THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.12751

LEGISLATION

Authorising Crime: The Covert Human Intelligence Sources (Criminal Conduct) Act 2021

Paul F. Scott*

The enactment of the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 pre-empted the outcome of the appeal against the decision of the Investigatory Powers Tribunal in the so-called 'third direction' case. This legislation article considers the background to the statute in the form both of the (absence of a) legal regime governing informant participation in criminality as revealed by reviews of events within the Northern Irish Troubles and the recent litigation. It analyses the key legal issues raised by the Act and locates it within the modern project of rationalising the law related to national security.

INTRODUCTION

With little warning, the Covert Human Intelligence Sources (Criminal Conduct) Bill was introduced into parliament in September 2020, becoming law in early 2021 and pre-empting in part the outcome of the appeal against the decision of the Investigatory Powers Tribunal (IPT) in the so-called 'third direction' case.[1] The Act provides MI5 in explicit terms with a stronger form of what the IPT had held that it already possessed – the power, through its officers (those in MI5's employ), to authorise its 'agents' (informants and the like) to engage in conduct that would normally constitute one criminal offence or another. But it is not just MI5 who can now authorise criminal conduct in this way: the relevant powers are also provided to a range of other public bodies, several of which did not (obviously) possess them previously. This article addresses the background to both the litigation and the legislation, analysing the latter in relation to the judgments of the IPT and the Court of Appeal and their various weaknesses.

The episode fits a familiar pattern whereby national security processes are carried out on a contestable legal basis, protected against challenge in the first place by the secrecy which surrounds them. When that secrecy breaks down

*Senior Lecturer in Law, University of Glasgow. Thank you to the MLR's reviewers for helpful comments.

1 *Privacy International* v *Secretary of State for Foreign and Commonwealth Affairs* [2019] UKIPTrib IPT/17/186/CH (*Privacy International* (IPT)) and, on appeal, [2021] EWCA Civ 330 (*Privacy International* (CA)).

and litigation ensues, they are replaced with powers which though formally superior are inevitably stronger and expanded in scope. More so than has been the case in the many reforms of recent years, however, the Act reflects a belated attempt by the British state to tidy up some of the many loose ends left over by its response to the Northern Irish 'Troubles'. Given, however, that it is a purely forward-looking enactment, without retrospective effect,[2] it will not by itself bring to an end attempts to secure accountability for what was done in Northern Ireland during that period. It must therefore be understood alongside the proposal for the introduction of a statute of limitations for the investigation of 'Troubles-related offences',[3] which will – if implemented – have much the same practical effect on such offences as would their retrospective authorisation.

BACKGROUND

Informants – under one of a number of names, and in one of a number of guises – are, as we are frequently reminded, an invaluable element of the state's security apparatus: both in terms of how it deals with 'ordinary' crime and how it responds to more severe or more far-reaching threats to its security. They are used, therefore, not only by law enforcement bodies but also by the various security and intelligence agencies (the SIAs: MI5, MI6 and GCHQ) and the army. The need to protect the identity of such informants within the criminal trial is recognised by case law going back hundreds of years on what is now known as public interest immunity.[4] But much of the discussion about these informants takes place against an uncertain criminal law background. In *R* v *Birtles*,[5] the Lord Chief Justice, Lord Parker, suggested the outer limits of what might be done within what is recognised as a tripartite relationship,[6] between the state actor, the informant and third parties, some of whom will be the target of whatever action is agreed between state and informer. 'It is one thing', he said, 'for the police to make use of information concerning an offence that is already laid on'. The police are entitled and indeed obliged 'to mitigate the consequences of the proposed offence, for example, to protect the proposed victim, and to that end it may be perfectly proper for them to encourage the informer to take part in the offence or indeed for a police officer himself to do so': 'But it is quite another thing, and something of which this Court thoroughly disapproves, to use an informer to encourage another to commit an offence or

2 A point which was stressed by the government. See for example the Minister for Security (James Brokenshire), HC Deb vol 681 col 657 5 October 2020: 'First, there is no retrospective effect – it is quite important for me to state that explicitly. Therefore, actions that have occurred in the past and are subject to further inquiry, and potentially further criminal investigation, are untouched by the Bill'. Though the absence of retrospective effect is not expressed on the face of the Bill, the courts would no doubt require its presence to be signalled by express language if it was to be used to authorise criminal conduct which had already taken place.

3 Secretary of State for Northern Ireland, *Addressing the Legacy of Northern Ireland's Past* CP 498 (July 2021).

4 See *R* v *Hardy* (1794) 24 St Tr 199.

5 *R* v *Birtles* [1969] 1 WLR 1047.

6 S. McKay, *Covert Policing* (Oxford: OUP, 2nd ed, 2015) [7.11]-[7.13].

indeed an offence of a more serious character, which he would not otherwise commit, still more so if the police themselves take part in carrying it out.'[7]

A particular difficulty arises in the question of whether a person who is participating in a crime with the true intention of in fact preventing that crime can be guilty as a secondary party to it.[8] The Aiders and Abettors Act 1861 provides that 'Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence … shall be liable to be tried, indicted, and punished as a principal offender'.[9] The conduct which might constitute the requisite assistance and encouragement might be 'infinitely varied',[10] and presence at the scene of the crime appears to be neither a necessary nor sufficient condition for secondary liability.[11] This, then, would seem clearly to encompass the situation in which an informant is acting with the encouragement or even on the instruction of a state actor. What of where the primary offence is committed by a third party, aided by an informant acting on such instructions? How far up the chain of command might liability stretch?

The answer to these questions is not clear. So, for example, the de Silva report into the killing of the Belfast lawyer Pat Finucane quotes Halsbury's Laws of England for the – hesitant – claim that '[i]t is doubtful whether a police officer, or a person acting under the directions of the police, who aids, abets, counsels or procures the commission of a crime for the purpose of detecting offenders and bringing them to justice, thereby becomes a secondary party to the crime'.[12] There is though no clear authority to confirm the point, and even if the principle which the passage suggests is valid, it is of limited scope, for the factual matrix which exists in such situations may be more complicated than a strict division between intending for a particular crime to be committed and intending for it to be mitigated or stopped suggests. 'The complexity', de Silva noted, 'is apparent when one considers the situation of an agent who participates in a crime not with the object of frustrating that particular incident, but with the intention of maintaining his cover, in order to help the security forces generally or to permit them to prevent a subsequent crime.'[13] At common law, therefore, the informant attracts no clear general immunity for the criminal acts in which he participates. Nor, crucially, does the representative of the state who – in the vocabulary used – 'handles' the informant and may him or herself become liable by virtue of the terms of the 1861 Act.

Though by no means the only relevant site of contestation, the Northern Irish 'Troubles' were the source of many of the most important disputes on the topic of agent-handling and its lapses – more than merely occasional – into collusion between agents of the British state and, usually, Loyalist

7 *R* v *Birtles* n 5 above, 1049-1050.
8 See McKay, n 6 above, [7.101]-[7.102].
9 Aiders and Abettors Act 1861, s 8.
10 *R* v *Jogee* [2016] UKSC 8 at [11].
11 *ibid* at [11].
12 Halsbury's Laws of England, 4th ed, Vol II (1), which de Silva notes 'was the relevant edition available at the time of Patrick Finucane's murder', cited in Rt Hon Sir D. de Silva QC, *The Report of the Patrick Finucane Review: Volume I* HC 802-I (2012-2013) [4.11].
13 *ibid*, [4.13].

paramilitaries.[14] Though it was a feature of many of the high-profile events of the Troubles in respect of which adequate accountability has not yet been (and may never be) achieved, the best source for understanding the governance of such handling is the inquiry, already cited, carried out by Sir Desmond de Silva into the events around the murder of Pat Finucane by the Ulster Defence Association in 1989. Therein de Silva concluded – inter alia – that he was 'left in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements of the State', for 'a series of positive actions by employees of the State actively furthered and facilitated his murder' and 'in the aftermath of the murder, there was a relentless attempt to defeat the ends of justice.'[15] In general, however, the de Silva report is clear on the value of 'agents' to the work of the various security bodies: running agents was amongst the most effective methods of the security forces, and their use by the SIAs 'played a significant role, in my view, in containing terrorist activity to such an extent that all paramilitary groups began to realise that their aims were unachievable by violent means.'[16] To be effective an agent would have to operate within the organisation being targeted. This inevitably meant involvement in criminal activity, not least because the majority of such organisations were at that time proscribed. This inevitability rendered vital the existence of 'a detailed legal and policy framework'.[17] There was though no such framework in place at the time – not in relation to the police, the security services, or the army.

A Home Office Circular entitled 'Consolidated Circular to the Police on Crime and Kindred Matters' was published in 1986 (though its substance dated originally from 1969).[18] The Circular stated that '[n]o member of a police force, and no public informant, should counsel, incite or procure the commission of a crime' and that where an informant gave the police 'information about the intention of others to commit a crime in which they intend that he shall play a part, his participation should be allowed to continue only' where three conditions were met: 'he does not actively engage in planning and committing the crime', 'he is intended to play only a minor role' and 'his participation is essential to enable the police to frustrate the principal criminals and to arrest them (albeit for lesser offences such as attempt or conspiracy to commit the

14 On the phenomenon of collusion see generally M. McGovern, *Counterinsurgency and Collusion in Northern Ireland* (London: Pluto Press, 2019). Official reports which discuss these issues include Sir John Stevens, *Stevens Inquiry 3: Overview and Recommendations* (17 April 2003), *Cory Collusion Inquiry Report: Patrick Finucane* HC 470 (2004), *Cory Collusion Inquiry Report: Robert Hamill* HC 471 (2004), *Cory Collusion Inquiry Report: Billy Wright* HC 472 (2004), *Cory Collusion Inquiry Report: Rosemary Nelson* HC 473 (2004); Police Ombudsman for Northern Ireland, *Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters* (22 January 2007), *Public Statement by the Police Ombudsman in accordance with Section 62 of the Police (Northern Ireland) Act 1998 Relating to a complaint by the victims and survivors of the Murders at the Heights Bar, Loughinisland, 18 June 1994* (June 2016).

15 de Silva, n 12 above, Executive Summary, [115].

16 *ibid*, [4.3].

17 *ibid*, [4.6]-[4.7].

18 'Informants who take part in Crime' Home Office Circular 97/1969 and 'Consolidated Circular to the Police on Crime and Kindred Matters' Home Office Circular 35/1986.

crime, or carrying offensive weapons) before injury is done to any person or serious damage to property.' An informant should 'always be instructed that he must on no account act as agent provocateur, whether by suggesting to others that they should commit offences or encouraging them to do so.'[19]

The Circular could not have had, and did not purport to have, any legal force, and its substance reflects a clear understanding that criminal liability might in certain circumstances attach both to the informant and to his handler. In any case, it was not applied by the RUC in Northern Ireland because the guidelines it contained took 'no cognizance at all of the special problems relating to Northern Ireland', having been 'drawn up to deal with "ordinary" criminals in a mainland context, rather than for coping with terrorists'. 'Given our special situation', the RUC said, 'the restrictions placed upon us by virtue of the guidelines are unrealistic if we are to continue paramilitary penetration/source protection.'[20] Source-handling by the British Army – and in particular its Force Research Unit (FRU) – was subject to a separate regime, which included the reminder that '[a]ll operations are to be conducted within the Law and members of the FRU remain subject to Military and Civilian Law at all times.'[21] Finally, MI5 had its own processes and 'the Service Legal Adviser in practice provided regular advice and guidance on the legal implications of specific agent-running operations'; a 'form of legal support and guidance [which] does not appear to have been available to the FRU or the RUC Special Branch … in the 1980s.'[22]

That this general state of affairs was inadequate seems to have been widely acknowledged at the time, but was brought into sharp focus by the prosecution in the early 1990s of Brian Nelson, who as well as being a senior member of the Ulster Defence Association had been a British Army agent.[23] Nelson pleaded guilty to offences including conspiracy to murder but the Commanding officer of the FRU gave evidence seeking to mitigate the sentence imposed on him.[24] Against this background, the Defence Secretary told the Attorney General that '[w]e cannot expect to obtain valuable intelligence from agents who are not at the heart of the target organisation or group' and so '[w]e must establish proper guidelines for all those concerned.' It was 'unacceptable that there are no clear legal rules or guidance to cover the specific circumstances of

19 'Consolidated Circular to the Police on Crime and Kindred Matters', *ibid*.

20 Letter from the RUC to the Northern Ireland Office (21 January 1987) quoted in de Silva, n 12 above, [4.16].

21 Major General A.S. Jeapes, Commander Land Forces, 'Directive for the Force Research Unit (Northern Ireland)' (26 July 1986) quoted in de Silva, *ibid*, [4.20].

22 de Silva, *ibid*, [4.34].

23 Nelson's role was uncovered by the first Stevens enquiry, the report of which was never published. In the report of the third enquiry, Stevens describes the obstruction he encountered from the Force Research Unit in his attempts to investigate and apprehend Nelson: Sir J. Stevens, n 14 above, [3.3]-[3.4].

24 'He testified that these guidelines were both "inappropriate" and impossible to abide by in Northern Ireland because of the proliferation of terrorist activity in the region and the essential need for agents to maintain their cover. According to him, the reality was that an agent who has infiltrated a murderous organisation "is bound to get himself involved in some degree of criminality". This view was shared, to some extent, by the Officer who was then in charge of RUC Special Branch, though, in his statement, he suggested that it was Special Branch policy to restrict agent involvement in terrorist crimes to a peripheral role.' Cory Collusion Inquiry, n 14 above, [1.149].

agent-running in the terrorist environment of Northern Ireland.'[25] And so, though the necessity of running agents was accepted by all concerned, along with the inevitability that for doing so to be effective the agents would have to participate or be willing to participate in criminal activity, the overall picture was wholly unedifying. None of the parties – the RUC, the FRU, or MI5 – adhered to the only general rules which existed, with each instead operating according to its own distinct regime, none of which directly addressed the legal implications of running agents who were participating in criminal activity.

When the matter was addressed, however, the formal legal position was left untouched. A set of draft guidelines for police was produced in 1989 by a Northern Ireland Office Working Group which included representation from the Home Office, the Security Service and the RUC. The key injunction of the guidelines was as follows:

> The informant must be clearly instructed that his employment or continued employment as an informant does not carry with it immunity from criminal prosecution. In particular, he should be warned that he should not expect to avoid criminal proceedings if he is detected committing or having committed any physical assaults, or attacks on property causing serious damage, or acts of extortion. Moreover, no police officer will counsel, incite or procure the commission of such criminal offence. However … an officer may employ a person as an informant whom he believes to be engaged in criminal activities, provided that, at the time of employing him he is satisfied that:
>
> (a) the informant is likely to be able to provide information concerning offences involving a risk of death or injury to persons, serious damage to property, extortion, or offences connected with the financing of terrorism;
> (b) the required information cannot readily be obtained by any other means; and
> (c) the need for the information that may be obtained by the employment of that person as an informant justifies his employment notwithstanding the criminal activities on which he may be engaged.[26]

The de Silva review quotes the Solicitor General of the day as noting that the 'thrust' of this paragraph is '"Don't get caught"!' and that it was therefore 'unpromising territory for Ministerial approval'.[27]

Though they had not received Ministerial approval, these draft Guidelines were approved by all three of the relevant bodies on their own initiative, having chosen not to await the outcome of the 'Review of Agent-Handling' that was carried out by Sir John Blelloch in the first half of 1992.[28] Blelloch noted that the matter had become more urgent after Nelson had been convicted: 'Source handlers and sources have both queried, as well they might, what, with Nelson in prison, their position now is and neither can at present be given a

25 Minute from the Secretary of State for Defence to the Attorney General (19 March 1991) quoted in de Silva, n 12 above, [4.30].
26 Draft Guidelines for the Police on the Use of Informants in Terrorist Related Cases (9 November 1989) quoted in de Silva, *ibid*, [4.55].
27 Solicitor General, 11 August 1992, quoted in de Silva, *ibid*, [4.56].
28 The report appears never to have been published.

very satisfactory answer', he said, noting that there was 'something manifestly unsatisfactory about a situation in which people are expected by Government to undertake difficult and often very dangerous tasks without, as far they can see, any clear idea of the extent of the support they can expect if things go wrong.'[29] Though Blelloch treated the status of the draft guidelines – rather than their substance – as the key shortcoming, he did not by that seem to intend their non-legal nature but rather the fact that they lacked Ministerial approval. He had suggested, it was reported by the Security Service Legal Adviser, that 'he is not sure that Ministers (particularly the Home Secretary) will approve the Guidelines for fear that that may involve them in allegations of conspiratorial criminality.'[30] Nevertheless, Blelloch concluded that the 'need to clarify this status seems to the review team to be a matter of some urgency now, and, moreover, one that will not go away …'[31]

Blelloch's report was followed by the creation in late 1992 of an Interdepartmental Working Group led by Sir John Chilcot, Permanent Secretary at the Northern Ireland Office. Its conclusions were summarised in a note from its chairman to the Secretary of State which emphasised the inherent limitations of an approach to the question of agent-handling which did not rest upon a statutory basis.[32] No such legislation was passed while the Conservative Party remained in power, with the urgency of the matter diminished as a consequence of the Provisional IRA ceasefire of 1994.[33] Desmond de Silva described the murder of Pat Finucane as having taken place in the context of a 'wilful and abject failure by the UK Government to put in place adequate guidance and regulation for the running of agents'.[34] Though such regulation was eventually introduced by the Regulation of Investigatory Powers Act 2000 this criterion of adequacy was not met: that statute (discussed in the next section) did not purport to represent a complete solution of the problems which had arisen in the Northern Ireland context. Eight years on from the publication of the de Silva report, with the Covert Human Intelligence (Criminal Conduct) Bill at Committee stage in the Lords, the Government announced – once again – that it would not order a public inquiry into the killing of Finucane.[35]

Though the Northern Irish Troubles give us perhaps the most startling examples of the use of informants and their involvement in crime, they are not the only source of unresolved issues which the new Act seeks to address. Shortly af-

29 Sir J. Blelloch, *Report of the Review of Agent Handling*, quoted in de Silva n 12 above, [4.65].
30 Internal minute from the Security Service Legal Adviser (25 March 1992), quoted in de Silva, *ibid*, [4.64].
31 Blelloch, n 29 above, [4.65].
32 'There is much that can, and should, be done on a non-statutory basis to improve matters. The Blelloch recommendations will help (although they are primarily directed to army agent handling, whilst the underlying problem affects all agencies). So will further elaboration of the existing schemes of guidance and regulation within agencies, based around a common core understanding both of the law and of best practice. Nonetheless, a stable and satisfactory way forward, which is fair to agents, handlers and the others could only (in the view of my group) be achieved by new legislation.' John Chilcot to the Secretary of State (14 July 1993) quoted in de Silva, *ibid*, [4.71].
33 de Silva, *ibid*, [4.73]-[4.74].
34 *ibid*, [4.89].
35 HC Deb vol 685 cols 54-56 30 November 2020 (Secretary of State for Northern Ireland).

ter the Bill was first published, the Undercover Policing Inquiry began – some five years after its institution – to take evidence.[36] The Inquiry, which is not expected to report for many years yet, is engaged in reviewing 'undercover police operations conducted by English and Welsh police forces in England and Wales since 1968'[37] or, in the prevailing terminology, the work of 'spycops'.[38] Such spycops can, like other types of human intelligence, be regulated via the legal framework put in place in 2000 but that framework is – for reasons discussed below – limited in its ability to immunise them against any criminal liability. This is potentially significant because,regardless of the activities of undercover police officers – whether they become involved in criminal activity or encourage others to do so[39] – the very construction of an undercover identity has traditionally involved unlawful acts.[40] Future activities of this sort will no doubt benefit from the immunity allowed for by the 2021 Act. At the time the spycops scandal emerged, however, the legal response was modest. By statutory instrument, new safeguards were put in place for long-term deployments of undercover police.[41] Most significantly, 'long term' authorisations could be granted to agents of the state (or, where relevant, renewed) only where approval was given by an independent party – originally a Surveillance Commissioner but now, after the enactment of the Investigatory Powers Act 2016, a Judicial Commissioner.[42]

THE RIPA REGIME

Notwithstanding that the various mischiefs associated with the legal status of informants had been identified more than a decade earlier, they were addressed

36 Undercover Policing Inquiry, 'Undercover Policing Inquiry's hearings start Monday' (29 October 2020).

37 Undercover Policing Inquiry, 'Terms of Reference' (nd).

38 See P. Lewis and R. Evans, *Undercover: The True Story of Britain's Secret Police*, (London: Guardian Faber Publishing, 2014).

39 One question which emerged after the widespread use of spycops was revealed was whether undercover policemen who had entered into relationships with women who had known them in their assumed identity could be charged with rape. The CPS concluded in relation to one specific case that there was insufficient evidence for a realistic prospect of conviction as the law does not 'allow the fact that a person does not reveal their true or full identity to be capable of vitiating consent where it is otherwise freely given' and 'any deceptions in the circumstances of this case were not such as to vitiate consent': Crown Prosecution Service, 'Charging decision concerning MPS Special Demonstration Squad' (21 August 2014). In *R (Monica)* v *Director of Public Prosecutions* [2018] EWHC 3508 (QB) an environmental activist who had been in a relationship with an undercover police officer sought judicial review of the decision not to prosecute him for offences including rape. The court dismissed the application, noting (at [86]) that the claim was 'founded on the proposition that dicta in the cases to which we have referred should be extrapolated to establish a new understanding of consent for the purposes of rape and all sexual offences' and which would result in 'the criminalisation of much conduct which, hitherto, has fallen outside the embrace of the criminal law.'

40 This is the technique – associated with the film 'The Day of the Jackal' – of acquiring the birth certificate of a deceased child of a similar age and using it in turn to (fraudulently) procure other identity documents.

41 The Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order 2013 (SI 2013/2788).

42 *ibid*, Art 4. For discussion of the status of Commissioners, see P.F. Scott, 'Hybrid institutions in the national security constitution: the case of the Commissioners' (2019) 39 *Legal Studies* 432.

for the first time – and only in part – by the Regulation of Investigatory Powers Act 2000 (RIPA). The issue of what are called covert human intelligence sources (CHISs) is dealt with by Part II of the Act,[43] which treats them alongside the issue of surveillance in two forms: directed and intrusive. A person is a CHIS, the Act provides, if 'he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of' two types of act: first, covertly using 'such a relationship to obtain information or to provide access to any information to another person' or, second, covertly disclosing 'information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.'[44] A relationship is used covertly, and information 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.'[45] Crucially, the Act provides that conduct shall be 'lawful for all purposes' if a CHIS authorisation 'confers an entitlement to engage in that conduct on the person whose conduct it is' and 'his conduct is in accordance with the authorisation.'[46]

Assessing the RIPA CHIS regime in the context of the debates and developments described in the de Silva report, a number of problems can be identified. Though that report considered that 'RIPA subsequently demonstrated the type of statutory regime that should have been applied much earlier in the context of Northern Ireland'[47] it continued by noting that 'it is doubtful whether RIPA and its associated Code of Practice provides a real resolution to these difficult issues given that it provides little guidance as to the limits of the activities of covert human intelligence sources.'[48] In a similar vein, the leading practitioner work on the topic quotes a claim that the rules about participation in criminality are a constitutional matter and that a clear statement of the principles applying to it would go 'towards meeting the legitimate public interest in understanding police strategy and the extent and limits of state power'[49] before observing that 'RIPA does not provide this'.[50] What, then, is the effect of the RIPA CHIS regime?

The Guidelines challenged before the IPT in the third direction case state that 'RIPA does not provide any immunity from prosecution for agents or others who participate in crime'[51] and so it was 'common ground before this Tribunal that the provisions of RIPA [were] not relevant' to the matter before

43 A consultation paper which preceded the Act focused only on the issues associated with the interception of communications data – the law on which was modernised by the 2000 Act – and the acquisition of communications data, for which the 2000 Act made provision for the first time: Secretary of State for the Home Department, *Interception of Communications in the United Kingdom: A Consultation Paper* Cm 4368 (1999). No consideration was given to the question of informants.

44 RIPA 2000, s 26(8).

45 RIPA 2000, s 26(9)(c).

46 RIPA 2000, s 27(1).

47 de Silva, n 12 above, [4.88].

48 de Silva, *ibid*, [4.88].

49 B. Fitzpatrick, 'Covert Human Intelligence Sources as Offenders: The Scope of Immunity from the Criminal Law' [2005] *Covert Policing Law Review* 15, quoted in McKay, n 6 above, [7.102].

50 McKay, *ibid*, [7.102].

51 'Guidelines on the use of Agents who participate in Criminality' (March 2011) [3], cited in *Privacy International* (IPT) n 1 above at [15].

it.[52] Though this conclusion is justified with reference to the RIPA savings clause,[53] it is unconvincing. The effect of that clause is that nothing which is not otherwise unlawful is so rendered by the fact that it can be authorised under RIPA. It does not speak to the effect of any such authorisation on acts which are otherwise unlawful, as criminal conduct – to use the 2021 Act's formulation – will by definition be. This point is worth exploring further, for the matter may be more subtle than the IPT's account suggests.[54] After all, and as noted above, the language used is that conduct is 'lawful for all purposes' if the relevant criteria are met,[55] and in *Wilson* v *The Commissioner of Police of the Metropolis* (*Wilson*), relating to the involvement of an undercover police officer in a sexual relationship with an activist, the IPT noted that from the beginning of the officer's deployment 'permission for [him] to participate in minor criminality was granted.'[56] The conduct authorised by a CHIS authorisation is conduct which (a) 'is comprised in any such activities involving conduct of a covert human intelligence source, or the use of a covert human intelligence source, as are specified or described in the authorisation', (b) 'consists in conduct by or in relation to the person who is so specified or described as the person to whose actions as a covert human intelligence source the authorisation relates' and (c) 'is carried out for the purposes of, or in connection with, the investigation or operation so specified or described.'[57]

The key limits are therefore to be found in provisions which define the 'conduct' or 'use' of a CHIS. The latter means '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'. The former means conduct which falls within or is incidental to the provision which defines a CHIS.[58] A person is a CHIS, it provides, if 'he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of' the following things: 'covertly [using] such a relationship to obtain information or to provide access to any information to another person' or 'covertly [disclosing] information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.'[59] Though this is not the most transparent drafting, it seems to follow from this that in at least some cases action taken by the CHIS which would otherwise attract criminal liability will be covered by the authorisation and so attract immunity. And crucially, as the spycops saga reminds us, a person can be a CHIS even though he or she is also an employee of the relevant public body. A CHIS authorisation may also – perhaps more importantly – provide immunity for the CHIS's handler, whose role in 'using' the CHIS might otherwise be sufficient to attract secondary criminal liability. It would hardly be a

52 *Privacy International* (IPT) *ibid* at [41].
53 *ibid* at [41]: '… this is because of the saving provision in section 80 of RIPA.'
54 The effect of the provision has been the subject of prior controversy: see the cases discussed in McKay, n 6 above, [7.103]-[7.107].
55 RIPA 2000, s 27(1).
56 *Wilson* v *The Commissioner of Police of the Metropolis* [2021] UKIPTrib/IPT/11/167/H at [63]. The Tribunal continued by noting that '[a]s this is not an issue in this case, this point is not further explored.'
57 RIPA 2000, s 29(4).
58 RIPA 2000, s 26(7).
59 RIPA 2000, s 26(8).

surprise if this, as much as the position of agents themselves, were the concern of the government in asking parliament to legislate for the CHIS regime in 2000. That this is not sufficient to cover all of the conduct that MI5 might wish to authorise (and did in fact 'authorise' under the Guidelines) accounts for the RIPA regime's marginal status in the 'third direction' litigation. We know that all of MI5's CHIS operations in the United Kingdom have been authorised under RIPA,[60] though only some subset of those CHISs will have also been granted authorisations under those Guidelines.

Elsewhere, the ability to provide criminal immunity may enjoy sounder footings. For example, the Secret Intelligence Service, MI6, enjoys a more generous – but geographically limited – power of authorisation under section 7 of the Intelligence Services Act 1994. An authorisation thereunder negates any civil or criminal liability which would otherwise arise from the doing of the conduct it authorises if the act is done outside the British Islands.[61] We know from the work of the Intelligence Services Commissioner that such power is used to authorise the conduct of CHIS abroad, via what is known as a 'class authorisation':[62] that is, one which authorises acts of a particular type rather than specific acts. In 2014, the Intelligence and Security Committee reported that MI6 had eight class authorisations (which 'remove liability under UK law for day-to-day activity undertaken in pursuit of SIS's statutory functions, such as the identification and use of Covert Human Intelligence Sources, Directed Surveillance and interference with, and receipt of, property and documents') in place,[63] while GCHQ had seven such authorisations.[64] It is clear, though, that not all CHIS activity authorised by MI6 is so authorised in accordance with section 7: that portion which is not 'has a statutory basis under section 1 of the Intelligence Services Act 1994' and 'is not, and has never been, subject to oversight by IPCO or its predecessors.'[65] The Surveillance Commissioner, who previously oversaw use of CHIS by other bodies, noted in his 2003–04 report that there were '5,907 CHIS recruited by law enforcement agencies during the reporting year, of whom 5,544 were cancelled during the year and 4,865

60 Along with 'the majority of those conducted overseas': Investigatory Powers Commissioner's Office (IPCO), *Annual Report of the Investigatory Powers Commissioner 2019* HC 1039 (2020) [8.5].

61 IPCO has stated that 'SIS has informed us that were it to be necessary for one of their agents to participate in criminality in the UK, this would be authorised via the MI5 PIC process' but that it 'cannot confirm the extent (if any) of such activity by SIS.' *ibid*, [9.11].

62 'SIS is primarily a humint (human intelligence) organisation. They operate overseas under a section 7 class authorisation for agent running (CHIS). I have recommended that this is an area where SIS could improve their paperwork recording in one document all the relevant considerations relating to authorising a CHIS. I am satisfied that although RIPA does not apply, SIS seek to apply the same principles and that the relevant points are being considered in relation to authorising a CHIS': The Rt Hon Sir M. Waller, *Report of the Intelligence Services Commissioner for 2014* HC 225 (2015) 21.

63 Intelligence and Security Committee, *Privacy and Security: A modern and transparent legal framework* HC 1075 (2015) [233].

64 *ibid*, [234].

65 IPCO, n 60 above, [9.2]. The reliance upon the Intelligence Services Act 1994, s 1 would seem to have made MI6 vulnerable to an adverse decision by the IPT, that provision being the analogue of the provision in the Security Service Act 1989 at issue in the third direction case.

remained in place at the end of March 2004'.[66] The most recent annual report of the Investigatory Powers Commissioner shows that the number of CHIS authorisations granted to law enforcement agencies had fallen below 2000 in each of 2018 and 2019.[67] This was part of a pattern of steady decline which the Investigatory Powers Commissioner's Office (IPCO) considered to reflect 'the changing shape of investigations and the commitment by forces to use the most appropriate and least intrusive method of investigation.'[68]

THE 'THIRD DIRECTION' CASE

In the 'third direction' case the Investigatory Powers Tribunal (by a majority) and the Court of Appeal (unanimously) upheld the lawfulness of an MI5 policy by which its officers were able to 'run' agents who participated in criminality. Each did so on the basis that MI5 had enjoyed the power to implement such a policy before the enactment of the Security Service Act 1989 and that that statute, properly interpreted, continued that power. A 'direction' in this context is an instruction from the Prime Minister to the Investigatory Powers Commissioner (formerly, the Intelligence Services Commissioner (ISC)) to keep under review 'the carrying out of any aspect of the functions of' the security and intelligence agencies – MI5, MI6 and GCHQ – and their counterparts in the army.[69] There is no absolute requirement for such directions to be published, and two directions were known of at the relevant point in time.[70] In earlier litigation, a confidential annex to the ISC's 2014 report was disclosed, which made reference to the existence of a third direction, by which the litigation before the IPT has become known. This 'third direction' is the Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Security Service's Agent Participation in Criminality) Direction 2017, which replaced a direction given in 2014. The subject of the Direction is a set of guidelines whose aim

66 Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2003-2004* HC 668 (2003-2004) 9.

67 IPCO, n 60 above, Figure 28.

68 *ibid*, [19.9].

69 Investigatory Powers Act 2016, s 230. See, before then, Regulation of Investigatory Powers Act 2000, s 59A, inserted by the Justice and Security Act 2013. These acts are discussed in Scott, n 42 above.

70 The first was Intelligence Services Commissioner (Additional Review Functions) (Consolidated Guidance) Direction 2014, which required the ISC to keep under review compliance with the so-called Consolidated Guidance (on which see P.F. Scott, 'Law, non-law, and torture: from the Consolidated Guidance to the Principles' [2020] *Public Law* 488). The second was the Intelligence Services Commissioner (Additional Review Functions) (Bulk Personal Datasets) Direction 2015, which related to the use by the SIAs of what are known as 'bulk personal datasets', for which there was – prior to the enactment of the Investigatory Powers Act 2016 – no statutory basis. Notably, however, their domestic lawfulness was not challenged in the relevant litigation before the IPT: *Privacy International* v *Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIPTrib 15/110/CH at [64]: 'There has been no challenge to the domestic legality of the collection of BPD.' In *Esbester* v *United Kingdom* (1994) 18 EHRR CD72 it was held that the interference with the applicant's Article 8 rights – the keeping of a file regarding his private life – 'had a valid basis in domestic law, namely, the Security Service Act 1989 which placed the Security Service on a statutory footing for the first time.'

was 'to provide guidance to agent-running sections on the use of agents who participate in criminality.'[71] As this language suggests, the document in question had no obvious legal basis. No statute referred to it, and it had never been published. The direction itself was not publicly avowed 'given the potential damage to national security were its existence to be made public.'[72]

The Investigatory Powers Commissioner's Office has stated in relation to participation in criminality by CHISs that it examines 'a high proportion of these cases to ensure that this activity meets a high necessity threshold' and that it has 'concluded that the activity authorised was proportionate to the anticipated operational benefits.'[73] Nevertheless, it seems significant that when the Prime Minister first requested that the Commissioner take on the task of reviewing the Guidelines, the mandate was an explicitly limited one. Though the ISC was 'to keep the application of this policy under review with respect to the necessity and proportionality of authorisations and consider such related issues as you find appropriate' it did not cover certain key questions – in particular whether any particular case would be referred to the prosecuting authorities – and would not 'provide endorsement of the legality of the policy'.[74] This latter caveat strongly suggests that there already existed doubts as to the lawfulness of the policy as a whole long before the IPT was called upon to consider the question. When it did, it divided three to two on the question of whether the policy was lawful, with the Court of Appeal later upholding the majority's judgment unanimously.[75] Much of what is contained in the two judgments is constitutionally significant; much too is contestable. In those circumstances it is hardly surprising that the government took fright and set out to legislate prior even to the appeal against the IPT's decision being heard.[76] The judgments of the IPT and Court of Appeal nevertheless offer important insight on certain points.

Though the Guidelines' modern form dated from 2011, MI5 has emphasised that they had 'been in place since the early 1990s'.[77] Those challenged before the IPT would therefore appear to be at least the spiritual and more likely the direct successor of the guidelines – discussed above – addressed by Sir John Blelloch, which he considered to be characterised most significantly by the absence of ministerial approval. Whether such approval was ever given is unclear. The criteria for the giving of an authorisation are partially redacted in the only

71 'Guidelines on the use of Agents who participate in Criminality' (March 2011) [1].

72 Letter from the Prime Minister David Cameron to the Intelligence Services Commissioner, 23 June 2013, quoted in *Privacy International* (IPT) n 1 above at [22].

73 See Investigatory Powers Commissioner's Office, *Annual Report 2018* HC 67 (2019-2021) [6.6]-[6.7]. It has also noted that 'authorising officers do not always lay out clear parameters under which the CHIS may operate and we have recommended that there should be greater consistency in this area.': IPCO, n 60 above, [8.12].

74 Letter from the Prime Minister, David Cameron, to the Intelligence Services Commissioner (27 November 2012), quoted in *Privacy International* (IPT) n 1 above at [19].

75 *Privacy International* (CA) n 1 above.

76 The Court of Appeal handed down its judgment little over a week after the 2021 Act had received the Royal Assent.

77 Letter from Andrew Parker (Deputy Director-General of the Security Service) to Sir Mark Waller, the Intelligence and Security Commissioner (23 September 2011) quoted in *Privacy International* (IPT) n 1 above at [17].

version which has entered the public domain, but they include the following: 'there is a reasonable prospect that the agent will be able to provide information concerning serious crime…', 'the required information cannot readily be obtained by any other means', and 'the need for the information that may be obtained by the use of the agent justifies his use notwithstanding the criminal activity in which the agent is or will be participating.'[78] On this final point, the burden of proof is reversed: the Guidelines state that the criterion is satisfied 'unless the authorising officer is satisfied that the potential harm to the public interest from the criminal activity of the agent is outweighed by the benefit to the public interest from the information it is anticipated that the agent may provide and that the benefit is proportionate to the criminal activity in question.'[79] Finally, the Guidelines are explicit as to the (lack of) legal effect of an authorisation given in accordance therewith, which has 'no legal effect and does not confer on either the agent or those involved in the authorisation process any immunity from prosecution':

> Rather, the authorisation will be the Service's explanation and justification of its decisions should the criminal activity of the agent come under scrutiny by an external body, e.g. the police or prosecuting authorities. In particular, the authorisation process and associated records may form the basis of representations by the Service to the prosecuting authorities that prosecution is not in the public interest. Accordingly, any such authorisation should, on its face, clearly establish that the criteria for authorisation are met, in terms which will be readily understood by a prosecutor.[80]

An authorisation will therefore be fed into the process by which the relevant authorities determine whether or not they will bring a prosecution in a particular case – whether against an MI5 officer or against an MI5 agent. This is a purely reactive process: the Guidelines do not foresee that the Service will actively inform the authorities of criminality on the part of its agents and both the Tribunal and the Court of Appeal were clear that as a matter of law there is no obligation on it to do so.[81]

The decision of the majority in the Tribunal explicitly rests upon an acceptance of the argument that an authorisation under MI5's policy was an authorisation in name only. That MI5 has – 'as a matter of public law' – the power to operate the policy, it said, 'does not mean that it has any power to confer immunity from liability under either the criminal law or the civil law (e.g. the law of tort) on either its own officers or on agents handled by them. It does not purport to confer any such immunity and has no power to do so.'[82] This claim is vital because it was accepted that to confer genuine immunity would, in accordance with the principle of legality, require explicit language to that effect. It rests though upon a rather artificial distinction between the legal effect of an authorisation (it has none) and its practical effect. This latter the Tribunal held to be an entirely lawful and proper contribution to the process of deciding, in

78 'Guidelines' n 71 above, [7].
79 *ibid*, [8].
80 *ibid*, [9].
81 *Privacy International* (IPT) n 1 above at [76]-[77]; *Privacy International* (CA) n 1 above at [107].
82 *Privacy International* (IPT) *ibid* at [67].

the context of a background understanding that there is no duty to prosecute in every case, whether it is in the public interest to do so in particular cases: 'All that the policy does … is to set out what the Security Service would intend to say by way of representations as to where the public interest lies if that becomes necessary.'[83]

Be that as it may, it nevertheless seems very likely that the opinion of the Security Service, as outlined in such an authorisation, is likely to prove dispositive of the matter, and before deciding what is (or is not) the effect of an authorisation, one would want to have some sense of how often authorisations are given, how often they are relied upon in discussions with, say, the CPS, and how often those representations result in prosecutions not being brought even though there is a realistic prospect of conviction. That information is of course unavailable. But the distinction between the de jure and what would seem to be the de facto positions allowed the Tribunal to not only find authority for it in a dubious place but also to evade certain interesting constitutional claims: that the Guidelines were a violation of the rule, found in the Bill of Rights 1689, that the 'pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal', and that they represented a violation of the independence of the prosecuting authorities. The Tribunal held instead that 'the policy under challenge does nothing of the sort.'[84] Though the Court of Appeal addressed directly the question of whether the Guidelines created a de facto immunity, its consideration of the factual position was limited to a series of generalised references to the close cooperation which takes place between the Security Service, the Police, and the prosecuting authorities.[85] These references work not to dispel but rather to strengthen the suspicion that in at least some cases a de facto immunity is created by the application of the Guidelines.

The key point of disagreement between the majority on the IPT and the dissentients related to the question of vires: whether domestic law offered the requisite authority for the operation of the policy. This was the result of a significant concession on the part of the government. That is, we have quoted the Guidelines and noted their insistence that an authorisation has no legal effect. Given the well-known common law rule whereby legal authority is required only for those acts which interfere with the public or private law rights of the individual – which have, that is, some legal effect[86] – it would have been open to the government to argue that no such authority was required. An authorisation not sounding in law, no legal basis was required to give it. And yet the government did not do so. Instead, it accepted that authority was required and so set itself the (unenviable) task of identifying suitable authority. One reason

83 *Privacy International* (IPT) n 1 above at [83].
84 *ibid* at [81].
85 *Privacy International* (CA) n 1 above at [113].
86 See for example the famous contrast between the decisions in *Entick* v *Carrington* (1765) 19 St Tr 1029; 95 ER 807 and in *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344, as well as the decision in *R* v *Secretary of State for Health, ex parte C* [2000] HRLR 400 confirming that no authority was required for the maintenance by the Department of Health of the 'Consultancy Service Index' listing individuals in respect of whom there existed concerns as to their suitability to work in the field of child care.

that this argument was not run would seem obvious: though it might suffice to satisfy the requirements of the common law, it would not do so in a situation in which the act done in accordance with the authorisation represented an interference with the ECHR rights of an individual.[87] It may be, however, that there were further such reasons for taking this path, related – perhaps – to other uses to which the vires ultimately identified here are put and the desire to clearly establish them as authorising acts which do have legal effect.

The government having accepted that authority was required, the question then became that of whether such authority existed. As noted above, both parties agreed that RIPA could not be the source of the power 'to do what the Security Service does under the Guidelines'.[88] If not RIPA, then what? The key statute is the Security Service Act 1989, which gave MI5 a statutory basis for the first time. Both the IPT's and the Court of Appeal's judgments offer a contestable account of the position prior to the 1989 Act.[89] The former, for example, states that 'the Service was created under, and governed by, the Royal Prerogative' with the relevant power being placed in abeyance by the 1989 Act.[90] This contradicts the famous account given of the Service by Lord Denning in his report on the Profumo Affair, in which he said that the Security Service was 'not established by Statute nor is it recognised by Common Law' and that its members were 'in the eye of the law, ordinary citizens with no powers greater than anyone else.'[91] It is not clear, against this background, how the IPT and the Court of Appeal could have attributed the existence and powers of the Service – what powers? – to the prerogative.

This account exemplifies a wider tendency that exists within the national security domain, and which often acts (paradoxically) as a disincentive to think carefully about whether any authority is needed. In opposition to it is the discussion of the prerogative in a recent (legal) history of the Security Service, where the authors note that though it is 'widely thought – by lawyers, politicians, and the Security Service itself – that MI5's legal authority was derived from the common law powers of the Crown in the form of the royal prerogative', a 'note of caution' is called for: 'assumption is one thing, authority another'. There is, they continue, 'no general prerogative power allowing the government to do whatever it likes for the defence of the realm, or specifically

87 So, for example, the decision in *Malone* v *Metropolitan Police Commissioner ibid* that no authority was needed for interception of telephone calls was followed by the decision of the Strasbourg Court in *Malone* v *United Kingdom* (1985) 7 EHRR 14 that absent such authority the interception in question was not 'in accordance with the law'.

88 *Privacy International* (IPT) n 1 above at [42].

89 Reflecting, it should be noted, a position which was common ground between the parties – 'There has been a Security Service for very many years. Its creation and, until the 1989 Act, its functions and operations were, as is common ground, governed by the Royal Prerogative': *Privacy International* (CA) n 1 above at [7].

90 *Privacy International* (IPT) n 1 above at [44].

91 'No special powers of search are given to them. They cannot enter premises without the consent of the householder, even though they may suspect a spy is there. If a spy is fleeing the country, they cannot tap him on the shoulder and say he is not to go. They have, in short, no executive powers. They have managed very well without them.' *Lord Denning's Report* Cmnd 2152 (1963) [273].

to create and maintain a secret service …'[92] The latter claim is no doubt true, but the former more contestable. That is, distinctive within the judgment of the Court of Appeal as compared to that of the IPT is a discussion of the decision of the same Court in *R* v *Home Secretary, ex parte Northumbria Police Authority*[93] (*Northumbria Police Authority*), taken here to demonstrate a 'broad approach' to the existence of a prerogative power aimed at the protection of national security. It is therefore worth noting certain features of the recognition, in that case, of a prerogative power to 'do all that is reasonably necessary to keep the Queen's peace.'[94] One is that it is entirely obiter: the Court of Appeal found that the Home Secretary was empowered to do what he proposed – maintain, and supply equipment from, a central store – by statute, and so there was no need to fall back upon the prerogative. A second is the weakness of the historical case for the conclusion arrived at, which saw one judge suggest that 'the scarcity of references in the books to the prerogative of keeping the peace within the realm' indicated not that no such prerogative existed, but rather 'may point to an unspoken assumption' that it did.[95] This is the closest the law reports come to an endorsement of the claim – more often, the assumption – that MI5 has (or could have) a prerogative foundation. It leaves much to be desired.

The Security Service Act 1989, in part prompted by the requirements of the Convention,[96] predates only by a little the Guidelines. Could it therefore be the basis of the power to do what they permit MI5 to do? The only power explicitly granted to MI5 by the 1989 Act was the power to interfere with property, a power which – it later transpired – was employed also to carry out computer hacking and other forms of what are now called 'equipment interference'. The government nevertheless claimed that the 1989 Act authorised the policy under challenge, pointing to the provision which states that '[t]he function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.'[97] Though this was accepted by the majority in the Tribunal and the Court of Appeal, it seems a misapprehension. As one of the dissentients noted, this provision, properly understood, does not give the Security Service any powers at all: rather it determines how its activities – both the powers it does have and those of its activities for which no legal authority is required – are to be directed.[98]

The majority in the IPT sought to justify its conclusion on this point by referring to a statutory provision – section 111(1) of the Local Government Act 1972 – which provide that a local authority 'shall have power to do any thing … which is calculated to facilitate, or is conducive or incidental to, the discharge

92 K. Ewing, J. Mahoney, and A. Moretta, *MI5, the Cold War, and the Rule of Law* (Oxford: OUP, 2020) 20 (citations omitted).
93 *R* v *Home Secretary, ex parte Northumbria Police Authority* [1989] QB 26.
94 *ibid*, 53.
95 *ibid*, 58.
96 See the decision in *Hewitt and Harman* v *United Kingdom* [1989] ECHR 29.
97 Security Service Act 1989, s 1(2).
98 'In classic public law terms, it is stating that lawful action may be carried out by MI5 for these purposes but only for these purposes.' *Privacy International* (IPT) n 1 above at [151].

of any of their functions.' There are two problems with that suggestion. One is that the leading treatment of this term 'functions' refers to it as embracing 'all the duties and powers of a local authority' – what is found in section 1(2) of the 1989 Act is neither a duty nor a power as we would normally understand those terms. The other is that no such catch-all provision is found in the 1989 Act, and so the IPT was forced to rely upon the general principle that a public authority will have an implicit power to do those things which 'may reasonably and fairly be consequential upon or incidental to its express statutory functions, provided they are necessary to the exercise of the primary function':

> In our view, there is an implied power in the 1989 Act for the Security Service to engage in the activities which are the subject of the policy under challenge. We bear in mind first what the position must have been on the eve of the introduction of the 1989 Act. The running of agents, including the running of agents who are embedded in an illegal or criminal organisation, such as the IRA, would obviously have been occurring before 1989 … It is impossible, in our view, to accept that Parliament intended in enacting the 1989 Act to bring to an end some of the core activities which the Security Service must have been conducting at that time, in particular in the context of the "Troubles" in Northern Ireland.[99]

The Court of Appeal relied similarly upon notions of continuity and necessity, holding that – having regard both 'to the context and to the purpose of the 1989 Act' and the need for agents to be able to participate in criminality – it followed 'as a matter of necessary implication that the Security Service under the 1989 Act was intended to retain the (essential) power to instruct agents to participate in criminality'.[100] Though it is difficult to see how parliament can have intended to authorise the continuation of activities of which it – as opposed to the government of the day – was almost certainly not aware, the point remains that the language of the 1989 Act does not come close to authorising the policy reflected in the Guidelines. In noting early in its judgment that it was 'well aware of the principles of interpretation which indicate that it is not legitimate for courts to form a view as to what the parliamentary intention is to be taken as having been and then to torture the statutory language used into conforming with that postulated intention'[101] the Court of Appeal may be felt to have protested too much.

Of particular note within the consideration of vires is the discussion of the principle of legality by the Court of Appeal, which noted that reliance upon the principle seems 'rather paradoxical' given that 'the activities of the agents are being "authorised" precisely with a view to preventing the taking of innocent life and to inhibiting the activities of those having no regard whatsoever to any principle of legality.' The rhetorical move is of interest in that it strongly resembles another feature of the *Northumbria Police Authority* case, where the Court of Appeal seemed (again, in obiter) to recognise an exception to the principle in *De Keryser's Royal Hotel* where the prerogative power at issue exists for the

99 *ibid* at [60].
100 *Privacy International* (CA) n 1 above at [72].
101 *ibid* at [57(3)].

benefit of the individual rather than representing a threat to his or her interests. Where, it was said, the action taken in exercise of the prerogative is 'directed towards the benefit or protection of the individual, it is unlikely that its use will attract the intervention of the courts.'[102] Such malleable distinctions should be avoided. The Court of Appeal continued by suggesting that the principle of legality simply did not apply in this case. It was, it said, 'very difficult to see how "fundamental rights" will necessarily be "overridden" if the 1989 Act is to be interpreted as permitting the continuation of the "authorisation" of undercover agents to participate in criminality' where the authorisation provides no immunity from criminal or civil sanction.[103] The logic of this point, however, must extend further than the Court of Appeal suggests. If the policy does not permit interference with fundamental rights, then it would seem not to permit interference with any rights. The somewhat unconvincing nature of the attempt to identify vires for the policy may indicate that the very endeavour is misguided.

At first instance, the IPT's split on the question of whether the 1989 Act provided a legal basis for the policy fed into a similar split as to whether the policy was 'in accordance with the law' for the purpose of the ECHR. Assuming that the policy allowed for interferences with Convention Rights (on which there was no dispute) then it was required to meet the requirements for a justified interference. One of those requirements is that there is suitable legal basis, and for the dissentients it obviously followed that if there was no suitable legal basis as a matter of 'domestic law' there could not be such a basis for an interference with the relevant Convention Rights.[104] But the 'in accordance with the law' requirement asks much more than that there exist a bare legal basis. Where the specific capacities of the state and the manner in which they are deployed must be kept secret, the Convention jurisprudence adds requirements that there the possibility of interference be sufficiently signposted and that there be safeguards against the arbitrary use of those capacities.[105] This 'signposts and safeguards' approach should have been applied to the Guidelines here, which have long been kept secret. Had it been so applied, it is obvious that the policy could not possibly have adhered to the Convention requirements, either before or after the enactment of the Human Rights Act. No reader, however careful, of the 1989 Act would have been able to determine that it empowered MI5 to operate the policy.

The (strained) reasoning of the majority of the Tribunal is barely plausible when working backwards from knowledge of the policy now that its existence is known; to reason forward from the Act to the policy, or something like it, would have been impossible. Though allegations of collusion were a recurring feature of the Northern Irish troubles, the material necessary to bridge the gap between that knowledge and the legal position was not in the public domain until the de Silva report was published in late 2012 (at which point this element appears to have gone largely unnoticed). And even if the basic outlines of the power had been known, the 1989 Act provides none of the detail which should

102 n 93 above, 53.
103 *Privacy International* (CA) n 1 above at [94].
104 *Privacy International* (IPT) n 1 above at [131].
105 See, for example, the decision in *Zakharov* v *Russia* (2016) 63 EHRR 17.

be available in the context of a secret power of this sort. The safeguards were just as deficient as were the signposts: the Intelligence Services Commissioner had no oversight of the Guidelines before 2014, meaning that there was more than a decade in which the policy was being put into effect without any external assurance of compliance. Even if, then, the bare 'legal basis' standard was met, the higher bar which should be applied in this context could not possibly have been. Though the IPT's decision therefore fails on a number of levels to convince, the Court of Appeal's holding on this point – that the litigants lacked standing for the purposes of section 7 of the Human Rights Act[106] – is perhaps less satisfying, raising as it does the possibility that the ECHR issues raised by the 2021 Act which now governs this area of law will never in fact be litigated to a substantive conclusion.

THE COVERT HUMAN INTELLIGENCE SOURCES (CRIMINAL CONDUCT) ACT 2021

With the appeal against the IPT's decision still pending, the Bill that became the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 (CHIS (CC) Act 2021) was introduced into the House of Commons on 24 September 2020. It provides a much firmer footing for the relevant activities than the one that the IPT had divined in the 1989 Act, heading off the possibility that an adverse decision on appeal might deprive MI5 of its power to authorise criminality on the part of its agents. It goes, however, much further than merely pre-empting the outcome of that appeal. The centrepiece of the Act is the insertion, into RIPA, of a new section 29B, which provides – alongside the existing power to make a Covert Human Intelligence Source authorisation – for the power to grant a 'criminal conduct authorisation' (CCA), this being 'an authorisation for criminal conduct in the course of, or otherwise in connection with, the conduct of a covert human intelligence source'.[107] CCAs are parasitic upon CHIS authorisations: they may only be granted alongside or subsequently to the granting of the latter, never existing alone.[108] Like CHIS authorisations, they can be made not only in respect of the agents of public bodies – those who act on their behalf but are not employed by them – but also the officers of those bodies, who are employed by them. The grounds for the making of a CCA are more limited than are those for making a CHIS authorisation, though are otherwise orthodox. The maker must believe that: it is necessary on one of the three standard grounds ('in the interests of national security', 'for the purpose of preventing or detecting crime or of preventing disorder' or 'in the interests of the economic well-being of the United Kingdom');[109] that the conduct authorised must be proportionate to what it is sought to achieve through it; and

106 *Privacy International* (CA) n 1 above at [129].
107 RIPA 2000, s 29B(2), as inserted by the CHIS(CC) Act 2021.
108 RIPA 2000, s 29B(3).
109 The inclusion of this third ground was the subject of comment by the House of Lords Constitution Committee, which noted that though economic well-being 'may justify a security response' it was 'concerned about the use of such a broad concept to authorise serious criminal conduct.'

that 'arrangements exist that satisfy such requirements as may be imposed by order made by the Secretary of State'.[110] Further safeguards apply where the person acting as a CHIS is to be a juvenile or a vulnerable adult.[111]

Where most investigatory powers – and certainly those deemed to be most intrusive – are now capable of being authorised only by the Secretary of State, a CCA can be granted by a figure who is not independent of the body in whose name the authorisation is granted, but is instead internal to it. Moreover, unlike in relation to the majority of powers created or reformed by the Investigatory Powers Act 2016, there is no 'double-lock' on these powers: that is, the making is not subject to the approval of the Investigatory Powers Commissioner and the Judicial Commissioners who work with him or her.[112] The combined effect of these points is to impliedly place CCAs (far) lower on the hierarchy of intrusiveness than are almost any of the state's more traditional investigatory powers, notwithstanding all of the ways in which a CCA would seem to be capable of licensing a greater intrusion than, say, the interception of one's communications. The latter issue in particular was therefore the subject of much of the debate within the legislative process. Though some pushed for the involvement of Judicial Commissioners in the form of prior authorisation,[113] with a Lords amendment which would have required a variant thereof being rejected by the Commons,[114] the government's unwillingness to provide for such involvement found support from former Independent Reviewers of Terrorism Legislation, who considered the authorisation of CHISs relevantly distinct from those processes in which prior authorisation by Judicial Commissioners is now standard.[115] Instead, debate crystallised around the idea that there should be (more or less) immediate notification of the giving of CCAs to the Investigatory Powers Commissioner, with an amendment to that effect

House of Lords Constitution Committee, *Covert Human Intelligence Sources (Criminal Conduct) Bill* HL Paper 174 (2020) [8].

110 RIPA 2000, s 29B(4) and (5).

111 RIPA 2000, s 29C and s 29D.

112 For discussion, see Scott, n 42 above, 450-453.

113 See Joint Committee on Human Rights (JCHR), *Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill* HL Paper 164, HC 847 (2019-2021) [94]-[100] and Constitution Committee, n 109 above, [15]-[17].

114 Covert Human Intelligence Sources (Criminal Conduct) Bill: Commons Reasons and Amendments, HL Bill 168, 58/1 (28 January 2021). The process provided for by the amendment would have permitted a Commissioner to determine, upon being notified of the granting of an authorisation, that the authorisation should not have been granted.

115 'The person who approves the interception by a public authority of telephone communications must assess the likely operational dividend against the likely intrusive effects – a task that judges are abundantly suited to perform, usually on the basis of a careful written assessment. Whether to use and how to task a CHIS requires decisions of a quite different nature based on immersion in the human complexities of fast-changing situations. Those decisions depend on close personal knowledge of a person's character, which will often be unreliable and volatile, and on assessments of the underworld group in which that person is embedded. The authorisation of criminality is simply one part of that complex human relationship.' HL Deb vol 808 cols 198-199 24 November 2020 (Lord Anderson of Ipswich). Lord Anderson was supported in this by – amongst others – another former IRTL, Lord Carlile of Berriew.

accepted at report stage.[116] The Act therefore provides that the grant or cancellation of a CCA must be notified to a Judicial Commissioner 'as soon as reasonably practicable and, in any event, before the end of the period of 7 days beginning with the day after that on which the authorisation' is granted or cancelled.[117] A notification must set out the grounds for believing that the requirements for the making of a CCA are met and specify the conduct which it authorises.[118] What is elsewhere a substantive and crucial oversight role is substituted here with a data-gathering exercise which is likely to be of benefit – if at all – only in assessing the operation of the CCA regime as a whole, rather than in excluding abuse in particular cases.

Turning to the effect of the authorisation resulting from this process, the 2021 Act provides that the conduct authorised by a CCA is 'any conduct that:

> (a) is comprised in any activities—
> (i) which involve criminal conduct in the course of, or otherwise in connection with, the conduct of a covert human intelligence source, and
> (ii) are specified or described in the authorisation;
> (b) consists in conduct by or in relation to the person who is so specified or described as the covert human intelligence source to whom the authorisation relates; and
> (c) is carried out for the purposes of, or in connection with, the investigation or operation so specified or described.[119]

A number of elements of this provision are of particular significance. One is that it follows from the language of 'in relation' that the legal immunity associated with the existence of a CCA can extend beyond the CHIS to encompass the actions of his or her handler that might otherwise be caught by, for example, the Aiders and Abettors Act.[120] Another is the language of 'specified or described'. In other circumstances, it has been argued that the statutory language of specification precludes the granting of authorisations which are 'thematic' in nature, rather than 'targeted' – which, that is, identify the type of acts authorised rather than specific such acts.[121] Though that argument, in the context of

116 Joint Committee on Human Rights, *Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019-21* HC 1127 (2021) 10.

117 RIPA 2000, s 32(3C)(3)(a).

118 RIPA 2000, s 32(4).

119 RIPA 2000, s 29B(8).

120 See JCHR, n 113 above, [54]-[58] and JCHR, n 116 above, 3: 'The public authority will retain close oversight of the activity carried out by a CHIS and will provide support and assistance to the CHIS. Most obviously, officials within the public authority will task the CHIS to perform the criminal activity. It is possible that, in itself, the tasking may attract criminal liability and it is therefore the intention of the Bill that this activity may be authorised and rendered lawful by a CCA.'

121 See the discussion of the distinction between general and thematic warrants in P.F. Scott, 'General warrants, thematic warrants, bulk warrants: property interference for national security purposes' (2017) 68 *Northern Ireland Legal Quarterly* 99.

equipment interference, was not accepted by the IPT,[122] the 2021 Act appears to unambiguously permit authorisations which are thematic in nature.

There are no substantive limits on the conduct which might be authorised contained on the face of the statute, but such limits may be prescribed by order.[123] This too was the source of much critical comment during the Bill's passage, where it was suggested that it opened the door to state authorisation of murder, torture, rape, or similarly serious offences. The absence of such limitations was explained by reference to the fact that their inclusion 'would place in the hands of criminals, terrorists and hostile states a means of identifying our agents and sources, creating a potential checklist for suspected CHIS to be tested against.'[124] If, that is, the legislation stated on its face that a CCA could not authorise murder, then the willingness of a person to carry out a murder could be used to prove that he or she was not a CHIS. The Joint Committee on Human Rights, noting that the equivalent Canadian legislation contains specific limitations on what conduct might be authorised, argued for the inclusion of a bar on the authorisation of 'serious criminal offences'.[125] A Lords amendment would have included in the Bill a list of criminal offences the commission of which could not have been authorised by a CCA,[126] but this was removed by the Commons when the Bill returned there.[127] Notably, in pushing back against the attempt to exclude certain offences from the purview of CCA, the government relied heavily upon the idea that the lack of explicit limitations was compensated for not only by the statutory requirements of necessity and proportionality, but also by the fact that those granting the authorisations remained subject to the Human Rights Act 1998[128] – a claim which, as we shall see below, is in considerable tension with its account of the Convention's application to these issues.

Also significant in the 2021 Act is that the range of authorities who might grant a CCA is very broad, not being limited to the SIAs or those similarly involved in the broad national security or crime-fighting enterprises. It includes, for example, 'Any of Her Majesty's forces', HMRC, the Competition and Mar-

122 *Privacy International* v *Secretary of State for Foreign and Commonwealth Affairs & Anor* [2016] UKIPTrib 14/85-CH. A judicial review of the decision has been allowed on exactly this basis: *Privacy International* v *Investigatory Powers Tribunal* [2021] EWHC 27 (Admin).

123 RIPA 2000, s 29B(10).

124 HC Deb vol 681 col 658 5 October 2020 (James Brokenshire MP). See also JCHR, n 116 above, 2, where the Government noted that one reason for which the approach of including specific limits, though employed elsewhere, could not be adopted in the United Kingdom was 'the unique challenges faced in Northern Ireland.'

125 JCHR, n 113 above, [53].

126 Amongst them causing – intentionally or recklessly – death or grievous bodily harm, offences relating to the obstruction or perversion of the course of justice, torture, and sexual offences: Lords Amendments to the Covert Human Intelligence Sources (Criminal Conduct) Bill, Bill 243, 58/1 (21 January 2021), amendment 2.

127 Covert Human Intelligence Sources (Criminal Conduct) Bill: Commons Reasons and Amendments, HL Bill 168, 58/1 (28 January 2021).

128 JCHR, n 116 above, 1-2: 'Our intelligence and law enforcement agencies work closely with our Five Eyes partners, however each country Second Special Report of Session 19-21 has its own legal systems, traditions, public bodies, and perhaps most crucially, threat picture. It is also important to note that the United Kingdom is the only Five Eyes country that is bound by the European Convention on Human Rights …'

kets Authority, the Environment Agency, the Financial Conduct Authority, the Food Standards Agency, and the Gambling Commission.[129] In some – though by no means all – of these cases one might be able to construct a hypothetical situation in which it is reasonable for the body in question to be capable of authorising the commission of criminal offences. More interesting from a constitutional point of view, however, is the position of those various authorities prior to the CHIS Act. None of those listed other than MI5 can have benefited from the particular (dubious) vires identified by the IPT and the Court of Appeal within the 1989 Act. This does not preclude, however, that other vires – perhaps similarly dubious, perhaps stronger – might have been identified in relation to some or all of them. So, for example, the British army appears to have used CHISs in Northern Ireland – via its Force Research Unit – and it is likely that those CHISs were authorised to commit crimes. If, as the IPT suggests, MI5 derived the power to authorise criminal conduct from the prerogative before 1989, then the army – whose prerogative status is much better-established than that of MI5 – must also have been able to, right up until today. Similarly, if law enforcement agencies have been required to identify a source of authority for an equivalent policy,[130] they may have been able to find it in the prerogative power to do what is necessary to keep the Queen's peace, discussed above.

What exactly the position was prior to the Act is however unlikely to be revealed in the near future: the Explanatory Notes to the Bill that became the 2021 Act state only that 'other public authorities rely on a combination of express, implied and common law powers.'[131] This is, with respect, inadequate, and so it is hardly surprising that the decision was made to legislate: though MI5's operation of the Guidelines survived appeal from the Tribunal's decision, equivalent policies operated by other bodies would have remained vulnerable, and so would be left relying upon the sort of 'legality through obscurity' – no one can challenge the lawfulness of acts they do not know are taking place – that has characterised much modern national security law. One danger, then, is that the sort of pseudo-authorisations which MI5 (at least) has been granting for several decades persists despite the enactment of the CHIS Act, which does nothing to prohibit them. The Government does not appear to have committed itself to ending the practice of granting such authorisations, either alongside or in lieu of CCAs under the Act, and so the rule of law concerns associated with the purported authorisation of criminal activity on weak or contestable legal bases may persist.

It is clear, however, that CCAs are of a different legal nature than what preceded them. We noted above MI5's insistence – and the courts' acceptance – that no formal immunity was conferred by an authorisation given under the

129 RIPA 2000, Sched 1, para A1.

130 IPCO has, for example, confirmed the authorisation of participation in criminality by CHIS authorised by law enforcement: 'The use of any CHIS participating in criminality, with the approval of an authorising officer, is also closely scrutinised during our inspections. This, again, is a tactic used very infrequently. It invariably occurs where a CHIS reports an offence that is already being planned or underway and use of the CHIS in a minor role allows the LEA to frustrate, prevent or detect the offenders.' IPCO, n 60 above, [12.16].

131 Covert Human Intelligence Sources (Criminal Conduct) Bill - Explanatory Notes, 58/1 (nd), [16].

Guidelines. The legal effect of a CCA is not in fact spelled out by the 2021 Act itself, but rather is made clear by the part of RIPA into which it is inserted. Section 27 of that Act – whose heading is, rather misleadingly, 'Lawful surveillance etc.' – provides that 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.' A person acting in accordance with a CCA will therefore be immune from both criminal and civil liability as regards the conduct authorised by it. He or she will benefit from a further extended civil immunity as regards conduct which 'is incidental to any conduct that is lawful by virtue of' the general rule, but which is 'not itself conduct an authorisation or warrant for which is capable of being granted under a relevant enactment [RIPA, the IPA, the ISA 1994, and the Police Act 1997] and might reasonably have been expected to have been sought in the case in question.'[132] Though from the perspective of political accountability a more explicit statement of the position would have been desirable, this would seem suitably clear for the purposes of what is often now called 'domestic law'. Oversight is, once more, by the Investigatory Powers Commissioner, to whom primary constitutional responsibility for the oversight of national security matters in the round now falls.[133] The relevant 'signposts and safeguards' are therefore – probably – in place.

This, however, does not close the question of ECHR compliance, but rather shifts it onto more familiar ground. Under the Act the state has the power to authorise the doing of acts by private parties which if it did them itself would undoubtedly constitute violations of certain provisions of the ECHR, including – for example – Articles 2 and 3. Rather than justify that directly, the human rights memorandum which accompanied the Bill upon its introduction into parliament suggested, loosely and with no reference to authority, that 'the context of much CHIS activity is such that the protective obligations of the State, or similar considerations, may be engaged.'[134] It suggested, for example, that 'it is to be expected that there would not be State responsibility under the Convention for conduct where the intention is to disrupt and prevent that conduct, or more serious conduct, rather than acquiesce in or otherwise give official approval for such conduct, and/or where the conduct would take place in any event.'[135]

A first point to note is that this claim cannot apply to the authorisation of crimes by those who, in the 'spycops' mould, are state officials. In relation to such persons, there can be no question of the state disclaiming responsibility and, indeed, no such argument seems to have run in *Wilson*.[136] The argument against state responsibility must therefore relate only to those CHISs who are

132 RIPA, s 27(2). On the issue of civil immunity see JCHR, n 113 above, [108]-[110].
133 The CHIS (CC) Act 2021, s 4 inserts new sections 229(4A) and 234(2)(ba) into the Investigatory Powers Act 2016.
134 Home Office, 'Covert Human Intelligence Sources (Criminal Conduct) Bill - European Convention on Human Rights Memorandum' (nd), [14].
135 *ibid*, [16].
136 n 56 above.

not state actors: 'agents' rather than 'officers', in the vocabulary of MI5. Two issues are muddled in the quoted claim. The first is the notion that an apparent violation of the Convention might be no such thing where it takes place in order to prevent a greater wrong. A (false) dichotomy is drawn between such a situation and one in which the state owns the conduct in question. But conduct can be in some sense a lesser evil while still the responsibility of the state. The absence of any authority for this 'lesser evil' principle gives, however, some sense of why the state might wish to set up such a dichotomy.

The second point is the claim that the conduct would have taken place anyway – a variant on the 'makes no difference' principle which has found its way into administrative law in recent years – and therefore the state is in some sense not responsible for its happening. The logic of this claim is deeply flawed. It may indeed be true that the act in question would have happened anyway, even in the absence of a CCA. What is not true, however, is that the CCA therefore makes no difference. Rather, it makes an infinite difference, depriving the act of any of the legal consequences – in private and criminal law – that would have followed from it. The government having later retreated – though to an ambiguous extent – from this hopeless position,[137] it is likely both that the compatibility of the grant of a CCA with the ECHR will be determined by the particular facts of the individual case and that in at least some cases the grant of an authorisation will not be compatible with the Convention notwithstanding that the requirements of the 2021 Act are complied with. The issue of CCAs may, in time, generate substantial case law. If it does not, it will likely be because of the limits of the new, transparent approach. That is, it remains to be seen if and how the existence of a CCA which covers certain (otherwise criminal) acts will be revealed. Will the victim of the acts in question be told that there exists a CCA or only that a decision has been taken that a prosecution is not in the public interest? If the latter, many of the advantages of the new approach may prove illusory. This is of particular significance in light of the Court of Appeal's holding on standing under the HRA, which – if followed – will prevent the compatibility of the new regime with the Convention being determined in general terms.

CONCLUSION

There are two dimensions to the process culminating – for now – in the enactment of the Covert Human Intelligence (Criminal Conduct) Act 2021: the immediate legal issue and the bigger national security picture of which that process forms the latest, but undoubtedly not the final, part. The judgment of the majority in the Investigatory Powers Tribunal opened by noting that the case concerned 'one of the most profound issues which can face a democratic soci-

137 See the comments of the Solicitor General at the final stage of the legislative process: 'I am happy to confirm that an authorisation of conduct that would breach the Human Rights Act would always be unlawful. All authorisations issued under the Bill must comply with the Human Rights Act or they will be unlawful. I can therefore confirm and place on record that the Human Rights Act binds all the authorised activity of undercover agents, alongside the state itself.' HC Deb vol 689 col 1823 24 February 2021.

ety governed by the rule of law'.[138] This is undoubtedly correct. The provision of absolute immunity from criminal liability not only for state actors but also for persons who are not state actors and who act in its interests only in an indirect fashion – at best – is of course a remarkable legal power. It is therefore striking how weak are the safeguards, both ex ante and ex post, on the use of the power, particularly when juxtaposed to those which apply to the powers introduced or reformed by the Investigatory Powers Act 2016. The legal issues addressed (so far) by the IPT and the Court of Appeal may yet prove to be of more than purely academic interest, for the provisions of the 1989 Act held to permit the policy which was the subject of the 'third direction' may ground other acts by MI5 for which no more robust legal basis can be identified.

The process culminating in the enactment of the CHIS Act repeats many of the features which are characteristic of modern national security law in the United Kingdom. The previous position was a mixture of legal rules of uncertain scope and non-binding policy which may not have required a legal basis, but for which one was nonetheless found. What replaces it is a legal framework which is clearer, but also – despite the government's insistence to the contrary – much broader than what preceded it. For every question answered a new one is asked, and it is likely that if the Act is not held to be incompatible with the ECHR it is only because it will operate in such secrecy that no suitable opportunity arises. How such secrecy will be maintained when the state has granted an absolute immunity to a CHIS (and which protects also those who 'handle' him or her) is as yet unclear, but we have not, it seems certain, heard the last of this matter. And yet, as has so often been the case, the various shortcomings and excesses of the new law can be discussed only because there is a statute, which states in (relatively) clear terms the powers which exist and their implications. It must, therefore, and notwithstanding its shortcomings, be judged an improvement on the status quo ante. Nevertheless, suspicion remains, and is well justified. How long might this situation have persisted had it not been for the dogged work of a small number of NGOs?[139] What other policies are carried out on the same sort of weak legal basis that the authorisation of criminal conduct until recently enjoyed?[140] Despite, and perhaps even because of, its attempts to assert the relative legal insignificance of each of these reforms, the government has long since forfeited the assumption of good faith, and such good faith is particularly valuable in this period of significant distrust towards the state and its deeds.

138 *Privacy International* (IPT) n 1 above at [1].

139 The four named claimants in the case are Privacy International, Reprieve, the Committee on the Administration of Justice, and the Pat Finucane Centre. The former was also the claimant in the case before the IPT in which the existence of the 'third direction' first emerged: *Privacy International Claimant* v *Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIPTrib/IPT/15/110/CH.

140 As was noted by the former Independent Reviewer of Terrorism Legislation Lord Anderson: 'There are claimant issues of great public concern which simply do not come to the attention of Parliament without the spur of litigation, and this is one of them.' HL Deb vol 809 col 1295 21 January 2021. Baroness Chakrabarti, however, observed (*ibid* col 1296) that, in light of the broader scope of the Bill as compared to the policy under challenge 'there may be a lesson here for those of us who at times have dabbled in test-case legislation: to be careful what we wish for when provoking the might of the state in this fashion.'