OUTER HOUSE, COURT OF SESSION

[2018] CSOH 108

P1032/16

OPINION OF LADY CARMICHAEL

In the Petition of

MATILDA GIFFORD

Petitioner

for

Judicial Review

Petitioner: O'Neill QC; Balfour + Manson LLP
First Respondent: Webster; Office of the Advocate General
Second Respondent: O'Neill (sol adv); Scottish Government Legal Directorate

21 November 2018

Introduction

[1] The petitioner avers that she is an environmental campaigner and activist associated with a group, Plane Stupid, which campaigns and protests against climate change and environmental degradation associated with air transport. Her petition challenges two decisions. One is a decision of the United Kingdom government refusing to amend the terms of reference of the Mitting inquiry into undercover policing ("the UCPI") so as to cover the activities of English police forces in Scotland and the activities of Scottish police forces. The second decision is a decision of the Scottish Government not to direct that there be a public inquiry in relation to these matters.

[2] The petitioner avers that she is directly affected by each of these decisions as she, and the group Plane Stupid with which she has been associated, were the victims of undercover policing in Scotland. Her petition relates that she was arrested in 2009 following a protest at Aberdeen Airport and that Plane Stupid was infiltrated by police after that protest, and that police officers from Strathclyde Police were deployed as undercover agents to spy on activist groups including Plane Stupid. She says that she does not yet know the full scale of this undercover police activity directed against her (amongst others) and separately against Plane Stupid and other activist groups, and that, therefore an independent inquiry into undercover policing is required.

[3] The petitioner's pleadings regarding her own involvement with undercover police operatives are lengthy, and I summarise them here.

- When she was on bail after her arrest in 2009 she was charged with a further offence of housebreaking with intent to steal, and was held in custody over a weekend. While she was held she was questioned about her membership of Plane Stupid and about how the group functioned.
- She returned to the police office afterwards to pick up keys which had not been returned to her when she was released, and when she did so she was invited in for a "chat" with two individuals who tried to obtain her assistance as an informant as to the activities of Plane Stupid.
- A further two meetings took place between the petitioner and these individuals, in which they made further attempts to obtain her assistance and hinted that she would be paid for information. The petitioner recorded the meetings. The recordings and transcripts were published by the *Guardian* newspaper.

- One of the individuals met the petitioner briefly in the street and told the petitioner that if she did not cooperate in providing information she might later find herself in prison.
- The petitioner made a subject access request in relation to her meetings with these individuals. This was successful to the extent that Strathclyde Police confirmed that the individuals were both officers in that force and on duty at the material times. The petitioner had also asked whether Strathclyde Police had any officers working with them who were employed by other agencies or police forces in the UK such as the security services.
- Mark Kennedy, then calling himself Mark Stone, an individual whose activities have become the subject of a great deal of publicity, and which are to be investigated by the UCPI, attended an activists' workshop held by the petitioner and organised by Plane Stupid in August 2010. The purpose of the workshop was "how to resist police infiltration".

[4] The petitioner makes various other averments about the activities of London-based undercover operatives in Scotland, and refers to findings in the HM Inspector of Constabulary("HMIC") publication *A Review of national police units which provide intelligence on criminality associated with protest* (February 2012) relating to the deployment of Mark Kennedy, including a finding that he made 14 visits to Scotland.

[5] The petition contains allegations about industrial blacklisting of construction workers. The averments were added on the last day for adjustment.

[6] The petitioner avers that the second decision was taken in September 2016, and that further reasons for it were given in February 2018. The second respondents maintain that the decision was taken in February 2018. Their position was, therefore, initially, that the

petition was premature. They accept, however, that the grounds of challenge in the petition and in relation to which permission was given are in essence the grounds which inform the challenge to the decision which they say was made in February 2018, that they did make a decision not to direct an inquiry, and that their decision is competently brought under review in this petition.

The decisions

[7] The Secretary of State for the Home Department established the UCPI under the Inquiries Act 2005 on 12 March 2015. In a written statement (HCWS381), she said:

> "The role of the inquiry will be to consider the deployment of police officers as covert human intelligence sources by the SDS [Special Demonstration Squad], the National Public Order Intelligence Unit and by any other police forces in England and Wales."

She announced the inquiry's terms of reference on 16 July 2016, which narrate its purpose in the following terms:

> "To inquire and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968 …"

The terms of reference include a section headed "Scope". The final sentence of that section reads:

> "The inquiry will not examine undercover or covert operations conducted by any body other than an English or Welsh police force."

[8] The petitioner has produced correspondence between the Cabinet Secretary for Justice, Michael Matheson MSP, and the Secretary of State for the Home Department, the Rt Hon Theresa May MP. That correspondence was provided to Dr Dònal O'Driscoll on 28 August 2017 following a Freedom of Information request by him on 31 July 2017.

[9] The Cabinet Secretary wrote to the Secretary of State on 10 December 2015. His letter has not been recovered, but it is apparent from the correspondence that follows that he had inquired whether the activity of undercover officers in Scotland would be considered by the inquiry. The Secretary of State replied on 11 January 2016, saying:

> "I am not minded to expand the terms of reference at this time, but I am happy to discuss further with you by telephone if you would find that helpful."

The correspondence records that the two spoke by telephone on 2 February 2016, and that the Secretary of State had undertaken to look at whether anything could be done to enable the undercover policing inquiry to consider specific incidents where Metropolitan Police officers had been involved in national operations in Scotland. On 9 March 2016 she wrote:

> "I have made further careful consideration of the issues in light of your concerns. It is clear that the inquiry is unable to take, or give any degree of consideration to, any evidence relating to activities in Scotland within the existing terms of reference. The only way to enable such evidence to be considered is through an amendment to the terms of reference. As you know, I am not minded to revisit the scope at this stage given the impact of doing so. I must therefore advise you that, regrettably, the inquiry will not be able to consider activities in Scotland."

The Cabinet Secretary for Justice wrote further on 22 March 2016 saying:

> "I note with some disappointment that you are not minded to revisit the scope of the inquiry at this stage.
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> … As you are aware there is a great deal of Scottish interest in understanding the full story of how the Metropolitan police may have operated in Scotland, and it is my understanding that a number of individuals are already providing Lord Pitchford's inquiry with information that relates to MPS activities in Scotland. I therefore remain of the view that the best course of action would be to extend the remit of the inquiry to cover MPS activities in Scotland."

On 12 April 2016 the Secretary of State wrote:

> "Although the Chairman of the inquiry has a wide discretion as to which documents he reviews, given the parameters of the inquiry established by the terms of reference he will not be able to make any conclusions or findings with regard to activities in Scotland even if such evidence is submitted. Any evidence which relates to activity outside England and Wales is beyond the inquiry's terms of reference."

The Cabinet Secretary responded on 25 May 2016:

> "[David Ford, former Justice Minister in Northern Ireland] proposes that the Inquiry be empowered to consider any relevant evidence of activities that have taken place in any UK jurisdiction, where it is considering a case in England and Wales and the operative has subsequently crossed a jurisdictional boundary."
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> Two further pieces of correspondence are dated 25 July 2016 and come from the Minister of State for Police and the Fire Service, the Rt Hon Brandon Lewis MP. The first is addressed to the Cabinet Secretary and encloses a letter addressed to Claire Sugden MLA, the then current Minister of Justice in Northern Ireland, and includes the following passages:
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> " It would not be possible to apply David Ford's proposal in Scotland for the same reasons as outlined in my letter to Claire Sugden. The Home Secretary does not intend to extend the scope of the inquiry beyond England and Wales, for reasons also set out in the enclosed letter and in the Home Secretary's previous correspondence with you."

The letter to Ms Sugden includes the following passages:

> "The current terms of reference for the undercover policing inquiry specify that it should "… inquire into and report on undercover police operations conducted by English and Welsh police forces in England and Wales …" This geographical limitation reflects both the police forces involved and the scope of the Home Office's responsibility for policing.
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> …
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> The inquiry as it stands is extensive and complex, with around 200 core participants. Amending the terms of reference at this stage would require further consultation and delay the progress of the inquiry.
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> In the interests of learning lessons from past failures and improving public confidence, it is important that the inquiry proceed swiftly and make recommendations as soon as possible. The Home Office is confident the inquiry can both gain an understanding of historical failings and make recommendations to ensure unacceptable practices are not repeated without a need to consider every instance of undercover policing, wherever it was undertaken … On balance therefore, the former Home Secretary has confirmed that she does not intend to amend the terms of reference."

[10] The Minister of State wrote to Neil Findlay MSP in terms similar, but not identical, to those in which he had written to Ms Sugden.

[11] Finally on 26 June 2018, the Rt Hon Nick Hurd MP, who had in the meantime become Minister of State for Policing and the Fire Service, wrote to the Cabinet Secretary, apparently in response to a letter of 7 February 2018 referring to the HMICS report on its strategic review of undercover policing in Scotland. It contains the following:

> "I have carefully considered the then Home Secretary's decision not to amend the UCPI Terms of Reference, taking into account relevant findings in HMICS' report and other factors. I have concluded that amending the UCPI Terms of Reference would have a disproportionate adverse impact on the Inquiry, with limited scope for improving overall outcomes.
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> The UCPI was established in 2015 in response to substantial evidence on the extent and serious nature of failings involving undercover officers deployed by English and Welsh police forces. The Inquiry needed to be framed in a way that allows it to get to the truth, and make recommendations across a wide range of issues as soon as possible. It needs to be able to do this, and in my view can do so, without being required to investigate every single instance of undercover activity in England and Wales or elsewhere within the United Kingdom.
>
> In this respect, I welcome and have regard to HMICS' view that it would be "reasonable to accept that any findings and recommendations from the UCPI would apply equally to similar concerns which might arise from the historic deployment of SOS and NPOIU officers in Scotland. Our findings should therefore be considered in conjunction with the outcomes of the UCPI in terms of continuous improvement and how undercover policing should be conducted in the future." It is in the best interests of all those affected by the work of the UCPI, that it delivers its important work as quickly as possible.
>
> Therefore we must allow the independent Inquiry to focus on delivering its challenging and complex programme of work. Since you wrote to the Home Office about the UCPI Terms of Reference in 2016, the Inquiry has continued to make progress. An amendment to the UCPI Terms of Reference would, through unnecessary complexity, introduce delay.
>
> The Inquiry, under its current Terms of Reference, can receive evidence from key witnesses in relation to the tasking by English and Welsh forces of undercover officers who were also deployed outside of England and Wales. It will then be for the Inquiry to decide whether such evidence should form part of the narrative in its final report; for example in relation to any systemic or institutional issues that it might identify. Accordingly, in all the circumstances it is reasonable and proportionate that the Inquiry is not required to distinctly examine or report on undercover activities undertaken in Scotland.

> I share your concern for anyone affected by undercover policing activity led by the SOS or NPOIU to be able to seek redress. You will be aware that the purpose of an Inquiry is to establish what has happened and ensure that lessons are learned.
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> Although it does not have the authority to determine criminal or civil liability, the Inquiry may decide to share evidence it receives with the relevant authorities for their consideration."

[12] The correspondence just referred to was not public, but some statements about it appeared in the press. The references in the press were collated for the purposes of these proceedings in an affidavit by Dr O'Driscoll. The chronology is relevant because the first respondent argues that the present petition is time-barred.

[13] On 22 September 2016, the Scottish Government announced a decision to direct a strategic review of undercover policing. That announcement came in the form of a Written Answer by the Cabinet Secretary to a question from Gil Paterson MSP:

> "Gil Paterson (Clydebank and Milngavie) (Scottish National Party): To ask the Scottish Government, following the decision of the UK Government not to allow the Pitchford inquiry into undercover policing in England and Wales to follow the operational evidence of undercover policing activity by Metropolitan Police units in Scotland, what action it plans to take.
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> Michael Matheson: The Scottish Government is extremely disappointed that the UK Government has indicated it does not support extending the terms of reference of the Pitchford Inquiry into Undercover Policing to include the activities of undercover Metropolitan Police units in Scotland. We continue to believe that a single coherent inquiry is the most effective approach to provide a comprehensive investigation into these activities.
>
> An extension of the terms of reference would have been the right thing to do, but in the light of the Home Office's decision I have today directed Her Majesty's Inspectorate of Constabulary in Scotland to undertake a strategic review of undercover policing in Scotland and to report on the extent and scale of undercover policing in Scotland conducted by Scottish policing since the Regulation of Investigatory Powers (Scotland) Act 2000 came into force; and the extent and scale of undercover police operations carried out in Scotland by the National Public Order Intelligence Unit ["NPOIU"] and the Special Demonstration Squad ["SDS"] in the same period."

[14] Her Majesty's Inspectorate of Constabulary in Scotland ("HMICS") reported in November 2016, although the report was not published until February 2018. On 7 February 2018 the Cabinet Secretary made a statement to the Scottish Parliament about the strategic review. His statement refers to, amongst other things, the current proceedings:

> "The accumulation of revelations of highly questionable and unethical behaviours eventually led to the establishment of the undercover policing inquiry. They all relate to English police forces that fall within the ultimate responsibility of the Home Secretary.
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> "Despite the evidence that the SDS and the NPOIU had been active in Scotland, the terms of reference for the undercover policing inquiry did not and do not extend to Scotland. I wrote on a number of occasions to Theresa May and Amber Rudd stating that I was disappointed that the terms of reference for the inquiry would not be extended to allow it to consider the evidence of those English and Welsh units' activity in Scotland. In her letter of January 2016, Theresa May wrote of the inquiry:
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> "They are interested in the whole story and are bound to encourage those coming forward to provide a complete picture when submitting their evidence."
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> Despite that response, neither Mrs May nor her successor saw fit to amend the terms of reference in order to allow that "whole story" to be considered.
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> The HMICS report confirms that undercover officers from the SDS and the NPOIU were active in Scotland. However, this activity was, as we understand it, not standalone and not self-contained within Scotland, nor did it have any particular Scottish focus. Nothing set it aside as something distinctive from the units' activities that were being considered by the undercover policing inquiry.
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> Those undercover units' officers required to be authorised. The HMICS review confirms that, with the exception of a number of authorisations made around the G8, they were authorised under the Regulation of Investigatory Powers Act 2000. That is the appropriate statute for the authorisation of activity by law enforcement bodies in England and Wales. The review comments that a number of G8 authorisations were dual authorised under RIPA and the Regulation of Investigatory Powers (Scotland) Act 2000. My understanding is that that was seen as a belt-and-braces approach and that the RIPSA authorisations, which were made by Tayside Police, were effectively a subset of the wider RIPA authorisations. Those authorisations would have been subject to oversight at the time by the Office of Surveillance Commissioners.
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> RIPA allows for authorised activity to cross the border north into Scotland, but it does so with one important caveat: it can do so only as long as not all the activity authorised takes place in Scotland. In simple terms, the activity of the English and

Welsh undercover officers in Scotland was authorised as part of an operation that began, or mainly took place, south of the border.

In 2005, SDS and NPOIU officers were deployed in support of the Scottish police operation for the G8 summit at Gleneagles. The HMICS review states:

"The SDS, the NPOIU and other deployments of undercover officers at the G8 Summit were undertaken with the full knowledge, co-operation and authorisation of Tayside Police. Outwith the policing of the G8 summit, the undercover deployments by the SDS and the NPOIU to Scotland were the responsibility of the SDS and NPOIU."

The report makes clear that, outwith the G8, Scottish police forces were unsighted on SDS and NPOIU operations in Scotland.

I welcome the HMICS recommendation that Police Scotland should, in partnership with the relevant United Kingdom bodies, establish a formal process for the reciprocal notification of cross-border undercover operations.

Members in this chamber and others have called on the Scottish Government to establish a Scottish inquiry. Both the Scottish and UK Governments are currently subject to a judicial review relating to the undercover policing inquiry. The case is currently in court, so I cannot go into detail about it, but the basis of it is a matter of public record. It challenges the UK Government on its decision not to extend the undercover policing inquiry to cover Scotland and it challenges the Scottish Government because we have not held an inquiry under the Inquiries Act 2005 with similar terms of reference in Scotland.

The HMICS strategic review was always going to be instrumental in informing my decision on how to respond to calls for a separate Scottish inquiry. We have seen no evidence of the sort of behaviour by Scottish police forces that led to the establishment of the undercover policing inquiry.

The HMICS review provides reassurance to the public and to the Parliament around the extent and scale of the use of undercover police officers since 2000, identifies room for improvement and makes a number of recommendations that Police Scotland has committed to implement in full.

I have considered carefully whether I should establish a separate Scottish inquiry under the Inquiries Act 2005. Given all the circumstances, I am not satisfied that establishing a separate inquiry is necessary or in the public interest.

There is some legitimate public concern around undercover policing activity in Scotland and I have had regard to that concern in reaching a decision on this matter. However, on balance, I consider that establishing a Scottish inquiry, under the 2005 act, into undercover policing is not necessary or justified. The factors that have led

me to that view include the lack of evidence of any systemic failings within undercover policing in Scotland.

In light of the limited scale of the activities of SDS and NPOIU police officers in Scotland, I believe that setting up a further inquiry would not be a proportionate response. I believe that such an inquiry would inevitably create a measure of duplication with the undercover policing inquiry by involving many of the same core participants and law enforcement officers, and that it would have the potential to overlap with that inquiry in its conclusions and remedies. It could, because of the scale and duration of the undercover policing inquiry, be subject to potential delay in obtaining Metropolitan Police service participation and documentation, and it would be disproportionate in terms of cost.

Responsibility for the actions of English and Welsh police units sits with the UK Government, London's deputy mayor for policing and crime, and the relevant chief officers.

The Scottish Government's position remains that the clearest and most effective way of addressing concerns about what might have happened in Scotland as a result of actions of English and Welsh police officers is for the terms of reference of the undercover policing inquiry to be amended to allow it to look at the activity of English and Welsh police operations that took place across Great Britain.

Accordingly, I have today written again to the Home Secretary to ask her to reconsider the terms of reference. I have provided her with a copy of HMICS's strategic review.

I assure the Parliament that any recommendations that arise from the undercover policing inquiry will be considered and, where appropriate and necessary, implemented in Scotland.

I have every sympathy for individuals if they have suffered due to the actions of undercover police officers who have behaved in ways that are entirely unethical and unacceptable. However, on the basis of the evidence that we have, I am clear that such behaviour by police officers in English and Welsh units is properly a matter for the Home Secretary and that the most effective way for the undercover policing inquiry to see the "whole story" and "complete picture" to which the current Prime Minister referred is for the inquiry to be allowed to consider all the relevant evidence."

[15] In response to questions from John Finnie MSP and Liam McArthur MSP regarding the decision not to order a public inquiry, the cabinet secretary indicated that if further information were to come to light he would consider it.

> "John Finnie will be aware that the report recognises that, as things stand, some of the information is provisional and is based on millions of documents that are being indexed and analysed as part of the preparations for the undercover policing inquiry. That is why I said that, if new evidence or information comes to light in due course on undercover policing operations involving police officers in Scotland, I will give due regard to that. However, as things stand, based on the information that HMICS has been able to get access to and which is available to it as part of the documentation process, I do not believe that that evidence is sufficient to justify establishing a public inquiry at this stage.
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> …
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> In relation to Liam McArthur's first point, on the undercover policing inquiry, I have been very clear as to the rationale behind and my reasoning for arriving at that decision. I recognise that some members in the chamber do not agree with it, but I reached it on the basis of the evidence in the HMICS report. I have also said that, should new information become available—particularly during the undercover policing inquiry, if that is not extended to include issues relating to English and Welsh units operating in Scotland—I will give full consideration to it in due course."

Summary of arguments

[16] The petitioner submitted:

- that the decisions were incompatible with certain of her Convention rights;
- that the decisions were unlawful because the reasons given for each did not satisfy the test in *Wordie* v *Secretary of State for Scotland* 1984 SLT 345; and
- that the decisions were irrational, and, separately, disproportionate, and therefore unlawful.

[17] The respondents resisted each of those challenges on its merits. The first respondent resisted the petition also on the basis that it was time-barred so far as directed at the decision by the United Kingdom Government. The plea is in general terms, and there are averments directed towards demonstrating that the petition was time-barred in its entirety. The Statement of Issues and the Note of Argument, however, refer to time-bar "at least *quoad* the challenge based on purported failure to give effect to Convention rights".

Procedural matters

[18] A number of developments in the pleadings took place, and a number of additional documents were lodged, either shortly before, or some time after the discharge of the procedural hearing. The procedural hearing, which was to have taken place on 16 May 2018, was discharged on the basis of representations that all parties were ready for the substantive hearing.

[19] On the last day for adjustment, the petitioner added averments about construction industry blacklisting in Scotland. A link to environmental activism can be discerned from the content of an affidavit dated 9 May 2018 from Dr Nick McKerrell, who depones that he was involved in various forms of political activism in the late 1980s and early 1990s, and that he was also involved in the campaign against the extension of the M77 motorway. He later discovered, following inquiry with the Information Commissioner's Office, that, despite never having been a construction worker, he was on the "green" (ie environmental) part of a construction industry blacklist, and eventually received compensation. A further affidavit relating to the construction industry blacklist, by Dave Smith, is dated 16 May 2018. I do not suggest that the petitioner did not have standing – at least in relation to the common law challenges made in the petition – to challenge the exclusion of police activity in Scotland or by Scottish forces and related to these matters from the scope of the UCPI. The second respondents referred to the breadth of matters covered in the petition, and queried whether the petitioner was necessarily a victim, for Convention rights purposes, in relation to all of them. They did not, however, attack any particular aspect of her case on that basis. I observe that standing is a matter which is to be considered at permission stage, and that in

some cases, if the matters covered by the petition are significantly expanded, separate and later consideration of standing in relation to the new matters will be required.

[20] More significantly, however, the petitioner lodged a report by Dr Eveline Lubbers dated 15 June 2018. It is 60 pages long and largely deals with matters which are not the subject of averment. It includes interviews with women who are said to have formed intimate relationships with police officers. At the start of the hearing I asked counsel to clarify what use he sought to make of it. He explained that the report indicated that there was more to the issue as to the necessary scope of any inquiry than was disclosed by the HMICS review. Dr Lubbers's report set out "what more there might be, and why". The extent to which any of its content was material which was before either the respondents and which ought to have been taken into account in any decision-making was not the subject of submission by the petitioner. Ms O'Neill submitted that the report was irrelevant, as it was not before the second respondents when they made their decision. She also submitted that it appeared that Dr Lubbers might be an activist rather than an independent expert.

[21] While it may be that Dr Lubbers's report identifies particular matters pertaining to activities in Scotland which will not be the subject of a public inquiry, that is not in my view relevant in these proceedings, in the absence of submissions orally or in writing linking its content to one or more of the grounds of challenge in the petition. It is wide ranging, and it is impossible to tell how much if any of its content the petitioner contends reflects information that should have informed either of the challenged decisions. I have, therefore, not taken it into account.

[22] Dr Lubbers's report was received into process on an unopposed motion. I appreciate that decisions not to oppose motions of this sort may be made to avoid unnecessary expenditure of public funds, particularly where submissions can be made at a

substantive hearing to the effect that a late production is simply irrelevant. That said, however, one purpose of the timetable issued when permission is granted is to ensure that the court has material available before the hearing that focuses the issues and enables the judge to identify what to read in preparation for the hearing. That purpose can be undermined when a report like the one in this case is lodged after the discharged procedural hearing, and where there is nothing in the pleadings or the notes or argument to indicate what is to be made of it.

Convention rights

[23] The petitioner argued that the decisions of the respondents were unlawful interferences with her Convention rights. Mr O'Neill referred to *CF* v *Secretary of State for the Home Department* [2014] 1 WLR 4240; *El-Masri* v *Former Republic of Macedonia* (2010) 57 EHRR 25; *Al-Nashiri* v *Poland* (2015) 60 EHRR 16; *R(Mousa)* v *Secretary of State for Defence* [2012] HRLR 210; *Szulc* v *Poland* (no 43932/08, 13 November 2012); *Magyar Helsinki Bizottság* v *Hungary* (no 18030/11, 8 November 2016); *Király and Dömötör* v *Hungary* (no 10851/13, 17 January 2017); *Guberina* v *Croatia* (2018) 66 EHRR 524; and *Savez Crkava "Riječ Života"* v *Croatia* (2012) 54 EHRR 1245.

[24] Mr O'Neill submitted that the decisions were incompatible with the "right to the truth" which the Strasbourg court had recognised. They were incompatible with the petitioner's rights under Article 8 and Article 10. They were incompatible also with her right not to be discriminated against in the enjoyment and protection of other Convention rights; Article 14 read with Articles 8, 9, 10 and 11. Although the petition raised challenges under Articles 9, 10 and 11 without reference to Article 14, these were not advanced in the note of arguments or in oral submission.

"The right to the truth"

[25] In connection with this submission, Mr O'Neill referred particular to *CF*, *Al Nashiri, Mousa*, and to *Study on the right to the truth*, a report to the Office of the United Nations High Commissioner for Human Rights (E/CN.4/2006/91).

[26] The respondents submitted that there was no freestanding Convention right to the truth. While the procedural aspects of Articles 2 and 3 give rise to obligations to investigate, those articles were not in issue in the present case. Even in cases where Article 2 or 3 was engaged, that did not necessarily entail a statutory public inquiry. The second respondents cited *R(L) v Justice Secretary* [2009] 1 AC 588, a case relating to a near-suicide in custody, which had resulted in serious and permanent injury, particularly passages at paragraphs 31, 63, 67, 77, and 106-108. In *R(Litvinenko) v Secretary of State for the Home Department* [2014] HRLR 131, also cited by the second respondents, Article 2 was engaged. A refusal to set up a public inquiry was not held to be incompatible with Article 2, but irrational on other grounds. Even then, and where there were strong grounds for setting up such an inquiry, doing so was not the only rational option.

[27] The UN report cited by the petitioner provides a useful survey of the approaches taken under various international instruments to a right to the truth. The concept of a right to the truth is important in combating impunity where atrocities have been committed: see, for example Dermot Groome, *The Right to Truth in the Fight against Impunity,* 29 Berkeley J Int'l Law 175 (2011). It is important particularly in cases of forced disappearance and where an individual has died in state custody. Some human rights instruments explicitly recognise a right to the truth. The United Nations Set of principles for the protection and

promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), for example, does so. Principles 2 and 4 are in the following terms:

> "PRINCIPLE 2. THE INALIENABLE RIGHT TO THE TRUTH
> Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.
>
> PRINCIPLE 4. THE VICTIMS' RIGHT TO KNOW
> Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."

[28] The ECHR does not expressly recognise a right to the truth. The Court has, however, recognised the rights to an effective investigation and to an effective remedy in relation to Articles 2 and 3. The expression "right to the truth" was used by the Court in *Al Nashiri*, at paragraph 489:

> "489. Furthermore, where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.
>
> An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."

The context was one in which the applicants were both persons thought by the United States authorities to be terrorists. The CIA operated a special interrogation and detention program designed for suspected terrorists at secret detention facilities outside the United States in cooperation with the governments of the countries concerned known as the High-Value Detainees Program (the HVD Program). Both applicants were detained in Poland.

Various interrogation techniques were authorised in relation to HVDs, namely shaving, stripping, diapering, hooding, isolation, white noise or loud music, continuous light or darkness, uncomfortably cool environment, restricted diet, shackling, water dousing and sleep deprivation. In addition "enhanced interrogation techniques" were authorised, namely the attention grasp, the walling technique, facial hold, facial or insult slap, cramped confinement, the use of insects, wall standing, stress positions, sleep deprivation and "water boarding". The Court found a breach of the substantive aspect of Article 3, on the basis of Poland's connivance in the programme, and its permission of rendition in the knowledge that there was a real risk of treatment contrary to Article 3. It also found a breach of the procedural obligations associated with Article 3, stating, at paragraphs 491 and 492:

> "491. Moreover, the Court considers that the importance and the gravity of the issues involved require particularly intense public scrutiny of the investigation in the present case. First, those issues include the allegations of serious human rights violations, encompassing torture and occurring in the framework of a secret large-scale programme of capture, rendition, secret detention and interrogation of terrorist suspects operated by the CIA owing to cooperation with the intelligence services of Poland and many other countries. No less importantly, it involves the questions of the legality and the legitimacy of both of decisions taken by Polish State officials and of activities in which the national security and intelligence services were engaged in the implementation of the CIA HVD Program on Poland's territory.
>
> Securing proper accountability of those responsible for the alleged, unlawful action is instrumental in maintaining confidence in the Polish State institutions' adherence to the rule of law and the Polish public has a legitimate interest in being informed of the investigation and its results. It therefore falls to the national authorities to ensure that, without unacceptably compromising national security, a sufficient degree of public scrutiny is maintained in the present case.
>
> 492. The instant case, apart from raising an issue as to an effective investigation of alleged ill-treatment contrary to art.3 of the Convention, also points out in this context to a more general problem of democratic oversight of intelligence services. 633 The protection of human rights guaranteed by the Convention, especially in arts 2 and 3 , requires not only an effective investigation of alleged human rights abuses but also appropriate safeguards—both in law and in practice—against intelligence services violating Convention rights, notably in the pursuit of their covert operations. The circumstances of the instant case may raise concerns as to whether the Polish legal order fulfils this requirement."

[29] *CF* relates to challenges made to control orders on the grounds of abuse of process, and the duties on the Secretary of State Secretary to disclose to the controlee the gist his case, including both his allegations against the controlee and his case in response to the abuse of process allegation. It concerned also the duty on the court to provide reasons for a decision, notwithstanding the availability of a statutory closed material procedure. The petitioner relied on the following passage, at paragraph 19:

> "I do not consider *El-Masri* to be a new panacea for the uninformed. It no doubt has its limits. However, the express inclusion of the criterion of maintaining public confidence in adherence to the rule of law is apt. It reflects what Lord Phillips said in the *AF (No 3)* case [2010] 2 AC 269, para 63:
>
> "Indeed, if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust."

[30] The context in which *El-Masri* v *Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25 was discussed in *CF* is set out by Maurice Kay LJ at paragraph 13:

> "13. After this case left the Administrative Court, the European Court of Human Rights decided *El-Masri v Former Yugoslav Republic of Macedonia* which concerned an allegation of "extraordinary rendition". It is relied on by MAM and CF in the present case because it addresses not only the interest of the affected person but also the public interest. The court said, at paras 191 and 192:
>
> "191. …the court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of 'extraordinary rendition' attracted worldwide attention …
>
> "192. …However, while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. As the Council of Europe stated in its guidelines of 30 March

> 2011 on eradicating impunity for serious human rights violations, 'impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations and to uphold the rule of law and public trust in the justice system'."

[31] *El Masri* concerned the detention of the claimant at the Serbian/Macedonian border, his torture at Skopje airport, and his rendition to a CIA-run facility in Afghanistan. The passage just quoted relates to the lack of an effective investigation in breach of the procedural aspect of Article 3.

[32] *Mousa* was an application for judicial review of the Secretary of State's refusal to order a public inquiry into allegations that persons detained in Iraq between 2003 and 2008 were ill-treated by British Armed Forces personnel contrary to Article 3. The Secretary of State had set up a form of inquiry under the auspices of the Iraq Historic Allegations Team. The Court of Appeal found that that team lacked the requisite independence, because it included members of the Provost Branch, who would be responsible for investigating allegations of abuse said to have occurred at a time when Provost Branch members were involved in matters surrounding the detention and internment of suspected persons in Iraq.

[33] There is no "right to the truth" in the Convention other than insofar as one arises from the procedural obligations associated with particular articles of the Convention. One of the third party interveners in *El- Masri*, the United Nations High Commissioner for Human Rights, contended specifically for an autonomous right to the truth, while also submitting that it was embodied in Article 13 and "woven in" to Articles 2, 3, and 5: *El-Masri*, paragraph 175. The Grand Chamber did not adopt the suggestion that there was an autonomous right to the truth, but proceeded to consider whether there had been violations of particular articles of the Convention.

[34] In *Al Nashiri*, *El-Masri* and *Mousa* Article 3 was engaged. The petitioner does not claim in her application for judicial review that her rights under Article 2 or 3 have been the

subject of interference by virtue of the activities of undercover police officers, or that the decisions of the respondents are incompatible with either of those Articles. The Strasbourg Court recognises that insofar as there is a "right to the truth" in consequence of the procedural aspects of articles of the Convention, it is not exclusive to the victim of the violation, in the sense that, to combat impunity, and to maintain public confidence, there must be public scrutiny. It does not, however, extend the status of victim to any member of the public who might be aggrieved by the want of a proper inquiry. The victims remain the persons who have been subjected to ill treatment, and in some cases their family members.

[35] None of the cases cited was authority for the proposition that a failure to hold a public inquiry into the activities of English and Welsh forces in Scotland and of Scottish forces in the circumstances of the present case was an unlawful interference with the petitioner's Convention rights, and this chapter of submission does not advance her case.

Article 8 – access to information

[36] The petitioner relied on *Szulc* v *Poland*, which concerns an individual who had been approached by the Polish security services in the 1970s. They had tried to recruit her as a collaborator, but she had refused. She sought access to the documents of the communist security services. She made many attempts to get access to them, over a ten year period, before finally being granted full access to her file. In the course of that period her name had appeared on a list, published on the internet, of alleged collaborators. Article 8 applied because the storing of information relating to an individual's private life in a secret register and the release of that information comes within the scope of Article 8(1): paragraph 81. The court found that Poland had not fulfilled its positive obligation to provide an effective

and accessible procedure enabling her to have access to all relevant information that would allow her to contest her classification by the secret services as their secret informant.

[37] Regarding the positive obligation in question, the Court said:

> "84. The Court recalls that, in addition to the primarily negative undertakings in art.8 of the Convention, there may be positive obligations inherent in effective respect for private life. In determining whether or not such a positive obligation exists, it will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual concerned, the aims in the second paragraph of art 8 being of a certain relevance.
>
> 85. With regard to access to personal files held by the public authorities, with the exception of information related to national security considerations, the Court has recognised a vital interest, protected by the Convention, of persons wishing to receive information necessary to know and to understand their childhood and early development, or to trace their origins, in particular the identity of one's natural parents or information concerning health risks to which interested persons were exposed.
>
> 86. In those contexts, the Court has considered that a positive obligation arose for the respondent State to provide an "effective and accessible procedure" enabling the applicant to have access to "all relevant and appropriate information".

[38] I accept that Article 8 gives rise to certain positive obligations. The petitioner's case, however, is not that she should be given access to data held regarding her, but that the respondents' refusal to order a public inquiry into undercover policing in Scotland is an unlawful interference with her Article 8 rights. I find it impossible to derive support for that case from the reasoning in *Szulc*.

Article 8 – effective investigation

[39] The petitioner relied on *Király and Dömötör*, a case in which the state's failure to investigate and prosecute criminal acts was characterised as a breach of a positive obligation under Article 8 to protect the psychological integrity of the applicants. The applicants complained of failures on the part of the state in relation to a demonstration by right-wing

politicians and activists. A right wing politician, GF, announced that a demonstration would take place in Devecser under the slogan "Live and let live". It followed shortly after riots between Roma and non-Roma families in the area. The police had been informed, by official sources, that in addition to members of the politician's party, nine far-right groups known for militant behaviour and anti-Roma racism would be present at the demonstration. The websites of the far-right groups contained statements that the demonstration was aimed "against Roma criminality" and similar expressions. At the demonstration GF invoked crimes committed by the Roma community, and demanded the reintroduction of the death penalty. He said that the Roma were not "normal". The judgment (paragraphs 9-10) relates a number of inflammatory and racist statements about Roma people by leaders of various of the groups involved, including claims that the Roma wanted to exterminate Hungarians. One declared that the only way to deal with the Roma was to apply force to "stamp out this phenomenon that needs to be purged".

[40] After the speeches the demonstrators marched through an area where many Roma people lived, chanting, among other things, "Roma, you will die", and "We will burn your house down and you will die inside". Concrete, stones, and plastic bottles were thrown.

[41] The police were present but were said by the applicants to have remained passive. The conduct of the police was criticised by the Commissioner for Fundamental Rights. The applicants complained to the police about their failure to take measures against the demonstrators, thereby endangering their life and limb and human dignity. The police dismissed the complaint, on the basis that the demonstration had remained peaceful, and no conflict had broken out, other than by stones being thrown. Only a small group of demonstrators had been armed with sticks and whips, and measures to detain suspects would have aggravated the situation and strengthened the hostility of the demonstrators

towards the police. Appeals against the dismissal of the complaints were unsuccessful, as was judicial review of those decisions. Criminal investigations in respect of the content of the speeches were discontinued. One person was eventually convicted of throwing stones.

[42] The passage on which the petitioner founded was at paragraphs 61-62. Paragraph 60 of the judgment provides further context:

> "60. The Court reiterates that while the essential object of Article 8 of the Convention is to protect the individual against arbitrary action by public authorities, there may in addition be positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations between individuals (see *Söderman,* cited above, § 78). To that end, States are required to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see *Sandra Janković v. Croatia*, no. 38478/05, § 45, 5 March 2009, and *A v. Croatia*, no. 55164/08, § 60, 14 October 2010).
>
> 61. The State's positive obligation under Article 8 to safeguard the individual's physical integrity may also extend to questions relating to the effectiveness of the criminal investigation (see *Osman v. the United Kingdom*, 28 October 1998, § 128, *Reports* 1998-VIII, and *C.A.S. and C.S. v. Romania*, no. 26692/05, § 72, 20 March 2012) and to the possibility of obtaining reparation and redress (see, *mutatis mutandis, A, B and C v. Latvia*, no. 30808/11, § 149, 31 March 2016), although there is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable (see, for example, *Brecknell v. the United Kingdom*, no. 32457/04, § 64, 27 November 2007). More generally, however, in respect of less serious acts between individuals which may violate psychological integrity, the obligation of the State under Article 8 to maintain and apply in practice an adequate legal framework affording protection does not always require that an efficient criminal-law provision covering the specific act be in place. The legal framework could also consist of civil-law remedies capable of affording sufficient protection (see *Söderman*, cited above, § 85).
>
> 62. The Court also reiterates that its task is not to substitute itself for the competent domestic authorities in determining the most appropriate methods for protecting individuals from attacks on their personal integrity, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. The Court will therefore examine whether Hungary, in handling the applicants' case, has been in breach of its positive obligation under Article 8 of the Convention (see *mutatis mutandis, Sandra Janković*, cited above, § 46).

[43] The Court found that Hungary had indeed breached its positive obligations under Article 8. As in *RB*, the finding was in relation to decisions taken after the demonstration, rather than in relation to the decision not to disperse it or to take particular steps during it. The relevant passages are paragraphs 71-80:

> "71. As regards the ensuing criminal proceedings against the speakers and the participants of the demonstration, the Court notes that the criminal investigation into the crime of incitement against a group was discontinued because the domestic authorities found that the speakers' statements during the march were not covered by the said offence (see paragraph 29 above). It also notes that an investigation was opened into the criminal offence of violence against a member of a group, in the course of which four demonstrators were found to have thrown stones at a house inhabited by a Roma family. The ensuing criminal proceedings led to the conviction of one of the demonstrators, the other three remaining unidentifiable (see paragraph 30 above).
>
> 72. The Court has already dealt with cases of harassment motivated by racism which involved no physical violence, but rather verbal assault and physical threats. It found that the manner in which the criminal-law mechanisms had been implemented was a relevant factor for its assessment of whether the protection of the applicant's rights had been defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention (see *R.B. v. Hungary*, cited above, §§ 84-85).
>
> 73. In considering the present case, the Court will draw inspiration from the principles formulated in its previous case-law under Article 10 of the Convention concerning statements alleged to have stirred up violence, hatred and intolerance. The key factors in the Court's assessment were whether the statements had been made against a tense political or social background (see *Zana v. Turkey*, 25 November 1997, §§ 57-60, Reports 1997-VII; *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, §§ 52 and 62, ECHR 1999-IV; *Soulas and Others v. France*, no. 15948/03, § 33, 10 July 2008, and *Féret v. Belgium*, no. 15615/07, §§ 66 and 76, 16 July 2009), whether the statements, fairly construed and seen in their immediate or wider context, could have been seen as a direct or indirect call for violence or as a justification for violence, hatred or intolerance (see, among other authorities, *Özgür Gündem v. Turkey*, no. 23144/93, § 64, ECHR 2000-III and *Fáber v. Hungary*, no. 40721/08, §§ 52 and 56-58), and the manner in which the statements had been made, and their capacity - direct or indirect - to lead to harmful consequences (see *Karataş v. Turkey* ([GC], no. 23168/94, §§ 51-52, ECHR 1999-IV).
>
> 74. In all of those cases, it was the interplay between the various factors, rather than any one of them taken in isolation, that determined the outcome of the case. The Court's approach to that type of case can thus be described as highly context-specific (see *Perinçek*, cited above, § 208).

75. Aware of its subsidiary role, the Court is mindful that it is prevented from substituting its own assessment of the facts for that of the national authorities. Nonetheless, based on the above, it cannot but consider that the domestic authorities should have paid particular attention to the specific context in which the impugned statements were uttered.

76. In particular, the rally in general quite clearly targeted the Roma minority, which was supposedly responsible for "Gypsy criminality", with the intention of intimidating this vulnerable group. Besides the adherents of a right-wing political party, it was attended by members of nine far-right groups, known for their militant behaviour and acting as a paramilitary group, dressed in uniforms, marching in formation and obeying commands. The speakers called on participants to "fight back" and "sweep out the rubbish from the country". Their statements referred to an ongoing ethnic conflict and the use of all necessary means of self-protection. It was following the speeches that the demonstrators marched down Vásárhelyi Street between the houses inhabited by the Roma, uttered obscenities against the inhabitants and engaged in acts of violence. Throughout the event, the police placed themselves between the demonstrators and the Roma residents to ensure the protection of the latter, while the participants themselves threatened the Roma that they would come back once the police had gone and demanded the police not to protect the Roma minority.

77. Moreover, the event was organised in a period when marches involving large groups and targeting the Roma minority had taken place on a scale that could qualify as "large-scale, coordinated intimidation" (see *Vona*, cited above, § 69).

78. For the Court, these were relevant factors that should have been taken into consideration when assessing the nature of the speeches. This is all the more so that according to the domestic courts' case-law, racist statements together with the context in which they were expressed could constitute a clear and imminent risk of violence and violation of the rights of others (see paragraph 36 above). However, it appears that the investigating authorities paid no heed to those elements when concluding that the statements had been hateful and abusive but that they had not incited violence. Thus, the domestic authorities inexplicably narrowed down the scope of their investigations.

79. As regards the criminal investigations into the offence of violence against a member of a group, the Court recalls that for an "investigation to be regarded as 'effective', it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means" (see, albeit in the context of Article 3, *Identoba and Others v. Georgia*, no. 73235/12, § 66, 12 May 2015). In the present case, these proceedings lasted almost three years; and their scope was statutorily bound to be limited to the actual acts of violence. The authorities eventually identified one incident liable to prosecution; the perpetrator was prosecuted for, and charged with, violence against a member of a group and convicted of that offence. Although the

> police had had sufficient time to prepare themselves for the event and should have been able to interrogate numerous persons after the incident (see paragraph 17 above), only five demonstrators were questioned; and three of the alleged perpetrators could not be identified. For the lack of any other elements possibly falling within the hypothesis of the offence in question, the police were not in a position to extend the scope of the prosecution to any other protagonists. In these circumstances, the Court finds that this course of action in itself was not "capable of leading to the establishment of the facts of the case" and did not constitute a sufficient response to the true and complex nature of the situation complained of.
>
> 80. The cumulative effect of those shortcomings in the investigations, especially the lack of a comprehensive law enforcement approach into the events, was that an openly racist demonstration, with sporadic acts of violence (see paragraphs 11-12 and 25-26 above) remained virtually without legal consequences and the applicants were not provided with the required protection of their right to psychological integrity. They could not benefit of the implementation of a legal framework affording effective protection against an openly anti-Roma demonstration, the aim of which was no less than the organised intimidation of the Roma community, including the applicants, by means of a paramilitary parade, verbal threats and speeches advocating a policy of racial segregation. The Court is concerned that the general public might have perceived such practice as legitimisation and/or tolerance of such events by the State.

[44] The case is in a line of authority that includes *Osman* v *United Kingdom* [2000] 29 EHRR 245; *X and Y* v *Netherlands* 26 March 1985, § 27, Series A no 91 and *Janković* v *Croatia* no 38478/05, 5 March 2009. Violence or harassment falling short of the severity required for Article 3 may require investigation in order to comply with the positive obligation associated with Article 8. Incidents which are said to be motivated by race require particularly careful scrutiny. In *RB* v *Hungary*, no 64602/12, 12 April 2016, which is cited on a number of occasions in *Király and Dömötör*, the Court found that there had been a breach of Article 8 in respect of a failure to investigate an incident of racist verbal abuse against the applicant, but not in respect of a failure to disperse a rally. The Court in *RB* explained at paragraphs 78, 83, 84 and 99:

> "78. The notion of "private life" within the meaning of Article 8 of the Convention is a broad term not susceptible to exhaustive definition. The notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8. It can therefore embrace multiple aspects of a person's

physical and social identity. The Court has accepted in the past that an individual's ethnic identity must be regarded as another such element (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008, and *Ciubotaru v. Moldova*, no. 27138/04, § 49, 27 April 2010). In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 58, ECHR 2012).

…

83. When investigating violent incidents, State authorities have an additional duty under Article 3 of the Convention to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have also played a role in the events (see *Abdu*, cited above, § 29, and *Šečić*, cited above, § 66). Furthermore, the Court has previously found under Article 8 of the Convention that acts of violence such as inflicting minor physical injuries and making verbal threats may require the States to adopt adequate positive measures in the sphere of criminal-law protection (see *Sandra Janković*, cited above, § 47).

84. The Court therefore considers that a similar obligation might arise in cases where alleged bias-motivated treatment did not reach the threshold necessary for Article 3, but constituted an interference with the applicant's right to private life under Article 8, that is, when a person makes credible assertions that he or she has been subjected to harassment motivated by racism, including verbal assaults and physical threats. In this connection it stresses that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see, mutatis mutandis, *Selmouni v. France*, [GC], no. 25803/94, § 101, ECHR 1999-V). Moreover, in the Court's view, in situations where there is evidence of patterns of violence and intolerance against an ethnic minority (see paragraphs 75-76 above), the positive obligations incumbent require a higher standard of States to respond to alleged bias-motivated incidents.

…

99. Nonetheless, as the Court held in the context of Articles 2 and 3, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation on the authorities to take preventive operational measures in certain well-defined circumstances to protect an individual must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (see *Đorđević v. Croatia*, no. 41526/10, § 139, ECHR 2012, and *Osman v. the United Kingdom*, 28 October 1998, § 116, Reports of Judgments and Decisions 1998-VIII). For the Court, the same consideration holds true as regards the State's positive obligation under Article 8 to protect an individual's private life from the acts of another individual, while taking into account the wide margin of

> appreciation the Contracting States enjoy in this area (see paragraphs 80 above). In this context, the Court accepts that in certain situations the domestic authorities might be required to proceed with the dispersal of a violent and blatantly intolerant demonstration for the protection of an individual's private life under Article 8."

[45] The petitioner invites me to conclude, on the basis of the reasoning in *Király and Dömötör*, that the respondents have acted incompatibly with their positive obligations under Article 8 by declining to order a public inquiry. The Court found a breach of a positive obligation arising from Article 8 in a context where the approach of the state authorities led to impunity for individuals inciting racial hatred and to the potential for a perception on the part of the general public that the state legitimised or tolerated the conduct in question: paragraph 80. The criticism of the state was in relation to the detection and prosecution of crime; the absence of effective measures affording protection from acts by private individuals which violated the psychological integrity of others. The approach of the Strasbourg court is one of increasingly close scrutiny of decisions about investigation and prosecution where there are allegations of harassment or threatening behaviour motivated by racism, and particularly in the context of evidence of patterns of violence and intolerance against an ethnic minority. Surveillance by the police undoubtedly falls within the ambit of Article 8. Actions of certain types taken by the police in the course of surveillance may violate the psychological integrity of individuals. What this petitioner avers is, however, not a violation of psychological integrity of the sort considered by the Court in *Király and Dömötör*. The present case involves no allegation of violence, or harassment, or racially motivated conduct. It is usual for domestic and Strasbourg jurisprudence to march hand in hand: *Brown* v *Parole Board for Scotland* 2018 SC (UKSC) 49, Lord Reed at paragraph 42. To infer a duty to direct that there be a public inquiry in the circumstances of this case would require a significant extension of the reasoning in *Király and Dömötör*. The petitioner has not

demonstrated that either respondent has acted incompatibly with her Convention rights on this basis.

Article 10 – access to information

[46] In this connection Mr O'Neill referred to *Magyar Helsinki Bizottság*. The applicant was a NGO monitoring the implementation of international human rights standards in Hungary. It investigated the effectiveness of a system for the appointment of defence counsel. The applicant requested the names of public defenders selected in 2008 and the number of assignments given to each lawyer from a total of twenty eight police departments. Two police departments refused to provide the information. The applicant was unsuccessful in the national courts in obtaining the information. The decision of the Strasbourg court is notable for extensive discussion about the jurisprudence relevant to the circumstances in which Article 10 will give rise to an obligation on a state party to impart information to an individual. These are where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular the freedom to receive and impart information, and where its denial constitutes an interference with that right.

[47] The court also proposes four threshold criteria, which overlap to some extent, for the assessment of whether and to what extent a denial of access to information constitutes an interference with an applicant's right to freedom of expression: paragraphs 157-169.

[48] The first of these is the purpose of the information request. The request must be to enable the applicant's exercise of the freedom to receive and impart information and ideas to others. It is relevant to consider whether the request is in connection with journalism or the "watchdog" function of an NGO.

[49] Second, the information, data, or documents sought must meet a public interest test: paragraphs 161-163.

> "161. Maintaining this approach, the Court considers that the information, data or documents to which access is sought must generally meet a public interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, inter alia, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.
>
> 162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism. In order to ascertain whether a publication relates to a subject of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 97 to 103, ECHR 2015 (extracts), with further references).
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> 163. In this connection, the privileged position accorded by the Court in its case-law to political speech and debate on questions of public interest is relevant. The rationale for allowing little scope under Article 10 § 2 of the Convention for restrictions on such expressions (see *Lingens v. Austria*, 8 July 1986, §§ 38 and 41, Series A no. 103, and *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV), likewise militates in favour of affording a right of access under Article 10 § 1 to such information held by public authorities."

[50] Third, the role of the applicant is relevant, and here there is some overlap with consideration of the purpose of the request. An important consideration in assessing whether a state has interfered with Article 10 rights by denying access to documents is the role of the applicant: is the applicant seeking information in order to provide information to the public, in the capacity of a public "watchdog"? A right to access to information does not apply exclusively to journalists and NGOs. A high level of protection applies to academic researchers, and authors of literature on matters of public concern. The internet

plays an important role in enhancing the public's access to news and facilitating the dissemination of information, so bloggers and popular users of social media may be regarded as having a similar function.

[51] Fourth, the court will have regard to the fact that information is "ready and available", and does not necessitate collection of data by the government. Difficulty in gathering information will not avail a state where the government's own practice has generated the difficulty, as in *Österreichische Vereinigung zur Ehrhaltung, Stärkung und Schaffung* v *Austria* (no 29434/07, 28 November 2013). I note that in *Österreichische Vereinigung* the applicant had offered to reimburse the cost of producing the information. The information in question was decisions made by a body charged with determining civil rights and obligations. The circumstance that it did not publish its decisions was remarked on by the Strasbourg court both as striking and as the source of the difficulty: *Österreichische Vereinigung* at paragraph 46.

[52] Again, the reasoning in *Magyar Helsinki Bizottság* does not translate readily to the circumstances of this application. The petition does not disclose on what basis it could be contended that access to particular information is instrumental for the petitioner to exercise her right to receive and impart information. The circumstances in the present application are far removed from those in *Magyar Helsinki Bizottság*. There is nothing averred in the petition or said in submission to indicate that the petitioner is fulfilling a "watchdog" role, or that she is requesting specific information with a view to communicating it to others in exercising such a role. She is asking the state to order a public inquiry; that is to carry out a costly exercise to gather information that it does not already have to hand. The second criterion (public interest) appears to be intended to be applied to identified, existing data. There are no identified data sought in the present case. As the information is not

identified, it is more difficult to apply a public interest test to it, although I accept that there is a public interest in discovering unlawful activity by the forces of the state. These are plainly matters that the public may legitimately take an interest in, as opposed to matters which would satisfy an audience wish for sensationalism. Application of the threshold criteria indicates that this application does not disclose an interference with the petitioner's Article 10 rights by virtue of the decisions complained of.

[53] The Strasbourg court has engaged in incremental development of its jurisprudence as to the circumstances in which the state is obliged to provide access to information held by public authorities under reference to Articles 8 and 10. *Magyar Helsinki Bizottság* in particular represents a development of the right of access to information by virtue of Article 10, but it does not recognise an equal right of all citizens to access information as an aspect of their Article 10 rights.

Article 14 with Articles 8, 9, 10 and 11

[54] The petitioner's argument was that there was discrimination, on a geographical basis, between victims of undercover policing located in Scotland and those located in England. Mr O'Neill submitted that the Supreme Court had recently recognised that there might in principle be unlawful discrimination on the basis of the place of residence of an individual: *R(A)* v *Health Secretary* [2017] 1 WLR 2492, Lord Reed paragraphs 37-49.

[55] The state had provided a public inquiry. If the state had gone beyond what was required of it by the Convention by setting up an inquiry, it could not then discriminate contrary to Article 14 by affording that benefit to some citizens rather than others, discriminating on a geographical basis. He referred to *Savez Crkava "Riječ života"* v *Croatia* and in particular a passage at paragraphs 56-58. He relied on *Guberina* v *Croatia* at

paragraphs 67-74, in particular paragraph 71, for a passage confirming that indirect discrimination in relation to the enjoyment of a Convention right may be unlawful by virtue Article 14.

[56] Mr O'Neill initially conceded that this challenge could be made only against the first respondent, which had provided for an inquiry, but one limited in the ways of which he complained. There could be no such challenge against the second respondent, which had not made provision for a public inquiry. He later, however, submitted that once the first respondent had acted unlawfully by providing an inquiry on a basis that discriminated unlawfully in terms of Article 14, it fell to the second respondents to provide an inquiry that remedied that unlawfulness. If they did not, they, similarly, were acting incompatibly with Article 8 taken with Article 14. An act included a failure to act: Scotland Act 1998, section 100(4).

[57] Both respondents accepted that the subject matter of the petitioner's complaint fell within the ambit of Article 8.

[58] Mr Webster's response was that, properly analysed, there was no discrimination of the sort contemplated by Lord Reed in *A.* There was no discrimination based on the geographical location of the victims of undercover policing. The location of the victims was irrelevant. The geographical limitation was in relation to the police forces involved, and the location where the operations had been conducted. In the course of debate there was some discussion as to whether there might be indirect discrimination in the sense that the decision of the first respondent impacted disproportionately on victims of undercover policing resident in Scotland. That argument was not, however, developed beyond the reference to *Guberina*.

[59] Ms O'Neill submitted that she had not anticipated the argument, as Mr O'Neill came to formulate it in his oral submissions. It was not foreshadowed in the pleadings or the notes of argument. Her submission came to be that the petition simply gave no notice at all of any argument concerning Article 14 ECHR.

[60] The only references at all to Article 14 in the petition are in Statement of Fact 43, in the body of a quotation from *Thlimmenos* v *Greece* (2001) 31 EHRR 15, in a passage dealing with discrimination contrary to Article 9 ECHR; and at Statement 58. The latter reference is within a section of the petition dealing with a failure at common law to give reasons, and is directed at the second respondents. It is in the following terms:

> "Section 28 of the Inquiries Act 2005 clearly allows the Scottish Ministers to set up an inquiry under the Inquiries Act 2005 with terms of reference effectively mirroring those of the formerly Pitchford (now Mitting) Inquiry to inquire into and report on undercover police operations conducted by Scottish police forces in Scotland. The reasons letter simply gives no adequate explanation as to why the second respondents refuse so to do, particularly against the background that the UK Supreme Court has confirmed that geographical differences within the United Kingdom in the availability of or access to rights may amount to unlawful discrimination in breach Article 14 ECHR: *R (A) v Health Secretary* … per Lord Reed from §§ 37-49. … The decision is therefore unlawful at common law."

[61] Nowhere in the petition is it pled that either respondent acted incompatibly with Article 14 taken with any other article of the Convention by making one of the challenged decisions. The petitioner's note of arguments, contains the following, formulated in exactly the same way in respect of each respondent.

> "It is incompatible with the right under Article 14 ECHR not to be discriminated against in the enjoyment and effective protection of other Convention rights (including rights of privacy under Article 8 ECHR, the right to conscientious objection under Article 9 ECHR, the right to free expression under Article 10 ECHR and the right to free assembly and association under Article 11 ECHR) for provisions for an Convention compatible public inquiry to be made in respect of victims of undercover policing operations in England and Wales but not for victims of undercover policing in Scotland: *R(A) v Health Secretary* [2017] UKSC 41 [2017] 1 WLR 2492 *per* Lord Reed from §§ 37-49. "

[62] Inclusion in the note of arguments of a challenge not foreshadowed in the petition is something that ought to have been detected. It should have been discussed at the procedural hearing. The procedural hearing in this case, as in many others, was discharged on the basis of correspondence from parties to the Court, representing that they were ready to proceed. As became apparent at the substantive hearing, however, there was an outstanding issue as to whether a particular line of argument fell within the scope of the challenges of which fair notice was given in the petition. An issue of this sort is suited to discussion and disposal at a procedural hearing. A party should not represent to the Court that it is ready to proceed to the substantive hearing if there is an outstanding case management issue like this one, raised by the second respondents only in the course of the substantive hearing in this case.

[63] I do not encourage pleadings in judicial review that are of excessive length, or an unduly formalistic approach to the content of the pleadings. That would be inappropriate in proceedings of this sort. As Lord Hope of Craighead observed in *Somerville* v *Scottish Ministers* 2008 SC (HL) 45, at paragraph 65:

> "… the degree of precision and detail in written pleadings that has traditionally been looked for in other forms of action in Scotland is not to be looked for in petitions for judicial review (Clyde and Edwards, *Judicial Review*, para 23.19). The core requirement is simply this. The factual history should be set out succinctly and the issues of law should be clearly identified."

[64] If, however, the issues of law are to be clearly identified, the petition should provide notice of the bases on which a decision or measure is challenged. Form 58.3 requires a petitioner to state briefly, in numbered paragraphs, the legal argument with reference to enactments or authority. The argument in this case is not a refinement of a line of challenge mentioned in the petition. It is a discrete ground of challenge. The court, and a

respondent, can reasonably expect to find in a petition specific mention of each of the articles of the Convention relied on by a petitioner. The reference to the article in question need be no longer than the concise formulation in the petitioner's note of arguments, quoted above.

[65] The petitioner did not give notice in the pleadings of an article 14 case against either respondent. No permission was granted in relation to a challenge formulated by reference to Article 14 taken with any other article of the Convention. Section 27B of the Court of Session Act 1988 provides, so far as material:

> (1) No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed.
>
> …
>
> (4) The Court may grant permission under subsection (1) for an application to proceed—
>
> (a) subject to such conditions as the Court thinks fit,
> (b) only on such of the grounds specified in the application as the Court thinks fit.

[66] The addition of new grounds after the initial grant of permission was considered by the Inner House in *MIAB* v *Secretary of State for the Home Department* 2016 SC 871, at paragraph 64:

> "… the Scottish Civil Courts Review (2009) (chapter 12, para 51) had recommended the introduction of the requirement for leave to proceed in order to filter out unmeritorious applications from the system. It was this recommendation which became section 27B, which requires that any application to the supervisory jurisdiction requires permission, which can only be given if the ground upon which it proceeds has a "real prospect of success". The Court, when granting permission, may do so in respect of particular grounds only. It is not immediately apparent that consideration was given to the situation where a petitioner might seek to introduce new grounds after permission to proceed generally had been granted. It must follow, however, that, since permission could only have been given for the grounds stated in the original application, such permission must also be necessary for any new grounds introduced later. Where the court is considering a Minute of Amendment in proceedings raised after the introduction of section 27B, it ought to be asked to grant or refuse permission to proceed on any new grounds advanced, at least at the stage of allowing any amendment."

[67] The petitioner has not sought to amend the petition, but instead has sought to advance a ground of challenge not mentioned in the petition. Given the terms of section 27B(1) and the decision in *MIAB*, the ground of challenge is not properly before the court, and I therefore decline to consider it.

Adequacy of reasons

[68] In relation to each decision, I was invited to assess the adequacy of reasons by reference to the test in *Wordie*, at page 348. A decision must leave the informed reader and the court in no real and substantial doubt as what the reasons for it were and what were the material considerations which were taken into account in reaching it.

First respondent

[69] The petitioner argued that the reasons amounted to nothing more than assertion that to extend the inquiry to Scotland would delay the progress of the inquiry. They took into account an irrelevant consideration, namely the scope of the Home Office's responsibility for policing.

[70] In seeking to defend on its merits this aspect of the petition, the first respondent relied exclusively on the content of the letter dated 25 July 2016.

[71] While those reasons are brief, I accept that, as the first respondent argued, they must be viewed in the context of a request to extend the terms of reference of an inquiry which had already started work. The reasons are, in essence, the avoidance of delay in the inquiry, and a view that the inquiry would achieve sufficient insight into historical failings to permit it to make recommendations without examining every instance of undercover

policing, wherever it was undertaken. There is no lack of clarity in the reasons given. It seems to me that the petitioner's complaint is really that, examining those reasons, the decision is irrational.

[72] The argument that the first respondent took into account an irrelevant consideration is really a separate challenge – one to the lawfulness of the decision based on the reasons given, rather than on the inadequacy of the reasons. On the face of it, the reasons given disclose some level of misunderstanding on the part of the first respondent. As was accepted by all parties, it would be competent for the Secretary of State to direct an inquiry that covered the activities of Scottish police forces, whether in Scotland or elsewhere in the UK: Inquiries Act 2005, section 27, subject to the requirement to consult in section 27(2)(a). It would be competent for her to direct an inquiry that covered the activities of English or Welsh forces in Scotland. So far as the decision was said to reflect her responsibility for policing, she had responsibility for the activities of English and Welsh forces in Scotland.

[73] It is, however, correct to say that if there was any misunderstanding in relation to these matters, it did not lead the Secretary of State to think that she could not extend the terms of reference. The letter to Ms Sugden proceeds on the basis that it would be competent to extend the terms of reference of the inquiry. The factors leading to the decision not to do were those already summarised, rather than any misunderstanding about responsibility for policing or the competency of extending the terms of reference. I therefore accept as correct the first respondent's submission that any error in this respect was not a material one.

Second respondents

[74] The date on which the decision was made was not the focus of discussion at the substantive hearing. Whether or not the decision to direct a review by HMICS should be regarded as a decision not to direct a public inquiry, it is my view that the second respondents took a decision in the light of the outcome of that review, and that they decided at that stage not to direct a public inquiry. If there was an earlier decision, it is superseded by the decision taken following the review. It is on that decision, taken in February 2018, that attention is properly focused in these proceedings. The petitioner criticises the reasons given by the second respondents particularly on the basis that the second respondents should have appreciated that the decision of the Home Secretary was productive of a difference in treatment on a geographical basis, which might be unlawfully discriminatory, having regard to the reasoning of Lord Reed in *R(A)* v *Health Secretary*: see paragraph 54 above.

[75] The reasons for the decision of the Scottish Ministers are in my view patent from the Cabinet Secretary's statement to Parliament, read with the contents of the HMICS review.

[76] The HMICS review involved examination of SDS records held by Operation Herne, an active investigation by the Metropolitan Police Service into the SDS. The review concluded that between 1997 and 2007 the SDS deployed eleven undercover officers to Scotland, including six in support of the Scottish policing of the G8 summit in July. In respect of NPIOU involvement, HMICS relied on material provided by the National Police Chief's Council. HMICS stated that the information regarding NPIOU deployments in Scotland should be regarded as provisional, in the light of ongoing investigation by Operation Elter, which was investigating the activities of the NPIOU.

[77] So far as the activities of Scottish forces were concerned, between 2000 and 2016 there had been 423 undercover operations, of which a significant majority related to drug related offences, with the remainder categorised as relating to "crime other", theft, violence, homicide, and human trafficking and exploitation. In relation to a much shorter period (1 October 2009 - 30 September 2013) there had been 3,466 such operations in England and Wales. HMCIS concluded that the use of undercover officers in Scotland was not widespread and, indeed, that two categories of officer, namely undercover advanced officers, and undercover online officers had been underutilised.

[78] The reasons given by the Cabinet Secretary on 7 February 2018 identify the following material considerations:

- the revelations of questionable and unethical behaviours which had led to the establishment of the UCPI related to English police forces;
- although SDS and NPIOU officers were active in Scotland, their activities were not "standalone" or self-contained within Scotland, and did not have any particular Scottish focus;
- outwith the context of the G8 summit, Scottish police forces were "unsighted" as regards the activities of the SDS and the NPIOU. A further, Scottish, inquiry into the activities of the SDS and NPIOU in Scotland would produce some duplication with the work of the UCPI and would be disproportionate in terms of cost;
- the Cabinet Secretary had seen no evidence of the sort of behaviour by Scottish police forces that had led to the establishment of the UCPI;
- the HMICS review provided reassurance to the public and Parliament around the extent and scale of use of undercover police officers since 2000;

- the HMICS review made recommendations that Police Scotland had committed to implementing;
- setting up a Scottish inquiry would not be proportionate, as it would create duplication with the UCPI by involving many of the same core participants and law enforcement officers, and there would be potential for overlap with the recommendations of the UCPI;
- a Scottish inquiry could be subject to delay because of the scale and duration of the UCPI, and would be disproportionate in terms of cost.

[79] It is correct to say that consequences of the decision by the second respondents not to order that there be an inquiry to complement the UCPI are that the activities of Scottish police forces will not be investigated in a public inquiry, and that the activities of English forces in Scotland will not be investigated. To that extent there is a geographical distinction. The Cabinet Secretary's reasons include reference to the absence of evidence that Scottish police forces had engaged in unethical practices, and the evidence in the HMICS as to the scale of activities by Scottish forces. They include also considerations as to duplication of effort, expense and the circumstance that activities of English forces in Scotland were not self-contained in Scotland, and did not have a particular Scottish focus. I consider that the reasons given leave no real and substantial doubt as to why the second respondents made the decision that they did, notwithstanding that it left activities which had taken place in Scotland rather than England or Wales not subject to the scrutiny of a public inquiry.

Proportionality

[80] Mr O'Neill invited me to consider the proportionality of the decisions at common law. He referred to the discussions of proportionality as a ground of review in *Bank Mellat v*

HM Treasury (No2) [2014] AC 70; *Pham* v *Secretary of State for the Home Department* and *R (Keyu and others)* v *Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355. The correct approach to proportionality was as set out by Lord Reed in *Bank Mellat* at paragraph 74.

[81] Both respondents submitted that lack of proportionality was not a relevant ground in common law.

[82] The discussions in the cases referred to by Mr O'Neill, particularly *Pham* and *Keyu*, reflect an analysis whereby proportionality is categorised as a tool providing a structured form of review. It will not inevitably require a more intense review than one based on rationality. Rather, intensity of review is dependent on context: see, for example, *Pham*, Lord Mance at paragraphs 94-96. The structured approach promoted by proportionality has certain advantages: *Kennedy* v *Information Commissioner* [2015] AC 445, Lord Mance, paragraph 54. Where common law rights are in issue, an approach to review has come to be adopted which incorporates significant elements of the principle of proportionality: *Pham*, Lord Sumption at paragraphs 105-107, 109-110; Lord Reed paragraph 118.

[83] Lord Reed, in *Pham* at paragraph 120, noted that there had been no argument made that the power at issue in *Pham* (the power to deprive a British citizen of that status) should be justified as being necessary to achieve the legitimate aim pursued, so expressly declined to express any view on the point. He noted, also, that the case was not the proper occasion to review cases such as *R* v *Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696 in which the House of Lords declined to accept that proportionality had become a distinct head of review in domestic law: paragraph 115.

[84] In *Keyu* the appellants argued that *Wednesbury* rationality should be replaced by a more structured approach based on proportionality. Lord Neuberger, with whom

Lord Hughes agreed, noted that such a change would have potentially profound and far reaching consequences, and that it was not appropriate for a five-justice panel of the Supreme Court to determine the matter: paragraphs 132, 133. Lord Mance agreed with Lord Neuberger's reasoning generally, and that the decision at issue was neither disproportionate nor unreasonable: paragraphs 142, 143. Lord Kerr (paragraph 271) agreed that it would not be appropriate for a five member panel of the court to determine the issue. He expressed the view that without an identifiable fundamental right in issue, it would be difficult to say that the decision under challenge was disproportionate: paragraph 283. Lady Hale dissented as to the result, but reached it by reference to the *Wednesbury* standard. As to proportionality, she wrote (paragraph 304):

> "… I agree with Lord Kerr JSC that it is one thing to apply a proportionality analysis to an interference with, or limitation of, a fundamental right and another thing to apply it to an ordinary administrative decision such as whether or not to hold some sort of inquiry."

[85] The position, then, is still that proportionality is not a free-standing ground for review of lawfulness at common law. A structured approach akin to proportionality has been adopted in a number of cases involving interferences with important common law legal rights. Where Parliament authorises significant interferences with such rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: *Pham*, Lord Reed, paragraph 119.

[86] The petitioner in this case has not identified an interference with an important common law legal right of the sort at issue in the cases discussed by Lord Reed in *Pham*. There is at present no basis for me to employ proportionality in reviewing the decision in this case under the common law.

[87] Mr O'Neill, responding in oral submissions, sought to found on the concession made by the respondents, in the context of their response to his Article 14 argument, that the provision of an inquiry fell within the ambit of Article 8. Their having done so, he said, meant that I was obliged to review the proportionality of the decisions by reference to Article 8. The respondents required to justify their decisions.

[88] The concessions, in the context of an Article 14 argument, that the matter falls within the ambit of Article 8, are not concessions that either of the decisions interfered with the Article 8 rights of the petitioner so as to require justification. A decision not to provide a facility or benefit may not interfere with a particular article, but a decision to provide it, which goes further than the state is obliged to do by virtue of the Convention rights, may still fall within the ambit of that article, so that discriminatory provision is unlawful by reference to Article 14: see, for example, *Savez Crkava "Riječ života"* v *Croatia*, at paragraphs 57-58.

[89] I therefore do not consider that the concession made by the respondents requires me to regard the decisions at issue as interferences with the petitioner's rights requiring justification and an assessment of proportionality.

Rationality

[90] The petitioner mentions in her pleadings information available to each decision maker from earlier reports and inquiries which indicate that undercover police activity took place in Scotland. Statements of fact 63 and 64, for example, make reference to the HMIC publication from 2012, A Review of national police units which provide intelligence on criminality associated with protest, and the HMICS review already mentioned. In each case the activities of Mark Kennedy are mentioned. According to the HMICS review, he

accounted for the majority of NPIOU deployments to Scotland, and between 2004 and 2010 visited Scotland on at least seventeen occasions with multiple activities during each visit. The chair of the UCPI indicated that the conduct of Mark Kennedy as an undercover officer would come under close scrutiny during the Inquiry: Core Participants ruling of 21 October 2015, paragraph 27. The chair noted that many of the applicants for designation as core participants had claimed that Mr Kennedy was an active participant in several environmental and political campaigns. The petitioner avers that he attended a meeting of Plane Stupid. It is not difficult to see why someone in her position would be aggrieved by the notion that close scrutiny should be applied to his activities in England, but not his activities in Scotland.

[91] Mr O'Neill urged me to apply an approach to rationality similar to that employed by Lady Hale in *Keyu*, itself a case about a decision not to order an inquiry. At paragraphs 308 to 301 she set out lists of considerations that a rational decision-maker would have taken into account about the background history, about the advantages of an inquiry, and about the disadvantages of an inquiry. Particularly significant for present purposes were the "benefits of catharsis, accountability and public confidence" and the "importance of acknowledging what had gone wrong and setting the record straight" (paragraph 310). She was critical of the Secretaries of State for focusing on what might be learned of contemporary relevance from an inquiry. They had not considered the most cost-effective form of inquiry or the "bigger picture": the public interest in properly inquiring into the event in question, and the private interests of relatives and survivors in knowing the truth and seeing the reputations of deceased relatives vindicated (paragraph 312).

[92] I am bound to recognise that Lady Hale was in the minority. She did not reach the same conclusion on the rationality challenge as any of the other justices, and her process of

analysis was not one articulated in the same way by any of the other justices: compare Lord Neuberger of Abbotsbury (with whom Lords Mance and Hughes agreed) at paragraphs 129-130. Lord Kerr was unable to find that the decision was disproportionate. Where no fundamental right was engaged he envisaged a "loosely structured proportionality challenge" (paragraph 282, quoting Lord Mance in *Kennedy*) – a testing of the decision in terms of its suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. Where no fundamental right is involved, I cannot, at common law, become involved in assessing the balance struck by the decision-maker between competing interests, or the weight to be accorded to those interests: *Keyu*, Lord Neuberger, paragraph 133.

First respondent – rationality

[93] In this context at least, both the first respondent and the petitioner categorise the decision as one to decline to extend the terms of reference of the UCPI. The Secretary of State took into account

- that the UCPI had already begun work;
- that it was extensive and complex;
- that it had 200 core participants;
- that amending the terms of reference of the inquiry at the stage that had by then been reached would require further consultation and delay the progress of the inquiry;
- that it was important in the interests of learning lessons that the inquiry proceed swiftly and make recommendations as soon as possible;

- and that the UCPI could gain an understanding of historical failings and make recommendations to ensure unacceptable practices were not repeated without needing to consider every instance of undercover policing wherever it was undertaken.

[94] The essence of the petitioner's criticism was that undue weight had been given to the disadvantages of extending the terms of reference, as against the advantage that would be gained in promoting transparency and public confidence in policing, given the available information as to the extent of undercover police activity in Scotland. For the reasons I have already given, I do not consider that it is open to me to assess the balance struck in relation to these competing considerations. Each of the considerations listed above is one which the Secretary of State was entitled to take into account, and she was also entitled to look at them cumulatively. Although the reasons given are brief, they do not disclose irrationality.

Second respondents – rationality

[95] In considering the "reasons" challenge, I have already set out the material considerations which were disclosed by the Cabinet Secretary in his statement to the Scottish Parliament. I do not repeat them in full here. These were all matters which in my view the second respondents were entitled to take into account. It seems to me that the reasons given disclose a number of considerations including cost, duplication of effort, the circumstance that activities by English officers in Scotland were not self-contained in Scotland, and the relatively small scale of undercover operations by Scottish forces. The Cabinet Secretary left open the possibility that he might reconsider matters if fresh information came to light in the course of the UCPI. The decision is one which in my view

falls within the range of responses reasonably open to the second respondents, and cannot be categorised as irrational.

Time-bar

[96] Section 27A of the Court of Session Act 1988 provides

> "27A (1) An application to the supervisory jurisdiction of the Court must be made before the end of—
> (a) the period of 3 months beginning with the date on which the grounds giving rise to the application first arise, or
> (b) such longer period as the Court considers equitable having regard to all the circumstances.
> (2) Subsection (1) does not apply to an application to the supervisory jurisdiction of the Court which, by virtue of any enactment, is to be made before the end of a period ending before the period of 3 months mentioned in that subsection (however that first-ending period may be expressed)."

[97] Article 4 of the Courts Reform (Scotland) Act 2014 (Commencement No 3, Transitional and Saving Provisions) Order 2015 (SSI 2015/247) made provision as to time limits where the grounds giving rise to an application first arose before 22 September 2015.

> "4(1) Paragraph (2) applies where the grounds giving rise to an application to the supervisory jurisdiction of the Court of Session first arose before 22nd September 2015.
> (2) Section 27A of the 1988 Act (time limits) has effect as if the reference to the date on which the grounds giving rise to the application to the supervisory jurisdiction of the Court of Session first arise were a reference to 22nd September 2015."

[98] The petitioner made her application for judicial review on 24 October 2016. The first respondent avers that the Secretary of State established the UCPI on 12 March 2015 and announced the terms of reference on 16 July 2015. Both the announcement and the terms of reference made it clear that the UCPI would not address activities of Scottish police forces, or activities of English and Welsh forces in Scotland. The first respondent argues that the application therefore required to be made before the end of the three months beginning with

22 September 2015. He makes that argument primarily, but not exclusively, in relation to the challenge founded on Convention rights. The first respondent argues, further, that even if the challenged decision is properly characterised as one to decline a request to extend the terms of reference of the UCPI, the decision to decline that request was made on 11 January 2016 and was reaffirmed on 9 March 2016.

[99] The petitioner contended that the grounds giving rise to the application (so far as directed against the first respondent) arose only on 25 July 2016, when the correspondence between the Cabinet Secretary and the Secretary of State came to an end. Her challenge, as formulated in the petition, is to a decision to refuse to amend the terms of reference of the UCPI.

[100] Mr Webster referred to a passage at paragraph 33 of *Wightman* v *Secretary of State for Leaving the European Union* 2018 SLT 356 (the Opinion of the Inner House in the reclaiming motion on permission in that case):

> "So far as time bar is concerned, the 3 month limit in section 27A of the 1988 Act cannot be circumvented simply by persuading a person to repeat a decision or other act complained of. That is essentially the petitioners' argument relative to the letter of 7 December 2017 which, in any event, is a document containing a statement of unchallenged policy and is hardly susceptible to reduction. However, the issues raised in the petition concern the effects of what is said to be an ongoing "position" which has the potential to influence future Government and Parliamentary action. In such circumstances, there is a substantial argument that the 3 month period should be extended under section 27A(1)(b)."

Mr Webster submitted that the present petitioner was relying on the repetition of the decision made in 2015 as to the scope of the inquiry in order to circumvent time-bar. If that analysis were correct, Mr O'Neill responded, the situation was similar to that in *Wightman*: the position of the first respondent was an ongoing one. I was told that in *Wightman* the Inner House had not only expressed a view about the strength of the position regarding extension of the time-bar, but had pronounced an interlocutor extending it. The competing

positions had been respectively (for the petitioners and reclaimers) that time started to run from the date of a letter containing a statement of policy and (for the respondent) that it started to run from the date of notification of withdrawal.

[101] *Wightman* is an unusual case. It relates to questions about the revocability or otherwise of the notification made by the UK to the EU under Article 50 TEU. Its subject matter is succinctly described in *Wightman* v *Secretary of State for Exiting the European Union* [2018] CSIH 62, at paragraph 7:

> "At the expiry of the two year period, there may or may not be an agreement. If there is an agreement, Parliament will have to decide whether to approve it. If it is not approved, and nothing further occurs, the treaties will cease to apply to the UK on 29 March 2019. The stark choice is either to approve the agreement or to leave the EU with no agreement. The petitioners seek a ruling on whether there is a valid third choice; that is to revoke the notification with the consequence, on one view, that the UK would remain in the EU. If that choice were available, the petitioners argue, members of the UK Parliament could decide which of three options was preferable. They could not only elect to reject the agreement because it was, in their view, a worse deal than having no agreement at all, but also because both the agreement or the absence of an agreement were worse than remaining in the EU; a situation which could be achieved by revoking the notification. If such revocation were not a legally valid option, the stark choice would be all that was left. The petitioners wish to have a definitive ruling, to enable them to make informed choices based on the options legally available."

[102] I have no difficulty in accepting that the time limit in section 27A cannot be circumvented by persuading someone to repeat a decision made earlier. The present petitioner has not done that. What she relies on are rejections of requests from the Scottish government to extend the terms of reference of the inquiry. Nevertheless, the underlying logic of the passage in *Wightman* (reclaiming motion, permission) is that, where a decision is simply adhered to in the face of repeated representations, the grounds giving rise to the application will in general have arisen when the decision is made, not each time it is then adhered to. This is not necessarily a hard and fast rule. It may be necessary to consider exactly what the representations have been, the circumstances of their rejection, and exactly

what is the focus of the challenge in order to identify when the grounds giving rise to a particular challenge arose. In some cases responsible efforts to avoid litigation by making further representations may be relevant to the exercise of the court's discretion.

[103] I do not find the approach to extending the time-bar in *Wightman* of assistance here. As I have already noted, the matter challenged in *Wightman* is unusual. At permission stage, while on the face it the petitioner sought reduction of a letter, and to challenge what was said to be government policy, the nature of the challenge was really to a position. By the time of the reclaiming motion on the substance of the issue, the focus of the challenge had shifted from one which sought to challenge what was alleged to be Government policy to one seeking a declarator irrespective of the Government's position. None of that translates easily to an argument about time-bar in the much more familiar situation, in the present case, where orders are sought about particular decisions. As a result I do not find the way that the Inner House dealt with time-bar in *Wightman*, so far as extension of the period is concerned, of assistance here.

[104] The petitioner challenges the exclusion of the activities of Scottish forces and activities in Scotland from the scope of the UCPI. She was not aware before 21 December 2015 that there was dialogue between the Cabinet Secretary and the Secretary of State. Their correspondence had as matter of fact begun on 10 December 2015, before the end of the three month period, but she did not know that. She does not, and cannot, claim that her decision not to raise proceedings on or before 21 December 2015 was influenced by knowledge that there were political discussions going on between the two governments about the matter, or that she believed that an earlier challenge would be premature because those discussions were happening.

[105] The grounds underlying the Convention rights challenges may simply be the exclusion from the UCPI of Scottish forces and activities in Scotland, which has been apparent since the terms of reference were announced. The challenges so far as based on adequacy of reasons for the decision, and rationality, however, focus on the adequacy of reasons given when making a decision in response to express requests from the Scottish Government that the terms of reference be extended. The grounds for the challenge relate specifically to the decision not to extend the terms of reference. The reasons given by the Secretary of State include the need to avoid further consultation, and resultant delay by so extending them. The first respondent, in his note of arguments, refers to the adequacy of the reasons precisely in the context of "a request to extend the terms of reference of the UCPI which had been set in July the year before and where the Inquiry had already started work".

[106] There was a decision not to extend the terms of reference of the inquiry. In relation to the challenges made on the basis of adequacy of reasons and rationality, the first respondent seeks to defend those on the basis of considerations which arise because of the stage in the process at which the decision was taken, such as the circumstance that, by then, the UCPI already had 200 core participants. Those considerations would not have applied in March or July 2015. The first respondent has not sought to represent that reasons were given for the decision taken in 2015 as to the terms of reference of the UCPI insofar as they excluded activities undertaken in Scotland or by Scottish forces. The correspondence dated 25 July 2016 relates that the former Home Secretary had confirmed that she did not intend to amend the terms of reference, "on balance": that is, having apparently undertaken a balancing exercise, of considerations, including those attaching to "amending the terms of reference **at this stage**" (emphasis added).

[107] I am satisfied that the challenges, at least in so far as based on adequacy of reasons and rationality, are directed at the decision not to extend the terms of reference of the inquiry. Even on that analysis, however, first respondent pleads that the petition is time-barred, as the decision was taken on 11 January 2016.

[108] The letter of 11 January is in terms which indicate that there is scope for further discussion, by inviting discussion by telephone. That of 9 March 2016 again uses the expression "not minded to" in relation to whether the terms of reference should be amended, although it does not invite further discussion. The correspondence of 25 July 2016 states, "The Home Secretary does not intend to extend the scope of the Inquiry …"

[109] The content of that correspondence was not public. The correspondence was obtained by Dr O'Driscoll, following a request by him on 31 July 2016 under the Freedom of Information (Scotland) Act. Dr O'Driscoll's affidavit, the content of which has not been challenged, helpfully sets out a history of press reporting of the correspondence between the Home Secretary and the Cabinet Secretary. The earliest press coverage was in articles on 17 January 2016. Four articles all included a quotation attributed to a Scottish Government spokesperson:

> "We have received a response from the UK Government in which the Home Secretary has offered to discuss the matter further with Mr Matheson. The Justice Secretary intends to take her up on her offer in due course."

That statement would convey to the reader the impression that the Secretary of State had not made a final decision on the matter. The next press report was on 9 March, when the Daily Record quoted a Scottish Government spokesperson as saying:

> "Discussions concerning extending the Pitchford Inquiry to cover activities of the Metropolitan Units in Scotland are still ongoing."

The first public reporting of a final decision on the matter was in a BBC online article on 28 July 2016.

[110] I do not consider that the letter dated 11 January 2016 demonstrates that a final decision had been taken. The position is perhaps less clear as regards the letter of 9 March, although it is notable that the Scottish Government continued to make representations following it. I consider that a final decision was made and communicated on 25 July 2016. Had I been of the view that the grounds for challenge arose before 25 July 2016, I would have been sympathetic to a submission that it was equitable to allow the petition to proceed, given that the correspondence containing the discussions was not public, and that the information available to the public, including the petitioner, did not indicate that a final decision had been taken until the BBC online article of 28 July 2016. The petitioner brought these proceedings less than three months after that date.

[111] I considered the Convention rights challenges directed against the first respondent on their merits, as there was no point of distinction between the arguments made against the first respondent and those made against the second respondents, and I have rejected those challenges on their merits. I do consider, however, that the grounds giving rise to the Convention rights challenges directed against the first respondent first arose earlier than the grounds giving rise to the challenges based on adequacy of reasons and rationality. The challenges based on Convention rights would have been open to her by the point when the terms of reference were announced, and the petition so far as based on them is time-barred.

[112] There was some discussion in submissions as to the extension of the time-bar, in the event that I found that the application had been brought out of time, under reference to the decision in *Wightman*, which as I have said, does not assist the petitioner here. As a matter of practice possible grounds for the exercise of the Court's discretion should be articulated in

the pleadings, even if only as representing an "*esto*" or fall-back position, by the stage of a substantive hearing. No such grounds were articulated in the petition as adjusted.

Disposal

[113] For the reasons already given I repel the pleas in law for the petitioner, and sustain the fourth and sixth pleas in law for the first respondent, and the third and fifth pleas in law for the second respondents. I sustain the first plea in law for the first respondent only insofar as directed to the petitioner's Convention rights challenges.