IN THE HIGH COURT OF JUSTICE **Claim No. CO/2368/2016**
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

B E T W E E N:

THE QUEEN on the application of
PRIVACY INTERNATIONAL

Claimant

-and-

INVESTIGATORY POWERS TRIBUNAL

Defendant

-and-

(1) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS
(2) GOVERNMENT COMMUNICATION HEADQUARTERS

Interested Parties

CLAIMANT'S SKELETON ARGUMENT
FOR HEARING ON 8-9 DECEMBER 2020

Time estimate: 1.5 days

Suggested pre-reading:

Judgment of IPT [2016] UKIP Trib 14_85-CH

Paul F Scott *General warrants, thematic warrants, bulk warrants: property interference for national security purposes* (2017) 68(2) NILQ 99

Judgment of Supreme Court in *Privacy International* [2019] 2 WLR 1219

Sections 5-7 ISA 1994

Summary

1. The claim raises two issues of law:

    1.1. First, does section 5 of the Intelligence Services Act 1994 ("**ISA 1994**"), which confers the power to issue a warrant "*authorising the taking of such action as is specified in the warrant in respect of any property so specified*", permit the issue of a warrant which authorises a class of acts in respect of an class of property or people, i.e. a general warrant? The Claimant contends this language is entirely insufficient to authorise the issue of a general warrant.

    1.2. Secondly, does the use of section 5 ISA 1994 to engage in computer hacking breach Article 8 of the European Convention on Human Rights? The Claimant contends that the use of that power for computer hacking, prior to publication of the Equipment Interference Code, did not meet the Article 8 requirement of foreseeability.

2. On 12 February 2016 the Investigatory Powers Tribunal handed down a judgment determining these questions against the Claimant as preliminary issues ([2016] UKIP Trib 14_85-CH).

3. At the time, there was no appeal from a decision of the IPT. The Claimant therefore issued a claim for judicial review. The question whether the claim was precluded by the 'ouster' provision in section 67(8) Regulation of Investigatory Powers Act 2000 ("**RIPA 2000**") was determined as a preliminary issue. On 15 May 2019, the Supreme Court ruled in the Claimant's favour on that issue ([2019] 2 WLR 1219). If the IPT errs in law, judicial review is available to correct the error. The claim now proceeds in relation to the substantive challenge. Permission was granted by Lang J.

4. The issues before the Court remain of real ongoing practical importance, despite the coming into force of the Investigatory Powers Act 2016 ("**IPA 2016**"). Much computer hacking is now authorised under Part 5 of that Act (see section 13 IPA 2016), but s. 5 ISA remains in force and continues to be used for other forms of property interference and certain types of computer hacking. Section 5 continues in use for:

    4.1. a covert entry and search of premises or goods;

4.2. interference with goods;

4.3. interference with intellectual property rights; and

4.4. computer hacking where the aim is "*not to acquire data… but simply to destroy or otherwise manipulate the functioning of electronic systems*". See Paul F Scott *General warrants, thematic warrants, bulk warrants: property interference for national security purposes* (2017) 68(2) NILQ 99.

Issue 1: the correct interpretation of section 5 ISA 1994

5. Applying ordinary principles of statutory construction, section 5 ISA does not permit the issue of a general warrant, allowing interference with a class of property without specifying the particular property to be affected, either by reference to a person or a place. A warrant issued under s. 5 must specify the property to which it relates and the acts that are authorised in relation to that property.

6. Section 5 ISA does not permit, for example, a warrant of the kind which according to leaked documents was sought by GCHQ in June 2008, authorising "*all continuing activities which involve interference with copyright or licensed software, but which cannot be said to fall within any other specific authorisation held by GCHQ and which are done without the permission of the owner*". Such a warrant neither specifies the property to be interfered with nor the persons to be affected.

7. This construction of section 5 ISA is correct applying the express words of the statute and the principles of construction applicable to such powers:

7.1. ISA 1994 contains two different formulations for the authorisation of acts that would otherwise be unlawful, depending on whether the acts take place within the jurisdiction or overseas. Section 5 governs activities within the British Islands. It empowers the Secretary of State to issue a warrant authorising specified acts in respect of specified property, thus retaining the traditional prohibition on the issue of a general warrant under section 5. In contrast, section 7 (which, subject to very limited exceptions, applies only outside the British Islands) empowers the Secretary of State to authorise the commission overseas of "*acts of a description specified in the authorisation*". Parliament chose to permit general class

authorisations outside the UK. But inside the UK, the traditional limits on search and seizure of property remained.

7.2. The power in section 5 to authorise specified acts in respect of specified property is far narrower than the power to authorise "*acts of a description*" in section 7. As the Minister of State put it in the House of Commons when promoting the Bill that first introduced a power in the form of section 5 ISA 1994 (the Security Services Act 1989), "*All that a warrant can authorise is action in respect of named property, and both the action and the name of the property must be on the warrant*" (HC Deb 17 January 1989, vol 145 col 269).

7.3. That conclusion, which is based on the words of the legislation, also follows from the principle of legality. The protection of real and personal property from interference without express legal justification is one of the most fundamental principles of English law, recognised in a series of cases culminating in *Entick v Carrington* (1765) 19 Howell's State Trials 1029, 95 ER 807. At common law, a general warrant that does not specify a person or place to be searched is not permitted. The common law, for reasons of fundamental constitutional importance, requires a warrant to specifically describe the person or property affected by it. A departure from that position requires clear statutory words.

8. The IPT held at §§37-47 that the word 'specified' in s.5 "*cannot have meant anything more restrictive than 'adequately described'*" (§44), and that it is sufficient that "*the property to be covered is objectively ascertainable*" (§47). It rejected the relevance of the principle of legality, saying: "*Eighteenth Century abhorrence of general warrants issued without express statutory sanction is not in our judgment a useful or permissible aid to construction of an express statutory power given to a Service, one of whose principal functions is to further the interests of UK national security, with particular reference to defence and foreign policy*." (§37) This was not the proper approach to the construction of a power to grant a general warrant and collapses Parliament's careful distinction between sections 5 and 7 of ISA 1994.

9. Since the claim was issued, Parliament has legislated in the Investigatory Powers Act 2016 to confer on the Secretary of State powers to issue "*targeted equipment interference warrants*" and "*bulk equipment interference warrants*". Both powers are subject to much more substantial safeguards than section 5 ISA 1994, including a requirement to obtain approval from a

Judicial Commissioner. Further, the provisions authorising 'targeted equipment interference warrants' spell out in detail the potential scope of such warrants: in particular, s.101 gives express Parliamentary authority for wide-ranging warrants, including over "*equipment which is being, or may be, used for the purposes of a particular activity or activities of a particular description*". The contrast with section 5 ISA 1994 is stark.

Issue 2: Compliance with Article 8

10. Prior to February 2015, the use of section 5 ISA 1994 to authorise computer hacking had not been publicly avowed. The Secretary of State first published a Draft Equipment Interference Code admitting the use of the power for hacking in February 2015, at the same time as filing the Response in the IPT proceedings. The Draft Code was published in final form in January 2016.

11. Prior to the publication of the Draft Equipment Interference Code, and/or the finalised Code, the arrangements governing the intelligence services' use of section 5 ISA in relation to computer hacking did not comply with the minimum safeguards required by Article 8 ECHR[1].

12. The Tribunal concluded that the arrangements had always complied with Article 8, before and after the publication of the Draft Code. In particular, it held that (i) it must have been obvious even before the practice was avowed that the intelligence services were engaging in computer hacking and that that activity was governed by a 2002 "Covert Surveillance and Property Interference Code" ("**the Property Code**"), and (ii) overall, the safeguards in place had been adequate at all times. The Claimant submits that both conclusions are wrong.

13. The Article 8 issue originally did not form part of the judicial review proceedings. This was because it raises issues that were capable of being addressed by the ECtHR if (as the Respondent and Interested Parties contended) judicial review was unavailable, whereas the issue as to the proper interpretation of section 5 ISA 1994 could only be raised in the

[1] The Claimant reserves its position in any appeal as to the lawfulness of the failure of section 5 ISA to require (a) prior independent judicial authorisation, (b) reasonable grounds for suspicion; and (c) post-hoc notification (where possible consistent with the public interest) as additional fundamental safeguards, as well as the proportionality of thematic warrants. Whether covert surveillance requires such safeguards under the ECHR is currently being considered by the Grand Chamber of the European Court of Human Rights in *Big Brother Watch v United Kingdom* (Application 58170/13 and others) (judgment pending).

domestic courts. Following the Supreme Court's decision that judicial review is available, it is right that the Court should consider the Article 8 issue as well.

Facts

14. In July 2014, the Claimant along with others issued a Complaint in the IPT against the Secretary of State and GCHQ, challenging various aspects of the arrangements under which the intelligence services were believed to make use of computer hacking techniques (otherwise known as Computer Network Exploitation or "**CNE**"). The complaint arose from a series of public disclosures, from June 2013 onwards, about the practices of the intelligence services.

15. CNE is an intrusive form of surveillance activity, which therefore requires strong safeguards if it is to be used in a democratic society. That is for at least four reasons:

    15.1. First, a wide range of personal information is nowadays commonly stored on computers and mobile devices. When deployed against an individual's computer or telephone, CNE can achieve results that are at least as intrusive as if the targeted individual were to have his house bugged, his home searched, his communications intercepted and a tracking device fitted to his person. As Roberts CJ explained in *Riley v California* (2014) (Supreme Court of the United States):

> "the term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. One of the most notable distinguishing features of modern cell phones is their immense storage capacity… Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."

    15.2. Second, unlike the interception of communications, CNE techniques can involve acquiring information which an individual has chosen <u>not</u> to communicate to any other person. At its simplest, that might include written information which the individual intended to keep entirely private. It may also include information of other kinds: as recorded in the June 2015 report of the Independent Reviewer of Terrorism Legislation (David Anderson QC), 'A Question of Trust', leaked

documents refer to GCHQ implanting software enabling them for example to switch on a smartphone and activate its microphone without the user's knowledge.

15.3. Third, CNE techniques can be deployed against entire networks of communications infrastructure, giving access to numerous computers at once. The consequence is the ability to gain bulk access to the data of very large numbers of people.

15.4. Fourth, CNE is not a passive means of collecting intelligence, in contrast to interception. It requires active intrusion into a persons' computer, and often involves changing and altering the system to serve the purpose of the intruder, the effect of which can be to make the system vulnerable to further intrusion (not only by the original intruder but also potentially by others).

16. At the point at which the Complaint was lodged, the use of CNE by the intelligence services had never been publicly admitted. The Secretary of State confirmed in response to a Request for Further Information that, to the best of the Respondents' knowledge, "*no public statements [had] been made about the use of CNE as a specific investigative technique prior to publication of the EI Code*". However, it was common ground during the proceedings that:

16.1. GCHQ has obtained warrants in respect of CNE under section 5 and authorisations in respect of CNE under section 7; and,

16.2. in 2013, about 20% of GCHQ's intelligence reports contained information derived from CNE.

17. The Draft EI Code was published on 6 February 2015 and set out a proposed set of safeguards governing the exercise of the power in section 5 ISA 1994 in the context of CNE.

18. On 25 June 2015, Sir Mark Waller (the Intelligence Services Commissioner) published his 2014 Report, in which he disclosed publicly that he had concerns about the manner in which section 5 ISA 1994 was being interpreted. He wrote:

> "Thematic Property Warrants
>
> I have expressed concerns about the use of what might be termed 'thematic' property warrants issued under section 5 of ISA. ISA section 7 makes specific

reference to thematic authorisations (what are called class authorisation) because it refers 'to a particular act' or to 'acts' undertaken in the course of an operation. However, section 5 is narrower referring to 'property so specified'.

During 2014 I have discussed with all the agencies and the warrantry units the use of section 5 in a way which seemed to me arguably too broad or 'thematic'. I have expressed my view that:

- section 5 does not expressly allow for a class of authorisation; and
- the words 'property so specified' might be narrowly construed requiring the Secretary of State to consider a particular operation against a particular piece of property as opposed to property more generally described by reference for example to a described set of individuals.

The agencies and the warrantry units argue that ISA refers to action and properties which 'are specified' which they interpret to mean 'described by specification'. Under this interpretation they consider that the property does not necessarily need to be specifically identified in advance as long as what is stated in the warrant can properly be said to include the property that is the subject of the subsequent interference. They argue that sometimes time constraints are such that if they are to act to protect national security they need a warrant which 'specifies' property by reference to a described set of persons, only being able to identify with precision an individual at a later moment".

19. Sir Mark Waller's term, 'thematic warrant', has been adopted by the parties and the IPT as a convenient shorthand.

20. The parties agreed a list of issues of law to be determined by the IPT at an open hearing on assumed facts. Those issues included:

> "Does section 5 ISA 1994 permit the issue of a 'thematic' warrant authorising acts in respect of a class of property, or must such a warrant specifically identify the property to which it relates?"
>
> "Is the regime which governs Computer Network Exploitation ('the regime') 'in accordance with the law' under Article 8(2) ECHR / 'prescribed by law' under Article 10(2) ECHR? In particular:
>
> a. Is the regime sufficiently foreseeable?
>
> b. Are there sufficient safeguards to protect against arbitrary conduct?
>
> c. Is the regime proportionate?
>
> d. Was this the case throughout the period commencing 1 August 2009?"

21. The IPT delivered its open judgment on 12 February 2016. In respect of the first issue:

21.1. At §37 it held that "*Eighteenth Century abhorrence of general warrants issued without express statutory sanction is not in our judgment a useful or permissible aid to construction of an express statutory power given to a Service, one of whose principal functions is to further the interests of UK national security, with particular reference to defence and foreign policy. The words should be given their natural meaning in the context in which they are set*." It is notable that the IPT went as far as to suggest that the constitutional cases about general warrants are not even a permissible aid to construction.

21.2. At §38 it held that the sufficiency of the specification in a warrant "*will be dependent on the particular facts of that case*", and that the "*test*" is "*Are the actions and the property sufficiently identified?*" It added that "*The property should be so defined, whether by reference to persons or a group or category of persons, that the extent of the reasonably foreseeable interference caused by the authorisation of CNE in relation to the actions and property specified in the warrant can be addressed.*"

21.3. At §39 it compared the statutory language with that in the Evidence (Proceedings in Other Jurisdictions) Act 1975, which referred to "*particular documents specified*", and said: "*There is no requirement here for specification of particular property, but simply for specification of the property, which in our judgment is a word not of limitation but of description, and the issue becomes one simply of sufficiency of identification*."

21.4. At §§43-44 it noted that section 5 also permitted warrants to be issued authorising "*action […] in respect of wireless telegraphy*", and said that "*Given the width of meaning contained in the words 'action' and 'wireless telegraphy' and, at least potentially, in the word 'property', specified cannot have meant anything more restrictive than 'adequately described'. The key purpose of specifying is to permit a person executing the warrant to know when it is executed that the action which he is to take and the property or wireless telegraphy with which he is to interfere is within the scope of the warrant.*"

21.5. At §45 it therefore specifically held that a warrant issued under s.5 need not "*identify one or more individual items of property by reference to their name, location or owner*", or "*identify property in existence at the date on which the warrant was issued*". It went on: "*Warrants could therefore, for example, lawfully be issued to permit GCHQ to interfere with computers used by members, wherever located, of a group whose activities could pose a threat to UK national security, or be used to further the policies or activities*

of a terrorist organisation or grouping, during the life of a warrant, even though the members or individuals so described and/or the users of the computers were not and could not be identified when the warrant was issued." Such warrants would neither specify the property to be interfered with, nor the persons to be affected. As will be explained below, the IPT's approach therefore unambiguously permits property interference on the basis of a class authority that Parliament only authorised under section 7 outside of the British Islands.

21.6. At §47 it concluded: "*In our judgment what is required is for the warrant to be as specific as possible in relation to the property to be covered by the warrant, both to enable the Secretary of State to be satisfied as to the legality, necessity and proportionality and to assist those executing the warrant, so that the property to be covered is objectively ascertainable.*"

22. In relation to the second issue:

22.1. At §70, the IPT held that the Draft EI Code complied with the requirements set out by the ECtHR in *Weber v Germany*.

22.2. At §81, it held that although there had been no admission prior to February 2015 that GCHQ's activities included CNE under section 5, "*Nevertheless it was quite clear that at least since 1994 the powers of GCHQ have extended to computer interference (under s.3 of ISA). It was thus apparent in the public domain that there was likely to be interference with computers, 'hacking' being an ever more familiar activity, namely interference with property by GCHQ […], and that if it occurred it would be covered by the Property Code. Use of it was thus foreseeable, even if the precise form of it and the existence of its use was not admitted.*"

22.3. At §82, it concluded that there was therefore no contravention of Articles 8/10 even in respect of the earlier period, saying:

> "Compliance with Weber (4) to (6) will in our judgment mean the provision, particularly in a national security context, of as much information as can be provided without material risk to national security. In our judgment, not least because of the consequences of a conclusion of unlawfulness simply by virtue of a perceived procedural insufficiency, a conclusion that procedural requirements or the publication of them can be improved (i) does not have the necessary consequence that there has prior thereto been insufficient compliance with Weber (4) to (6) and (ii) does not

constitute such a material noncompliance as to create a contravention of Article 8. This Tribunal sees it as an important by-product of the exercise of its statutory function to encourage continuing improvement in the procedures adopted by the Intelligence Agencies and their publication (and indeed such improvement took place as a consequence of our Judgments in Liberty/Privacy No.1, Liberty/Privacy No.2 and Belhadj), but it does not conclude that it is necessary, every time an inadequacy, particularly an inadequate publication, is identified, to conclude that that renders all previous conduct by the Respondents unlawful. The E I Code is plainly a step forward by the Respondents, which this Tribunal welcomes: taking the Property Code together with the other safeguards which we have set out in paragraph 80 above, we are satisfied that there was prior to that step adequate protection from arbitrary interference."

Issue 1: The correct interpretation of s.5 ISA 1994

The legislative framework

23. Section 5 ISA 1994 provides, in relevant part:

"(1) No entry on or interference with property or with wireless telegraphy shall be unlawful if it is authorised by a warrant issued by the Secretary of State under this section.

(2) The Secretary of State may, on an application made by the Security Service, the Intelligence Service or GCHQ, issue a warrant under this section authorising the taking of such action as is specified in the warrant in respect of any property so specified or in respect of wireless telegraphy so specified if the Secretary of State:

(a) thinks it necessary for the action to be taken for the purpose of assisting, as the case may be,—

(i) the Security Service in carrying out any of its functions under the 1989 Act; or

(ii) the Intelligence Service in carrying out any of its functions under section 1 above; or

(iii) GCHQ in carrying out any function which falls within section 3(1)(a) above; and

(b) is satisfied that the taking of the action is proportionate to what the action seeks to achieve;

(c) is satisfied that satisfactory arrangements are in force under section 2(2)(a) of the 1989 Act (duties of the Director-General of the Security Service), section 2(2)(a) above or section 4(2)(a) above with respect to the disclosure of information obtained by virtue of this section

and that any information obtained under the warrant will be subject to those arrangements."

24. Section 7 ISA 1994 provides:

> "(1) If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section. […]
>
> (4) Without prejudice to the generality of the power of the Secretary of State to give an authorisation under this section, such an authorisation—
>
> (a) may relate to a particular act or acts, to acts of a description specified in the authorisation or to acts undertaken in the course of an operation so specified;
>
> (b) may be limited to a particular person or persons of a description so specified; and
>
> (c) may be subject to conditions so specified."

25. There is no equivalent to section 7(4) in section 5.

26. The issue of interpretation arising in relation to section 5 was summarised by Lord Carnwath in the Supreme Court's judgment on the preliminary issue, at §12:

> "The issue arises under section 5 of the Intelligence Services Act 1994 which empowers the Secretary of State to issue a warrant "*authorising the taking of such action as is specified in the warrant in respect of any property so specified*" if he considers, among other things, that such action is necessary for the purpose of assisting the intelligence services in carrying out their functions. According to the appellant's case, the significance of that provision became apparent when the Intelligence Services Commissioner (Sir Mark Waller) disclosed in his 2014 Report that the intelligence services were using it to authorise CNE activity, and expressed concern that this interpretation of the section might arguably be too broad. Their case before the tribunal was that section 5 did not permit the issue of so-called "*thematic*" warrants authorising activity in respect of a broad class of property. They argued, inter alia, that the section needed to be construed against the background of the long-established aversion of the common law to general warrants, recognised in cases going back to *Entick v Carrington* (1765) 2 Wils KB 275."

27. At §139 Lord Carnwath added: "*The legal issue decided by the IPT is not only one of general public importance, but also has possible implications for legal rights and remedies going beyond the scope of the IPT's remit.*"

28. There are accordingly three features of the law that are relevant: the principle of legality; the long-standing common law concern regarding warrants of broad scope which purport to authorise interference with property; and the meaning of the word "*specified*".

The principle of legality

29. The principle of legality, in the well-known formulation propounded by Lord Hoffmann in *R (Simms) v SSHD* [2000] 2 AC 115 at 131:

> "… means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

30. Three points about the scope and effect of the principle of legality are relevant in the present case.

31. First, as confirmed by Lord Reed in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 at §152, the principle also means that Parliament will not without clear words be held to have conferred on another a power to override fundamental rights:

> "The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so. As Lord Browne-Wilkinson stated in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 575: 'A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect … the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.'"

32. Second, the principle does not only apply in determining whether, as a binary matter, Parliament has or has not legislated in a way that interferes with fundamental rights; it also operates in determining the extent of the interference which a given legislative act has permitted:

32.1. That is clear from the summary of the principle put forward by Lord Brown in *HM Treasury v Ahmed* [2010] UKSC 2 at §204: "*The Simms principle is intended to ensure that human rights are not interfered with to a greater extent than Parliament has already unambiguously sanctioned*."

32.2. It is also clear from *Simms* itself. The issue in that case was whether paragraphs 37 and 37(A) of the Prison Regulations, which provided that "*Visits to inmates by journalists or authors in their professional capacity should in general not be allowed and the governor has authority to refuse them without access to headquarters*", should be construed as permitting a blanket ban on interviews between prisoners and journalists, even where the prisoner's purpose was to pursue a legitimate attempt to establish his innocence. Lord Steyn, giving the lead judgment, concluded that, applying the principle of legality, the regulations did not authorise a blanket ban. Lord Hoffmann's concurring judgment, as well as containing the classic articulation of the principle of legality, also said: "*What this case decides is that the principle of legality applies to subordinate legislation as much as to acts of Parliament. Prison regulations expressed in general language are also presumed to be subject to fundamental human rights. The presumption enables them to be valid. But it also means that properly construed, they do not authorise a blanket restriction which would curtail not merely the prisoner's right of free expression, but its use in a way which could provide him with access to justice.*"

32.3. The same point was also made by Lord Reed in *R (UNISON) v Lord Chancellor* [2017] 51 at §§80-88:

> "Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question. […]
>
> [in *R (Daly) v SSHD* [2001] UKHL 26] Lord Bingham concluded that 'the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners' (para 21). Since that degree of intrusion was not expressly authorised by the relevant statutory provision, it followed that the Secretary of State had no power to lay down the policy."

33. Third, the strength of the principle depends on the strength or notoriety of the fundamental right or the constitutional principle that is potentially affected. See the judgment of the

Divisional Court in *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at §82-83:

> "82. Statutory interpretation […] must proceed having regard to background constitutional principles which inform the inferences to be drawn as to what Parliament intended by legislating in the terms it did. This is part of the basic approach to be adopted by a court engaging in the process of statutory interpretation. Where background constitutional principles are strong, there is a presumption that Parliament intended to legislate in conformity with them and not to undermine them. One reads the text of the statute in the light of constitutional principle. In the particular context of the primary legislation which falls for interpretation, can it be inferred that a Parliament aware of such constitutional principle and respectful of it intended none the less to produce effects at variance with it?
>
> 83. There are several examples of this approach to statutory interpretation. […] All these presumptions can be overridden by Parliament if it so chooses, but the stronger the constitutional principle the stronger the presumption that Parliament did not intend to override it and the stronger the material required, in terms of express language or clear necessary implication, before the inference can properly be drawn that in fact it did so intend. Similarly, the stronger the constitutional principle, the more readily can it be inferred that words used by Parliament were intended to carry a meaning which reflects the principle."

34. As is noted below, principle of legality is not of recent invention. It formed the basis of the reasoning in *Entick v Carrington*.

The hostility of the common law to general warrants

35. The principle that an interference with property must be supported by clear and specific legal authorisation is long established at common law. It is no exaggeration to describe it as one of the foundational principles of English law.

36. The most famous example is *Entick v Carrington* in which the Court held that the absence of express statutory authority was fatal to the validity of a warrant. Lord Camden CJ explained what we would now call the principle of legality as follows: "*such is the power* [under the warrant], *and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant*".

37. But *Entick* did not involve a general warrant. John Entick and his premises in Stepney were expressly referred to in the warrant.

38. The most important cases for present purposes are those that immediately preceded *Entick*, involving general warrants which did not name the people or places to be searched.[2]Those cases were summarised accurately by Blackstone in Book IV of his *Commentaries* as follows:

> "A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons guilty of a crime therein specified, is no legal warrant".

39. George III opened Parliament on 19 April 1763. In his speech, he praised the Treaty of Paris, ending the Seven Years War but ceding numerous colonies to France. The speech was the work of Lord Bute, the former Prime Minister.

40. John Wilkes penned a savage criticism of the speech. The critique was published four days later in issue 45 of *The North Briton*. The choice of issue 45 was no accident: Bute was popularly associated with the Jacobite rising of 1745 by Bonnie Prince Charlie against George II.

41. George III considered the publication a personal insult and seditious. He ordered that a general warrant be issued to identify the author, publisher, printer and their associates.[3]

42. Lord Halifax, the Secretary of State, complied:

> "On 19 April 1763, the King made a speech from the throne... on the 23 April 1763 a certain seditious and scandalous libel or composition... was unlawfully and seditiously composed, printed and published concerning the King and his said speech... That the Earl of Halifax was then... one of His Majesty's principal Secretaries of State; and that information was given to him of the said publication of the aforesaid libel... he thereupon in due manner issued his warrant in writing under his hand and seal... by which warrant the said earl did in His Majesty's name authorise and require them, taking a constable to their assistance, to make strict and diligent search for the said authors, printers and publishers of the aforesaid seditious libel... and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before the said earl, to be examined concerning the premises, and to be further dealt with according to law" (*Money v Leach* (1765) 3 Burrow 1742, 97 ER 1075).

---

[2] As Professor Timothy Endicott (Vinerian Professor of English Law at Oxford) puts in "*Was Entick v Carrington a Landmark?" in* Tomkins & Scott (2015) "*Entick… made a significant change to the law. General warrants had already been held to be unlawful… there is a reason for students today to learn about John Entick's case, although I wish they would also learn about the case of the historically much more important John Wilkes…"*

[3] A detailed history has been published in *Feldman*, *The Politics and People of Entick v Carrington* (2015).

43. The warrant therefore did not name its targets, or the places that could be searched. It permitted the King's Messengers to search whoever and wherever their suspicions fell, without any prior approval by the Secretary of State as to who or where would be searched.

44. This general warrant was used to search dozens of premises and led to numerous arrests. In a series of decisions, the Courts held the general warrant to be void, and awarded compensation to the victims. In *Huckle v Money* (1763) 2 Wilson 205, 95 ER 768 Lord Pratt CJ noted that:

> "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject".

45. In *Money v Leach* (1765) 3 Burrow 1742, 97 ER 1075 Lord Mansfield CJ held:

> "It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer. This is so, upon reason and convenience.
>
> Then as to authorities – Hale and all others hold such an uncertain warrant void: and there is no case or book to the contrary."

46. As indicated in that judgment, Sir Matthew Hale had written in *History of the Pleas of the Crown* (1736) that "*if A makes oath before a justice of peace of a felony committed in fact, and that he suspects B and shews probable cause of suspicion the justice may grant his warrant to apprehend B and to bring him before him, or some other justice of peace to be examined, and to be farther proceeded against, as to law shall appertain; and upon this warrant the constable, or he to whom the warrant is directed, may arrest him, and if occasion be may break doors to take him […] But a general warrant upon a complaint of robbery to apprehend all persons suspected, and to bring them before, &c was ruled void […]*"

47. Similarly, in *Wilkes v Wood* (1763) Lofft 1, 98 ER 489, in Lord Camden CJ said: "*The defendants claimed a right, under precedents, to force persons houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject*."

48. These cases have always been recognised as stating fundamental common law principles. The prohibition on general warrants was recognised as a fundamental constitutional principle and incorporated into the Fourth Amendment to the US constitution ratified in 1792 ("*no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized*"). As Roberts CJ put it in *Riley v California,* the Fourth Amendment was "*… the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era*".

49. As Scott puts it, "*These cases amount to a clear rejection by the common law of interferences with property which neither specify the person whose property is to be subject to interference (effectively leaving the sufficiency of the evidence against any given individual to be determined by those executing the warrant rather than those granting it) nor identify the specific property to be interfered with*".

50. Thus, the hostility of English law to interference with property without clear and specific legal authorisation is undoubtedly sufficiently well-established as to engage the principle of legality. It is not a historical artefact, as the IPT's decision suggests. Indeed, *Entick v Carrington* was cited twice by the unanimous Supreme Court in *Miller and Cherry v Prime Minister* [2020] AC 373 (the challenge to the decision to prorogue Parliament in September 2019) as a paradigm example of a situation in which the courts would uphold a constitutional principle:

    50.1. At §§31-32: "*Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense. […] The later 18th century was another troubled period in our political history, when the Government was greatly concerned about seditious publications. That did not deter the courts from holding, in Entick v Carrington (1765) 19 State Tr 1029, that the Secretary of State could not order searches of private property without authority conferred by an Act of Parliament or the common law.*"

    50.2. At §40: "*The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law. We have already given two examples of such principles, namely that the law of the land cannot be altered except by or in accordance with an Act of Parliament, and that the Government cannot search private premises without lawful authority.*"

51. Further, when in *HM Treasury v Ahmed* [2010] UKSC 2 the Supreme Court applied the principle of legality in determining whether a provision of the United Nations Act 1946 authorised an interference with property rights, the case cited as shorthand for the obvious constitutional importance of property rights in English law was *Entick v Carrington*: §75.

The meaning of 'specified'

52. Finally, although it would be wrong to seek to interpret section 5 without reference to the above context, even without that context the Court have in other circumstances treated 'to specify' as meaning something narrower than 'to describe'.

53. The most direct example is the decision of the Court of Appeal in *R (Ulster Bank Ltd) v Inland Revenue Commissioners* [1997] STC 832:

    53.1. Section 20 of the Taxes Management Act 1970 empowered an Inland Revenue inspector to issue a notice requiring a person to deliver or permit inspection of documents. The statutory scheme required that the documents be "*specified or described*" in the notice.[4]

    53.2. A notice was issued requiring Ulster Bank to produce statements in respect of a group of accounts identified by description ("*all sundry parties/suspense accounts*"), together with documents relating to transactions involving such accounts above a certain value.

    53.3. Ulster Bank challenged that notice on the grounds that the statutory power only permitted the Revenue to ask for such documents as "*are specified or described in the notice so as to enable the bank to know without the need for any further judgment or analysis on its part what it must produce*" (p838). As summarised by Morritt LJ at p839a: "*The bank accepts that it may be required to produce specified documents. But it contends that it cannot be made to produce documents so loosely described as to require it, at its own expense, to carry out the investigation on behalf of the Revenue by a process akin to discovery of documents.*"

[4] This requirement arose somewhat indirectly, as a result of the cumulative effect of the provisions set out by Morritt LJ at p835. It is however clear that the Court considered that the upshot of those provisions was that the notice "*must relate to documents 'specified or described'*": see Simon Brown LJ at p844c-d and Morritt LJ at p836a.

53.4. In an earlier case at first instance (*R (Northern Bank Ltd) v O'Kane* [1996] STC 1249), Ferris J had held that s.20 did not permit the issue of a notice in respect of "*classes of documents, documents whose existence is conjectural or categories of documents in respect of which the bank is required to carry out an exercise in judgment in order to determine whether it has or has not in its possession or power documents of the kind identified*." His conclusion, as cited by Morritt LJ at p840, was:

> "s.20(3) does not allow a notice to be given in respect of conjectural, as distinct from actual, documents. It follows that, in my view, those items in the schedules to the s.20(3) notices which are expressed in terms which indicate that the draftsman of the notice does not know whether such documents exist but requires the bank to consider and inquire whether they do and, if they do, to search them out and produce them for inspection are outside the scope of s.20(3)."

53.5. In reaching that conclusion he compared s.20 with s.2(4)(b) of the Evidence (Proceedings in Other Jurisdictions) Act 1975, which referred to "*particular documents specified in the order*", and said: "*It seems to me that the main difference lies in the use of s.20(3) of the word 'described' in addition to 'specified'. I think that this does enable documents to be described by reference to a class rather than individually, so long as the description is not so wide as to be a description of conjectural documents*." In other words, he held that even that wider language was insufficient to permit a notice requiring production of documents that were not known to exist.

53.6. Morritt LJ disagreed, on the grounds of the breadth of the word 'described'. He held at p841:

> "The word 'described' is wider than the word 'specified'; it connotes the recitation of the characteristics of that which is referred to rather than its details or particulars. Thus it is appropriately used for the individual of classes or categories of documents as opposed to a single document. […]
>
> Of course a description may be more or less informative depending on the number of characteristics incorporated in the description. The word 'letter' is descriptive of a type of document but, depending on the context in which it is used, of little help. Thus the description must be genuinely directed to the purpose for which the notice may be given, namely to secure the production of documents which in the reasonable opinion of the inspector may contain information relevant to the Revenue's inquiries into the tax liability of another taxpayer whether or not named. If it is not then the notice will not come within the purview of sub-s(3) or (8A) anyway. Accordingly I see no reason for restricting the meaning of the words 'specified or described' in sub-s (8D) to less than their normal meanings.

> The safeguards against the misuse of the extensive powers conferred by s.20 lie not in the construction of these words but in the other statutory conditions which Parliament has ordained."

53.7. He accordingly held that the notices were valid even though it "*would be necessary to consider with regard to any particular document whether it comes within the description*": p842d. Sir Brian Neill and Simon Brown LJ both agreed.

54. In other words, Morritt LJ expressly drew a distinction between 'described' and 'specified', holding that the former "*connotes the recitation of the characteristics of that which is referred to*", and that the latter connotes the identification of "*its details or particulars*". That is the very distinction that arises in relation to s.5 and s.7 ISA 1994.

55. It is also instructive that that appears to be how section 5 was understood and presented by the Minister of State for Home Affairs, John Patten MP, in the House of Commons when promoting the Security Services Bill (which had introduced a power in materially the same form, which section 5 ISA later replaced). He explained, at HC Deb January 1989 vol 145 col 269, that a warrant under the proposed provision would only be able to authorise "*action in respect of a named property, and both the action and the name of the property must be on the warrant*". That is consistent with the ordinary principle that section 5 ISA requires the property that is the subject of the warrant to be ascertained and its details and particulars set out in the warrant.

56. Finally, where Parliament wishes to grant wider powers, it does so expressly. For example:

56.1. s.41A Proceeds of Crime Act 2002 provides that a restraint order authorising the detention of property "*may […] relate to specified property, to property of a specified description or to all property to which the restraint order applies*"; and,

56.2. s.245C Proceeds of Crime Act 2002, which provides that a property freezing order may be varied to exclude property from its scope, and says at subsection (7): "*If excluded property is not specified in the order it must be described in the order in general terms.*"

Submissions

57. First, the clearest indication that "*specified*" in section 5 ISA 1994 means something other than "*adequately described*" (the formulation adopted by the IPT at §44) is the fact that section

7 ISA 1994 adopts the term 'description' and section 5 does not. Parliament sought to maintain the traditional common law limits on generalised interferences with property within the UK, whilst permitting a more permissive regime outside the UK. Within the UK, general warrants in respect of property were not to be granted by the Secretary of State. Outside the UK, the position was different. Section 7 is clearly intended to be more permissive than section 5 given the territorial restriction on its use (see *Privacy International v SSFCO* [2019] UKIPTrib IPT_17_186_CH at §123).

58. The IPT's particular interpretation of section 5 results in 'specified' being elided with 'described', notwithstanding Parliament's clear intention to distinguish between the two (and the clear differences between the two as a matter of language and authority: in particular *Ulster Bank*).

59. Second, the ordinary meaning of the word "*specified*", and its meaning in a range of other legal contexts, connotes the identification of particular, ascertained things, rather than the collective description of a class of things.

60. Third, the effect of the principle of legality in this context is that, even if that were not the natural meaning of the word, that is in any event how the provision should be construed. In view of the importance of the constitutional principle that there can be no interference with property without clear and specific legal authorisation, section 5should be construed as permitting interference by means of clear and specific legal authorisation, but not otherwise.

61. Fourth, in particular, in view of the aversion of the common law to general warrants that leave significant matters of judgement to the person executing the warrant rather than the person responsible for issuing it – the requirement to "specify" requires the person and place to be interfered with to be specified. Clear legislative words would be required to authorise what Sir Mark Waller calls a 'thematic warrant'.

62. Fifth, section 5, as interpreted by the IPT, has application in contexts other than the use of CNE. In particular, it could be used to authorise a covert search and seizure warrant in similar terms to that used in the eighteenth-century general warrant cases. Examples are given at Annex 1.

63. The consequence of the IPT's interpretation of section 5 is demonstrated by its illustration at §45: "*Warrants could therefore, for example, lawfully be issued to permit GCHQ to interfere with computers used by members, wherever located, of a group whose activities could pose a threat to UK national security, or be used to further the policies or activities of a terrorist organisation or grouping, during the life of a warrant, even though the members or individuals so described and/or the users of the computers were not and could not be identified when the warrant was issued*":

63.1. This approach places wide discretionary power in the hands of the person executing the warrant; it illustrates why 'specified' does not mean 'described'.

63.2. Parliament decided that these questions of judgement were for the Secretary of State, acting personally, not officials.

63.3. Such a warrant demonstrates precisely the vice that led to the general warrant cases. They transfer control over grave covert interferences with property from the Secretary of State to officials because the persons and places to be interfered with are neither specified in the warrant, nor provided to the Secretary of State for prior approval.

64. In short, in the absence of clear and express words, Parliament has not departed from the traditional limits on search and seizure within the UK. There is nothing objectionable in a warrant under section 5 ISA that defines its target by reference to a specified person(s) or premises. But legislation should not readily be construed as permitting a covert general warrant of uncertain scope within the UK, in the absence of clear words.

65. The national security context makes no difference. The Eighteenth Century cases were instances of what we would now call national security litigation: counsel for the defendants in *Entick v Carrington* expressly relied on the fact that the context was the investigation of seditious libel, "*for there can hardly be a greater offence against the State, except actual treason*" ((1765) 95 ER 807 at p813). Arguments that a different approach to the principle of legality should be taken in the national security context were rejected in *Ahmed*, Lord Hope noting the "*dangers that lie in the uncontrolled power of the executive*": §§79-80.

Issue 2: Compliance with Article 8

66. This issue has two parts: (i) did the arrangements governing the use of section 5 for the purposes of CNE comply with the safeguards that are essential in order for such powers to

be compliant with Article 8 ECHR before the publication of those arrangements, and (ii) have they complied thereafter?

67. The IPT considered that the turning point between the two was February 2016, when the Draft EI Code was published. The Claimant submits that is wrong: the Draft EI Code was a draft of a document which was intended to be approved and published pursuant to a statutory authority conferred by RIPA 2000, and therefore to the extent that the publication of any arrangements is relied upon as securing compliance with the requirements of Article 8 the relevant date is the date on which the draft document was approved, in January 2017. However, (i) in principle the approach of distinguishing between the period before and after publication is correct, and (ii) the changes between the draft and final versions of the Code are immaterial to the criticisms advanced.

Compliance with Article 8: period before publication

68. Any interference with Article 8 must be "*in accordance with the law*": Article 8(2). As is well-established, this requires more than merely that the interference be lawful as a matter of English law: it must also be "*compatible with the rule of law*" (*Gillan v United Kingdom* (2010) 50 EHRR 45 at §76). In other words, there must be "*a measure of legal protection against arbitrary interferences by public authorities*", and public rules must indicate "*with sufficient clarity*" the scope of any discretion conferred and the manner of its exercise: *Gillan* at §77.

69. There are therefore three sub-requirements:

    69.1. the conduct must comply with domestic law (legality);

    69.2. the public rules must be sufficiently clear and describe the scope of any discretion and the manner of its exercise (foreseeability); and

    69.3. there must be adequate legal protection against arbitrary interference with privacy (arbitrariness).

70. Numerous cases have addressed these requirements in the context of secret surveillance and information gathering:

    70.1. In *Malone v United Kingdom* (1985) 7 EHRR 14, the Court held that the legal regime governing interception of communications "*must be sufficiently clear in its terms to*

give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence": §67. It must be clear "*what elements of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive*" and the law must indicate "*with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities*": §79.

70.2. In *Association for European Integration and Human Rights v Bulgaria* (62540/00, 28 June 2007), the Court held at §75:

> "In view of the risk of abuse intrinsic to any system of secret surveillance, such measures must be based on a law that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for us is continually becoming more sophisticated …"

70.3. In *Weber & Saravia v Germany* (2008) 46 EHRR SE5 [A2/49] the ECHR held at §§93-94:

> "The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures […]
>
> Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference."

71. In *Weber* the Court at §95 set out a number of minimum safeguards which it considered necessary in the context of telephone tapping:

> "In its case law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed."

72. The present context is different: as explained above, CNE is potentially vastly more intrusive than telephone tapping. However, *Weber* is an illustration of the detail and specificity of what has been held to be required in order for an interference to be "*in accordance with law*".

73. In *Liberty v UK* (Application no. 58243/00), the ECtHR applied these principles to UK bulk interception of 'external communications' prior to RIPA 2000 and held that there was insufficient information made public about the arrangements for the scheme to be in accordance with the law: §§68-69.

74. In *Szabo & Vissy v Hungary* (Application 37128/14, 12 January 2016), the ECtHR indicated that "*The guarantees required by the extant Convention case-law on interception need to be enhanced*" in view of the impact of "*cutting-edge technologies*" on the scale and effect of such interception.

75. This issue is not one in which the Court gives any margin of discretion to the state. See the judgment of Lord Reed in *R (T) v Chief Constable of Greater Manchester* [2014] 3 WLR 96 at §114:

> "*Whether a system provides adequate safeguards against arbitrary treatment, and is therefore "in accordance with the law" within the meaning of the Convention, is not a question of proportionality, and is therefore not a matter in relation to which the court allows national authorities a margin of appreciation*."

76. Here, the point is straightforward. In circumstances where almost nothing about the arrangements governing the use of CNE was publicly acknowledged – as set out above, it was not even admitted that CNE was taking place, let alone that it was taking place under section 5 ISA 1994, a provision which is far from obviously concerned with computer hacking – it cannot realistically be said that the legal regime governing the use of CNE was:

    76.1. "*sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence*" (Malone, §67); or,

76.2. clear in respect of "*what elements of the powers […] are incorporated in legal rules and what elements remain within the discretion of the executive*" or "*the scope and manner of exercise of the relevant discretion conferred on the public authorities*" (Malone §79); or,

76.3. governed by "*particularly precise*" law and "*clear, detailed rules on the subject*" (AEIHR, §75).

77. The position was worse than in *Liberty v UK*, where at least the activity being conducted was apparent from the legislation. Nevertheless, the IPT concluded that the absence of anything like the EI Code did not affect the lawfulness of the arrangements. Its reasoning had two parts.

78. First, the IPT held that it must have been obvious that the intelligence services were engaging in CNE. The only published code concerning interference with property was the Property Code. It was therefore obvious that CNE activities were governed by the Property Code.

79. That logic is unsound. It may indeed have been likely that the intelligence services were engaging in CNE. It was not at all obvious that they were doing so *lawfully*, or (if so) under what guidelines or constraints.

80. As to the Property Code, there was nothing in it to suggest it was being treated by the intelligence services as applicable to CNE. Any conclusion that it contained the safeguards applicable to the use of CNE would have been no more than a guess; to an external observer it would have been at least as likely that there was no Code of Practice governing CNE at all. Nor are there any safeguards specifically directed at CNE.

81. Second, the IPT held that the publication of the EI Code did not mean that the arrangements in the period before publication were defective, referring in particular to the desirability of encouraging the intelligence services to improve their arrangements.

82. Again, that reasoning lacks force. The Tribunal accepted that Article 8 requires disclosure of as much information as possible about the arrangements without material risk of harm to national security. The publication of the First Draft EI Code was possible without such material risk, or it would not have been published. This was the reasoning of the Strasbourg Court in *Liberty v UK* – where it has been possible to disclose much more, that is a strong

indication that the previous arrangements did not meet the test of foreseeability. At §68 the ECtHR held: "*In the United Kingdom, extensive extracts from the Code of Practice issued under section 71 of the 2000 Act are now in the public domain (see paragraph 40 above), which suggests that it is possible for a State to make public certain details about the operation of a scheme of external surveillance without compromising national security*".

83. It is no answer that the intelligence services ought to be encouraged to improve. First, that is irrelevant to the legal requirements of Article 8. Second, that logic means that there is no adverse consequence for an authority that waits until challenged before taking action to comply with the law.

84. For those reasons the IPT ought to have held that the arrangements governing the use of section 5 ISA 1994 in relation to CNE were non-compliant with Article 8 ECHR before and the publication of the Draft EI Code in February 2016, and/or the finalised Code in January 2017.

Compliance with Article 8: period after publication

85. The Claimant reserves its position on compliance with Article 8 after publication of the EI Code until after the Grand Chamber has given judgment in *Big Brother Watch v UK*. The Claimant considers that reasonable suspicion and individual targeting minimum safeguards are necessary for compliance with the Convention. Nonetheless, the Claimant recognises that the First Section of the ECtHR did not accept that argument in *Big Brother Watch v UK* in respect of bulk interception. Judgment is pending in the Grand Chamber. Accordingly, unless the Grand Chamber gives judgment before this claim is heard, the Claimant does not propose now to argue the issue of compliance with Article 8 and reserves its position pending the Grand Chamber decision.

Conclusion

86. The Court is invited to quash the incorrect findings as to the law made by the IPT, make declarations as appropriate and remit the case to the IPT for further consideration.

BEN JAFFEY QC

TOM CLEAVER

clerks@blackstonechambers.com

BHATT MURPHY

16 November 2020

Annex 1: Proper limits to the use of section 5 ISA

Scenario	Within s 5 ISA?	Comments
Mobile phone with serial number ABC123	Yes	
Mobile phone used by Smith	Yes	
All mobile phones used by Smith	Yes	May cover more than one item of property, expressly described in the warrant
All mobile phones used by Smith or Bloggs	Yes	May cover more than one person's property, expressly described in the warrant
All mobile phones used by the blonde-haired man approximately 5ft 10 tall (name unknown) seen leaving 1 Acacia Avenue at midday on 1 December 2015	Yes	May not know the true identity of person, but property is objectively ascertainable. An interference with the wrong person's property would be unlawful
All mobile phones used by persons who at today's date are on the FCO Syrian diplomatic list	Yes	Persons are objectively ascertained at point of warrant grant. No more than shorthand for a list of names in a schedule
All computers at 1 Acacia Avenue	Yes	May be described by reference to a set of premises
All computers at 1 and 2 Acacia Avenue	Yes	May cover more than one person's property, expressly described in the warrant

All mobile phones used by suspected members of Al-Qaeda	No	Leaves decision and discretion as to intrusion to official, not the Secretary of State authorising a warrant.
All mobile phones used by suspected associates of members of Al-Qaeda	No	Leaves decision as to intrusion to official.
"*All continuing activities which involve interference with copyright or licensed software, but which cannot be said to fall within any other specific authorisation held by GCHQ and which are done without the permission of the owner*"	No	Indeterminate class. Leaves decision as to what property will be intruded in to official, and cannot be determined at time of warrant issue. This is an authorisation of an *operation*, permissible under section 7 ISA, but not section 5.
All mobile telephones in Birmingham	No	Indeterminate class. Cannot determine from warrant the property to which it will be directed.
A "*strict and diligent search for the… authors printers and publishers of the aforesaid seditious libel intitled* The North Briton*… and them or any of them having found, to… seize… their papers*" (*Money v Leach* (1765) 3 Burrow 1742, 97 ER 1075)	No	Leaves decision as to intrusion to official. This is a general warrant authorising an *operation* not a search of specified property.