Further, Ms Kaufmann's test (which excludes all sexual, or intimate sexual, relationships) is unnecessary. The requirement that any authorisation meet the tests of necessity and proportionality are laid down by s.29. These provide all the safeguards that are needed.

146. In any event, since Mr Fowler does not allege sexual conduct towards himself, the consequence is that the IPT must have jurisdiction over his claim.

147. As to Art 6, she submits that proceedings before the IPT have been held to be compliant with that Article in *Kennedy v UK* App No 26839/05 (2011) 52 EHRR 4. The Court said:

> "184. The Court reiterates that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, for example, *Jespers v. Belgium*, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports (DR) 27, p. 61; *Foucher v. France*, judgment of 18 March 1997, *Reports* 1997-II, § 34; and *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, p. 380-81, § 47). The Court has held nonetheless that, even in proceedings

under Article 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, § 70, *Reports* 1996-II; *Jasper v. the United Kingdom* [GC], no. 27052/95, §§ 51 to 53, ECHR 2000-II; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 205, ECHR 2009 ....). A similar approach applies in the context of civil proceedings.

185. The Court notes that the IPT, in its preliminary ruling of 23 January 2003, considered the applicant's complaints regarding the compliance of the Rules with Article 6 § 1. It found that, with the exception of Rule 9(6) which required all oral hearings to be held in private, the Rules challenged by the applicant were proportionate and necessary, with special regard to the need to preserve the Government's "neither confirm nor deny policy" (see paragraphs 92 to 95 above).

186. At the outset, the Court emphasises that the proceedings related to secret surveillance measures and that there was therefore a need to keep secret sensitive and confidential information. In the Court's view, this consideration justifies restrictions in the IPT proceedings. The question is whether the restrictions, taken as a whole, were disproportionate or impaired the very essence of the applicant's right to a fair trial.

187. In respect of the rules limiting disclosure, the Court recalls that the entitlement to disclosure of relevant evidence is not an absolute right. The interests of national security or the need to keep secret methods of investigation of crime must be weighed against the general right to adversarial proceedings (see, *mutatis mutandis*, *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 46, ECHR 2004 X). The Court notes that the prohibition on disclosure set out in Rule 6(2) admits of exceptions, set out in Rules 6(3) and (4). Accordingly, the prohibition is not an absolute one. The Court further observes that documents submitted to the IPT in respect of a specific complaint, as well as details of any witnesses who have provided evidence, are likely to be highly sensitive, particularly when viewed in light of the Government's "neither confirm nor deny" policy. The Court agrees with the Government that, in the circumstances, it was not possible to disclose redacted documents or to appoint special advocates as these measures would not have achieved the aim of preserving the secrecy of whether any interception had taken place. It is also relevant that where the IPT finds in the applicant's favour, it can exercise its discretion to disclose such documents and information under Rule 6(4) (see paragraph 84 above).

188. As regards limitations on oral and public hearings, the Court recalls, first, that the obligation to hold a hearing is not absolute. There may be proceedings in which an oral hearing is not required and where the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other

> written materials. The character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court (see *Jussila v. Finland* [GC], no. 73053/01, §§ 41 to 42, ECHR 2006 XIII). The Court notes that Rule 9(2) provides that oral hearings are within the IPT's discretion and it is clear that there is nothing to prevent the IPT from holding an oral hearing where it considers that such a hearing would assist its examination of the case. As the IPT held in its preliminary ruling, its discretion to hold oral hearings extends to *inter partes* oral hearings, where such hearings can take place without breaching the IPT's duty to prevent the potentially harmful disclosure of sensitive information (see paragraph 92 above). Finally, in respect of the stipulation in Rule 9(6) that hearings must be held in private (interpreted by the IPT not to apply to cases involving the determination of preliminary issues of law – see paragraph 93 above), the Court notes that it is clear from the terms of Article 6 § 1 itself that national security may justify the exclusion of the public from the proceedings.
>
> 189. Concerning the provision of reasons, the Court emphasises that the extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *Ruiz Torija v. Spain*, 9 December 1994, § 29, Series A no. 303 A). In the context of the IPT's proceedings, the Court considers that the "neither confirm nor deny" policy of the Government could be circumvented if an application to the IPT resulted in a complainant being advised whether interception had taken place. In the circumstances, it is sufficient that an applicant be advised that no determination has been in his favour. The Court further notes in this regard that, in the event that a complaint is successful, the complainant is entitled to have information regarding the findings of fact in his case (see paragraph 87 above).
>
> 190. In light of the above considerations, the Court considers that the restrictions on the procedure before the IPT did not violate the applicant's right to a fair trial. In reaching this conclusion, the Court emphasises the breadth of access to the IPT enjoyed by those complaining about interception within the United Kingdom and the absence of any evidential burden to be overcome in order to lodge an application with the IPT. In order to ensure the efficacy of the secret surveillance regime, and bearing in mind the importance of such measures to the fight against terrorism and serious crime, the Court considers that the restrictions on the applicant's rights in the context of the proceedings before the IPT were both necessary and proportionate and did not impair the very essence of the applicant's Article 6 rights".

148. Further, if there were a proper concern that the normal procedures of the IPT might lead to an interference with the Claimants' Art 6 rights, the remedy lies with the IPT to adapt its procedures. The IPT has in fact shown a willingness and ability to do this in its public judgments, including its first public judgment given in the *Kennedy* case, cited above.

149. As to ACPO Ms Carss-Frisk submits that it is a false target, that is, not a proper defendant. By the Police Act 1996 s.10 and s.88 the chief officer of police for a police area is liable in respect of any unlawful conduct of police officers under his direction

and control in the performance or purported performance of their functions. The IPT are right to say that ACPO has no statutory role.

Mr Johnson's submissions

150. Mr Johnson adopted the submissions of Ms Carss-Frisk.

151. He reminds the court that on this first question there is no discretion to be exercised by the court. The IPT either has jurisdiction, or it does not. If it has jurisdiction, then the fact, if it be a fact, that the IPT does not have jurisdiction over claims against ACPO or any other claims, cannot affect the answer to this first question.

152. Mr Johnson accepted that if sexual relationships were wholly outside the scope of Part II of RIPA, then the IPT would not have jurisdiction over proceedings or complaints arising out of such relationships. But he submits that in s.28(8)(a) "personal" plainly includes "sexual", and if Parliament had intended that "personal" should not include "sexual" then it would have made that plain in the statute. In the example referred to in para 144 above, it would be surprising if a person in an existing (and perhaps longstanding) sexual relationship could not be authorised to "maintain" (s.28(8)(a)) that relationship, assuming that, without authorisation, the conduct in question would be unlawful. If no sexual relationship could ever be authorised, then it would be easy for criminals to test suspicions that a person might be a CHIS. So he submitted that an act of sexual intercourse could be "incidental" within the meaning of s.26(7)(a). Further, there is no direct relationship between the degree of physical intimacy and the degree of intrusion.

153. In reply Ms Kaufmann submitted that on her case it would not necessarily or always be unlawful for public authorities to enter into or maintain a sexual relationship with a CHIS who was a member of the public. The effect of her interpretation of RIPA is that if a police officer who is a CHIS does that, then he must rely on other legal principles to demonstrate that what he has done is lawful. In a really serious case there might be a defence of necessity.

154. By s.80 there is a general saving for lawful conduct:

> "(1) Nothing in any of the provisions of this Act by virtue of which conduct of any description is or may be authorised … or by virtue of which information may be obtained in any manner, shall be construed—
>
> > (a) as making it unlawful to engage in any conduct of that description which is not otherwise unlawful under this Act and would not be unlawful apart from this Act; …
>
> before any such conduct of that description is engaged in; or
>
> (c) as prejudicing any power to obtain information by any means not involving conduct that may be authorised under this Act.".

Discussion

155. It appears to me that the points canvassed in relation to this question can be divided up as follows: (1) is there any, and if so what, conduct alleged by the Claimants that, by reason of the principle of legality, is incapable of being authorised under Part II of RIPA? (2) IN relation to any conduct that is capable of being authorised from Part II of RIPA, does it appear from the statutory provisions for authorisation in RIPA and the SIs that Parliament did not contemplate that such conduct should be authorised under Part II? (3) IN relation to any conduct that is capable of being authorised from Part II of RIPA, does it appear from the statutory provisions for the procedure of the IPT that Parliament did not contemplate that the IPT should have jurisdiction? I do not consider that the fact that ACPO is a defendant affects the outcome. Whether or not the IPT is the only appropriate tribunal for a claim against CPM cannot depend upon whether or not it would be the only appropriate tribunal for a claim against another defendant.

Conduct incapable of being authorised under Part II of RIPA

156. In my judgment conduct which amounts to an interference with a fundamental right not to be subjected to degrading treatment is incapable of being authorised under Part II of RIPA. This is so whether the right in question is the fundamental right recognised by the common law in *GG*, or the corresponding ECHR Art 3 right. This follows from the two principles of legality (namely the common law principle in *Simms* and HRA s.3). In the case of the common law principle, RIPA does not contain words sufficiently specific to override the fundamental right. In the case of the Art 3 right it is both for that same reason, and because the Art 3 right is expressed to be unqualified.

157. On the other hand, conduct which amounted to no more than an interference with the right to privacy is capable of being authorised under Part II of RIPA. This is so whether the privacy right in question is the fundamental right recognised by the common law, or the corresponding right under ECHR Art 8. This follows from the fact that it is the express purpose of RIPA to make provision for the lawful interference with rights of privacy, and from the fact that Art 8 is a qualified right. Further, s.29 specifically provides that the Art 8(2) tests of necessity and proportionality must be satisfied before any authorisation can be given.

158. However, Ms Kaufmann and Ms Williams submit that the covert establishment or maintenance by a police officer of a sexual, alternatively an intimate sexual, relationship with another person for the purpose of obtaining information or access to information is, by reason of the principle of legality, incapable of being authorised under Part II of RIPA. In effect they submit that such a relationship is by its nature so degrading as necessarily to fall within Art 3 or the fundamental right recognised by the common law in *GG*. I reject that submission.

159. In my judgment what is or is not a sexual relationship, or an intimate sexual relationship, is too broad and uncertain a concept for the whole range of such possible relationships to be characterised as degrading, and so outside the scope of any possible authorisation.

160. As Ms Carss-Frisk and Mr Johnson submit, there is such a range of relationships that can come within that definition, not all of which would be highly intrusive, that it is impossible to say that the establishment or maintenance of such a relationship could never be authorised. Some sexual relationships established or maintained covertly might amount to degrading treatment, under either or both common law and under ECHR Art 3. Others might amount to no more than an interference with a right to privacy, whether or not recognised as sounding in damages at common law or under a statute. Other such sexual relationships may be insufficiently serious to amount to an interference with any fundamental right (whether or not they might nevertheless give rise to a claim for damages in tort or under a statute). A relationship may be sexual, and may even be intimate, without being physical, and a physical sexual relationship which is covertly maintained may not necessarily amount to degrading treatment, depending on the degree and the nature of the concealment or deception involved.

161. Nor is there a clear distinction between sexual and other personal relationships, such that it can be said that the sexual element in the relationship marks the distinguishing feature which should take the relationship outside the possible scope of s.26. Some non-sexual relationships can be as intimate as, or more intimate than, some sexual relationships. I note that the relationship in question in Mr Fowler's claim is not alleged to be a sexual relationship. So absent any submission by him that that alleged relationship is incapable of being authorised under Part II, it follows that the IPT does have jurisdiction to hear his claims under HRA s.7 in any event.

162. It follows in my judgment that conduct involving the covert establishment or maintenance by a police officer of a sexual, alternatively an intimate sexual, relationship with another person, for the purpose of obtaining information or access to information, would be conduct that took place in challengeable circumstances within the meaning of s.65(7).

163. It therefore also follows that the only appropriate tribunal for the purposes of HRA s.7 in relation to any proceedings under s.7(1)(a) for the claims under HRA in respect of any interference with an ECHR right is the IPT.

164. Ms Carss-Frisk further submitted that if, as the Claimants submit, no authorisation is capable of being granted for sexual conduct which is incidental to other authorised CHIS conduct, the effect of s.27(2) (para 86) is that no person may be subject to any civil liability in respect of such conduct. But this is a misreading of s.27(2). It is not possible to interpret s.27(2) as granting immunity to a person who has, for example, inflicted degrading treatment upon another person, in breach of Art 3. The legislative purpose of s.27(2) is to prevent a person relying on s.27(1) where he has engaged in conduct which is incidental to any conduct that has been authorised under Part II, in circumstances where that conduct could be the subject of an authorisation or warrant under a relevant enactment, and he might reasonably have been expected to have sought such an authorisation or warrant.

The statutory provisions for authorisation in RIPA

165. I do not accept Ms Kaufmann's submission that those statutory provisions in RIPA which set out who may grant an authorisation under Part II, and to which organisations, demonstrate that Parliament did not contemplate that authorisation might be given for the covert establishment or maintenance by a police officer of a

sexual, alternatively an intimate sexual relationship, with another person for the purpose of obtaining information or access to information.

166. I recognise the force of her submission that the covert establishment or maintenance by a police officer of such a relationship may be highly intrusive (even if falling short of degrading treatment), and that it may be much more intrusive than the surveillance which requires an authorisation by the Secretary of State. She may be right to submit that consideration should be given by the Secretary of State to the designation, under s.30(1), (3), (5) and (6), of persons who, for the purposes of s.29, may grant authorisations for the conduct or use of a CHIS. But whether she is right or not in that submission is not a matter for this court.

167. The uncertainty relating to such relationships, and the considerations that they may raise, is illustrated by the distinction drawn between lawful conduct (which, by s.80, does not require authorisation) and unlawful conduct, which does require authorisation, if it is to become lawful pursuant to s.27. This distinction raises difficult issues, some of which were not canvassed in argument before me.

168. To take the present case, it may well have been in the contemplation of the police and MK that he might engage in some minor offences, such as criminal damage, or offences against public order, in maintaining his cover while in the company of activists. It is relatively easy to determine in advance whether some conduct, such as damage to property, will amount to a crime or not. But as to sexual and other personal relationships between adults, whether they are unlawful or not will depend on consent. It is to be noted that in the present case, while all the women claimants allege inhuman or degrading treatment, none of them plead that they are the victims of an offence under the Sexual Offences Acts. They do not, of course, have to allege that: civil law claims for compensation do not depend upon there having been any crime.

169. I raised two examples during submissions. The first example came from my recollection of a case I tried with a jury in the Crown Court in the 1980s. The police planned to raid a nightclub (to arrest drug dealers, if my recollection is correct). The raid was planned for late one evening. Some hours before the planned time of the raid a number of young women police officers were deployed under cover in the night club, posing as members of the public having a night out. Their true role was to observe what was happening in the nightclub during the evening (and maybe to make test purchases), and, when the raid took place, to arrest (or to help other officers to arrest) the suspects. For this purpose these officers were equipped with armbands which they took out and put on to identify themselves, both to the other officers who carried out the raid, and to the men whom they had been deceiving as to the purpose for which they were present. I think it likely that some of these young officers might have found it necessary to form some basic personal relationships with the men in the club (perhaps involving some sexual touching), if invited to do so, in order to maintain their cover. I doubt if anyone would suggest that the women were doing anything unlawful (whether under the criminal or under the civil law) if they used deception to lead the men on to form a personal relationship in a nightclub.

170. A more difficult example is the very much publicised case of a woman police officer referred to as Lizzie James who was deployed to deceive Colin Stagg into forming a personal relationship with her, at a time when he was (wrongly) suspected of having murdered Rachel Nickell on Wimbledon Common in July 1992 (again before RIPA).

At my invitation Ms Kaufmann managed to obtain overnight the transcript of the reasons given by Ognall J on 14 September 1994. He ruled that the evidence of the police officer should not go before a jury. I am indebted to Ms Kaufmann for this, and to those who supplied the transcript.

171. In that case the police were assisted by a clinical psychologist who advised on the characteristics that the murderer might be expected to display. Lizzie James was given instructions as to how she might procure the suspect to identify himself as the murderer. The relationship she deceived him into forming was not a physical relationship. It was carried on by letters and by meetings in public places. But it was a highly intimate relationship, in which each wrote and spoke about sexual fantasies and wishes (false ones in the case of Lizzie James). In that sense it was a sexual relationship. They seem to have talked and written about little else. Ognall J was very critical of the extent to which he said Lizzie James had manipulated and entrapped the suspect. He described it as "thoroughly reprehensible" for that reason (transcript p18D-F and p21C). But that is irrelevant for the purposes of this judgment.

172. It is an important distinction between that case and the cases I am considering that Lizzie James was tasked to obtain evidence. Lizzie James was not tasked simply to investigate, as MK was.

173. In that case Ognall J set out a number of submissions made by the Crown with which the defence did not take issue. Ognall J himself did not comment adversely upon these submissions, and he did not suggest that there was anything wrong in principle in the deployment of a policewomen undercover for the purpose of investigating a crime as serious as the rape and murder of a young woman in a public place. The undipsuted submission of the Crown included (transcript p8C-9B):

> "… 2) that not all evidence obtained by a trick is inadmissible as unfair; 3) that in certain cases the law permits an undercover operation designed to obtain evidence from a suspect by means falling short of direct questions about the offence, which ought properly only to be asked by a police officer in interview under caution, and observing the provisions of and codes to the Police and Criminal Evidence Act;…"

174. There was no discussion as to whether or not the conduct of Lizzie James and her superiors was a tort. The only question for Ognall J to rule upon was whether the evidence should go before a jury. For that purpose he did not need to decide whether Lizzie James had committed a crime or a tort. In describing the operation Ognall J stated, at p25E-F, that after Mr Stagg had been re-arrested he was confronted with Lizzie James, by that time wearing her true colours as a serving policewoman, and he added:

> "It must have been on any view a traumatic moment for both of them".

175. I express no view one way or the other as to whether what the police did in that case was a crime or a tort. But if they did commit a crime or a tort, in those days before RIPA s.27, neither the fact that they were investigating one of the worst of all crimes, nor, in the case of Lizzie James, the fact that she was acting on instructions from her

superiors, would be likely to have provided any defence in law. The need to provide a defence for investigating officers was one reason why RIPA was required.

176. The HMIC Report refers, at p23-4, to *R v. Loosely* [2001] UKHL 53; [2001] 1 WLR 2060 where Lord Hoffmann said at para 69:

> "…it is been said that undercover officers who infiltrate conspiracies to murder, rob or commit terrorist offences could hardly remain concealed unless they showed some enthusiasm for the enterprise. A good deal of active behaviour in the course of an authorised operation may therefore be acceptable…"

177. Other examples come to mind from the realms of fiction. James Bond is the most famous fictional example of a member of the intelligence services who used relationships with women to obtain information, or access to persons or property. Since he was writing a light entertainment, Ian Fleming did not dwell on the extent to which his hero used deception, still less upon the psychological harm he might have done to the women concerned. But fictional accounts (and there are others) lend credence to the view that the intelligence and police services have for many years deployed both men and women officers to form personal relationships of an intimate sexual nature (whether or not they were physical relationships) in order to obtain information or access.

178. So when Ms Kaufmann submitted, as she did, that, in enacting RIPA, Parliament cannot have contemplated that sexual, or intimate sexual, relationships might by established by a CHIS, I took her to be using the word "contemplated" in a technical sense. In the 1980s and the 1990s, when RIPA and other statutes were passing through Parliament, everyone in public life would, in my view, have assumed, whether rightly or wrongly, that the intelligence services and the police did from time to time deploy officers as CHIS in this way.

179. However, that does not determine the question whether, in the technical sense of "contemplated" (that is where it refers the legislative purpose), Parliament contemplated that Part II of RIPA was to permit authorisation of that practice, so as to make it lawful under s.27, if it would otherwise have been unlawful.

180. In my view those who thought about the matter might well have had little idea as to whether, or in what circumstances, the use by undercover officers of deception to develop such personal relationships might be lawful or unlawful under the civil law.

181. However, for the reasons that I have stated, provided that the establishment or maintenance of such a relationship does not involve degrading treatment, I find nothing in the provisions of s.30, or the Statutory Instrument made under it, to support the submission that Parliament did not contemplate authorisations of such relationships. In the case of some possible sexual relationships, there would seem to be little basis for criticising the legislation which nominates a superintendent of police as the person who may give the authorisation, assuming that without authorisation such conduct would be unlawful.

The procedure of the IPT and the right to a fair trial

182. I accept the submission of Ms Carss-Frisk that if there be a proper concern that the normal procedures of the IPT might lead to an interference with the Claimants' Art 6 rights, then it would be for the IPT to adapt its procedures. It is not for this court to construe provisions of RIPA as to jurisdiction restrictively, or to assume that the IPT will not hear a case consistently with the Art 6 rights of the Claimants.

The answer to the first question

183. The answer to the first question is that the IPT does have jurisdiction over the Claimants' claims under HRA against the CPM and the CCSWP.

THE SECOND ISSUE: CAN THE IPT HEAR THE COMMON LAW CLAIMS?

184. Ms Carss-Frisk recognised that the IPT might not have exclusive jurisdiction in relation to non-HRA claims, but she submits that it does have jurisdiction to determine these claims. She refers to the provisions for it to hear "complaints" under s.65(2), and to award compensation under s.65(7). It can also make other orders, such as that an authorisation be cancelled or quashed, or that records be destroyed.

185. Ms Carss-Frisk and Mr Johnson submit that there is authority for the proposition that the IPT has jurisdiction to entertain a claim for breach of confidence, namely *Z (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 169 at paras 40 and 46.

186. In *Z (Algeria)* the claimant had brought a claim alleging (1) violation of Art 8, (2) breach of confidence, and (3) an unlawful disclosure of personal data contrary to the DPA, all of this arising out of information allegedly disclosed by the authorities to a foreign state in order to obtain assurances about his likely treatment on return. The Claimant applied for disclosure. The President of the Queen's Bench Division, with whom the other members of the Court agreed, said at paras 40 and 46:

> "It is accepted that the tribunal also has jurisdiction to entertain a claim for breach of confidence if there is one but that jurisdiction is not exclusive…. The human rights claim has to go to the tribunal. Any breach of confidence claim should, other things being equal, go there also".

187. Ms Kaufmann submits that the IPT has no jurisdiction to determine the Claimants' common law claims. She notes that the Secretary of State has power under s.65(2)(d) to allocate certain other types of proceedings to the exclusive jurisdiction of the IPT, that is proceedings within s.65(3), even if they are not under the HRA. So he could have allocated common law claims to the IPT, but he has not done so.

188. Referring to s.65(3) (para 111 above) Ms Kaufmann submits that "proceedings" and "complaints" are different, and that the non-HRA claims are not complaints. She cites the words of Dyson LJ (as he then was) *R (A) v Director of Establishments of the Security Service* at para 50:

> "A claim cannot be entertained by the courts unless it is in respect of a right of action recognised by the common law or a statute which gives the courts jurisdiction to entertain it.

> Similarly, a claim cannot be entertained by a tribunal unless it is one which the tribunal has jurisdiction to entertain. All this is trite enough. But it is important to keep in mind that a "complaint" is not the same thing as a claim in respect of a right of action which is recognised by the common law or a statute. A "complaint" is no more than a complaint by a person who is "aggrieved" by any conduct falling within section 65(5) which he believes satisfies the conditions stated in section 65(4) and (4A) …."

189. Ms Kaufmann refers to the Justice and Security Green Paper, October 2011 Cm 8194, which gives reasons for the decision not to do so at para 2.69. She submits that the authors of that Paper are correct to state that:

> "If the IPT's remit is expanded then the mechanisms and rules of the IPT may have to be amended in order to ensure continued compliance with requirements under Article 6 of the ECHR, in the new contexts in which the IPT would operate [fn18: In *Kennedy v UK* (2011) 52 EHRR 4, the ECHR confirmed that the IPT's procedures within its present remit comply with Article 6.]. Special Advocates may have to be appointed to represent the interests of the individual in cases falling within the IPT's amended jurisdiction. An appeals procedure would have to be provided against any exercise by the IPT of its new jurisdiction [fn 19: S.67(9) of RIPA, not presently in force.]."

190. She also observes that there are two further provisions of RIPA that would apply if s.65(2)(d) were brought into force. By s.66(1) an order under s.65(2)(d) might provide for the IPT to have exclusive jurisdiction, and if it did, then it would have to provide that the IPT have power "to remit the proceedings to the court or tribunal which would have had jurisdiction apart from the order".

191. It is this limitation on the current jurisdiction of the IPT which has led to the problems discussed in *Al Rawi v Secretary of State* [2012] 1 AC 531, and to the proposals set out in the Justice and Security Green Paper.

192. Ms Williams adopts the submissions of Ms Kaufmann, and adds one further point. The Tuckers Claimants have claims under the DPA. That Act provides that it is the High Court and the County Court that have jurisdiction to entertain claims under it: s.15.

193. Ms Kaufmann and Ms Williams submit that *Z (Algeria)* is not authority for any proposition. Rather, they submit, the court in that case simply recorded a concession, which the court was willing to adopt without further consideration.

194. In my judgment Ms Kaufmann and Ms Williams are correct in their submissions on *Z (Algeria)*. The Court of Appeal was recording a concession. The judgment is unreported, and clearly not intended as a statement of principle: the Court had already decided at para 35 that the claimant had no claim for breach of confidence in any

event. The Court was concerned with a possible abuse of process, which is the third question in the present case.

195. Implicit in Ms Carss-Frisk's submission that the IPT has power to quash an authorisation is that the Claimants might, in some respects, be better off in the IPT than in this court. In proceedings for damages for common law and statutory torts (which is what the present proceedings are) the High Court does not normally quash decisions of public authorities. If that is the relief sought, the complainant will normally proceed by way of judicial review. But whether the Claimants would be better off before the IPT or in this court is a matter for them to decide.

196. In so far as the claims are in tort or under a statute other than the HRA, in my judgment the IPT has no jurisdiction to entertain such claims. The provisions of s.65 do not apply to proceedings in respect of such claims. Proceedings at common law are not a "complaint" within s.65(2)(b) and (4). That sub-section shows that Parliament plainly did not overlook that there might be factual situations where a person might pursue both a claim under HRA and a claim other than one under HRA, which must include a claim in respect of a common law or statutory tort.

197. The answer to the second question is that the IPT does not have jurisdiction over the Claimants' claims for damages at common law or for any statutory tort.

THE THIRD ISSUE: SHOULD THE COURT STRIKE OUT OR STAY THE NON-HRA LAW CLAIMS?

198. The Defendants submit that the pursuit of the Claimants' claims both in the IPT (the HRA claims) and in the High Court (the claims at common law and under statute) is an abuse of process. They relied on two grounds: (1) that it would be an abuse to pursue proceedings in two different venues (the IPT and this court) on the same alleged facts and (2) that the Defendants cannot receive a fair trial in this court. In the alternative, the Defendants ask that the proceedings in this court be stayed pending resolution of the HRA claims in the IPT.

Abuse: two different venues

199. The first ground was that the IPT has jurisdiction over both types of claim, and that it would be an abuse for them to continue in this court their non-HRA claims when those claims arise out of the same alleged facts as the HRA claims which are required by statute to be pursued exclusively in the IPT (cf. *Z (Algeria)* at paras 41 and 46). That ground falls away, since I have decided that the IPT has no jurisdiction in respect of the non-HRA claims.

200. Even if I am wrong in finding that the IPT has no jurisdiction to entertain the non-HRA claims, I doubt that, in the particular circumstances of this case, it would be an abuse of process for the Claimants to pursue their claims in this court at the same time as proceeding in the IPT, for the following reasons.

201. First, the Claimants' claims at common law and under statute are complicated, and seem likely to give rise to numerous issues of fact on both liability and damages. The IPT is required by s.65(2) and (3) to apply the same principles for making their determination in proceedings and complaints as would be applied on an application

for judicial review. At the present stage of these proceedings it cannot be said with confidence that the application of those principles would provide a fair means of resolving the issues in this case.

202. Second, it is not clear at this stage that the power of the IPT to award compensation under s.65(7) would provide an effective remedy for any claims that may be established at common law or under statutes other than the HRA.

203. Third, I note that HRA s.11(b) provides that "A person's reliance on a Convention right does not restrict … his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9".

204. However, I do not need to reach a decision on whether it would be an abuse of the process of the court for the Claimants to pursue the HRA claims and their other claims concurrently in the IPT and in this court.

Fair trial in the High Court

205. The second ground for alleging abuse of process is that the Defendants submit that they cannot have a fair trial in this court. They cannot defend themselves if the proceedings are heard in open court, and since *Al Rawi* it is clear that the proceedings cannot be heard otherwise than in open court. The problem is the one that was considered in *Al Rawi*, where Lord Brown said at para 86-87:

> "86 … For my part I have reached the reluctant conclusion that, by their very nature, claims of the sort advanced here, targeted as they are principally against the Intelligence Services, are quite simply untriable by any remotely conventional open court process. The problems they raise, of oral no less than documentary evidence, are just too deep-seated to be capable of solution within such a process. Far too little would be gained, and far too much lost, by the appellants' proposed development of the common law. In short, some altogether more radical solution is, I believe, required. Realistically there seem to be only two possible solutions. Either cases of this kind, necessarily involving highly sensitive security issues, should go for determination by some body akin to the Investigatory Powers Tribunal which does not pretend to be deciding such claims on a remotely conventional basis (see my judgment in *Tariq v Home Office*). Or they must simply be regarded as untriable and struck out on the basis that, as Laws LJ put it in *Carnduff [v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786] at para 36: "[They] cannot, in truth, be justly tried at all."
>
> 87. Obviously, I need hardly add, claims of the sort made here – of the complicity of the Intelligence Services in torture – ought not simply to be swept under the carpet. That, of course, explains why, these particular claims having been settled without admission of liability, they are to be the subject of an inquiry under the chairmanship of Sir Peter Gibson. It is to be hoped that, in the light of that inquiry's findings, together with the responses to the

Government's proposed Green Paper, an acceptable way ahead may be found for the resolution of this type of case. ”

206. Amongst the things which the Defendants submitted that they would not be able to do, consistently with the NCND principle are the following (although some of them apply only to the Tuckers Claimants' claims). They would not be able:

i) to confirm or deny whether a particular individual was in fact a person who had served as a police officer with any particular police force (and if so whether as a CHIS);

ii) to confirm or deny whether they would be vicariously liable for the actions of any such individual;

iii) whether such individual denied that he had had a sexual relationship with any particular Claimant, or, if he admitted that he had, why such a relationship had happened;

iv) whether relevant authorisations had been made, and if so what they said;

v) to positively advance a case based on the statutory defence afforded by s.27, even if such a defence were available to them on the facts;

vi) reveal the basis for any such authorisations (if they existed), and so they could not positively advance a defence that any such authorisations had been reasonably made and were necessary and proportionate.

207. After the hearing the CMP and ACPC informed the court that they no longer ask the court to strike out the Birnberg Claimants' claims. The reasons for this change of position are set out in a third witness statement by Mr Pierce dated 19 December 2012. In substance it is accepted that the information already in the public domain, as set out above, makes this an exceptional case. And further information has been set out in letters from the First Defendant to solicitors acting for MK. These reasons do not affect the application to strike out the claims of the Tuckers Claimants. Nor, it is said, do they preclude the possibility of a further application to strike out the Birnberg Claimants' claims at a later date, if the circumstances make that appropriate.

208. The Defendants accept that there is no closed material procedure which they could ask the court to adopt. They recognised that they could claim public interest immunity, and indeed assert that they would in practice be bound to do so. But that would not assist them in defending themselves. On the contrary, it would mean that there would be no material before the court to support any defence. In practice the Defendants would have little choice but to admit liability and settle the claims on the basis of the facts as alleged by the Claimants, whether or not those allegations are true. This is the dilemma of public authorities which are engaged in covert activities, and which is discussed in the Justice and Security Green Paper.

209. The Defendants rely on *Carnduff v Rock and Chief Constable of West Midlands Police* [2001] 1 WLR 1786; [2001] EWCA Civ 680. In that case the plaintiff, a registered police informer, brought an action against a police inspector and his chief

constable to recover payment for information and assistance provided to police. Laws LJ expressed the question as follows at para 31:

> "whether the disputed issues disclosed on the pleadings can be tried without injury to the public interest: injury, I should at once accept and indeed emphasise, which outweighs the public interest in the doing of justice between the parties by holding a trial of the action."

210. There was by the time of that application a defence, in which the defendants pleaded that no contractual liability existed, and the case had got to the stage of disclosure. Amongst the applications before the court was one that the action should be struck out on grounds that it could not be fairly tried (paras 1-4). After considering the pleadings in detail the court struck out the claim. Laws LJ (with whom Jonathan Parker LJ agreed) said at para 36:

> "The pleaded contest arising from the issues joined in the amended statement of claim and the amended defence cannot be resolved without adjudication of some or other or all of the issues [relating to police operations] to which I have referred; it is upon these issues that the contest wholly depends. And once any such issue were raised, it is to my mind inevitable that the court's duty would be to hold that the public interest in withholding the evidence about it outweighed the countervailing public interest in having the claim litigated on the available relevant evidence. In reality such a position could only be avoided if the police made comprehensive admissions which absolved the court from the duty to enter into any of these issues. But a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all."

211. Ms Carss-Frisk notes that Mr Carnduff made an application to the ECtHR. He complained that he had been denied his rights under Arts 6 and 13. His claim was held to be inadmissible. In *Carnduff v the United Kingdom* - 18905/02 [2004] ECHR 731 the Strasbourg Court considered that the decision of the Court of Appeal was consistent with the applicable principles which it identified as follows:

> "The Court recalls that it has had previous occasion to hold that the procedural guarantees laid down in Article 6 of the Convention concerning fairness, publicity and expeditiousness would be meaningless if there were no protection of the pre-condition for the enjoyment of those guarantees, namely, access to a court, which is established as an inherent aspect of the safeguards enshrined in Article 6. The right to institute proceedings before a court in civil matters constitutes one aspect of the right of access to court.
>
> However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State…. [The Court] must be satisfied that the limitations applied do not

> restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved…
>
> On the facts of the present case, the Court finds the protection of the public interest in preserving the confidentiality of police operations – thereby maintaining the effectiveness of the police service and hence the prevention of disorder or crime – to be a legitimate basis for restricting the right of the applicant to proceed with civil proceedings. …
>
> There is no reason to consider the striking-out procedure as *per se* offending the principle of access to a court. In such a procedure, the claimant is able to submit to the court the arguments supporting his or her claims on the law and the court will rule on those issues at the conclusion of the adversarial procedure…"

212. Ms Carss-Frisk submits that the Defendants' case in relation to the Tuckers Claimants' claims is stronger than the defendant's case in *Carnduff*. First, the information in the present cases seems likely to be more confidential and sensitive than the information that the police would have wished to rely on in *Carnduff*. And second, unlike in *Carnduff,* there is available to them another legitimate way of advancing their claims, namely by proceedings in the IPT.

213. Ms Williams criticises the Defendants for failing to raise this point at any time before service of their Skeleton Arguments for this hearing. While she accepts that in principle the Defendants may be entitled to rely on public interest immunity to withhold certain information, the balancing of interests required to be carried out in accordance with *Carnduff* falls to be carried out on very different facts. The claim of Mr Carnduff for contractual payments was of significantly less weight than the claims of the Tuckers Claimants that they have been submitted to degrading treatment in breach of their fundamental and ECHR rights.

214. Ms Williams refers to the observations by Lord Dyson in *Al Rawi* [2012] AC 531 at paras 16 and 50 to the effect that it would only be in rare cases that it could be right to strike out a claim on the grounds set out in *Carnduff*, and to the words of Lord Clarke at 175 on the need for further consideration of the principles engaged and their application. Ms Williams also notes no defendant has in fact sought to strike out claims in reliance upon *Carnduff* since that case was decided, notwithstanding that numerous claims have arisen since then in which such an application might have been made. Further she submits that in any event such an application is premature. There has been no defence served, and no consideration of a possible PII application.

215. Ms Williams submits that NCND is not a principle of law to be relied on to defeat the Tuckers Claimants' claims without regard to the specific facts of the case. But the Defendants have placed no evidence before the court to support the application to

strike out the claims on this basis (Mr Pierce's witness statement does not mention this point).

Discussion

216. In my judgment the submissions of Ms Williams are well founded. The claims of these Claimants which I have held cannot be heard in the IPT are that they have suffered the gravest interference with their fundamental rights recognised by the common law. There is at this stage of the proceedings no evidence before the court as to what facts are to be put in the balance which could lead the court to conclude that these Claimants' rights to bring their non-HRA claims before this court are outweighed by the public interest in ensuring that information about police operations are not disclosed to the public at large.

217. The NCND policy is one that is of obvious importance as a means of preserving the confidentiality of police operations. There may be cases where it is also a means of advancing other interests, such as the protection of the fundamental and ECHR rights of informants and police officers, including their rights under Arts 2, 3 and 8 (see e.g. *Commissioner of Police of the Metropolis v Times Newspapers Ltd* [2011] EWHC 2705 (QB)). But the NCND policy does not give the equivalent of an immunity from claims in tort. It may well be that where it is invoked it will in some cases outweigh a claimant's right to proceed with civil proceedings. Mr Pierce (in para 27 of his witness statement of 8 June 2012 and para 19 of his witness statement of 30 July 2012) refers to the importance of not disclosing information which would be damaging to the public interest. But he does not give any specific reasons relevant to the Tuckers Claimants as to why their right to proceed with the non-HRA claims in the High Court is outweighed by the public interest or the need to protect the fundamental or ECHR rights of other individuals.

218. The answer to the third question is for these reasons that the pursuit of the non-HRA claims in the High Court has not been shown to be an abuse of process at this stage, and the applications to strike them out will be dismissed.

Stay of proceedings pending the IPT

219. Ms Carss-Frisk and Mr Johnson submit that if the proceedings in the IPT and in the High Court are both permitted to proceed, but they are to proceed sequentially, then it is the IPT proceedings which should go first. In those proceedings it may be determined that there is a defence under s.27, which would be determinative of the non-HRA claims. Or there might result some other determination which might form the basis upon which the non-HRA claims could be pursued. It is possible that the Claimants might obtain compensation under s.65(7) which would remove any need or justification for them to pursue their non-HRA claims.

220. Ms Kaufmann and Ms Williams submit that it is the High Court proceedings which should go first. They submit that, because of the closed nature of the IPT's procedure and the limited form in which it notifies the parties of its decision, it is unlikely that the High Court will be assisted by any decision which the IPT might reach. And they note that the power to award compensation under s.67(7) is discretionary, whereas at common law a successful claimant has a right to damages. Further, Ms Williams submits that the IPT will not in any event determine the claims against ACPO, or

under the DPA. And they note that the limitation periods are different: one year for HRA claims and the usual six years for the non-HRA claims. So a decision by the IPT is unlikely to be of assistance in respect of any period earlier than the one year under the HRA.

221. Ms Williams notes that in *R (A) v Director of Establishments of Security Service* [2010] 2 AC 1 at para 33 Lord Brown contemplated that there could be proceedings outside HRA s.7(1)(a) brought in the courts so that full effect can be given to the preservation of such rights by HRA s.11. He stated that that was subject always to the court's abuse of process jurisdiction.

222. In my judgment the interests of justice would best be served by the IPT proceedings being heard first. If there is a defence under s.27, then there will be no obstacle to the CPM and the CCSWP advancing their cases to that effect in the IPT. It is not for this court to speculate as to how the IPT would make known to the parties, and so to the High Court, what decision it had reached on the HRA claims in a manner which would assist the parties and the High Court in the subsequent advancement of the non-HRA claims. But the IPT must be given the opportunity to do what it considers to be just and appropriate. I decline to assume that the IPT will be unable to overcome perceived difficulties in circumstances where it has not been asked to do it. There seems to me that there is at least a possibility that a decision of the IPT will be of assistance in resolving the difficult procedural issues that arise in cases such as *Al Rawi* and the present cases. As to s.67(7), that corresponds to HRA s.8, under which no damages may be awarded by the High Court unless the court is satisfied that the award is necessary to afford just satisfaction.

223. Accordingly, I shall stay the High Court proceedings pending the determination of proceedings in the IPT.

THE CLAIMS AGAINST ACPO

224. ACPO was a joint applicant with the CPM in the Application Notice dated 8 June 2012. But it does not rely on any ground which is not also relied on by the CPM.

SUMMARY

225. The answer to the first question is that the IPT does have jurisdiction over the Claimants' claims under HRA against the CPM and the CCSWP (para 183).

226. The answer to the second question is that the IPT does not have jurisdiction over the Claimants' claims for damages at common law or for any non-HRA statutory tort (para 196 above).

227. The answer to the third question is that the pursuit of the non-HRA claims in the High Court has not been shown to be an abuse of process at this stage, and the applications to strike them out will be dismissed (para 218 above). The proceedings in the High Court will be stayed pending the determination of proceedings in the IPT, or for so long as the Claimants are pursuing the HRA claims in the IPT. This stay is temporary, and should not be long if the Claimants pursue their claims in the IPT expeditiously.