INVESTIGATING THE INVESTIGATORS:

POLICE FAILURES TO INVESTIGATE AND REDRESS UNDER THE HUMAN RIGHTS ACT 1998

INTRODUCTION

1. This paper considers the opportunities for legal redress under the Human Rights Act 1998 ("HRA") where police fail to carry out their investigative responsibilities. The main focus is on the claims available to victims of serious crimes against the person. However, I also examine briefly the position of those accused of crimes who experience delay in their exoneration as a result of incompetent investigation.

2. As discussed below, the possibility for bringing claims under the HRA is particularly significant because of the difficulties in establishing liability in tort in these contexts.

3. This document should be read in conjunction with the paper prepared by Adam Straw, "*The duty to investigate within the European Convention on Human Rights*", presented at the morning plenary session with Henrietta Hill QC. Adam's paper deals in detail with (and I will not repeat):
   - 3.1 The circumstances in which investigative duties under articles 2 – 4 of the European Convention on Human Rights ("ECHR") arise: see §§ 9 – 32;
   - 3.2 The components of these duties to investigate: see §§ 36 – 49; and
   - 3.3 The measures that may satisfy these duties: see §§ 50 – 54.

4. In broad terms, these investigative duties (also referred to as the procedural duties) require that an effective and independent investigation is undertaken.

5. On occasions, police failings to prevent or detect crime may also give rise to issues in relation to: (i) the general positive obligation (or systems obligation) on the state to put in place a framework of laws and means of enforcement which will prevent substantive

violations[1]; and/or (ii) the operational obligation to take all reasonable preventative measures to protect people from known risks to their life or person. However, a detailed consideration of these obligations is beyond the scope of this short paper[2].

THE TEXT OF ARTICLES 2 - 4 ECHR

6. Article 2:

> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
>
> *(a) in defence of any person from unlawful violence;*
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

7. Article 3:

> *No one shall be subjected to torture or to inhuman or de-grading treatment or punishment.*

8. Article 4:

> *1. No one shall be held in slavery or servitude.*
>
> *2. No one shall be required to perform forced or compulsory labour[3].*

FAILURES TO PROPERLY INVESTIGATE: VICTIMS OF CRIME

9. The paradigm situation considered in this section of the paper is one where police fail to effectively investigate credible allegations of violent crime, such as serious assault and in consequence the victim of that crime suffers distress, fear, frustration, psychiatric injury and / or financial losses; in addition, the perpetrator is left free to re-offend and this may give rise to additional damaged victims seeking redress.

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[1] See by way of example *R (B) v Director of Public Prosecutions* [2009] 1 WLR 2072 in respect of an unjustified prosecutorial decision to discontinue a prosecution for assault.

[2] For a comprehensive description of the general positive obligations, the protective obligations and the investigative obligations arising under articles 2 and 3 ECHR, see "*Private law claims under articles 2 and 3 ECHR*" by Heather Williams QC and Jesse Nicholls, available in the conference papers section in the resources part of the PLP's website at www.publiclawproject.org.uk.

[3] Article 4(3) then sets out various instances that do not amount to '*forced or compulsory labour'*.

Tort claims

10. In these kinds of situations it is difficult to establish liability in tort. Police will only be liable for misfeasance in a public office if there is an element of bad faith on the part of officers. This is usually difficult to prove and may tend to invite some judicial scepticism. Even gross negligence or bad misjudgement will not suffice to establish misfeasance: *Muuse v Secretary of State for the Home Department* [2001] EWCA Civ 453 at § 77; *B v Reading DC* [2009] EWHC (QB) 998 at §75[4]. In the majority of instances, it will be difficult to prove that investigative failings are the result of conspiracy rather than cock-up.

11. However, it is also very difficult to sue the police in negligence in relation to failures to investigate or poorly conducted investigations. The appellate courts have long held that police do not owe duties of care in negligence in relation to the apprehension, investigation or suppression of crime: *Hill v Chief Constable West Yorkshire Police* [1988] 1 AC 53 HL; *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 HL; *Van Colle v Chief Constable of Hertfordshire; Smith v Chief Constable of Sussex* [2009] 1 AC 225 HL; and *Michael Chief Constable of South Wales Police* [2015] 2 WLR 343 SC. This is said to be because it is not "*fair, just and reasonable*" to impose a duty of care in circumstances which could lead to conflicting priorities, detrimentally defensive policing and diversion of resources. In the majority of these cases, the claimant was also unable to show that there was a sufficient relationship of 'proximity' for a duty of care to be imposed[5].

12. Limited circumstances exist where a claim in negligence in respect of investigative failures can overcome these hurdles, in particular: (a) where the police have assumed a responsibility to the particular claimant through giving an express assurance[6]; and (b) instances where police intervention creates an additional danger or worsens the danger / damage in question[7]. Beyond that, is a vague and largely untested prospect of a duty of care arising in 'exceptional situations'[8]

[4] By way of contrast, in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 197 HL there was a deliberate failure to investigate and an attempted cover up involving forged documentation.
[5] Indeed, the focus of the majority's decision in *Michael* was on the lack of proximity: see §§ 97 – 100 and 115 – 121.
[6] For example, *An Informer v A Chief Constable* [2013] QB 579 CA; confirmed in *Michael* at § 69.
[7] *Knightley v Johns* [1982] 1 WLR 349; *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242; discussed in Lord Toulson's judgment for the majority in *Michael* at §§ 37 and 75.
[8] See Lord Nicholls at §6 and Lord Steyn at §34 in *Brooks*; and Lord Phillips at §97, Lord Carswell at §109 and Lord Brown at §135 in *Van Colle*.

13. In the *Smith* case (heard with *Van Colle*), the House of Lords rejected the submission that it was fair, just and reasonable for a duty of care to be owed by police to investigate his complaints of assault and protect him from the threat of further harm from an ex-partner, as the same failings could now give rise to a claim under the Human Rights Act for a violation of article 2 ECHR (there in relation to a breach of the operational obligation, in failing to prevent a further serious assault): see in particular Lord Brown at §137-139. The submission was rejected on the basis that there was no good reason for mirroring the Convention duties in the common law, given the former had very different objectives from private law tort actions. A similar argument was afforded a similar response by Lord Toulson who gave the leading judgment for the majority in *Michael*, see §§ 126 - 128. On the other hand, Lady Hale (who was in the minority with Lord Kerr) took the opposite view on this point in *Michael*, holding that the existence of a HRA claim meant that the policy reasons advanced against the imposition of a duty in negligence claim had largely ceased to apply: § 196.

Claims for breach of the articles 2 – 4 ECHR investigative duties

14. Accordingly, the opportunity to bring a claim under the HRA in respect of deficient investigations is highly significant. As foreshadowed above, this paper focuses upon claims by victims of serious assaults. I touch on the basics of who can sue and limitation, before considering in greater detail what will amount to a breach of investigative obligations on the part of the police (and then dealing with remedies).

Procedural points

15. The claim is brought under section 7(1) HRA. If the victim is living, a claim for a violation of investigatory duties would normally be brought in their name. However, if the victim is deceased, relatives can bring claims for violation of the investigative duty arising under article 2 or 3 ECHR, provided they qualify as a "victim" of the violation within the meaning of section 7(1). Parents, aunts, brothers and sisters, nephews, an unmarried partner, and an adopted daughter may all qualify as victims: *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, §§ 46 - 48; *Yasa v Turkey* (1999) 28 EHRR 408, §§ 63 - 66.

16. Pursuant to section 7(5) HRA 1998, a claim made under section 7(1) must be brought before the end of the period of one year beginning with the date on which the act complained of took place. This period can be extended under section 7(5)(b) where the court considers it just and equitable to do so having regard to all the circumstances of the case: see for example: *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133, §43; *Weir v Secretary of State for Transport* [2004] EWHC 2772 (Ch).

When the investigative duty is breached

17. In terms of the circumstances in which the article 3 ECHR investigative duty arises, the standard imposed *and* the level of failings that will constitute a breach of the duty, the leading case is *DSD v Commissioner of Police of the Metropolis; Korau v Chief Constable of Greater Manchester Police* [2015] EWCA Civ 646; [2016] QB 161. The Supreme Court has recently granted the Commissioner's application for permission to appeal on these issues.

18. The claimants, DSD and NBV were victims of the serial "black cab rapist", John Worboys. Between 2002–2008 he committed over 105 rapes and sexual assaults upon women who were passengers in his cab. DSD reported her attack to police in May 2003; Worboys remained free to continue his crime and he attacked NBV in July 2007. In his judgment below, Mr Justice Green identified multiple systemic failings and operational failings in respect of the Metropolitan police investigation, which in turn enabled Worboys to continue to perpetrate his crimes. The Commissioner raised a number of grounds of appeal; the Court of Appeal's ruling on each is now summarised.

Is the article 3 investigative obligation parasitic on Article 1 ECHR?

19. The Commissioner's first (and highly optimistic) submission was that article 3 was drafted in purely negative terms. The positive obligation to investigate where circumstances came within article 3 was thus derived from article 1 ECHR; as article 1 was not a Convention right within the HRA, there was no duty to investigate in respect of article 3 treatment in domestic law. The Court gave this contention short shrift: §§ 15-17.

Does the article 3 investigative obligation only arise where the state is complicit in the substantive breach?

20. The Court of Appeal rejected the Commissioner's second submission that a duty to investigate under article 3 only arose where the state was complicit in the alleged substantive breach of the article (in this context, the sexual assault), noting that it was contrary to a "*clear and constant line of authority from Strasbourg*", which a domestic court would need very good reason to depart from. The cases envisaged the same obligation to conduct an article 3 compliant investigation, despite the state having no complicity in the ill-treatment itself. Accordingly, "*serious violent crime by non-state agents generally requires a proper criminal investigation by the state*". (See §§ 23-25, 36-37 & 41.)

21. In addressing this point, Laws LJ considered the common law duty of care cases I discussed at §§ 11 – 13 above. He concluded that as Convention claims have very different objectives to civil actions, the current distinction in relation to when there is liability for deficient investigation can co-exist: see §§ 27 – 30.

The content of the article 3 obligation to investigate violent crime by non-state agents:

22. The Court confirmed that "*the nature, scope and rigour of the investigative exercise do not in principle shift as between articles 2 and 3*": §53.

23. Whilst there was no general principle that the article 3 investigative obligation was less extensive in cases involving the criminal acts of private individuals, rather than in cases involving state agents, that may be so in particular circumstances. The Court said the article 3 investigative duty entailed varying degrees of rigour, according to the gravity of the particular case. This was described as a sliding scale, with deliberate torture by state officials at one end and the consequences of negligence by non-state agents at the other. The margin of appreciation the state had as to the means of compliance with article 3 widened at the bottom of this scale and narrowed at the top. At the lower end of the scale, the state's provision of a judicial system with civil remedies would often suffice. Serious violent crime by non-state agents was higher up the scale and in such cases a proper criminal investigation was required. However, not every allegation of ill-treatment meeting the article 3 threshold called for a full criminal investigation. Where the facts were known or the harm caused by negligence and there was no criminal act, a full criminal investigation may be unnecessary, inappropriate or disproportionate. (See §§ 43 - 46, 54 and 59 - 62.)

24. The Court indicated that there was no general principle that a successful prosecution within a reasonable time necessarily prevented prior operational failures from amounting to a violation of the article 3 investigation obligation. However, the fact of conviction would be relevant in assessing whether the procedural obligation has been met and a successful prosecution would generally bring closure to the case: §§ 57 - 58. The Court also confirmed that the investigative obligation can be owed to a victim – in this case NBV – before

she was attacked; the time frame for a duty to investigate a criminal focuses on the conduct of the criminal, not the victim: §§ 79-81.

25. The ECHR's purpose is to secure minimum standards of human rights protection. This is a very different focus to domestic private law claims. Because the focus is on the former, rather than on loss to an individual, the enquiry into compliance with the investigative duty was primarily concerned with the overall nature of the investigative steps taken by the state, rather than the effect on the claimant, so that a margin of discretion should be afforded to the relevant state parties in the adjudication of claims under the HRA: §§ 65 & 67-69. Accordingly, a broad margin of appreciation should be afforded to the police when assessing whether a criminal investigation was adequate: § 69.

26. It remains to be seen how broad this "broad margin of appreciation" proves to be in practice. In the *DSD* case the position on liability was clear-cut. The Court of Appeal considered that on the basis of the policing failings found by Mr Justice Green, the conclusion that the article 3 investigative obligation was violated was "*inescapable*" (§70) and "*inevitable"* (§77). These failings are summarised in more detail at §§ 71 – 76 of the Court of Appeal's decision. In essence they comprised the following:

Systemic failings:

26.1 Failure to provide relevant training to the investigating officers; Mr Justice Green found that had such training been provided it was probable that a significant number of the serious failings would not have occurred;

26.2 Management failures by superior officers resulting from lack of appropriate training and pressures not to focus on sexual assaults;

26.3 Failure to use intelligence resources. By the time NBV was assaulted, Worboys had already assaulted about 100 women and had a distinct MO, but links had not been identified;

26.4 Failure to maintain the confidence of victims;

26.5 Failure to allocate appropriate resources;

Specific failings re DSD included:

26.6 Failure to record relevant facts when the crime was reported;

26.7 Failure to interview an important witness;

26.8 Failure to believe her or take her complaint seriously;

26.9 Failure to collect relevant CCTV evidence;

26.10 Failure to use intelligence sources;

Specific failings re NBV included:

26.11 Failure to collect intelligence;

26.12 Failure to conduct proper searches;

26.13 Failure to conduct a proper interview with Worboys or follow up on discrepancies;

26.14 Failure to follow up on CCTV evidence;

26.15 Failure to record the incident as a serious sexual offence.

27. In short, the police failings in this case were very serious, multiple and protracted.

28. However, in the other appeal heard with *DSD, Karou v Chief Constable of Greater Manchester Police*, the Court of Appeal upheld the trial judge's decision that errors in the conduct of the investigation did not amount to a violation of the article 3 duty. The claimant was attacked and his ear bitten by a man unknown to him when he was in a bar. Police failures included omitting to obtain statements from door staff; failing to clarify discrepancies in the available material; and failing to seek some of the relevant CCTV footage. Whilst acknowledging these deficiencies in the investigation, the trial judge found that a number of positive steps had been taken by investigators; the assault was not of the most serious kind and given various evidential difficulties, the case was always likely to be closed.

29. *OOO v Commissioner of Police of the Metropolis* [2011] EWHC 124 (QB), [2011] HRLR 29 provides a further example of a successful claim for a declaration and damages in respect of police failings in relation to investigative obligations arising under articles 3 and 4 ECHR.

30. The claimants were young Nigerian women who had been brought to the United Kingdom illegally to live in conditions of domestic servitude, where they remained for a number of years, suffering physical and emotional abuse. The women eventually escaped and in due course were assisted by Hackney Law Centre who complained to the police about their treatment. The police failed to undertake any investigations until they were threatened with judicial review proceedings.

31. Mr Justice Wyn Williams rejected the Commissioner's arguments as to the content of the investigative duty, including a submission that only gross negligence would amount to a violation and a contention that the extent of the duty should be influenced by the limited circumstances in which a duty of care in negligence would arise[9]. In this case no investigation at all had been undertaken and thus the Court did not need to consider what degree of failings would be required for a violation to occur.

Causation

32. At first instance in *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), Mr Justice Green indicated that the state would be liable in relation to an investigative failure that would have been "capable" of leading to the apprehension and prosecution of the offender. "Capability" in this context meaning a "causal connection" between the failing and the ability of the investigation to identify and arrest the perpetrator, i.e. whether had the step been taken, it could or might have led to the identification and arrest of the perpetrator: see §§ 221, 226(v) and 287 - 298. The Court of Appeal's judgment (discussed above) does not appear to depart from this view.

33. In any event and importantly, the claimant is not required to show that had the police taken the appropriate steps, the crime would not have occurred / the perpetrator would have been apprehended / successfully prosecuted.

Value of the claim

34. The Commissioner's appeal in *DSD v Commissioner of Police of the Metropolis* related to the liability findings; Mr Justice Green's analysis of and application of the Strasbourg principles relating to damages awards remains undisturbed: see [2014] EWHC 2493 (QB), [2015] 1 WLR 1833.

35. Mr Justice Green identified the following factors as relevant to the assessment of damages:

    (i) The seriousness, scale and manner of the violation. The greater the degree of culpability, the higher the damages award: § 68(iv);

    (ii) The nature of the harm suffered by the claimant: § 118;

    (iii) The severity of the damage sustained and the degree of loss suffered by the claimant;

[9] See my discussion of the common law position at §§ 11 – 13 above and the way the Court of Appeal dealt with the equivalent submission in DSD at § 21 above.

(iv) The duration of the breach: § 118;

(v) The nature of the failings and whether they were operational and / or systemic: § 118;

(vi) The overall context to the violations: §§ 118 and 126;

(vii) The conduct of the claimant, and whether it can be described as in any way reprehensible. Material contributory fault may lead to a reduction in damages: *DSD* §§ 37 and 68(v);

(viii) The conduct and culpability of the defendant including: whether the defendant has demonstrated any contrition and whether any apology has been provided; whether the violation was deliberate and / or in bad faith; whether the state has drawn the necessary lessons and whether there is a need to include a deterrent element in an award; whether there is a need to encourage others to bring claims against the state by increasing the award; and whether the violation was systemic or operational: §§ 40, 118 and 127. The willingness of the state to learn lessons and conduct investigations is unlikely to result in a material reduction in damages. The fact that state agents have been disciplined in relation to the circumstances surrounding the violation is not relevant to damages: § 48;

(ix) The fact that the size of awards made by the ECtHR often reflects the quality of the evidence provided on the harm suffered by the claimant. ECtHR cases indicate that where expert evidence establishes a recognised condition, e.g. material psychological harm, awards are often markedly higher: § 68(i);

(x) Where modest sums are awarded by the ECtHR, this is often because modest sums have been claimed, rather than because the Court positively decided to make a modest award: § 68(ii);

(xi) The effect of the failings on others can be relevant to the level of damages: § 126;

(xii) Where the award sits on the range of awards made by the ECtHR and in similar domestic cases: § 118.

36. By way of background, awards from the ECtHR for violations of the Article 2 procedural obligation alone include the following:

(i) Jaloud v Netherlands (App. No. 47708/08). The applicant was awarded €25,000;

(ii) Al-Skeini v UK (2011) 53 EHRR 18; £15,000 for each of the five applicants;

(iii) *Dimitrova v Bulgaria* (App. No. 44862/04); €10,000 to each parent.

(iv) *Silih v Slovenia* (2009) 49 EHRR 37; €7,500 to the applicant.

(v) *Şemsi Önen v Turkey* (App. No. 22876/93), 14 May 2002. The applicants were awarded between €13,000 and €16,000 for a violation of the procedural obligation in relation to the deaths of their parents and brother.

(vi) *Jordan v UK* (2003) 37 EHRR 2; the applicant was awarded £10,000.

37. A further issue Mr Justice Green had to consider in *DSD* was the significance of earlier awards received by the claimants in relation to the sexual assaults. He held that it was necessary to consider whether the damages claimed under article 3 related to different aspects from this earlier compensation and he bore in mind that a civil claim brought against the perpetrator of the article 3 treatment, who may be impecunious, will often be significantly undervalued: §§ 14, 55, 60 – 61, 63 and 65. In this case the compensation received from Worboys did not compensate the claimants for the damage (including psychological damage) caused by the failings in the police investigations (as distinct from the damage caused by the rapes themselves). The claimants therefore received compensation under article 3 in addition to that already received from the perpetrator.

38. Mr Justice Green also noted the following principles (at §§ 68, 118, 124-127, 137-140):

(i) All violations of article 3 result in awards of damages. However, the greater the degree of culpability, the higher the damages award;

(ii) Material contributory fault may lead to a reduction in damages, e.g. delay in notifying the police, failure to cooperate with the police;

(iii) The effect of the failings on others are relevant to the award. In *DSD* the failings resulted in the perpetrator continuing to rape and assault numerous other women (and in NBV's case the rape she suffered would have been avoided had the failings not occurred);

(iv) The range of awards made by the ECtHR for article 3 violations resulting in psychological or mental harm is between €1,000 and €8,000 for a nominal award; €8,000 to €20,000 for a routine violation; and €20,000 to €100,000 for cases with aggravating features;

(v) Aggravating features could include: medical evidence of material psychological harm; mental harm amounting to a recognised medical condition; situations where the victim has also been the victim of physical harm or a crime caused in part by the state; the duration of the failings; the nature of the failings and whether they were operational and / or systemic; morally reprehensible conduct or bad faith by the state. This list indicates that

damages can be awarded in the absence of medical evidence or a recognised medical condition; these factors simply aggravate the award.

39. ECtHR awards for violations of Article 3 vary significantly: see Mr Justice Green's decision in *DSD a*t §§ 68, 128 for a detailed summary of relevant ECtHR awards.

40. Domestic awards for violation of the article 3 investigatory duty have been as follows:

    (i) In *OOO v Commissioner of Police of the Metropolis* (discussed at §§ 29 - 31 above), the claimants were each awarded £5,000 for generalised distress and frustration resulting from the failure by police to carry out any investigations for 12 – 15 months;

    (ii) In *T v Chief Constable of Staffordshire Police* (18 January 2013, unrep; Birmingham County Court), the claimant was awarded £5,000 for serious upset and distress caused by flaws in a police investigation into her serious sexual assault; and

    (iii) In *DSD v Commissioner of Police of the Metropolis* (discussed at length above; see §§ 18 and 26 in particular) the claimants were awarded £22,500 (including £2,250 for future treatment costs) and £19,000 (including £2,000 for future treatment costs), respectively.

FAILURE TO PROPERLY INVESTIGATE CRIME: SUSPECTS

Tort claims

41. The opportunities for redress for those who are prosecuted as a result of botched investigations is heavily limited in terms of tort claims.

42. A prosecution based on weak evidence, even one that was self-evidently weak at the time, will not of itself give rise to a successful claim in malicious prosecution as the required element of 'malice' will not be established; see for example: *Moulton v Chief Constable of the West Midlands [2010] EWCA Civ 524.* Analogous difficulties with a claim for misfeasance in a public office have already been highlighted at § 10 above[10].

43. Furthermore, it is well established that prosecuting authorities do not owe a duty of care to those suspected of crime in relation to the quality or efficiency of their

[10] Even if bad faith could be shown, for a successful misfeasance claim, issues raised by the doctrine of witness immunity would also have to be overcome: *Darker v Chief Constable of West Midlands* [2001] 1 AC 435.

investigations: *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335 CA.

Claims under Article 5 ECHR

44. However, where a suspect suffers a protracted remand in custody as a result of police / CPS delay and/or incompetence the recent decision of the Court of Appeal in Zenati *v Commissioner of Police of the Metropolis & the Crown Prosecution Service* [2015] EWCA Civ 80; [2015] 2 WLR 1563, indicates that a claim may lie under the HRA in respect of violations of Article 5 ECHR itself. Specifically, the Court held that articles 5(1)(c) and 5(3) ECHR could be breached by the claimant's continued detention after the police became aware that there were no longer grounds for the charge but failed to communicate the same to the prosecuting authorities or to the court. Further, that article 5(3) could be infringed by post-charge delay on the part of investigating / prosecuting authorities.

45. In *Zenati* the claimant was charged with offences and on 10 December 2010 remanded in custody by a court on the basis that his British passport was a fake. About five weeks later the police sent the passport to a fraud unit for examination and were informed a few days later on 19 January 2011 that the passport was genuine. However, over two weeks later on 4 February 2011 a plea and case management hearing went ahead in the Crown Court and the claimant was further remanded without the police informing the CPS or the court about the new information. Later that day the police informed the CPS the passport was genuine but it was another five days before a further bail hearing was listed and the claimant was released.

46. The claimant contended that:

    (i) His detention from 19 January 2011 (when police learnt his passport was genuine) until 9 February 2011 (the date of his release), was contrary to article 5(1)(c) as during this time there was no longer any reasonable suspicion that he had committed the offence; and

    (ii) His detention from 10 December 2010 (his initial remand in custody) until his release was a violation of article 5(3), as it had been unreasonably long, given the initial the delay in causing his passport to be examined and the subsequent delay in actioning the outcome.

47. The Court of Appeal allowed the claimant's appeal against the striking out of his article 5 claims.

Article 5(1)(c)

48. The Court acknowledged that the paradigm article 5(1)(c) case involved detention for the purpose of bringing a person before the court at the *initial stage* where the authorities have a reasonable suspicion that the alleged offence has been committed. However, there was nothing in the language of article 5(1)(c) to indicate that it was limited to detention pending the first court hearing. If it were so limited there would be a gap in the protection afforded by article 5 as it would permit detention to continue after that first hearing where the investigating authorities no longer had a reasonable suspicion that the offence in question had been committed: §§ 15-16. To continue detention after the authorities had ceased to hold a reasonable suspicion was bound to lead to arbitrary detention and a wider construction of article 5(1)(c) would be consistent with article 5(3): § 17.

49. Having decided that article 5(1)(c) applied to detention after the first court hearing, the Court then considered what it required where investigating authorities ceased to have a reasonable suspicion that the detained person had committed the offence. It was implicit in article 5(1)(c) that the investigating / prosecuting authorities were required to bring the relevant facts to the attention of the court as soon as possible, so as to enable the court to review whether there were grounds for the continuing detention: § 20. Thus, it was arguable that the police's failure to inform the CPS and the court of the outcome of the passport examination until after the hearing on 4 February 2011 was a breach of article 5(1)(c): § 21.

Article 5(3)

50. The Strasbourg jurisprudence showed that lack of diligence on the part of those responsible for investigating the case and preparing for trial was relevant to the question of whether the court has conducted the proceedings with the required "special diligence" and whether detention has been for an unreasonably long period. Thus, if delay on the part of the investigating / prosecuting authorities caused the court to fail to conduct the proceedings with special diligence, those

who were responsible for the delay would be responsible for the breach of article 5(3): § 43.

51. Further, if the investigating authorities failed to bring to the attention of the court material information which the court should have been made aware of when reviewing the detention, this could have the effect of causing a decision by the court to refuse bail to be in breach of article 5(3). Thus if the investigating authorities prevented the court from discharging its duty of reviewing the lawfulness of the detention fairly, they could be liable under article 5(3): § 44.

52. On the pleaded facts it was arguable that the police were liable for breach of article 5(3) in failing to convey the information that the passport was genuine on a timely basis: § 47. It was also arguable that both the police and the CPS were liable for failing to progress the investigation with due expedition: § 48.

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