



# Convention on the Elimination of All Forms of Discrimination against Women

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## Committee on the Elimination of Discrimination against Women

### Decision adopted by the Committee under article 4 (2) (c) of the Optional Protocol, concerning communication No. 126/2018<sup>\*,\*\*</sup>

<i>Communication submitted by:</i>	A.J. et al. (represented by counsel, Birnberg Peirce Ltd)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	United Kingdom of Great Britain and Northern Ireland
<i>Date of communication:</i>	17 December 2017 (initial submission)
<i>References:</i>	Decision taken pursuant to rule 69 (3) of the Committee's rules of procedure, transmitted to the State party on 12 March 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	28 October 2019

\* Adopted by the Committee at its seventy-fourth session (21 October–8 November 2019).

\*\* The following members of the Committee participated in the examination of the present communication: Gladys Acosta Vargas, Hiroko Akizuki, Tamader Al-Rammah, Nicole Ameline, Gunnar Bergby, Marion Bethel, Louiza Chalal, Esther Eghobamien-Mshelia, Naéla Gabr, Hilary Gbedemah, Nahla Haidar, Rosario G. Manalo, Lia Nadaraia, Aruna Devi Narain, Bandana Rana, Rhoda Reddock, Elgun Safarov, Wenyan Song, Genoveva Tisheva, Franceline Toé-Bouda and Aicha Vall Verges.



**Background**

1.1 The authors are A.J., S.B., D.L., T.B., R.B., H.S. and B.H., nationals of the United Kingdom of Great Britain and Northern Ireland, born in 1973, 1971, 1972, 1971, 1965, 1965 and 1962, respectively. They claim that the State party has violated their rights under articles 1, 2 (a), (b), (d) and (f), 3, 5, 7 (c) and 16 (a), (b) and (e) of the Convention. The Optional Protocol to the Convention entered into force for the State party on 17 March 2005. The authors are represented by counsel, Birnberg Peirce Ltd.

1.2 On 12 March 2018, the communication was registered. On 10 March 2019, the Committee, acting through its Working Group on Communications under the Optional Protocol, granted the State party's request to split the consideration of the admissibility and merits of the communication.

**Facts as submitted by the authors**

2.1 The authors were activists and/or were associated through social networks with political groups conducting environmental and/or social justice campaigns. They were deceived into entering into long-term intimate relationships with male undercover police officers during various periods between 1987 and 2009.

2.2 A.J.'s relationship began in September 2004 and ended in October 2010, when she learned of the identity of the undercover officer, who had left the police force in 2009 but had continued to spy on her for a private company. S.B.'s relationship lasted from February to September 2005. S.B. had further intimate encounters with the officer in 2007 and 2008, and learned of his undercover identity in October 2010.

2.3 D.L.'s relationship lasted from November 1999 to September 2000, when the officer left her abruptly, which was traumatizing for her. He informed her in November 2001 that he had been paid as an undercover police officer. In a state of vulnerability, D.L. became pregnant with their first child two weeks later and subsequently had another child with him. Both children were diagnosed with a degenerative disorder. D.L. felt compelled to marry the officer in 2005; they are now divorced.

2.4 T.B.'s relationship lasted from November 1997 to the middle of 1999; she discovered the officer's undercover identity in January 2011. R.B.'s relationship lasted from the second quarter of 1995 to April 2000, when the officer abruptly moved out of their shared home. R.B.'s subsequent suspicions that the man was an undercover officer were confirmed in 2010.

2.5 H.S.'s relationship lasted from May 1990 to April 1992, when the officer abruptly left her. She learned of his identity in 2003, when her efforts to trace him led her to discover his marriage certificate. B.H.'s relationship lasted from May 1987 to December 1988, when the officer abruptly left her. She learned of his undercover identity at an unspecified time.<sup>1</sup>

2.6 The officers who targeted the women were all members of two covert units controlled by the Metropolitan Police Service in London. Their mission was not to investigate crime, but to infiltrate social and political movements in order to gather intelligence and thereby predict and control the impact of protest activity. One of the units was the Special Demonstration Squad, a highly secretive and small unit created in 1968 during the Vietnam War and disbanded in 2008. The other, the National Public Order Intelligence Unit, operated nationally. It was formed in 1999 and disbanded in 2011. The public knew little about the existence, activities, policies and

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<sup>1</sup> In its observations, the State party maintains that this discovery occurred in 2011.

methodologies of the units during their periods of operation. The average length of deployment of undercover officers was four to five years. The long duration of deployment increased the risk of gross intrusion by the officers into the lives of targeted individuals. Such intrusion was disproportionate to the purpose of the surveillance.

2.7 Undercover officers from the units adopted false identities and pretended to be dedicated political activists. Using their false identities, some or many of the officers pursued long-term and intimate sexual relationships with the authors and other women. It is believed that the officers formed the relationships to build and maintain their undercover identities and to increase the officers' credibility and the trust afforded to them by activists. The relationships lasted from seven months to nine years. One of the officers fathered children with one of the authors.

2.8 The authors all suffered psychological harm when they discovered that their partner or former partner was, or had been, an undercover police officer. Such deception seriously undermined the authors' ability to continue or further engage in political activity and form close and intimate personal relationships. As a result, some of the authors have been deprived of the opportunity to have biological children.

2.9 None of the authors has received information about why the relationships were allowed to take place, or about any of their personal data that the State party retains. The police officers and senior officers involved have not been criminally sanctioned for the abuses committed.

2.10 On 20 October 2011, A.J. and S.B. filed civil actions against the Commissioner of Police for the Metropolis before the High Court of Justice. On 18 July 2012, the five other authors did the same. All of them raised civil common law claims on the basis of deceit, negligence, misfeasance in public office and assault. The authors whose relationships with the officers had begun after October 2000, when the Human Rights Act 1998 entered into force, also raised claims under articles 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

2.11 The Commissioner of Police for the Metropolis applied to strike out all of the authors' claims on the grounds that they should be heard by the Investigatory Powers Tribunal. In January 2013, the High Court of Justice struck out the authors' claims regarding the police officers' engagement in sexual relationships with them, on the grounds that the claims fell within the scope of Part II of the Regulation of Investigatory Powers Act 2000 and should therefore be considered by the Tribunal. The High Court of Justice, however, also held that the authors' common law claims could not be struck out because the Tribunal did not have jurisdiction to consider the claims.

2.12 In November 2013, following an appeal by the authors, the Court of Appeal affirmed the decision of the High Court of Justice. The authors subsequently requested permission to appeal to the Supreme Court. In their request, the authors challenged the determination of the lower courts that, under the Regulation of Investigatory Powers Act 2000, undercover police officers could be lawfully authorized to enter into sexual relationships with members of the general public while using their undercover personae, for the covert purpose of gathering intelligence. On 22 December 2014, the Supreme Court denied the authors' request for permission.

2.13 The authors pursued their common law claims before the High Court of Justice, under a conditional fee agreement with their legal representatives. This type of agreement is premised on a contingency "no win no fee" basis. A claimant losing the case is liable for the defendants' costs. Thus, claimants may decide, as the authors did, to purchase private "after the event" insurance to provide costs protection. The

defendants made financial offers during the proceedings to settle the authors' claims. Under their insurance policy, the authors' insurance coverage would terminate if they did not accept a "reasonable" offer. If the authors had been obligated to pay the defendants' legal costs, they would have been financially ruined. Thus, to retain their insurance policy, the authors collectively decided to enter into agreements to settle their civil claims. They felt that they had no other choice owing to the prohibitive level of the costs that they risked facing. The settlement agreements included the provision of compensation and a public apology to the authors. However, the authors consider that they retain their victim status before the Committee.

2.14 In July 2015, a public inquiry was initiated and is currently pending. Owing to extensive delays, no evidence is to be heard until 2019, and the final report is expected no earlier than 2022.

2.15 On 20 November 2015, the police published an apology to all of the authors. In the apology, the police recognized that the relationships were "abusive, deceitful, manipulative and wrong", and that they constituted "a violation of the women's human rights, an abuse of police power and caused significant trauma". The police stated that the relationships should never have happened and were a "gross violation of personal dignity and integrity". The police also recognized that "money alone cannot compensate the loss of time, their hurt or the feelings of abuse caused by these relationships" and acknowledged that such relationships should not be allowed to happen again.

2.16 The authors submit that they have exhausted all available domestic remedies. They also claim that domestic remedies were ineffective because: (a) they still do not know the extent of the violations to which they were subjected or who sanctioned the violations; (b) they did not receive a declaration or ruling by the court in which it was stated that their rights had been violated; (c) the legislative framework still allows, and even enables, such violations to occur; (d) the contradictory conduct of the police undermines the public apology that it provided; and (e) the State party's prosecuting authority, the Crown Prosecution Service, has taken no further action to sanction the men involved or their superiors.

### **Complaint**

3.1 The authors allege that the State party violated their rights under articles 1, 2 (a), (b), (d) and (f), 3, 5, 7 (c) and 16 (a), (b) and (e) of the Convention by authorizing and/or failing to provide effective protection from undercover police officers who entered into sexual relations with them without disclosing their law enforcement affiliations.

3.2 The policy and practice of instructing and/or enabling undercover police officers to have and maintain emotional, familial and sexual relations with women while deceiving them as to their real identity and purpose constituted direct discrimination against women. The policy and practice overwhelmingly affected women. There is no indication that men were targeted in the same way. Moreover, the policy and practice affected women differently, in particular because it had a significant effect on the victims' reproductive rights. The effect of the discriminatory treatment was to nullify the authors' enjoyment and exercise of their human rights and fundamental freedoms. The discriminatory treatment fundamentally undermined each author's dignity and privacy. By commencing and maintaining sexual relationships with the authors on the basis of false identities, and by acting as State agents, the police officers invaded the authors' bodily integrity and privacy, showed complete disregard and disrespect for their human dignity, deeply degraded and humiliated them and caused them intense mental suffering and pain. By using and deceiving the authors to obtain information,

male police officers engaged in a form of coercion that amounted to gender-based discrimination.

3.3 Furthermore, the discriminatory practice and policy had a number of specific aspects that constitute additional violations of the Convention. In violation of article 2 (d) of the Convention, the State party took no steps to prevent the police officers' conduct at the time and has not subsequently criminalized that type of conduct; it has not instituted criminal or even disciplinary sanctions against those responsible for committing the abuses.

3.4 In violation of article 2 (a)–(c) and (f) of the Convention, the State party failed to adopt legislative measures to prevent police officers from having sexual relations with women when working undercover. The Court of Appeal has ruled that legislation regulating the conduct of covert human intelligence sources cannot be construed so as to prevent or in any way outlaw sexual relationships. The Crown Prosecution Service has refused to take action against the officers or their supervisors involved. The decision not to prosecute any of the officers was taken despite the fact that several cases involving identity deception vitiating consent have successfully been prosecuted in circumstances in which women deceived other women as to their real gender in sexual relations with other women. This difference in approach indicates that the decision not to prosecute the officers was discriminatory. The refusal to prosecute also indicates that the State party is failing to meet its positive obligation to enforce sanctions on those committing abuses and to desist from the practice, despite having knowledge of the pain and suffering that the practice is causing.

3.5 In violation of article 3 of the Convention, the State party has failed to take appropriate measures to guarantee the exercise by women of fundamental freedoms on an equal basis with men, including the freedom of expression and assembly, the right to freely participate in politics and civil society, the right to enter into familial relationships, the right to exercise choice over reproduction and the right to form sexual relations. In the absence of such safeguards, women are discouraged from exercising their right to freedom of expression and assembly on an equal basis with men. Women are also inhibited in their ability and freedom to enter into sexual and family relations and to enjoy privacy. As such, the fear of being deceived into an intimate relationship with an undercover officer inhibits the exercise of a range of the authors' fundamental freedoms, including the right to freely participate in politics and civil society, the right to enter into familial relationships, the right to exercise choice over reproduction and the right to form sexual relations.

3.6 In violation of article 5 (a) of the Convention, the authors were subjected to gender stereotyping by the undercover police officers who targeted them. The pretence of intimacy, both emotional and sexual, was carried out with behaviour calculated to engage the women's attentions and commitment. In four of the seven cases, the deceit was extended through the behaviour undertaken to end the purported relationship, with elaborate stories about personal crises and a pretence of moving to other countries. These stories were constructed to play on the authors' sympathies. The authors went to great lengths to find the officers to ensure their well-being, even travelling long distances at great cost to themselves. The policy and practice disempowered the authors because it exploited the social context of male-female sexual and familial relations and the women's emotional and sexual responses within that context.

3.7 In violation of article 5 (b) of the Convention, D.L. was deceived into conceiving and giving birth to children. The undercover officer in her case sought to recommence his relationship with her, possibly under the instruction or express authority of his police superiors because she was on the cusp of discovering the existence of the Special Demonstration Squad. This resulted in her conceiving their

two children, and D.L. has not been informed why this was allowed to occur. The impact on D.L.'s children of being born into a family subject to control and deceit by an officer has fundamentally interfered with their formative years and identities. D.L. also considers that the deceit that led to the conception and birth of her children was part of the pattern of coercive control to which the officer subjected her.

3.8 In violation of article 7 (c) of the Convention, the authors were identified and targeted on the basis of their gender and activities in political organizations. The State's failure to prevent undercover officers from initiating sexual relationships with the women in organizations that they are targeting inhibits the ability of women to participate in non-governmental organizations and associations concerned with the public and political life of the country on equal terms with men. The fear of being deceived into an intimate relationship with an officer inhibits the exercise by women of their fundamental freedoms of political association and full participation in public life. The lack of due diligence by the State party to prevent officers from initiating sexual relationships with politically active women discourages women from exercising their right to freedom of expression and assembly on the basis of equality with men, and fundamentally undermines their dignity and autonomy.

3.9 Lastly, in violation of article 16 (a), (b) and (e) of the Convention, the State party denied the authors the right to freely choose their partners. They could not have provided informed consent when entering into the long-term, intimate relationships, and would not have entered into these relationships had they known that their partners were undercover officers tasked by the State party to spy on them. The State party also knew that the officers would disappear at the end of their lengthy deployments, and that there was clearly no prospect of lifelong partnerships with or without children. The authors' relationships with the officers deprived them of the right to freely decide on the number, timing and spacing of their children and had a significant impact on their reproductive rights. D.L. had two children with the officer that she would not have had if she had known that he was an officer when they first began their relationship, and if she had not subsequently been subjected to his deceitful and controlling behaviour upon his return. Several of the authors lost the option to have biological children, owing to the timing of the relationships in terms of their optimum childbearing years and to the impact on their subsequent ability to trust and thereby form a new relationship. Other authors had children much later in life than they would have chosen. The policy/practice thus had a significant impact on the authors' reproductive rights, as it violated their ability to make choices about reproduction and give informed consent for both sexual relations and entering into family life. The targeting of women in this way has a disproportionate effect, given their limited childbearing years.

3.10 The remedies provided by the State party are inadequate. Restitution is incomplete because the authors have not been provided with information about the extent of the surveillance to which they were subject. The authors need that information in order to put their experience of violation behind them. In addition, neither the officers nor their supervisors have been punished for the abuses that they committed. Similarly, the authors have not received rehabilitation; they cannot achieve psychological well-being owing to the fact that they have been refused the complete information about what happened to them and have not received clear reassurance that they are able to continue their lives without surveillance or intrusion. Satisfaction has not been achieved; although an apology was given, the applicants asked for it to include a recognition of institutionalized sexism by the State. The Metropolitan Police Service refused to include such recognition in its apology. Lastly, the State has not committed itself to giving guarantees of non-repetition, and the laws that permitted the use of intimate relationships with undercover officers as a method of spying on protesters remain unchanged.

### **State party's observations on admissibility**

4.1 In its observations dated 21 November 2018, the State party complements the factual background of the communication and provides extensive information on the numerous national reports and inquiries that have been issued or conducted to examine the subject of undercover policing since 2010. These inquiry procedures include the following: (a) a review in 2012 by Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, which examined and issued recommendations relating to national police units that provide intelligence on criminality associated with protest; (b) Operation Herne, which began in 2011 and is ongoing, an independent review established by the Metropolitan Police Service of the use of undercover police officers by the former Special Demonstration Squad, following which the former undercover officer with whom D.L. and T.B. had sexual relationships was dismissed from the police for gross misconduct; and (c) the Undercover Policing Inquiry, which began in 2015 and is ongoing, and is described in further detail below. The State party also declares that it makes no admissions as to the accuracy of any of the alleged facts, including the alleged identity of the alleged undercover police officers, in the communication and the supporting documentation.

4.2 The State party considers that the communication is inadmissible because all seven authors failed to exhaust domestic remedies. First, none of the authors alleged sex- or gender-based discrimination as a matter of fact, in either their tort-based claims or their claims under the Human Rights Act 1998. They clearly could have done so. Thus, the national bodies had no opportunity to examine this claim. The authors' apparent assertion that they raised the issue of discrimination before national bodies is incorrect.

4.3 Specifically, the complaint brought by A.J. and S.B. raised, on the one hand, tort-based common law claims of deceit, misfeasance in public office, assault/battery and negligence and, on the other hand, a claim under the Human Rights Act 1998 invoking articles 3 and 8 of the European Convention on Human Rights, relating to the prohibition of torture and the right to respect for private and family life, respectively. The complaint brought by D.L., T.B., R.B., H.S. and B.H. raised tort-based common law claims of deceit, misfeasance in public office, assault/battery and negligence. It did not include any claim under the Act because the relationships of the women did not start or continue after October 2000, when the Act entered into force. The fact that each of the authors is a woman and the fact that each of them was involved in a sexual relationship with an undercover officer are plainly insufficient to constitute an allegation of sex- or gender-based discrimination.

4.4 Second, A.J. and S.B. did not allege sex- or gender-based discrimination as a matter of law in their national claim. They could have done so under section 6 (1) of the Human Rights Act 1998, according to which "it is unlawful for a public authority to act in a way which is incompatible with a Convention right". In their national claim, A.J. and S.B. expressly relied on certain provisions of the European Convention on Human Rights, but not on article 14 of the Convention, which relates to non-discrimination. All seven authors were represented at all material times by solicitors and barristers. The only reasonable deduction is that they made a deliberate decision not to pursue a claim of sex- or gender-based discrimination.

4.5 Third, all of the authors settled their civil claims, as reflected in court orders dated 19 November 2015. On 19 November 2015, A.J. and S.B. agreed not to pursue their claims further under the Human Rights Act; it is stated in the settlement agreement that it was a "full and final settlement of their claims against the defendant in claim No. HQ11X03952 and the [Investigatory Powers Tribunal] proceedings brought by the [authors] under the [Human Rights Act]". On the same date, the five remaining authors reached a separate settlement, in the agreement to which it is stated

that it represented a “full and final settlement of their claims against the Defendant in Claim No. HQ12X02912”. The seven authors received substantial compensation, the amounts of which are confidential. In addition, all seven authors received payment for legal costs, as well as a public apology, in accordance with the terms of the settlement agreements. The settlement means that they either failed to exhaust domestic remedies or that they lacked victim status. The authors claim “that they had no choice” but to accept the settlement offers made by the defendant because of the “prohibitive level of the costs risks that [they] would be exposed to if they continued the case”. They also acknowledge, however, that their insurance policy required them to accept only a “reasonable” offer by a defendant. It may be inferred that the authors were advised, by their solicitors and barristers, that the defendant’s offers to settle were “reasonable”. They obviously had a choice and were able to reject unreasonable offers. Therefore, the authors accepted the settlement offers because they were reasonable, rather than because they had “no choice”. That this is so is apparent from the fact that a third claimant, who was a party to the civil claim brought by A.J. and S.B., and is not an author of the communication, chose not to settle her claim at the same time.

4.6 The public apology issued to the authors included the following remarks:

The Metropolitan Police has recently settled seven claims arising out of the totally unacceptable behaviour of a number of undercover police officers. ... It has become apparent that some officers ... entered into long-term intimate sexual relationships with women which were abusive, deceitful, manipulative and wrong. I acknowledge that these relationships were a violation of the women’s human rights, an abuse of police power and caused significant trauma. I unreservedly apologise on behalf of the Metropolitan Police Service. ... I entirely agree that it was a gross violation [of privacy] and also accept that it may well have reflected attitudes towards women that should have no part in the culture of the Metropolitan Police. ... One of the concerns which the women strongly expressed was that they wished to ensure that such relationships would not happen in future. ... These matters are already the subject of several investigations including a criminal and misconduct inquiry called Operation Herne; undercover policing is also now subject to a judge-led Public Inquiry which commenced on 28 July 2015. Even before those bodies report, I can state that sexual relationships between undercover police officers and members of the public should not happen. ... [It] would never be authorized in advance nor indeed used as a tactic of a deployment. If an officer did have a sexual relationship despite this (for example if it was a matter of life or death) then he would be required to report this in order that the circumstances could be investigated for potential criminality and/or misconduct. I can say as a very senior officer of the Metropolitan Police Service that I and the Metropolitan Police Service are committed to ensuring that this policy is followed by every officer who is deployed in an undercover role. Finally, the Metropolitan Police recognise that these cases demonstrate that there have been failures of supervision and management. ... We accept that appropriate oversight was lacking.<sup>2</sup>

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<sup>2</sup> The apology also contains the following remarks: “None of the women with whom the officers had a relationship brought it on themselves. They were deceived pure and simple. ... It is apparent that some officers may have preyed on the women’s good nature and had manipulated their emotions to a gratuitous extent. This was distressing to hear about and must have been very hard to bear. Fourth, I recognise that these relationships, the subsequent trauma and the secrecy around them left these women at risk of further abuse and deception by these officers after the deployment had ended. ... It is of particular concern that abuses were not prevented by the introduction of more stringent supervisory arrangements made by and pursuant to the Regulation of Investigatory Powers Act 2000. The Metropolitan Police recognizes that this should never happen again and the necessary steps must be taken to ensure that it does not.”



4.7 Fourth, the Undercover Policing Inquiry is one of the domestic remedies available to the authors in relation to the possibility of obtaining further information and recommendations. A strategic review of the inquiry was published in May 2018; the Committee is invited to read the document in full.<sup>3</sup> The State party provides extensive information concerning the nature of the inquiry, which was established in March 2015. The final report on the inquiry is expected to be issued in 2023. The Chair of the inquiry is a retired judge of the High Court of Justice. The Chair is assisted by a team of around 50 people, including lawyers and civil servants. The scope of the inquiry includes an examination of “the motivation for, and the scope of, undercover police operations in practice and their effect upon individuals in particular and the public in general”. Thus, the inquiry procedure is sufficiently broad to cover the investigation of issues of discrimination and the specific violations against women. It is irrelevant whether the inquiry procedure is regarded for these purposes as a judicial or administrative remedy. What is relevant is that it is an independent inquiry aimed at investigating a range of issues, including those raised by the authors, such as whether and for what purpose, extent and effect undercover police operations have targeted political and social justice campaigners. The list of issues that may be considered as part of the inquiry with respect to the Special Demonstration Squad expressly includes consideration of the relationships formed by undercover officers during their deployment. The authors request disclosure of information, and systems have been established as part of the inquiry to ensure that all reasonably practical steps are taken to preserve potentially relevant documents and avoid the destruction of necessary materials. There is no blanket policy in relation to applications for orders to restrict disclosure of evidence or documents. The policy of “neither confirm nor deny” is not, in and of itself, a reason to request restriction of disclosure. A considerable amount of material is likely to be published, which, because of its security classification, would otherwise not have been exposed to public scrutiny. By the end of March 2018, over £10 million had been spent on the inquiry. As part of the inquiry, more than 560 requests for evidence have been issued to around 59 organizations, more than 460 witness statements have been received and over 1 million pages of evidence from the Metropolitan Police Service alone have been provided. By May 2018, there were 207 core participants and 25 legal representatives, 19 of which are funded through the inquiry. The authors have non-State core participant status in the inquiry. They have chosen to lodge their communication before being provided with information, as part of the inquiry process, and before factual findings and recommendations have been made under the inquiry about how undercover policing should be conducted in future. They have therefore failed to exhaust that domestic remedy, and their criticisms of the inquiry are therefore either irrelevant or unmeritorious.

4.8 The State party rejects the remainder of the authors’ assertions with regard to exhaustion of domestic remedies, on various grounds. First, while the authors claim that they do not know the extent of the violation to which they were subjected and did not receive a court ruling on the violation of their rights, that is because they chose to settle their civil claims against the Metropolitan Police Service and chose the terms on which to settle. They cannot validly complain about a lack of effective redress because they chose to accept reasonable offers of settlement that included payment of damages, payment of legal costs and a public apology.

4.9 Furthermore, the authors have chosen to submit their communication while the Undercover Policing Inquiry is ongoing. The inquiry is a relevant domestic remedy in that regard, because it is a mechanism through which the authors may obtain information and/or documents; thus, the authors should have exhausted it before submitting their communication. The authors’ criticisms of the inquiry are

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<sup>3</sup> See [www.ucpi.org.uk/wp-content/uploads/2018/06/20180510-strategic\\_review.pdf](http://www.ucpi.org.uk/wp-content/uploads/2018/06/20180510-strategic_review.pdf).

unmeritorious. The inquiry involves a factual investigation, and recommendations will be made on the future deployment of undercover policing. An issue as complex as undercover policing, dating back to 1968, requires thorough and sensitive factual investigation before it may be considered at the policy level. The time that is being taken for the inquiry, the approach to legal representation and the management of information and evidence are, therefore, reasonable in the light of the scale and complexity of the task. That the inquiry is a relevant domestic remedy is not undermined by the authors' criticism of the timing or by their criticism that they have only one set of lawyers or that they may not have unrestricted access to "the full contents of their police or special branch files; only the content of the files which the Inquiry considers to be relevant and necessary to the Inquiry's terms of reference". Regarding the authors' assertion that the recommendations of the inquiry may or may not relate to some of the remedies that they seek, this does not assist the authors, because they have chosen to submit their communication while the inquiry is ongoing and at a time when no recommendations have yet been made. Moreover, the authors have the opportunity, as core participants in the inquiry, to make submissions on what should be recommended as part of the inquiry. Lastly, the contention that there is no power, under the inquiry, to ensure that its recommendations are enacted does not negate the fact that it is a legitimate and important part of the process by which the State party is considering the future of undercover policing and a mechanism through which the authors may obtain information, documents and recommendations.

4.10 Second, the authors lack victim status with respect to their argument that the legislative framework allows and enables similar violations to occur. The authors obtained effective redress for the harm that they suffered by settling their claims. The authors are not victims solely because they consider that there are defects in the legislative framework in circumstances that do not affect them.

4.11 Third, although the authors argue that the public apology is undermined by the lack of assurances by the police that the disputed conduct will not reoccur, it is hardly surprising that there is a range of views on undercover policing. That range of views explains why the State party has made such significant efforts to investigate the matter, including through the inquiry. The inquiry involves, among other things, assessing the adequacy of the justification, authorization, operational governance and oversight of undercover policing; the selection, training, management and care of undercover police officers; and the statutory, policy and judicial regulation of undercover policing.

4.12 Fourth, while none of the police officers involved or their superiors has been criminally prosecuted, the reasoning of the Crown Prosecution Service is explained in the documents annexed to the communication. As a result of the ongoing Operation Herne, the officer who had relations with D.L. and T.B. has been dismissed from the police for gross misconduct. Because D.L. does not appear to have taken legal steps to challenge the decision of the Crown Prosecution Service, the lack of prosecution may not be criticized.

4.13 The communication is also inadmissible because all seven authors lack victim status. As with the author in *X. v. Austria*, each author settled her national civil claims. The authors each received substantial damages, payment for legal costs and a public apology.

4.14 Moreover, the authors' attempt, now, to impugn the settlement is unmeritorious, for the following reasons: (a) they were legally represented at all material times and chose to accept the settlement offers, which they must have been advised were reasonable, at the very least; (b) they chose, by agreeing to settle, to forego the opportunity to press for or obtain disclosure or a court ruling; (c) they chose the terms

on which they settled; and (d) the public apology constitutes an acknowledgment of wrongdoing, as the authors themselves accept.

4.15 Thus, the authors have obtained effective redress for the harm that they suffered as a result of their relationships with the undercover police officers. This is made explicit in both of the schedules to the settlement agreements. Both schedules contain explanations that the settlement agreement was in “full and final settlement” of the authors’ claims. If, contrary to the State party’s position, the authors’ national claims did include either factual or legal assertions regarding sex- or gender-based discrimination, any such claims were clearly within the scope of the settlement agreement and were fully and finally settled. Alternatively, if the authors’ national claims did not include either factual or legal assertions regarding sex- or gender-based discrimination, the settlement agreements were clearly intended to be in full and final settlement of all the harm suffered by the authors as a result of their relationships with the officers. That is why provision was made not only for financial compensation for the harm suffered but also for a public apology and for payment of legal costs. It is utterly fanciful to contend, as the authors appear to, that, despite such “full and final settlement”, it was the intention of the parties that the authors remained free to bring a claim relating to the matter before the Committee.

4.16 In addition, the communication is inadmissible *ratione temporis* with respect to D.L., T.B., R.B., H.S. and B.H. The State party acceded to the Optional Protocol on 17 December 2004, and the circumstances of the five authors’ claims arose before that date. The alleged sexual relationships in their cases lasted from 1997 to 1999 (T.B.), 1995 to 2000 (R.B.), 1990 to 1992 (H.S.) and 1987 to 1988 (B.H.). For the author D.L., “her sexual relationship continued into 2005, but she discovered the identity of her partner in 2001, and so the alleged wrongful act took place whilst the relationship lasted from 1999–2001 (i.e. during the time she did not know his true identity)”.

4.17 The authors’ reliance on the Committee’s jurisprudence in *A.T. v. Hungary* is misplaced because, in that case, the Committee’s conclusion turned on a fact-sensitive assessment of ongoing domestic abuse that had continued after the entry into force of the Optional Protocol for Hungary.

#### **Authors’ comments on the State party’s observations on admissibility**

5.1 In comments dated 21 February 2019, the authors assert that they have exhausted domestic remedies. In its views in communication No. 47/2012, the Committee considered that an author must have made “reasonable efforts” to exhaust all domestic remedies available.<sup>4</sup> The authors have made such reasonable efforts, given the complex and extensive litigation that they have brought in this matter.

5.2 The settlement of the authors’ civil claims did not constitute a voluntary settlement of damages. The authors accepted the settlement in order to remain insured to protect them from being liable for the defendant’s legal costs in the event that they lost. It was a condition of the continued insurance policy that a settlement offer be accepted if counsel advised that it was reasonable. Once the defendant had made a financial offer that the claimants were unlikely to better at trial, the claimants were aware that, if they rejected that offer, they would no longer be insured under their policy. If they lost the policy, they could have faced costs of hundreds of thousands of pounds. The settlement offers were made without any disclosure being provided to the authors. Such disclosure was a crucial remedy for them. The authors assert that “the operation of this system creates intersectional discrimination on the basis of gender and socioeconomic status”. Owing to a lack of financial resources, the authors

<sup>4</sup> *González Carreño v. Spain* (CEDAW/C/58/D/47/2012), para. 8.6.

were unable to continue their legal action and were essentially forced to accept the settlement offer. To require the authors to take such an immense risk to exhaust domestic remedies would be unreasonable and would perpetuate the intersecting discrimination that they suffered.

5.3 Whereas the State party asserts that the authors did not raise claims of discrimination before the national authorities, the authors maintain that the discriminatory element of their claims was made clear before the national courts. In their plea, five of the authors stated, regarding the risk created by the conduct of the undercover officers, that “the aforesaid risk had a discriminatory impact on women in that it impacted upon them disproportionately if not exclusively at the time”. The Human Rights Act 1998 could have been invoked only by two of the authors, because it came into effect only in October 2000. The authors did not invoke article 14 of the European Convention on Human Rights because their claim arose in October 2011, before the extent of the activities of the officers was known. The clear discriminatory impact has become more evident over time. The authors maintain that the State party understood that their complaints concerned discrimination, as is made clear from the public apology issued, which contained the following remark: “I entirely agree that it was a gross violation [of privacy] and that it may well have reflected attitudes towards women that should have no part in the culture of the Metropolitan Police”. Moreover, in its views in communication No. 19/2008, the Committee considered that, although the State party asserted that the author had not raised discrimination before the national authorities, discrimination had clearly been shown owing to the presence of gender-based violence.<sup>5</sup> The facts that the authors have raised before the Committee are the same as those raised before the national courts.

5.4 Furthermore, the remedies that the authors received (compensatory damages and a public apology) were not “complete and effective remedies” within the meaning of the Committee’s general recommendations. The women remain entirely ignorant of the reasons for and extent of the surveillance to which they were subjected. Specifically, they do not know: (a) whether or why they were targeted for a relationship; (b) at what level of authority people were aware of or sanctioned the relationship; (c) when the surveillance ended, or whether it continued after the relationship ended; (d) how information about them was shared; (e) what kind of information was shared; (f) how much information was shared and with whom; and (g) by whom they were watched, and when. This is crucial information, without which the authors are unable to know the scope of the harm to which they were subjected, and they are haunted by uncertainty. The refusal to provide information has exacerbated the authors’ suffering. The opportunity for the authors to understand the truth of what happened to them should form a key component of treatment. The authors describe in detail their attempts to obtain disclosure of such information.

5.5 In addition, the remedies that the authors obtained from the State party did not include an assurance of non-repetition. While the College of Policing produced draft guidance in 2016, stating that such sexual relationships should never be authorized or used as a tactic of deployment, the authors do not know whether the guidance has ever been formalized, nor is such guidance sufficient reassurance of non-repetition. The authors seek legislative changes to criminalize the activity in question and ensure that it will result in prosecution, while allowing officers to raise as a defence the existence of extraordinary and extenuating circumstances. In the absence of such changes, the authors remain at risk of being subjected to the impugned behaviour again should they engage in political activism, and they are psychologically affected every time evidence of similar deceit is discovered. Guarantees of non-repetition are part of an effective remedy.

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<sup>5</sup> *Kell v. Canada* (CEDAW/C/51/D/19/2008), para. 7.4.

5.6 Moreover, the Undercover Policing Inquiry does not constitute an adequate domestic remedy because, inter alia: (a) the inquiry is unreasonably prolonged, and substantial portions of it are held in private with no access offered to the authors; (b) it is not certain that information or assurances of non-repetition to the authors as part of the inquiry will be provided; (c) it has been stated that the final report on the inquiry will be provided to the Secretary of State for the Home Department towards the end of 2023, thus constituting an unreasonable period in which to wait for a remedy; (d) it has not been guaranteed that the findings of the inquiry will be made public; and (e) the authors are extremely concerned by the lack of understanding by the Chair of the inquiry of issues relating to sex-based discrimination and have little confidence that issues of discrimination will be adequately addressed as part of the inquiry. The Chair admitted that he has never received any training in discrimination and stated in February 2018 that “experience of life tells [him]” that “officers who have reached a ripe old age who are still married to the same woman [are] less likely to have engaged in extramarital affairs”. The relevance of this is that the Chair was more likely to believe an undercover officer who denied having sexual relations with women he spied on if he were married.

5.7 Furthermore, the harm suffered by the women was not purely economic. They wasted important years of their lives nurturing deceptive relationships that provided no basis for future settled lives. Some of the authors considered or may have considered having children, but this did not happen owing to various excuses provided by the officers. The authors’ ability to trust has been damaged, thereby hampering their formation of new relationships. Discovery and assurances of non-repetition are therefore as important, if not more important, to the authors than financial compensation.

5.8 The authors reiterate that they have victim status because they have not been afforded an effective remedy. The communication is not inadmissible *ratione temporis* because the violations claimed are not limited to the original deception but are instead continuing violations owing to the lack of an effective remedy. While some of the violations date from before December 2004, the failure to provide an effective remedy is an ongoing breach of the Convention.

### **Issues and proceedings before the Committee**

6.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 66, the Committee may decide to examine the admissibility of the communication separately from its merits. Pursuant to rule 72 (4), it is to do so before considering the merits of the communication.

6.2 In accordance with article 4 (2) of the Optional Protocol, the Committee has ascertained that the matter has not already been and is not being examined under another procedure of international investigation or settlement.

6.3 The Committee recalls that, under article 4 (1) of the Optional Protocol, it is precluded from considering a communication unless it has ascertained that all available domestic remedies have been exhausted or that the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.<sup>6</sup> The Committee recalls its jurisprudence to the effect that authors must avail themselves of all available domestic remedies and must have raised in substance at the national level the claim before the Committee, so as to provide the national authorities and/or

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<sup>6</sup> See *E.S. and S.C. v. United Republic of Tanzania* (CEDAW/C/60/D/48/2013), para. 6.3; and *L.R. v. Republic of Moldova* (CEDAW/C/66/D/58/2013), para. 12.2.

courts with an opportunity to address the claim.<sup>7</sup> This obligation does not apply where it is shown that the application of domestic remedies is unreasonably prolonged or is unlikely to bring effective relief.<sup>8</sup>

6.4 The Committee notes the State party's position that the communication is inadmissible under article 4 (1) of the Optional Protocol because the authors have not exhausted domestic remedies, since the Undercover Policing Inquiry, which began in 2015, is ongoing. The Committee notes the State party's statement that the final report on the Inquiry is expected to be issued in 2023. The Committee considers that this remedy is being unreasonably prolonged and that the authors are therefore not required to exhaust it. Accordingly, the Committee considers that the ongoing Inquiry does not constitute an obstacle to the admissibility of the communication under article 4 (1) of the Optional Protocol.

6.5 The Committee also notes the State party's argument that the communication is inadmissible under article 2 of the Optional Protocol because the authors lack victim status. The Committee notes the State party's position that the authors reached "full and final" settlements with the Government to settle their claims at the national level, and agreed to terminate all proceedings with final effect. The Committee observes that the authors' complaints at the national level included, for A.J. and S.B., claims of torture and violations of the right to privacy and family life and, for all seven authors, claims of assault/battery, misfeasance, negligence and deceit by the police officers. The Committee also notes the factual claims made by D.L., R.B., T.B., B.H. and H.S. regarding the discriminatory impact of the policing practice and policy on them as women. While noting the authors' argument that the settlement agreements do not provide full reparation for the harm that they suffered, the Committee also notes that the terms of the agreement indicate a "full" settlement and an unequivocal waiver of further related claims by the authors. The Committee observes that, under the settlement agreements, the authors each obtained substantial financial compensation. The Committee also notes that, pursuant to the agreement, each author also received payment for legal costs, as well as a public apology published on 20 November 2015. The Committee observes that in the apology the relationships were characterized as "abusive, deceitful, manipulative and wrong", and that they constituted "a violation of the women's human rights, an abuse of police power and caused significant trauma". It was further stated in the apology that the relationships should never have happened and were a "gross violation of personal dignity and integrity", and "may well have reflected attitudes towards women that should have no part in the culture of the Metropolitan Police". It was also recognized in the apology that "money alone cannot compensate the loss of time, [the authors'] hurt or the feelings of abuse caused by these relationships". Noting the authors' position that guarantees of non-repetition were not provided, the Committee also notes that the apology includes the following statement: "I can state that sexual relationships between undercover police officers and members of the public should not happen. ... [It] would never be authorized in advance nor indeed used as a tactic of a deployment". The Committee takes note of the authors' claims that they retain victim status because the settlement agreement was not voluntary, since they felt compelled to accept it in order to retain their insurance policy, without which they could have been liable for significant legal costs in the event that their claims were unsuccessful. The Committee, however, also notes the authors' information that their insurance policy required them to accept a settlement offer only if counsel advised that it was reasonable. The Committee notes that the authors were represented during settlement proceedings by counsel of their own choosing. It also notes that the authors have not indicated that they expressed concerns to their counsel and the State party's

<sup>7</sup> See, inter alia, *N. v. the Netherlands* (CEDAW/C/57/D/39/2012), para. 6.3.

<sup>8</sup> See, inter alia, *X. v. Austria* (CEDAW/C/64/D/67/2014), para. 6.4.

representatives about the fairness of the agreement's terms, an inequality of arms or undue pressure to agree to the proposed terms. The Committee also notes that one of the parties to the claim filed by A.J. and S.B., who is not a party to the authors' communication, chose not to settle her claims at the same time. The Committee further considers, taking into account the amounts of the compensation awards, the payment of the authors' legal costs and the text of the public apology, that the terms of the settlement agreement are not in and of themselves patently unfair towards the authors. In the light of the information made available to it, the Committee is unable to conclude that the settlement agreement was manifestly inequitable or was the result of undue pressure or coercion owing to onerous terms, so as to vitiate the authors' waiver to submit a communication to the Committee concerning the same matter. Accordingly, the Committee is of the view that the authors lost their victim status when they concluded the settlement in full and final satisfaction of their claims at the national level. The Committee therefore concludes that the communication is inadmissible under article 2 of the Optional Protocol.<sup>9</sup>

7. The Committee therefore decides that:

- (a) The communication is inadmissible under article 2 of the Optional Protocol;
- (b) The present decision shall be communicated to the State party and to the authors.

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<sup>9</sup> In the light of its findings, the Committee does not deem it necessary to examine other grounds of inadmissibility.