**Relationship of international law and municipal law — Treaties — Treaty of Guarantee between United Kingdom, Turkey, Greece and Cyprus, 1960 — Need for incorporation of international treaties — Effect of United Nations Security Council Resolutions 541 and 550 in international and domestic law**

**Recognition — Recognition of Northern Cyprus — Non-recognition of Northern Cyprus by United Kingdom — Acts amounting to recognition — Co-operation with law enforcement authorities of unrecognized entity**

**Jurisdiction — European Arrest Warrant — Jurisdiction over individuals from unrecognized States — Jurisdiction for crimes committed within England and Wales — Jurisdiction under European Convention on Human Rights, 1950**

**Human rights — Human Rights Act 1998 — European Convention on Human Rights, 1950 — Article 3 of European Convention prohibiting torture and inhuman or degrading treatment or punishment — Article 6 of European Convention providing right to a fair trial — Conditions within prisons and courts of Northern Cyprus — Evidence relevant in European Convention on Human Rights claims — Extent of territorial jurisdiction — Whether claimant within jurisdiction of United Kingdom for purposes of European Convention — Whether claimant being granted permission to challenge provision of material to Northern Cyprus police on this ground — The law of England**

# Regina (Akarcay) *v.* Chief Constable of the West Yorkshire Police[1]

([2017] EWHC 159 (Admin))

*England, High Court, Queen's Bench Division, Administrative Court (Divisional Court).* 3 *February* 2017

(Burnett LJ; Thirlwall J)

[1] The claimant was represented by Alun Jones QC and Ramiz Gursoy, instructed by Kaim Todner; the defendant was represented by Matthew Holdcroft, instructed by Alison Walker at West Yorkshire Police. The interested parties, the Secretary of State for the Home Department and the National Crime Agency, were represented by Hugo Keith QC and Dr Christopher Staker, instructed by the Government Legal Department, and Clair Dobbin, instructed by the National Crime Agency, respectively.

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SUMMARY:[2] *The facts*:—The claimant, a 60-year-old businessman who regarded himself as a citizen of Northern Cyprus, sought to challenge the provision of material by the defendant, the Chief Constable of the West Yorkshire Police ("the Police") to their counterparts in the Turkish Republic of Northern Cyprus ("Northern Cyprus") where he was facing prosecution for alleged drug-related and money laundering offences committed in England. In September 2006, drugs had been found in Bradford, West Yorkshire. In February 2008, the Police obtained the claimant's fingerprints from their colleagues in Northern Cyprus where he had previous convictions for drug offences. It was alleged that there was fingerprint evidence to link him to the Yorkshire drugs.

A European Arrest Warrant was issued in October 2012 and a restraint order was made in Bradford Crown Court in February 2013 against the claimant as a result of proceedings under the Proceeds of Crime Act 2002. The claimant was arrested in Northern Cyprus in August 2015 and released on bail with a view to being prosecuted there. Northern Cyprus could not extradite suspects to any country except Turkey but had assumed a wide jurisdiction to try its nationals for crimes committed elsewhere as well as within its own claimed territory. The Police co-operated with their counterparts in Northern Cyprus, with the advice of the National Crime Agency which acted in conformity with the view of the Foreign and Commonwealth Office that to do so was in conformity with the United Kingdom's non-recognition of Northern Cyprus. Some of the material expected to be used in the prosecution of the claimant was sent to Cyprus in a diplomatic bag and handed over to the police in Northern Cyprus at the office of the British High Commission in Cyprus. Some of the material was handed over in the United Kingdom directly to visiting officers from Northern Cyprus.

The claimant was granted permission to apply for judicial review on two grounds. The first ground was that the provision of such material amounted to an act of recognition of Northern Cyprus by the United Kingdom in breach of both international and domestic law. The second ground was that the only lawful mechanism for providing such information to the Northern Cypriot law enforcement agencies was by using the provisions of the Crime (International Co-operation) Act 2003 ("the 2003 Act"). During the proceedings, a third ground arose in relation to the Human Rights Act 1998. The claimant contended that the provision of the material would violate his rights under Articles 3 and 6 of the European Convention on Human Rights, 1950 ("the European Convention") since, if convicted, he would be imprisoned in conditions which would give rise to a serious violation of Article 3 standards, and any trial was likely to be delayed and the standard of interpretation poor.

*Held*:—The claim was dismissed. The claimant had failed to make good either of the grounds upon which he was granted permission to apply for judicial review and the third ground was inarguable.

[2] Prepared by Mr M. Dowbenko.

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(1) There was no domestic law duty to refrain from recognizing Northern Cyprus as a State. United Nations Security Council Resolutions 541 and 550 did not create a legally binding duty not to recognize Northern Cyprus even in international law but amounted to recommendations only. Whilst the Treaty of Guarantee between the United Kingdom, Greece, Turkey and the Republic of Cyprus, 1960 imposed international law obligations on the United Kingdom, these did not translate into domestic law obligations without the process of incorporation (paras. 14-24).

(2) It was therefore unnecessary to explore the Secretary of State's submission that, whether or not a domestic law non-recognition duty arose, any challenge to the Foreign Office policy of non-recognition, or the scope of that policy, touched intimately on the conduct of foreign affairs and would therefore be non-justiciable. Moreover, police-to-police co-operation involved in the case, which had been facilitated by the National Crime Agency and sanctioned in principle by the Foreign Office as compliant with international law, could not amount to implied recognition in any event (paras. 25-6).

(3) There was no general prohibition on police forces providing voluntary help to foreign law enforcement agencies; they were not restricted to making a formal request via the 2003 Act. Mutual legal assistance using the powers in the 2003 Act supplemented such informal co-operation. Confidential material in the possession of the police could be provided to others if countervailing public interest was sufficiently strong. In the present case, the public interest in co-operation was clear. The claimant was suspected of being part of a significant drug conspiracy and had put himself beyond the reach of the English criminal justice system (paras. 27-34).

(4) Permission to pursue the third ground relating to the risk of an unfair trial under Article 6 of the European Convention and the possibility of incarceration under conditions not meeting the standards required by Article 3 of the European Convention was refused. The claimant was not within the jurisdiction of the United Kingdom for the purposes of the European Convention. In any event, there was insufficient evidence to support either of the factual contentions underlying the claim (paras. 35-9).

The following is the text of the judgment of the Court, delivered by Burnett LJ (with whom Thirlwall J agreed):

## LORD JUSTICE BURNETT

1. The claimant seeks to challenge the provision of material by the West Yorkshire Police ("the Police") to their counterparts in the Turkish Republic of North[ern] Cyprus ("Northern Cyprus"), where he now faces prosecution for drug related and money laundering offences alleged to have been committed in England. Northern Cyprus is not recognised by the United Kingdom, nor by any other

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country save Turkey. The alleged offences were fully investigated by the Police. The claimant would have been prosecuted in this jurisdiction had he not relocated to Northern Cyprus. Indeed, after he left the United Kingdom a warrant for his arrest was issued and then a European Arrest Warrant. That meant that he would have been arrested had he set foot in any EU country, including the Republic of Cyprus ("Cyprus"), and returned to the United Kingdom for prosecution. But he has chosen to remain in Northern Cyprus.

2. The Police have co-operated with their counterparts in Northern Cyprus and provided them with the fruits of the English investigation. They did so with the advice of the National Crime Agency ("the NCA"), who acted in conformity with the view of the Foreign and Commonwealth Office that to do so is compatible with our non-recognition of Northern Cyprus. The NCA has an officer based in the British High Commission in Cyprus who has dealings with law enforcement agencies in both Cyprus and Northern Cyprus. Some of the material was sent to Cyprus in the diplomatic bag and then handed to the police in Northern Cyprus by that official. Some of it was handed over in the United Kingdom directly to visiting police officers from Northern Cyprus. The material is expected by all concerned to be used in the prosecution of the claimant in Northern Cyprus. Witnesses, most of whom are police officers, are expected to travel to Northern Cyprus in due course to give evidence in the trial.

3. The claimant has permission to challenge the provision by the Police of investigation materials to their counterparts in Northern Cyprus on two grounds:

(i) That the provision of the material amounted to an act of recognition by the United Kingdom of Northern Cyprus in breach of international and domestic law;
(ii) That the only lawful mechanism for providing information to the law enforcement agencies of Northern Cyprus would be by using the provisions of the Crime International Co-operation Act 2003 ("the 2003 Act").

The skeleton argument filed on behalf of the claimant for the hearing of the judicial review claim raised a fresh issue under the Human Rights Act 1998:

(iii) That the provision of material in aid of a prosecution in Northern Cyprus would give rise to violations of the claimant's rights under articles 3 and 6 of the European Convention on Human Rights ("ECHR"). The first because, if convicted, he would be

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imprisoned in conditions which would give rise to a serious possibility of a violation of article 3 standards. The second, relying on the judgment of the Second Section of the Strasbourg Court in *Amer* v. *Turkey* of 13 January 2009 (App. No 25720/02) because any trial is likely to be delayed and the standard of interpretation poor.

4. The defendant and interested parties were content that we should consider whether to grant permission for the third ground to be argued and for it to be dealt with substantively if permission is granted.

*The facts*

5. The claimant is a 60 year old businessman who regards himself as a citizen of Northern Cyprus. Until the end of December 2006 he owned a property in Enfield, Middlesex. In 2006 the Police began a wide-ranging investigation into drug smuggling, money laundering and other criminal activity believed to be organised by a criminal gang. In September 2006 12.5 kilograms of heroin were found in Bradford. The claimant's brother-in-law was one of those suspected of involvement in a conspiracy relating to that seizure. He was arrested in January 2007, prosecuted and in due course acquitted in June 2007. The claimant had also been suspected but before he could be arrested he left the country in December 2006. In February 2008 the Police obtained the claimant's fingerprints from their colleagues in Northern Cyprus where he had previous convictions for drugs offences. It is alleged that there is fingerprint evidence to link him to the Yorkshire drugs.

6. A European Arrest Warrant was issued in October 2012 and shortly afterwards proceedings under the Proceeds of Crime Act 2002 were commenced which resulted in a restraint order being made against the claimant in Bradford Crown Court in February 2013. The domestic criminal proceedings fell away in due course when it became apparent that the claimant would be prosecuted for the same alleged offending in Northern Cyprus. He was arrested in Northern Cyprus in August 2015 with a view to being prosecuted there. He is on bail.

7. The non-recognition of Northern Cyprus brings with it the reality that fugitives from justice living there, so long as they are willing to sustain the relatively constrained life inevitable if they never leave its territory, cannot be extradited to any country (except Turkey). The claimant is far from being the first wanted person who has stayed in Northern Cyprus knowing that he remains invulnerable to extradition to face trial in the United Kingdom or elsewhere. However, Northern Cyprus has assumed a wide jurisdiction to

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try its nationals for crimes committed elsewhere as well as within its own claimed territory. It was in those circumstances that that law enforcement agencies in the United Kingdom have co-operated with the Northern Cypriot police.

8. In 2011 the Foreign and Commonwealth Office issued a memorandum to the Serious Organised Crime Agency (the predecessor of the NCA) which indicated that it had "no objection to UK law enforcement authorities passing relevant information and evidence" to Northern Cyprus and to their police officers "travelling unofficially to the UK in the execution of their duty". It articulated the policy of the Government of the United Kingdom towards Northern Cyprus and forms the backdrop to the co-operation which has occurred in this case:

The UK does not recognise the self-declared "Turkish Republic of Northern Cyprus" and has no relations with it at state level. It is not possible for the UK to conclude international agreements with the "TRNC" on any issue. However, the UK maintains a dialogue with the political leadership of the Turkish Cypriot community and co-operates with Turkish Cypriot authorities on many issues of immediate concern. Such co-operation does nothing to undermine the non-recognition of the "TRNC".

The Foreign and Commonwealth Office has no objection to UK law enforcement authorities passing relevant information or evidence to law enforcement authorities in northern Cyprus. Similarly the FCO has no objection to "TRNC" law enforcement officers travelling unofficially to the UK in the execution of their duty where this does not contravene UK domestic legislation. Due to the political sensitivities that exist, all contacts with Turkish Cypriot law enforcement authorities should, in the first instance, be made through SOCA and their resident Liaison Office in Cyprus.

In 2004, UN Secretary General Kofi Annan called for the international community to lift the isolation of the Turkish Cypriot Community. In response, EU foreign ministers determined to lift the isolation of the Turkish Cypriots in recognition of their commitment to a UN settlement on the island and its accession to the EU. Doing so will bring the Turkish Cypriots closer to the EU and promote re-unification. Working with Turkish Cypriot authorities is an integral element of these objectives . . .

The transfer of material relating to criminal matters from UK to Turkish Cypriot law enforcement authorities and vice versa is entirely consistent with these objectives. Where UK law enforcement authorities are aware that individuals wanted in connection with criminal matters in the UK are residing in northern Cyprus, the Foreign and Commonwealth Office has no objection to them sharing that information with the Turkish Cypriot law enforcement authorities through the SOCA Liaison Office in Nicosia.

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9. In 2012 the NCA began Operation Zygos designed to assist in securing the arrest of fugitives in Northern Cyprus. The operation was conducted in the public domain. A Crimewatch programme on the BBC identified some of the main suspects, including the claimant. There was contact between the High Commission in Cyprus and the Northern Cypriot authorities regarding the claimant's case in April 2014. Later that year there were discussions between the Police and the NCA about co-operating with those authorities. The Northern Cypriot law enforcement authorities appear to have indicated their willingness to prosecute the claimant in October 2014. Evidential material was provided to Northern Cyprus in February 2015 and then, following further discussion between the Police and the NCA, the Police file on the case was provided to their Northern Cyprus colleagues.

10. In October 2015 four officers of the Northern Cyprus police travelled to the United Kingdom and spent time with the Police. On 23 October 2015 further documents were sent by the Police to their colleagues in Northern Cyprus via the NCA Liaison Office at the High Commission in Cyprus. Various other documents were provided directly to Northern Cypriot police officers in Yorkshire. A large volume of further material was provided in January 2016. Solicitors acting for the claimant commenced correspondence with the Police in late December 2015. These proceedings were issued on 19 January 2016.

11. The prosecution, had it been proceeding in this country, would have rested on the evidence of a large number of police officers. Their statements have been provided to the Northern Cypriot police along with a substantial volume of financial records seized using statutory powers, which include bank transactions of the claimant's estranged wife.

12. From time to time, the NCA completes an internal document known as an "Overseas Security and Justice Assistance Risk Assessment" in respect of countries to which it is providing assistance. In May 2016 one was completed for Northern Cyprus. It noted the division of the island and a *de facto* border patrolled by the United Nations. That organisation is seeking to achieve a long-term settlement of the dispute. It continued by recognising that Northern Cyprus is a democracy with a fair system of justice. The NCA view was that "detention facilities are good—and currently there are less complaints about conditions in their facilities than in the corresponding [Cyprus] detention areas." It noted a problem with corruption in Northern Cyprus but not in connection with law enforcement in which the

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NCA had been involved. There had been co-operation with the Northern Cypriot police since the early 80s. It continued:

All NCA/law enforcement activity is supported by the FCO Mission, and legal advice previously obtained to support the level of co-operation that can be accomplished without giving "recognition" to the north Cyprus "law enforcement authorities". No formal international agreements can be ratified with north Cyprus, but in line with the UN objective to unify Cyprus again, and as a Guarantee Power, the UK is keen to find areas of collaboration, so that should agreements be reached, there can be seamless transition into the unified state. Law enforcement activity is a fundamental area for this.

A section of the assessment dealt with the question whether co-operation would lead to human rights violations. The answer given was "No". The document recognised the sensitivities of dealing with the law enforcement authorities of Northern Cyprus. Finally, it dealt with the question of whether there were any reputational or political risks attaching to the NCA activity:

Yes. The majority of other countries, and some agencies in the UK, refuse to engage with the north Cypriot authorities for fear of breaching policy or being viewed as recognising "TRNC". The NCA takes a contrary view which is fully supported by NCA strategy and partnerships, the [High Commission] and the FCO. Bespoke legal advice has previously been provided on the subject. Notwithstanding, the NCA stance could still attract criticism of HMG from either [Cyprus] or other third party stakeholders but whilst the objective of the co-operation remains to address [organised crime] and deal with suspects the position is entirely defensible. The tactic of pursuing in country TCP prosecutions against TC fugitives from UK justice who have absconded to north Cyprus is under scrutiny. Op Zygos target Hasan AKARCAY is currently on conditional bail awaiting trial in north Cyprus for serious drug trafficking offences committed in the UK. AKARCAY has challenged the legality of this process and was recently granted permission by a British judge to apply for judicial review. . . . The JR outcome will either validate or disqualify the whole concept of local prosecution as a tactic. This tactic has been led by the NCA and an adverse decision is likely to have a negative and detrimental effect on NCA/HMG standing and reputation by both the authorities in [Cyprus] and also in north Cyprus who have invested heavily in their local investigations.

13. The United Nations itself maintains a body in Cyprus which facilitates co-operation between the law enforcement agencies of both parts of the divided island. The organization, known as UNCIVPOL, is part of the UN Force in Cyprus ("UNFICYP"). It co-operates with the police in Northern Cyprus as well as in Cyprus itself. The role of this organisation was described in the International Law Association

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Interim Report on Recognition/Non-Recognition in International Law in 2014:

> As extradition is "a formal procedure involving the executive and judiciary of two states," it cannot exist as a formal matter between the Republic of Cyprus and the separatist authorities in Northern Cyprus. When practical issues of police co-operation arise, the two sides make informal arrangements, facilitated by the [UNFICYP].

That was further explained in a memorandum produced by Dr Aristotle Constantinides for the International Law Association:

> For instance, in 2012, UNFICYP facilitated the transfer, from the north to the south, of four persons arrested on criminal charges, three of whom were wanted on European arrest warrants. A joint communications room (JCR), launched by the UN-backed bi-communal Technical Committee on Crime and Criminal Matters became operational in May 2009. The JCR is a round-the-clock-operation run by Greek Cypriot and Turkish Cypriot law enforcement experts, along with UNFICYP police officers, aiming to support information exchange between the police forces in both communities on criminal matters which have inter-communal elements and are related, *inter alia*, to thefts, murders, drug offences and human trafficking.

*The non-recognition issue*

14. Mr Jones QC submits that the provision by the Police of assistance and evidence in connection with the prosecution of the claimant in Northern Cyprus amounts to an act of recognition by the United Kingdom of the regime. That is contrary to international law and domestic law. It is contrary to international law, he submits, because it conflicts with the resolutions of the Security Council of the United Nations which call upon states not to recognise Northern Cyprus. The claimant relies also on the Treaty of Guarantee of 1960 between the United Kingdom, Greece, Turkey and the newly independent Republic of Cyprus ("the 1960 Treaty"). By article 2 of that treaty the United Kingdom, Greece and Turkey undertook to prohibit, so far as concerned any of them, "any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other State or partition of the island." Mr Jones submits that the 1960 Treaty and the resolutions of the Security Council form part of domestic law with the result that if the provision of assistance by the Police in this case is an act of recognition of Northern Cyprus it is unlawful not just in international law terms but as a matter of domestic law. It is thus open to the claimant to rely upon the international law obligations in this litigation. Mr Keith QC, on behalf of the Secretary

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of State, supported by Mr Holdcroft on behalf of the Police and Miss Dobbin on behalf of the NCA, submits that the legal duty not to recognise Northern Cyprus operates only on the international law plane and forms no part of domestic law. Furthermore, he submits that the boundaries between acts that amount to recognition and those which do not are not justiciable because they depend upon value judgements in the sphere of international relations. Moreover, he submits that the activities here under scrutiny do not, on any view, amount to acts of recognition.

15. The Treaty of Guarantee was a response to long-standing tensions between the majority Greek speaking south of the island and the minority Turkish speaking north. There was political support amongst the former for union with Greece and amongst the latter for independence or union with Turkey. Problems soon developed with the *de facto* division of Nicosia in 1964 policed by British and United Nations forces. Turkish troops intervened in the north of the island in 1974. This led to the division of the whole island governed by two autonomous administrations with the border patrolled by peace-keeping forces. In 1975 a "Turkish Federated State of Cyprus" was established but without a unilateral declaration of independence. On 15 November 1983 the Turkish Cypriot authority declared independence and purported to establish the Turkish Republic of Northern Cyprus. It was that act which led within days to the first of the United Nations Security Council resolutions (541) upon which the claimant relies. Amongst its provisions the Security Council "calls upon all States not to recognise any Cypriot state other than the Republic of Cyprus." That position was restated in a further resolution in May 1984 (550) by which the Security Council "reiterates the call upon all States not to recognise the purported state of the 'Turkish Republic of Northern Cyprus' set up by secessionist acts and calls upon them not to facilitate or in any way assist the aforesaid secessionist entity."

16. The claimant's argument that the international law obligations assumed by the United Kingdom by virtue of the 1960 Treaty and the Security Council resolutions form part of domestic law rests upon the decisions of the Administrative Court and Court of Appeal in *R (Kibris Turk Hava Yolari and CTA Holidays Ltd)* v. *Secretary of State for Transport* [2009] EWHC 1918 (Admin); [2010] EWCA Civ 1093. The claimants were a Turkish airline and its subsidiary travel agent based in England. The latter arranged holidays in Northern Cyprus. The airline operated flights to Turkey from the United Kingdom pursuant to a permit granted under Article 138 of Air Navigation Order 2005. The claimants sought permits to operate direct flights,

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both scheduled and charter, from the United Kingdom to Northern Cyprus which were refused by the Secretary of State. They sought to quash that refusal.

17. At the time (and still) it was the policy of the Government of the United Kingdom to increase contact with the authorities in Northern Cyprus as part of a concerted international effort to diminish its isolation and seek a long-term solution to the problems of the island. To that end, were it lawful to do so, the Secretary of State would have granted the permits sought. He had a discretion under the Air Navigation Order but considered that to grant the permits would contravene the terms of the Chicago Convention on Civil Aviation to which both the United Kingdom and Cyprus (but not Northern Cyprus) were states parties. At first instance Wyn Williams J considered the argument under the Chicago Convention and found in favour of the Secretary of State. He considered the interpretation under the Chicago Convention of the rights of Cyprus (an interested party in the proceedings) to be of critical importance. It was common ground before him, by virtue of section 60(2) of the Civil Aviation Act 1982, that Article 138 of the Air Navigation Order should be interpreted in compliance with the Chicago Convention and in a way so that its powers were exercised in conformity with it. The claimants' argument, in short, on this aspect of the case was that when the Chicago Convention spoke of "sovereignty" (and cognate terms) it was concerned with *de facto* control. Cyprus was not in *de facto* control of the northern part of the island and thus the grant of the permits as a matter of discretion under the Air Navigation Order would not violate the Chicago Convention. The judge's conclusion, after a detailed consideration of the terms of the Chicago Convention, was stated in paragraph 66:

> . . . the Defendant and [Cyprus] are correct when they assert that the United Kingdom would be in breach of its obligation to respect and uphold the rights conferred upon [Cyprus] by virtue of its status as a contracting state to the Convention if the Defendant had granted the Claimants the permits which they seek.

18. The Court of Appeal upheld that conclusion: see paragraph 69 of the judgment of Richards LJ. He had earlier noted (paragraph 15) that the Secretary of State had a wider argument to support his decision:

> It flows from the fact that the United Kingdom in accordance with its obligations under international law, has not recognised the TRNC as a state. It is said to follow as a matter of domestic law that decisions may not be made

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on the basis of, or by reference to, the purported laws and acts of the TRNC (save for those falling within a limited exception); and that to have granted the applications, thus approving international air services to and from airports in northern Cyprus, would inevitably have infringed this prohibition.

Richards LJ observed that Wyn Williams J had dealt *obiter* with this aspect of the case. It is on those aspects of the judgment in the High Court that the claimant relies in support of his contention that, as a matter of domestic law, no arm of the state (including the Police) may do any act which impliedly recognises Northern Cyprus as a State; and to provide information and evidence in aid of a prosecution there amounts to such implied recognition.

19. Richards LJ, who gave the only reasoned judgment in the Court of Appeal did not deal with this aspect of the case, save as regards a single part based upon the exception he had referred to in the passage just quoted. In particular, he did not discuss whether the argument advanced that the international law obligation not to recognise Northern Cyprus was part of our domestic law was correct. Wyn Williams J had concluded that the grant of the permits would amount to an act of recognition (paragraphs 79, 84). The Secretary of State did not seek to support that conclusion in the Court of Appeal but rather relied upon the narrower proposition that to grant the permits would have entailed a decision being made on the basis of, or by reference to, the laws of Northern Cyprus relating to air travel. Both Wyn Williams J and Richards LJ noted without adverse comment that there was co-operation between law enforcement agencies in this country and Northern Cyprus.

20. It is not entirely clear by what mechanism it was said to be part of *domestic law* that it would be unlawful to recognise Northern Cyprus as a sovereign state. It was common ground in the High Court that the Security Council resolutions did not create a legally binding duty not to recognise Northern Cyprus even in international law (paragraph 83). That is clearly correct. The resolutions amounted to recommendations only: see *Colgar* v. *Billingham* [1996] STC 150 at paragraph 41. In any event, Security Council resolutions may create obligations in international law but do not, without domestic legislative action, become part of domestic law of the United Kingdom. A special procedure exists under the United Nations Act 1946 to give such effect by Order in Council. Counsel for the Secretary of State is recorded in paragraph 83 of the judgment of Wyn Williams J as submitting "that the duty of non-recognition arises by virtue of the Treaties of Establishment and the Treaty of Guarantee . . . and also by virtue of established principles

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of customary international law." That is a reference to the 1960 Treaty, in particular. The judge considered it unnecessary to deal with these submissions because (once more) it was common ground that there was a duty of non-recognition "as a matter of customary international law, not to recognise the TRNC as legal or lawful." As a result the judge concluded:

The upshot is, of course, that the United Kingdom Government is under a legal duty not to recognise the TRNC. I have found that the grant of the permits sought by the Claimants would constitute acts of recognition. It follows that the grant of the permits sought would render the United Kingdom in breach of its duty not to recognise the TRNC.

21. I have no difficulty in accepting that the 1960 Treaty imposes in international law a range of duties upon the United Kingdom but its provisions have not been incorporated into domestic law. It has no effect in domestic law for the reason identified by Lord Templeman in *JH Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry* [1990] 2 AC 418 at 476. After observing, perhaps wryly, that the case concerned a "short question of construction of the plain words of a statutory instrument" (it took 26 days to argue in the House of Lords) he continued:

Losing the construction argument, the appellants put forward alternative submissions which are unsustainable. Those submissions if accepted, would involve a breach of the British constitution and an invasion of the judiciary into the functions of the Government and of Parliament. The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts enforce those laws; judges have no power to grant specific performance of a treaty . . . or to invent laws or misconstrue legislation in order to enforce a treaty.

A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

22. This statement of principle does nothing to undermine the rule of statutory interpretation that requires statutes to be construed, if possible, in a way which conforms with extant international treaty

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obligations. Nor does it call into question that a decision maker given a discretion may have regard to unincorporated treaty obligations when exercising that discretion, just as he may ignore them.

23. We heard no argument and were shown no materials on whether customary international law required the non-recognition of Northern Cyprus. Mr Jones rested upon what was, in effect, a concession in the *Kibris* case about which there is no discussion in the judgments in either the High Court or the Court of Appeal. But even if such were the position, customary international law does not automatically become part of the Common Law. The legal debate about the extent to which customary international law becomes part of the common law is not entirely settled. A valuable discussion is found in an article written by Sales and Clement entitled *International law in domestic courts: the developing framework* (2008) LQR 388. A recent statement of the position is found in the judgment of Lord Mance in *Keyu* v. *Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 59; [2016] AC 1355 at paragraphs 142 and following. In paragraph 150 he made the uncontroversial observation that the incorporation of customary international law into the common law must respect the constitutional arrangements within the United Kingdom. The conduct of international affairs is a paradigm example of an area in which the courts recognise the institutional competency of the executive. Whether to recognise a state or a government (the difference is discussed in *Kibris* at first instance) is an intensely political act bound up in the complexities of foreign relations which extend well beyond dealings with the state in question. Even if it could be shown that customary international law imposed an obligation not to recognise Northern Cyprus, in my opinion it could not form part of the common law. To treat it as such would contravene the unequivocal constitutional principle that questions of recognition are for the executive. It is not for the courts to dictate to the executive whether they can, must, or cannot recognise a state.

24. The claimant's argument on this ground relies upon the proposition that there is a domestic law duty upon the Government to refrain from recognising Northern Cyprus as a state. In my opinion there is no such domestic law duty.

25. In view of this conclusion, it is unnecessary to explore the submission advanced by Mr Keith to the effect that, whether or not a domestic law non-recognition duty arises, any challenge to the Foreign Office policy on non-recognition, or the scope of that policy, touches intimately on the conduct of foreign affairs, and is therefore non-justiciable.

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26. Mr Keith had a further submission that the police to police co-operation involved in this case, facilitated by the NCA as to some extent it was and sanctioned in principle by the Foreign Office as compliant with international law, could not amount to implied recognition in any event. In my judgment that submission is correct. We were shown in translation the opinion of Professor Talmon, of the Universities of Oxford and Bonn, in his book entitled *Collective Non-recognition of Illegal States* (Mohr Siebeck 2006), illustrated by reference to the example of Northern Cyprus. It is entirely supportive of the proposition that contacts between police forces of the sort that have occurred in this case do not entail any breach of the non-recognition principle. He supports his conclusion with copious citation of authority and references to activities in analogous situations. Such co-operation with the North Cypriot authorities is of long-standing. He also refers to the fact that the United Nations itself works with the Northern Cypriot authorities on law enforcement matters, and facilitates co-operation between the police forces of both parts of Cyprus. Such activity, it might be thought, is inconsistent with any suggestion that it would entail implied recognition of Northern Cyprus either by the United Nations or Cyprus itself.

*The mutual legal assistance issue*

27. The way in which the claimant puts this part of his case has changed significantly over time. This point was not taken in the original grounds of 20 January 2016 or in a supplementary argument dated 29 February 2016. On 13 April 2016 Hickinbottom J gave various directions and ordered that the permission hearing be heard by a Divisional Court. For that hearing the claimant recast his claim completely, introducing the non-recognition issue but also what was described as the "mutual legal assistance issue". In paragraph 69 of the skeleton argument filed in support of the application for permission it was submitted on behalf of the claimant:

> . . . it would be unlawful for the Chief Constable to have supplied material to the TRNC outside the scheme of the 2003 Act.

28. A contention that assistance to foreign police forces could be rendered only through a formal request and the activation of the procedures of the 2003 Act would be contrary to the long-established practice of co-operation outside the procedures of the 2003 Act and Home Office Guidance to Police Forces and foreign law enforcement agencies on what might be called force to force co-operation. It was this

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apparent full frontal attack on the whole system of the informal provision of information to foreign law enforcement agencies that led to the involvement of the Secretary of State for the Home Department as an interested party. I have noted that Mr Keith helpfully developed submissions on the non-recognition issue (both in writing and orally) but the main thrust of the detailed grounds of opposition lodged on behalf of the Secretary of State was to demonstrate that the proposition advanced at the oral permission hearing was fallacious. It appears that the arguments advanced in the detailed grounds hit their mark because in the skeleton argument lodged in advance of the hearing before us the argument had changed. The proposition became:

> . . . it would be unlawful for the Chief Constable to have supplied material to the TRNC because it is inconsistent with the common law principles of confidentiality underlying the statutory principles of mutual legal assistance set out in the scheme of the 2003 Act.

29. In oral argument Mr Jones refined the argument further. He submits that nothing obtained by the Police in confidence can be transmitted to a foreign law enforcement agency without the explicit consent of the person to whom a confidence is owed. For example, he submits that the statements made by the many police officers involved in this case are subject to an implied duty of confidence to the effect that they will not be used save in connection with a prosecution in England and Wales. Before giving copies to the Northern Cypriot police, authority should have been obtained from the officers who made the statements. The same would apply, he submits, to bank details obtained from his former wife pursuant to a court order. Despite the statements being made in connection with a criminal investigation in this jurisdiction, and other material being acquired or secured for the same purpose, he submits that it would be lawful to supply such material to the police or prosecuting authorities in the other jurisdictions within the United Kingdom (i.e. Scotland and Northern Ireland) without explicit consent but not to the other jurisdictions within the British Isles (Jersey, Guernsey etc.), Crown Dependencies, member states of the European Union or other foreign countries. The justification for the distinction was that "nobody expects their material to be sent to overseas authorities." Guidance from the Home Office which encourages the use of informal co-operation, rather than through the mechanisms of the 2003 Act, misstates the law and in following the guidance, the Police acted unlawfully.

30. Mr Holdcroft, for the Police, supported by Mr Keith, submits that in accordance with principles reflected in, amongst other cases,

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*Marcel* v. *Commissioner of Police* [1992] Ch 225, *Scopelight* v. *Chief Constable of Northumbria* [2010] QB 438 and *Woolgar* v. *Chief Constable of Sussex* [2000] 1 WLR 25, the Police were entitled to provide information to the Northern Cypriot law enforcement authorities in aid of their criminal investigation into the claimant because it was in the public interest to do so.

31. The claimant's concession that there is no general prohibition on police forces providing voluntary help to foreign law enforcement agencies, rather than being restricted to formal request via the 2003 Act, is clearly correct. In broad outline, the 2003 Act, in so far as it deals with providing assistance to overseas authorities to obtain evidence in the United Kingdom, is concerned with formal requests made to the relevant territorial authority here by a foreign court or prosecuting authority (or certain international authorities). The territorial authority in the United Kingdom (the United Kingdom Central Authority ("UKCA") for England, Wales and Northern Ireland for all except tax and customs matters) has a discretion whether to assist. In the event that it agrees to assist, what follows is coercive in character, for example directing that a search warrant be applied for, or for evidence to be taken in a court: see sections 13 to 19. The statutory scheme does not exclude the possibility of providing assistance without the use of such powers. It is expressly concerned with "furthering co-operation", as the long title puts it, rather than setting up a complete code for the provision of mutual legal assistance.

32. It is convenient to approach the applicable principle through the discussion in the *Woolgar* case. Both *Marcel* and *Scopelight* were complicated by the fact that the material in question had been seized using powers under the Police and Criminal Evidence Act 1984. The facts in *Woolgar* were straightforward. Following a death in a nursing home, a police investigation into the conduct of a nurse followed but the evidence collected did not meet the evidential test required for criminal charges. The matter was then referred to the United Kingdom Central Council for Nursing Midwifery and Health Visiting ("UKCC"). The nurse who had been the subject of the investigation sought to restrain the police from disclosing to the UKCC the contents of her police interview. The practice of the police force in question at the time was to seek the consent of anyone who had made a statement for the purposes of a criminal investigation before disclosing it to a regulatory body. The claimant was asked for her consent but refused. The police nonetheless indicated their intention to provide a copy of the recording of the interview to the UKCC. Astill J refused the relief sought. In the Court of Appeal Kennedy LJ, who gave the only reasoned judgment, reviewed

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a good deal of authority, including under article 8 of the ECHR, before stating his conclusion starting at page 36C:

Essentially, Mr Wadsworth's submission was and is that when the plaintiff answered questions when interviewed by the police she did so in the reasonable belief that what she said would go no further unless it was used by the police for purposes of criminal proceedings. The caution administered to her so indicated, and in order to safeguard the free flow of information to the police it is essential that those who give information should be able to have confidence that what they say will not be used for some collateral purpose.

However, in my judgment, where a regulatory body such as UKCC operating in the field of public health and safety, seeks access to confidential material in the possession of the police, being material which the police are reasonably persuaded is of some relevance to the subject matter of the inquiry by the regulatory body, then a countervailing public interest is shown to exist which, as in this case, entitles the police to release the material to the regulatory body on the basis that, save in so far as it may be used by the regulatory body for the purposes of its own inquiry, the confidentiality which already attaches to the material will be maintained.

. . . Even if there is no request from the regulatory body, it seems to me that if the police come into possession of confidential information which in their reasonable view, in the interest of public health or safety, should be considered by a professional or regulatory body, then the police are free to pass that information to the relevant regulatory body.

33. The principle which emerges from the judgment is that material in the possession of the police which is confidential may nonetheless be provided to others if there is a strong enough countervailing public interest in doing so. We were not taken in any detail to the content of the material provided by the Police to the Northern [Cypriot] authorities but some of it is likely to be confidential, bank details for example, although much may not be. There was also no argument on the question whether someone who is himself owed no duty of confidence in respect of the disputed material can rely upon a duty of confidence owed to others. But in my judgment such matters do not need exploration to resolve this issue. There will often be a strong public interest in co-operating with foreign law enforcement agencies to assist them in their investigations which aim to bring criminals to justice. That is especially so in the modern world where crime may have a multi-jurisdictional element or where prosecution in respect of the same conduct may be possible in more than one jurisdiction. There is no principled basis for drawing a line around the United Kingdom of Great Britain and Northern Ireland which has the effect of denying the

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voluntary provision of material of this nature to the law enforcement authorities of all foreign jurisdictions. The Home Office Guidance is correct when it repeatedly makes the point that mutual legal assistance using the powers in the 2003 Act is supplementary to the informal co-operation that can be given between law enforcement agencies. The UKCA may itself provide assistance informally, that is without using the powers in the 2003 Act, in circumstances where it has been provided with material being sought: see *R (Al Fawwaz)* v. *Secretary of State for the Home Department* [2015] EWHC 166 (Admin) at paragraph 26. The evidence before us shows that British police forces provided assistance to Northern Cypriot law enforcement authorities in connection with two murders in 1999 and 2005. That illustrates the operation of informal co-operation in the precise circumstances which arise in this case. There is no question, in my view, of such co-operation being unlawful simply on the basis that it is with a foreign entity.

34. In the circumstances of this case the public interest in co-operation is clear. The claimant is suspected of being part of a significant drug conspiracy. Had he remained in England he would have been prosecuted. He has put himself beyond the reach of the criminal justice system of England and Wales. There is a clear public interest in his being prosecuted elsewhere if that is possible. It is possible in Northern Cyprus.

*The human rights issue*

35. Mr Jones submits that the provision of information to Northern [Cyprus] about the claimant's alleged criminal activity exposes him to a risk of an unfair trial and also, if convicted, to the possibility of incarceration in conditions which do not meet the standards required by article 3 ECHR. I would refuse permission to pursue this ground for two reasons. First, the claimant is not within the jurisdiction of the United Kingdom for the purposes of the ECHR according to the well-settled jurisprudence of the Strasbourg Court. Secondly, even if he were, the material before us does not sufficiently support either of the factual contentions underlying this aspect of the claim.

36. The question of what is meant by "jurisdiction" for the purpose of article 1 ECHR has been examined in numerous domestic cases and authoritatively by the Strasbourg Court in *Bankovic* v. *Belgium* (2001) 11 BHRC 435 and *Al Skeini* v. *United Kingdom* (2011) 30 BHRC 561, in the latter case between paragraphs 130 and 142. Mr Jones recognised that the United Kingdom exercises no jurisdiction within Northern Cyprus in any of the senses hitherto recognised by the

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Strasbourg Court and invited us to craft a "new exception" to the territorial restriction on the concept of jurisdiction under article 1 ECHR. But to do so on the facts of this case would be incompatible with the approach of the Strasbourg Court to the question. There is, in my judgment, no credible argument to support the contention that the claimant is within the jurisdiction of the United Kingdom for the purposes of the ECHR.

37. Moreover, were this an extradition case with surrender being resisted on article 6 grounds, it would be necessary for the requested person to demonstrate that he faced a trial where the very essence of the rights guaranteed by article 6 would be denied to him or, put another way, there would be a flagrant denial of justice: see the discussion in the speech of Lord Bingham in *R (Ullah)* v. *Special Adjudicator* [2004] 2 AC 323 at paragraph 17. The Strasbourg Court has heard cases relating to Northern Cyprus on the basis that it is within the jurisdiction of Turkey and as such has had cause to consider the case of *Amer* (to which I have referred) where violations of article 6 were established because of delay and inadequate interpretation. Such an isolated finding does not begin to support the proposition that any trial the claimant might receive in Northern Cyprus would amount to a flagrant denial of justice. Evidence filed from Mr Amer's lawyer in Northern Cyprus shows that the ECHR is "included in the legislation of [Northern Cyprus] and is binding on its courts". He is critical of the standard of interpretation and the extent of translation of documents into the mother tongue of a defendant. There is nothing to suggest that is anything but a hypothetical problem for the claimant. Nothing within his statement (or that of Mr Kadri, another Turkish Cypriot lawyer) would assist the claimant in surmounting the high hurdle needed to rely upon article 6.

38. Similarly, the material before us does not establish that, if the claimant was convicted and imprisoned, there would be substantial grounds for believing that the conditions of detention would fall short of those required by article 3 ECHR. We were shown no case from the Strasbourg Court or any human rights reports of the sort familiar when arguments of this nature are raised. I have quoted from the NCA assessment from May 2016 which indicated that conditions of detention were satisfactory. The claimant relies upon press reports from August this year quoting local campaigners for the improvement of prison conditions and a statement from Ozge Ugrasin, a Northern Cypriot lawyer. These were served late and the defendant and interested party have had no opportunity to respond to them. Mr Ugrasin gives a broad description of how the only male prison in Northern

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Cyprus operates. Much of his description does not touch on conditions of detention. His main complaint is that the prison is overcrowded with the consequence that prisoners, in his estimation, have only 2.5 square metres of personal space and with consequential pressure upon lavatory and showering facilities. He speaks of problems with central heating and hot water. There is a suggestion that the authorities are trying to ameliorate difficulties, although Mr Ugrasin believes they have failed to do so.

39. The Strasbourg Court has considered prison conditions in many of the ECHR states in pilot judgments dealing with a very large number of complaints. In that connection it has analysed in detail the conditions by reference to such matters as space, ventilation, opportunities for exercise, time out of cellular confinement, medical facilities and much else. Its consideration in these cases was of conditions being experienced by serving prisoners whose particular circumstances were set out extensively in evidence. I readily accept that the evidence recently gathered on behalf of the claimant raises some concerns about the men's prison in Northern Cyprus and about whether the authorities there are dealing properly with those concerns, whatever their stated intention. But it is not of a nature to establish the proposition that current facilities routinely fail to meet article 3 standards, still less that at an unspecified date in the future, were the claimant convicted and imprisoned, there is a real risk that they would do so.

*Conclusion*

40. The claimant has failed to establish either of the grounds upon which he was granted permission to apply for judicial review. I would refuse permission to pursue the third ground because it is unarguable and dismiss the claim.

MRS JUSTICE THIRLWALL

41. I agree.

[Report: 167 NLJ 7734, [2017] ACD 39]

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