Section 5 and 6. Statement of Facts and Grounds. Section 8- Remedies sought.

References are made to the Core Bundle and its pagination in consecutive red numbering. (Some of the documents retain previous numbering caused by their originating publication)

Statement of Facts

1.The is an application for permission for judicial review from a longstanding academic researcher at professorial level and journalist of 46 years' standing who has found that the First Tier Tribunal and Upper Tribunal (Information Rights) system legislated for under the Freedom of Information Act 2000 has not accorded to him what he sincerely believes to be his rights under Article 10 of the Human Rights Act and European Convention, ECtHR jurisprudence, and English Common law freedom of expression iterated in higher domestic case law.

2.At the heart of the case is the frustration that absolute exemptions set out in FOIA, in particular Section 23 covering state 'security bodies' and information held by other government departments and organisations subject to FOIA that relates to security bodies, denies access to historical files central to public interest/watchdog projects. The claimant argues these would significantly and essentially contribute to important and high status political debates about the activities of the state in collecting information about staff and students in higher education.

3.This application specifically concerns the claimant's request in January 2018 to the Metropolitan Police for historical Special Branch files relating to staff and students at University of London, Goldsmiths' College (as it then was) between 1917 and 1989, the activities of the Communist Party of Great Britain and British Union of Fascists at the college, and any information relating to Peter Clifford Faith, President of the College's Student's Union 1952-3. The Claimant is the appointed and *pro bono* historian of Goldsmiths, University of London which he is continuing as an Emeritus Professor since his retirement at the end of August 2020.

4.The FOIA request was based on public domain information published in the memoirs of Goldsmiths Warden Sir Ross Chesterman (1953-74) that he had been in regular communication with Metropolitan Police Special Branch about what he perceived to be politically extremist activities of some staff and students which disrupted the operation of the College. He alleged that Mr Faith was so committed to communism he stole the student union's funds to travel to Moscow and live there for several months at the height of the Cold War. The claimant, therefore, had compelling and persuasive evidence that the Metropolitan Police and, indeed, The Security Service (MI5) held this information.

5.The claimant's need to access this information was bolstered by the release to the Inquiry into Undercover Policing of a witness statement by a Goldsmiths student in the early 1970s, and Metropolitan Police Special Branch files detailing security surveillance at Goldsmiths' College at this time. (See pages 80-96 of Core Bundle) An indication of the public interest importance of this aspect of the College's history is the published account by the Claimant of the public confession by Malcolm Edwards/McLaren to burning down the College's library

in 1971 which was linked to his activities as a disruptive Situationist Marxist. See: 'How and why did Sex Pistols Manager Malcolm McLaren burn down the Goldsmiths' College library? At https://sites.gold.ac.uk/goldsmithshistory/how-and-why-did-sex-pistols-manager-malcolm-mclaren-burn-down-the-goldsmiths-college-library/ After all submissions had been made at the First Tier Tribunal, the Metropolitan Police revealed that it had made a partial release under the Freedom of Information Act to a Special Branch file on Goldsmiths lecturer Margot Heinemann in 2017. (See Core Bundle page 69-79) The author, Richard Knott, stated that this was an FOI application and release at page 188 of his book 'The Secret War Against The Arts' published by Pen and Sword in 2020. This is in the context of there being 182 Metropolitan Police Special Branch files in the National Archives. (See Core Bundle 97-123). 47 of these are open documents and the other 135 are 'open description' status, which means they are still withheld from public examination. There are, in fact, over 5,000 historical Security Service files released to the National Archives concomitant with the time frames of the Claimant's historical research projects; many of which are fully open as well as described.

6.At all stages of the FOIA process, the third defendant, The Metropolitan Police, has held to the neither confirm, nor deny position under Section 23 of the legislation that such information relates to the close liaison Special Branch, and its continuing existence as Counter-Terrorism Command, has with the Security Service MI5- one of the security bodies specifically excluded from FOI duties and obligations in the legislation. The first and second defendants have supported this position and due to the precedence of the Upper Tribunal decision in Moss v ICO and Cabinet Office 2020 (Core Bundle pages 196-277), they have adhered to the legal position that Article 10 and ECtHR jurisprudence arising from Magyar 2016 (Core Bundle pages 125-190) are not applicable. The Claimant believes that he fully qualifies under the specific terms of Magyar in having a qualified right to state information as a journalist, academic researcher, and representative of an NGO performing a public watchdog role. He was President of the Chartered Institute of Journalists 2020-22 and continues to be Chair of the CIoJ's Professional Practices Board.

7.The FTT and Upper Tribunal have emphasized that they do not have any power to make declarations of incompatibility and the learned Judge Jacobs has observed that words such as 'security, controversial, political, and balancing – are all warning signs to avoid unnecessary judicial comment.' (See page 52 paragraph 17). The First Tier Tribunal ruling is at Core Bundle pages 20 to 46, its refusal to give permission to appeal at Core Bundle pages 47-49 and the Upper Tribunal's rejection of permission to appeal by Judge Jacobs at Core Bundle pages 50-52, along with the Claimant's application for permission to appeal at Core Bundle pages 3-19. The grounds set out there more or less summarize quite extensively why the Claimant believes his Article 10 rights to public interest information have been breached, and there should be a declaration of incompatibility if the High Court decides the existing FOI regime and legal system is incapable of providing relief. He disagrees with Judge Stewart Wright in Moss that Lord Bingham's ruling in Kay 2006 means domestic precedence set out in UKSC in Sugar 2012 and Kennedy at Court of Appeal 2012 and UKSC in 2014 prevents the lower courts from taking into account Magyar 2016. This is all fully argued and set out in his Upper Tribunal appeal grounds. (Core Bundle pages 10 to 18)

8.A key motive in the Claimant's application is a public interest move to resolve the existing clash and tension between UK domestic FOIA and ECtHR precedence and to clarify legitimate, reasonable and realistic routes of remedy for breaches of Article 10 rights by refusing access to information. Very briefly the Duncan Kennedy/Times Newspaper case versus the Charity Commission concerned denial of access on the basis of FOIA absolute exemption in Section 32. The Court of Appeal commissioned the First Tier Tribunal in 2011 to investigate whether Article 10 rights could be read down and applied in FOIA law to provide a remedy. Judge Angel and Tribunal said it could. (Core bundle pages 278-299 Kennedy v Information Commissioner [2011] UKFTT(GRC) EA20080083). The ruling by UKSC in Sugar 2012 and more pertinently by the UKSC in their own appeal decided by the majority it could not. However, the majority of Justices ruled English Common law rights in freedom of expression provided a remedy by way of judicial review. (Core bundle pages 300-391 Kennedy v The Charity Commission [2014] UKSC 20 (26 March 2014)) The Charity Commission released most of the files sought, but held some back. Instead of pursuing an adjudication of access through judicial review, Kennedy and Times sought to take breach of Article 10 action at Strasbourg. The ECtHR denied jurisdiction because they ruled the applicants had not exhausted their domestic legal remedy by way of judicial review. (Core bundle pages 392-423 Times Newspapers Ltd & Dominic Kennedy v The United Kingdom, 13 November 2018, First Section ECtHR, Application No. 64367/14) This the applicants did not do. They argued that judicial review is not practical for FOI requesters who operate on an each side pays its own costs adjudication regime. Two of the UK Supreme Court Justices in Kennedy, Lords Wilson and Carnworth had ruled the Section 78 Common Law judicial review route is not a system of equivalent FOIA resolution. (See Core Bundle pages 361 to 391).

9.Consequently, one of the main purposes of this application for permission for judicial review is to ask the Administrative Court to clarify whether Article 10 rights arising out of Magyar 2016 and Kennedy 2014 in relation to existing statutory absolute exemptions in the legislation can only be determined via Section 78 of FOIA by way of judicial review at the High Court or County Court. This is a crucial matter of general legal public importance. The Claimant would argue that the Tribunal system (Information Rights) needs assistance and guidance on this issue. This is also the case with public interest journalists, academic researchers and NGOs researching matters and issues in a public watchdog role who according to the Grand Chamber of ECtHR in Magyar now qualify for a standing right under Article 10 for government information, but are denied remedy in the FOIA statutory regime and fearful, perhaps reluctant to engage with the Common Law/judicial review alternative. There is a substantial body of ECtHR jurisprudence which has been developing before and since Magyar which is not being engaged in FOIA litigation. See the extract of the Section of the 'ECtHR Guide to Article 10 of the Convention – Freedom of expression' which summarizes the extensive Strasbourg jurisprudence relating to 'Freedom of expression and the right of access to State-held information.' (Core bundle pages 191-195). It cannot be in the public interest that these cases are not being interpolated, applicable and engaged in British FOIA case law.

10. If the Administrative Court decides judicial review is the only remedy, the Claimant is asking the court to provide it and take on the function of an independent judicial body adjudicating the balancing exercise between his Article 10 rights as a public interest academic researcher and journalist and the desire of the public/government body, in this

case the Metropolitan Police to maintain the right to national security and any others that would be relevant. He would argue that this would be necessary in a democratic society and there is a pressing social need so to do.

11.The Claimant is pursuing the application for judicial review as a matter of public interest because he has exhausted all of the FOIA remedies available to him in relation to the Goldsmiths History Project and two other academic/journalistic research projects- the investigation into the MI6 Intelligence officer and spy fiction author Alexander Wilson and left wing drama and feature writers and producers at the BBC during the 1920s and 1930s. These sought access to Security Service and Secret Intelligence Service files.

12.All of these requests and unsuccessful appeals in four other First Tier Tribunal hearings, and two other Upper Tribunal application for permissions to appeal have met the same barrier presented in the Metropolitan Police Special Branch case- the absolute exemption in Section 23, the FOI Tribunal system being a creature of statute, and Article 10 ECtHR jurisprudence not being applicable because of the block or clash with domestic case law precedence. This was the fate with applications to the Home Office for relevant Goldsmiths History files and files on BBC writers and producers collected by MI5 before 1989- GIA/2013/2019 and GIA/753/2020 decided 4 August 2021 by Judge Stewart Wright. (See Core Bundle 62-68). Direct FOI requests to the Security Service (Goldsmiths staff and student files and BBC writers and producers files) and the Secret Intelligence Service (Alexander Wilson project files) on Article 10 grounds were not successful and the ICO, First Tier Tribunal and Upper Tribunal ruled that these bodies were outside the statutory remit of FOIA- GIA/446/2021 and GIA/447/2021 decided 13 September 2021 by Judge Rupert Jones. (See Core Bundle 53-61)

13. The Claimant's argument that MI5 belonged to or was part of the Home Office before its statutory enactment in 1989 has been consistently rejected, thereby preventing an opportunity for FOIA to be engaged and arguably enabling the ICO and Tribunal system of Information rights the opportunity to comply with Articles 2, 3, and 6 of the Human Rights Act. The Claimant's similar argument that the Secret Intelligence Service prior to its statutory enactment in 1994 was the responsibility of the Foreign and Commonwealth Office was also unsuccessful in the FOI appeal ruled on by Judge Peter Lane in 2016 in relation to the Alexander Wilson project. (See Core Bundle 528-532)

14. The present situation of denial of access to historical files through a disproportionate blanket application of the pertaining to national security absolute exemption seriously damages the public interest. The Claimant explained and submitted to the First Tier Tribunal how the denial of the existence of Security Service and Special Branch files on George Orwell to the academic and biographer Professor Bernard Crick meant this his research and publication in 1980 was unable to discuss the author of Nineteen Eighty Four being the subject of state surveillance and attention. The files would be released in 2005 and 2007. The Claimant had a similar experience in respect of research and writing the first biography of Alexander Wilson. He had asked the Secret Intelligence Service for information prior to publication in 2010. In 2013 a substantial file revealing that he had been accused of fabricating the existence of a spy network in London was released to the National Archives causing considerable distress to his family. The Claimant's research and publication of an

academic book on politically motivated writers and producers working for the BBC in the 1930s has been substantially limited by the refusal of the Security Service to provide any dialogue or cooperation through the release of files relating to individuals long deceased, and acknowledged as having been under MI5 surveillance in BBC written archives. The same damage to the public interest operates in relation to his research and writing of the history of Goldsmiths, University of London. Where legitimate and public interest requests are met with scorched earth and asbestos closed doors, the Claimant finds the paradox and ambiguity of release of files and information to other researchers and judicial forums. The disparity and closure of access is a disproportionate application of state control over a monopoly of information.

15. As argued before Judge Edward Jacobs in the Upper Tribunal permission to appeal hearing, the Divisional Court has clearly demonstrated a paradigm shift in balancing the public's right to national security information, even sensitive in the present time, and the desire of national security bodies to conceal it. The rulings of Mr Justice Chamberlain in Attorney General v the BBC indicate that the neither confirm, nor deny 'invocation of national security was not always conclusive and the extent to which it was appropriate to defer to the executive would depend on the legal context.' (Core bundle page 513, paragraph 29 and continuing to paragraph 33 on page 514.) The full rulings are Core bundle pages 494-505 HM Attorney General for England And Wales v British Broadcasting Corporation (BBC) [2022] EWHC 380 (QB) (22 February 2022)) and pages 506-527 Her Majesty's Attorney General for England and Wales v British Broadcasting Corporation [2022] EWHC 826 (QB) (07 April 2022). The Judge offered extensive analysis in the earlier February ruling between paragraphs 43 and 54 (Core bundle pages 502-504) about the risks of discouraging future covert human intelligence sources coming forward if there are publications about their present and past activities. He said: 'To paraphrase Maurice Kay LJ in a closely related context, it is not simply a matter of a government party to litigation hoisting the national security flag and the court automatically saluting it.'

Grounds.

1.As a matter of law the Upper Tribunal and First Tier Tribunal has not properly recognised the precedence of recent case law on freedom of expression which trumps reliance on the absolute exemption in section 23(5) FOIA and qualified exemptions in sections 24(2), 27(4) 30(3), 31(3) & 40(5). The UK Supreme Court in Kennedy 2014 demonstrated that English common law freedom of expression can negate absolute exemptions in FOIA when the public interest is strong enough. ECtHR in Magyar Helsinki v Hungary subsequently recognised the positive right to state information under Article 10 for public interest FOIA applications qualified to journalists, academic researchers and researching/campaigning NGOs with a public watchdog role. In the balancing act between Article 10, English Common Law freedom of expression and interpretation of case law and statute, UKSC in Kennedy and ECtHR in Magyar combine to sustain the jurisprudential imperative and prominence of freedom of expression and access to the information in the circumstances of this case.

2.The Upper Tribunal and First Tier Tribunal were wrong in law not to have distinguished Claimant's case from the Upper Tribunal ruling in Moss 2020 because Mr Moss as an appellant did not meet the qualified right to state information outlined in Magyar when the applicant did. Magyar establishes at ECtHR Grand Chamber level with a high majority ruling, a clear and unambiguous qualified standing and positive freedom of expression right under Article 10 in relation to freedom of information regimes of Council of Europe treaty signatories for public watchdog and interest journalists, academic researchers and campaigning NGOs. The Claimant meets all three of these categories. He has been a journalist since the age of 16- a total of 46 years in the profession, he is a longstanding researcher and published academic at professorial level, and has been President and a continuing representative and officer of an NGO campaigning for the interests of journalists and freedom of expression, the Chartered Institute of Journalists, which is the world's longest established professional association of journalists.

Mr Moss was not one of these categories. The learned Judge Stewart Wright was not in a position to evaluate the development of UK domestic law jurisprudence and its relationship with Strasbourg law from the perspective of the recognisable qualified right status category.

Mr Moss was seeking planning information about a local development and regeneration scheme. He was not a member or representative of any campaigning, researching and public watchdog organisation. He was not a journalist intending to publish news to the wider public, and he was not a research academic seeking to publish on a matter of public interest.

3. A close reading of Magyar Helsinki v Hungary, 8 November 2016, Application No. 18030/11 at (Core bundle pages 125-190) and indeed the Court of Appeal ruling in Kennedy v Charity Commission [2012] EWCA Civ 317 (20 March 2012) (Core bundle pages 300-391) combined with the ruling of Judge Angel in the specially commissioned First Tier Tribunal in Kennedy v Information Commissioner [2011] UKFTT(GRC) EA20080083 (Core bundle pages 278-299) fully determines the direction of travel in UK domestic law to ECtHR jurisprudence to specifically connect and recognise the positive right recognition of journalists, academic researchers and campaigning NGOs. This is also recognised in Gibbs v FCO & ICO 043 211218 Decision of UK First Tier Tribunal. EA20170258 & 0275 Decision 20 December 2018 (Core bundle pages 424-471) See specifically the observations in paragraphs 100 to 119 (Core bundle pages 445 to 451)

The qualified standing right does not apply to individuals such as Moss or indeed appellants and applicants such as Roche, Leander, Gaskin and Guerra, or indeed the appellant in the UK Supreme Court case of Sugar. There might be an argument it applies in Guerra, but did that applicant actually represent an investigative and campaigning public watchdog NGO? Roche, Leander, Gaskin and Sugar were certainly not journalists, academic researchers or campaigning NGOs.

Moss is to be fully distinguished because the learned judge had no representation or indeed any representations from the three categories of appellants and FOI requesters central to Magyar. The Upper Tribunal has not had the benefit of fully appreciating the applicability of Magyar from the relevant line of qualifying case law which in the UK is Kennedy as

interpreted by Judge Angel at [2011] UKFTT(GRC) EA20080083, the obiter of Lords Wilson and Carnworth in Kennedy UKSC 2014, the obiter of the FTT in Gibbs 2018.

The relevant line of qualifying case law in Europe is: Dammann v. Switzerland - 77551/01 Judgment 25.4.2006, Társaság a Szabadságjogokért v. Hungary - 37374/05 Judgment 14.4.2009, Kenedi v. Hungary - 31475/05 Judgment 26.5.2009, Youth Initiative for Human Rights v. Serbia - 48135/06 Judgment 25.6.2013, Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria - 39534/07 Judgment 28.11.2013, Magyar Helsinki Bizottság v. Hungary [GC] - 18030/11 Judgment 8.11.2016 and Selmani and Others v. the former Yugoslav Republic of Macedonia - 67259/14 Judgment 9.2.2017.

Magyar changed the law in respect of FOI requesters and appellants in the FOI Tribunal system. It has the status of legislation and it is argued that it would be unconscionable and a breach of articles 2, 3 and 6 of the Human Rights Act for the Metropolitan Police, ICO, Courts and Tribunals not to recognise that it should be properly taken into account.

The relevant and compelling passages of *Magyar* relate to the status of the appellant, the recognition of the standing right and its purpose and the rejection by the Grand Chamber of the United Kingdom government's intervening arguments. None of these are properly addressed by Moss which concentrates on whether UK domestic law of the past trumps ECtHR law of the present.

In respect of the status of the Claimant, *Magyar* explains and identifies why the Claimant fits the criteria of the qualified standing right. The court said this should be investigated by the purpose of the information request, the nature of the information sought, the role of the applicant, and whether the information is ready and available.' Paragraphs 158 to 170 set out in the Core Bundle pages 160-161 define the proper approach.

The purpose of the information is clearly fulfilling a public interest and public watchdog role investigating educational history with research and journalistic publication that would contribute valuable democratic debate about issues of security, surveillance, human rights in the higher educational context. The information is clearly ready and available as evidenced by the published testimony of former Goldsmiths' College Warden Sir Ross Chesterman, the Metropolitan Police Special Branch file on Goldsmiths' College lecturer Margot Heinemann released to the National Archives and the Metropolitan Police Special Branch files released into the public domain by the Inquiry into Undercover policing.

The Grand Chamber rejected all of the arguments resisting the recognition of standing FOI rights from the United Kingdom government at paragraphs 99 to 103 of the ruling set out Core bundle pages 150-151.

The Claimant argues as a matter of law that the interference with his Article 10 rights in the present case cannot be justified because it is not necessary in a democratic society, and there is no pressing social need for it. The interference seriously damages the public interest. The delay between the *Magyar* ruling in 2016 and applying the jurisprudence in domestic law is unconscionable because of the injustice and damage being caused to the

public interest and the legitimacy and credibility of the freedom of information tribunal system.

Paragraph 167 of the *Magyar* ruling at Core bundle page 162 explains what is at stake and being put in peril:

'The manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of "public watchdog" in imparting information on matters of public concern (see Bladet Tromsø and Stensaas, cited above, § 59), just as it is to enable NGOs scrutinising the State to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their "watchdog" role effectively, and their ability to provide accurate and reliable information may be adversely affected (see Társaság, cited above,§ 38).'

4.As a matter of law the Upper Tribunal and First Tier Tribunal have been wrong not to agree to the legal submission provided by the Claimant that the learned Judge in Moss was wrong in the interpretation of Lord Bingham in Kay 2006 on taking into account *stare decisis*. Proper and binding precedent is that Bingham's guidance in Ullah 2004 when combined with Kay, recognises necessary exceptionality to draw down and follow ECtHR jurisprudence to any level of court when it is 'clear and constant.' Lord Bingham warned all courts and tribunals have a duty imposed by section 2 and 'should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right.' UK and ECtHR jurisprudence on the public interest watchdog right to government information in respect of journalists, academic researchers and campaigning NGOs has been clear and consistent. The Moss ruling is wrong if applied to these clearly defined genres of Claimants and imperatives. It is argue that this position was further confirmed by the ECtHR in Kennedy 2018.

It is argued that the House of Lords ruling of Kay 2006 and the observations of Lord Bingham on the relationship between domestic law and European Court of Human rights jurisprudence have wrongly ossified into an inflexible and unjust doctrine of precedent which in theory prevents any UK court or tribunal below the level of the Supreme Court from properly taking into account ECtHR jurisprudence when there is a conflict between higher domestic law precedent and the later jurisprudence of the ECtHR.

It is submitted that Lord Bingham's Kay doctrine contained a provision for exceptionality properly ensuring the interests of justice and avoidance of injustice, and indeed any damaging public policy consequences of this rule of precedent being wrongly applied.

It is submitted that were Lord Bingham's observations in Kay to determine the position on precedent, they have to be qualified by his position in Ullah where he states the 'duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'. (R (Ullah) v Special Adjudicator [2004] UKHL 26 at [20])

Blocking the applicability of *Magyar* to the Information Rights Tribunal system would disable the duty of the national courts to keep pace with Strasbourg jurisprudence. Lord Bingham did say 'certainly no less', and not being able to obtain the Article 10 rights redress from Magyar in the present appeals would certainly be a matter of 'less.'

It is argued that where an over-rigid interpretation of Kay prevents the national courts from keeping pace with Strasbourg, the exceptionality provision in the Kay doctrine should apply. This is the case with *Magyar* and the Information Rights tribunal system and the appeal under consideration in this case. The Magyar ruling took place towards the end of 2016. It is now nearly five years later and it is unlikely any individual or corporate party in Freedom of Information law will be in a position to pursue the applicability of FOIA standing right for public interest journalists, academic researchers and campaigning NGOs in the next five years as far as the UK Supreme Court.

The Sugar and Times Newspaper/Kennedy legal narratives from beginning to end involved time spans of 2005 to 2012, and 2007 to 2018 respectively. In Mr Sugar's case, and most regretfully, he had died by the time the UK Supreme Court finally ruled on his case posthumously. It may not be facetious or indeed inappropriate to apply the Dickensian metaphor of Jarndyce v Jarndyce in the context of FOIA and Human Rights law. It is not in the public interest that changes in Human Rights law and compliance and cohesion between Strasbourg and domestic courts should be moving in the pace of changing generations. On the contrary this process should be engaged with constitutional credibility and in the spirit of the Human Rights Act and the intentions of Parliament.

It was the intention of Parliament to incorporate the European Convention on Human Rights into domestic legislation to avoid the situation of individuals whose human rights having been breached, have to take their cases to the very top of the UK legal jurisdictional system and then onto Strasbourg. An over-rigid application of the Bingham Kay doctrine, limiting the writ of being able to follow changes in Strasbourg jurisprudence at the level of the UK Supreme Court only and not below, frustrates the intention of Parliament to prevent the previous 'justice delayed meaning justice denied' problem of access to human rights remedies in litigation.

The direction and narrative of jurisprudence is clear, cogent and consistent.

a. Domestic legal precedent in FOI has not been inconsistent with Strasbourg in Sugar and Kennedy at Court of Appeal and UKSC levels. Prior to *Magyar* neither one side, nor the other had concluded as a matter of law that there was a positive right under Article 10 (1) to government information. This was the position of the UK courts in Sugar & Kennedy. This was the case in Strasbourg in *Leander, Gaskin, Guerra* and *Roche*- mostly decided at Grand Chamber level. *Társaság* and *Kenedi* in 2009 were both ECtHR Section level rulings from Hungary that still consistently confirmed that Article 10(1) did not confer a general right of

access to administrative data and documents. These cases merely developed a further understanding of the application of Article 10 rights to social watchdog cases affected by the exercise of censorial power from information monopoly. The UK courts were consistent in ruling that a positive right to government information could not be drawn down until Strasbourg decided this matter of principle in relation to the scope and meaning of 10(1) in freedom of information law.

b.Lord Bingham also stated in the Kay doctrine that Strasbourg 'is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down' ([2006] UKHL 10 at paragraph 28. It is argued that his line of reasoning in the 'constructive collaboration' part of his speech in Kay means that this cannot support rigid adherence to the rules of precedent where the Strasbourg court has authoritatively adopted a broader interpretation of a convention right and done something so significant as the Grand Chamber did in Magyar 2016 which was to turn a negative right into a positive one for social watchdog and public interest journalists, research academics and campaigning NGOs. It is contended that any failure to do so would be to nullify and challenge Lord Bingham's assertion that the Strasbourg court is the highest and ultimate authority.

c. It is submitted that a jurist of Lord Bingham's standing on matters of justice and good law would not have intended that his speech in Kay should force the lower courts to follow precedents that would almost certainly not be followed on appeal, and which render claimants/appellants/applicants in hopeless and unnecessarily weak positions in the lower courts. A strict interpretation of Kay is a significant barrier to the ability of this Claimant and so many others to retrieve their Convention rights in the domestic courts and thereby bring their rights home.

In conclusion, this legal ground contends that Lord Bingham's ruling in Kay does not support the view that a domestic precedent continues to carry significant authority where a subsequent decision of the ECtHR on the same facts reached a different decision. This is particularly so where the judgment of the ECtHR concerned the scope and meaning of a Convention right and was at Grand Chamber level as in *Magyar*. It is argued that Lord Bingham would surely be horrified at the idea that any Grand Chamber ruling from Strasbourg, that was nearly unanimous (15-2) and the apogee of a 'clear and constant' line of cases, with there being no reasonable prospect of arguing that the judges had misunderstood the law or procedure, could not be followed by a domestic court, or that the domestic court could actually be persuaded to depart from its decision.

This line of reasoning is endorsed by Professor Shaun D. Pattinson of Durham University who had investigated the subject of the Human Rights Act and the doctrine of precedent in an authoritative and impressive peer-reviewed academic article published in 2015. See Core bundle pages 472-493 Pattinson, Shaun D. (2015) 'The Human Rights Act and the doctrine of precedent.', Legal studies., 35 (1). pp. 142-164

5.It is argued that the blanket rejections of the Claimant's FOI requests throughout amounts to a 'scorched earth' censorship approach by MPS, ICO and Tribunal. This is a significant failure in applying the legal concept of proportionality in any consideration of a balancing act between Article 10 freedom of expression and opposing right. Under Section 12 of the Human Rights Act, Parliament has legislated for the need for courts to 'have particular regard to freedom of expression for journalistic, literary or artistic material' in the balancing exercise with other convention rights.

The MPS holds an information and censorship monopoly and control over historical archives information and the FOIA system is failing to give the Claimant's public interest legitimacy proper recognition. The information requested is more than 30 years old and a balancing exercise is justifiable in these circumstances because it is necessary in a democratic society. Any pressing social need for national security for denial of access requires independent judicial scrutiny, challenge and remedy. The maintenance of neither confirm or deny and absolute exemption is disproportionate and unreasonable in law. FOI law requires proper and fair evaluation of the continued censorship by the neither confirm nor deny policy, reliance on the national security relationship with the Security Service, and privacy and cost implications in relation to the specific requests made by the Claimant. The public domain information researched by the Claimant concerns historical events in time for which absolute and qualified exemptions in FOIA no longer apply and identifiable individuals e.g. Sir Ross Chesterman, Clifford Peter Faith, Malcolm Edwards (McLaren) are all deceased. The bodies and institutions referred to such as the British Union of Fascists and Communist Party of Great Britain no longer exist and are not in operation, and the University of London, Goldsmiths' College as it then was does not currently employ anyone in its management and decision making structure who had those roles before 1989. The revelation that there had been a partial release of the Special Branch file on Margot Heinemann after a previous FOIA request, still not currently accessible anywhere online, and the release of Special Branch files on surveillance of students and liaison with Goldsmiths' College in 1974 to the Undercover Police Inquiry represent powerful evidence that the freedom of expression and public interest imperatives in this case have not been given the proper weight and consideration that the law requires. Section 12(4) of the Human Rights Act states that when a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression the court-
'must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
(a)the extent to which—
(i)the material has, or is about to, become available to the public; or
(ii)it is, or would be, in the public interest for the material to be published.'

The rulings of Mr Justice Chamberlain in Attorney General v BBC confirm a paradigm shift and approach by the higher courts in balancing national security interests with freedom of expression rights. See: Core bundle pages 494-505HM Attorney General for England And Wales v British Broadcasting Corporation (BBC) [2022] EWHC 380 (QB) (22 February 2022) and core bundle 506-527 Her Majesty's Attorney General for England and Wales v British Broadcasting Corporation [2022] EWHC 826 (QB) (07 April 2022)

The operation of the absolute exemption in FOIA law is the same as hoisting the national security flag or casting its shutdown incantation. The rule of law now is that it is not the absolute privilege of the executive to exclude access to public interest information that has in all probability exhausted its national security sensitivity. It is the role of the courts to determine equitably in a balancing exercise which applies by the principle of proportionality in the interests of a democratic society.

It is argued that the Claimant in the context of the freedom of information act circumstances of this case has not experienced the proportionate 'particular regard' to freedom of expression necessary in a democratic society.

Section 8. Remedies sought in this application for permission for judicial review.

1. Quashing the decision of the Upper Tribunal Information Rights refusing permission to appeal.

2. Mandatory order to the Upper Tribunal to read down Article 10 and the jurisprudence of the European Court of Human Rights in respect of applying FOIA law in respect of the claimant's case.

3. Mandatory order to the Upper Tribunal to carry out a public interest balancing exercise in respect of the claimant's original request under FOIA for information from Metropolitan Police Special Branch files concerning staff and students at Goldsmiths, University of London prior to 1989 so that he receives as much information as he can for the purposes of his research project.

In the alternative:

4. Declaration that Section 23 of FOIA as a statutory exemption is incompatible with Article 10 Freedom of Expression of the Human Rights Act 1998.

5. Declaration that Article 10 remedies in Freedom of Information Law are retrievable via Section 78 of FOIA via Judicial Review at the County Court or Divisional Court with the equivalent costs regime in First Tier Tribunal and Upper Tribunal system so that each party bears its own costs;

6. The Administrative/Divisional High Court carries out a public interest balancing exercise in relation to the information sought in the original FOIA request so as to adjudicate the claimant's Article 10 rights and provide as much access to this information as possible.

The seeking of this remedy invites the Cabinet Office to be joined as an Interested Party; particularly as the Cabinet Office was a defendant in the case of Derek Moss v the Information Commissioner and the Cabinet Office [2020] UKUT 242 (AAC)IN THE UPPER TRIBUNAL Appeal No: GIA/1531/2017.