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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY C, A, W, M and McE

Before Kerr LCJ, Campbell LJ and Girvan LJ

KERR LCJ

Introduction

[1] C and A were arrested under section 41 of the Terrorism Act 2000 on 19 April, 2006. W was arrested under article 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989 on 16 May 2006. All three were taken after their arrest to the Serious Crime Suite at Antrim Police Station where each of them nominated a solicitor that they wished to represent them. In each case the nominated solicitor asserted their client's right to a private consultation with his/her legal adviser and asked for an assurance from police that those consultations would not be monitored. They asked for that assurance because there had been media reporting a short time before about the arrest of a solicitor who was subsequently charged with serious offences. The reports suggested that the arrest had been the result of covert surveillance of legal consultations that the solicitor had had with clients in custody. Police refused to provide the assurances that the solicitors for C, A and W had sought. They said that it was their practice "not to comment" on such issues.

[2] M was arrested under section 41 of the Terrorism Act 2000 on 30 May, 2006 at Ballymena Police Station. He was then taken to Antrim Police Station. His father and his solicitor were concerned about his medical condition and they communicated their concerns to the police. As a result, arrangements were made for M to be medically examined to determine whether he was fit for interview. Dr Graeme McDonald, a consultant psychiatrist, was contacted by M's solicitor and he agreed to examine M. He wanted to be sure that the consultation with M would be confidential, however, and he asked the solicitors to seek an assurance that there would be no covert surveillance. The

police would not give that assurance. Dr McDonald was not prepared to proceed with the consultation and it did not take place. M was examined twice by a medical officer retained on behalf of the police. On both occasions he was found to be fit for interview.

[3] McE, while in custody on remand, made a complaint (with two other prisoners) to the Prisoner Ombudsman about their suspicion that their legal visits at HMP Maghaberry were the subject of surveillance. In response the Ombudsman indicated that legal consultations were not exempt from such surveillance. In an affidavit filed on behalf of the Prison Service, Mr Max Murray, a deputy director of the Service, stated: -

> "The ability to employ covert surveillance generally, and in particular in the context of legal consultations of those detained in prisons in Northern Ireland, is a very important tool available to the Northern Ireland Prison Service in achieving the aims as set out in … [preventing crime, etc.] and in particular by way of example in gathering information in relation to plans contrary to the good order and discipline of prison establishments and regarding the smuggling of contraband or unauthorised articles in and out of prison establishments."

[4] In each of these applications the applicants are, broadly speaking, seeking declaratory relief to the effect that they are entitled to the guarantee of freedom from covert surveillance. They assert that failure to provide the assurances that have been sought is incompatible with articles 6 and 8 of the European Convention on Human Rights and Fundamental Freedoms and is, on that account, a breach of section 6 of the Human Rights Act 1998. They also claim that the refusal of the police or the Prison Service to confirm that the consultations will not be monitored is a breach of their common law rights and contrary to certain provisions under PACE, the Terrorism Act 2000, and the Prison and Young Offenders Centre Rules (Northern Ireland) 1995. Orders of mandamus are also sought to compel the relevant authorities to give the requested assurances and to make available facilities which would ensure the privacy of solicitor/client and doctor/patient consultations.

The right of access to legal advice – the statutory context

[5] Paragraph 7 of Schedule 8 to the Terrorism Act 2000 provides that a person detained under Schedule 7 or section 41 of the Act is entitled to consult privately with a solicitor as soon as is reasonably practicable. That right is subject only to paragraphs 8 and 9 of Schedule 7, which allow for deferral of

access and supervised access to a solicitor in certain circumstances. Neither of those exceptions applied to C or A.

[6] Article 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989 contains a similar right of access to a solicitor, with, again, the only exception being for deferral of access in certain circumstances. That exception did not apply to W.

[7] Rule 71 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 provides: -.

> "(1) Reasonable facilities shall be allowed for the legal adviser of a prisoner who is party to legal proceedings, civil or criminal, to interview the prisoner in connection with those proceedings in the sight but not in the hearing of an officer.
>
> (2) A prisoner's legal adviser may, with the Secretary of State's permission, interview the prisoner in connection with any other legal business in the sight but not in the hearing of an officer."

The right of access to legal advice – the common law context

[8] Before the enactment of the PACE provisions in England and Wales (in 1984) and Northern Ireland (in 1989), the right to consult a solicitor privately existed at common law. That right was described by Lord Bingham of Cornhill and Lord Steyn in the following passage from their joint opinion in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763, at 1770/1: -

> "It is now necessary to explain the law about a detained person's access to legal advice as it stood before the 1984 Act was enacted. The common law recognised a general right in an accused person to communicate and consult privately with his solicitor outside the interview room. This development is reflected in the Judges' Rules and Administrative Directions to the Police which were published as Home Office Circular No 89/1978. The text expressly provided that the Judges' Rules do not affect certain established legal principles which included the principle:

> '(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so ...'"

[9] The need for confidentiality when consulting a legal adviser has been consistently recognised as an indispensable aspect of the right. In *R (Morgan Grenfell & Co., Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 606/7 Lord Hoffmann said: -

> "[Legal professional privilege] is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice. The cases establishing this principle are collected in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487. It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention (*Campbell v United Kingdom* (1992) 15 EHRR 137; *Foxley v United Kingdom* (2000) 31 EHRR 637) and held by the European Court of Justice to be a part of Community law: *A M & S Europe Ltd v Commission of the European Communities* (Case 155/79) [1983] QB 878."

The right to legal advice – the Convention context

[10] Article 6 of the European Convention on Human Rights and Fundamental Freedoms provides: -

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
>
> …

> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> > (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

[11] In *S v Switzerland* (1991) 14 EHRR 670, ECtHR dealt with the need for conditions of privacy while an accused person was consulting with his legal adviser. Paragraph 48 of the judgment stated: -

> "The Court considers that an accused's right to communicate with his advocate out of the hearing of a third person is one of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective."

[12] In *Brennan v UK* (2002) 34 EHRR 18 it was claimed that the system of supervising consultations between solicitors and arrested persons who were in police detention breached article 6 of ECHR. ECtHR concluded that there had been a violation of article 6 (3) (c) in conjunction with article 6 (1) because a police officer was in a position within earshot of the applicant's consultation with his solicitor. At paragraph 62 the court said: -

> "… the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him. Both the applicant and the solicitor had been warned that no names should be mentioned and that the interview would be stopped if anything was said which was perceived as hindering the investigation. It is immaterial that it is not shown that there were particular matters which the applicant and his solicitor were thereby stopped

> from discussing. The ability of an accused to communicate freely with his defence lawyer, recognised, *inter alia*, in Article 93 of the Standard Minimum Rules for the Treatment of Prisoners, was subject to express limitation."

[13] In *Öcalan v Turkey* (2003) 37 EHRR 10 the European Court made it clear that an accused's right to communicate with his legal adviser in private was not an absolute one. At paragraph 146 it said: -

> "**146** The Court refers to its settled case law and reiterates that an accused's right to communicate with his legal representative out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Art.6(3)(c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective. The importance to the rights of the defence of ensuring confidentiality in meetings between the accused and his lawyers has been affirmed in various international instruments, including European instruments. However, as stated above restrictions may be imposed on an accused's access to his lawyer if good cause exists. The relevant issue is whether, in the light of the proceedings taken as a whole, the restriction has deprived the accused of a fair hearing."

[14] The international instruments referred to in this paragraph include the Standard Minimum Rules for the Treatment of Prisoners, adopted on 30 August 1955 by the First United Nations Congress on the Prevention of Crime, the Treatment of Offenders and the United Nations Basic Principles on the Role of Lawyers and the United Nation's International Covenant on Civil and Political Rights (ICCPR). The first of these provides at paragraph 93: -

> "For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material.

> Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official."

[15] The United Nations Basic Principles on the Role of Lawyers pronounces the following principle: -

> "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing of law enforcement officials."

[16] The right to a fair trial is also enshrined in article 14 of ICCPR. In a comment on that article the Human Rights Committee (which is the ICCPR supervisory body) said: -

> "9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter." (Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984)

[17] Article 8 of ECHR provides: -

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

[18] In *Klass and others v Federal Republic of Germany* (1979-80) 2 EHRR 214, ECtHR considered legislation in Germany which permitted the state authorities to open and inspect mail and to listen to telephone conversations in order to protect against, *inter alia*, 'imminent dangers' threatening the 'free democratic constitutional order' and 'the existence or the security' of the state. Certain 'factual indications' had to be present before such surveillance could be undertaken. The surveillance required the approval of the supreme *Land* authority or a designated federal minister and this had to be applied for by the head of one of four security agencies. The subject of the surveillance had to be notified after it ended if that could be done without jeopardising the purpose of the surveillance, and a statutory commission supervised this aspect of the system. The surveillance itself was supervised by an official qualified for judicial office. The Minister had to make regular reports to an all-party parliamentary committee on the use of the legal provisions that permitted surveillance. Normally a statutory commission had to approve surveillance that the Minister wanted to undertake. The applicants, five German lawyers, claimed that the legislation infringed articles 6, 8 and 13 of ECHR. They did not dispute the state's right to have recourse to such measures, but they challenged the legislation on the grounds that it contained no absolute requirement to notify the persons who had been the subject of surveillance after it had ended and that it excluded any remedy before the courts against the ordering and implementation of the surveillance measures.

[19] ECtHR held that legislation permitting monitoring of mail etc. clearly interfered with an individual's rights under article 8 (1) when it was applied to him. Powers of secret surveillance of citizens, being features of a police state, could only be tolerated under the Convention if they were strictly necessary to safeguard the institutions of the state. The court found, however, that since democratic societies found themselves threatened by highly sophisticated forms of espionage and by terrorism, legislation granting powers of secret surveillance over the mail etc. of subversive elements within

their jurisdiction was, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime. Failure to inform an individual *a posteriori* that he had been subject to surveillance was not in principle incompatible with article 8 (2).

[20] In *Erdem v Germany* (2002) 35 EHRR 383 the impugned practice was that of intercepting correspondence between a defendant on remand and his lawyer. Correspondence between the applicant, who was remanded in custody, and his lawyer had been monitored by a judge pursuant to the Code of Criminal Procedure. It was claimed that this constituted a violation of article 8. The Strasbourg court recognised that a lawyer's correspondence with a prisoner might legitimately be intercepted if there was reasonable cause to believe that the privilege was being abused. At paragraph 61 the court said: -

> "It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged. Indeed, in its *S v. Switzerland* judgment of 28 November 1991 the Court stressed the importance of a prisoner's right to communicate with counsel out of earshot of the prison authorities. It was considered, in the context of Article 6, that if a lawyer were unable to confer with his client without such surveillance and receive confidential instructions from him his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective. In the Court's view, similar considerations apply to a prisoner's correspondence with a lawyer concerning contemplated or pending proceedings where the need for confidentiality is equally pressing ... The reading of a prisoner's mail to and from a lawyer … should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as 'reasonable cause' will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an

> objective observer that the privileged channel of communication was being abused."

[21] At paragraph 68 the court said that "a certain form of conciliation between the imperatives of the defence and a democratic society and those safeguarding individual rights is inherent in the system of the Convention". It concluded that, in view of the threat presented by terrorism in all its forms, the guarantees which surrounded the monitoring of correspondence and the margin of evaluation that the State had at its disposal, the interference was not disproportionate to the legitimate ends pursued.

The right to a medical examination

[22] The Code of Practice made under the Terrorism Act provides at paragraph 9.6: -

> "If a detained person requests a medical examination a Medical Officer must be obtained as soon as practicable and arrangements made to conduct the medical examination. A detained person may in addition be examined by a medical practitioner from the Practice with which he or she is registered, at his or her own expense. A Medical Officer shall be present at such an examination."

[23] Paragraph 9.7 provides that a medical examination under 9.6 can be delayed for certain specified reasons. None of these grounds arose in the case of M and the police had no objection to his being examined by Dr McDonald without the medical officer being present.

[24] Paragraph 11A deals with mentally disordered and other vulnerable persons who are to be questioned by police. It provides: -

> "11A It is important to bear in mind that although juveniles or persons who are mentally disordered are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information which is unreliable, misleading or self-incriminating. Special care should therefore always be exercised in questioning such a person, and the appropriate adult involved, if there is any doubt about a person's age, mental state or capacity. Because of the risk of unreliable evidence it is also important

> to obtain corroboration of any facts admitted whenever possible."

[25] The Code enjoins police officers questioning a detained person to be alert to the possibility of that person being mentally disordered. At paragraph 1.6 it is provided: -

> "1.6 If an officer has any suspicion, or is told in good faith, that a person of any age, including a person called to a police office to act as an appropriate adult, may be mentally disordered or mentally incapable of understanding the significance of questions put to him or her or his or her replies then that person shall be treated as a mentally disordered person for the purposes of this Code."

[26] Similar provisions are to be found in the PACE Code of Practice and, in a commentary on these at paragraph 15-479, *Archbold on Criminal Procedure and Practice* states: -

> "Where it is necessary to make a finding as to whether a defendant was "mentally handicapped", this should be based on medical evidence; and police officers, not having expertise in the matter, should not be allowed to state their opinion: *R. v. Ham* (1995) 36 B.M.L.R. 169, CA. *Semble*, the court was confining itself to a finding of "mental handicap" within the specific definition in section 77. The approach of Code C is not to require police officers to make judgments about whether or not a suspect is mentally disordered or vulnerable, but to require them to err on the side of caution. In the current Code C the expressions "mentally vulnerable" and "mental disorder" are defined in Note 1G. If an officer has any suspicion, or is told in good faith, that a person may be mentally disordered or mentally vulnerable, then he is to be treated as if he were mentally disordered or mentally vulnerable (Code C:1.4 (Appendix A-40)). To this extent, the opinion of a police officer may obviously be relevant."

[27] In M's case police officers were informed by his solicitor that he might be mentally disordered and it is therefore contended that he should have been treated by them as coming within those provisions of the Code that concern

mentally disordered persons. Although he had been assessed as fit for interview by the forensic medical officer, it was submitted, on the authority of *R v Aspinall* [1999] 2 Cr.App.R. 115, that this could not be regarded as conclusive. In order to ensure that M was accorded the full range of protections provided for by the Code of Practice, the police should have ensured that a confidential assessment by Dr McDonald took place, counsel argued.

The Regulation of Investigatory Powers Act 2000 (RIPA)

[28] Part II of RIPA deals with surveillance and covert human intelligence sources. Section 26(1) outlines the three types of conduct to which Part II applies – directed surveillance; intrusive surveillance; and the conduct and use of covert human intelligence sources. It is agreed that the type of surveillance involved in the present applications, if it were to occur, would be directed surveillance. Section 26 (2) defines directed surveillance as follows: -

> "(2) Subject to subsection (6), surveillance is directed for the purposes of this Part if it is covert but not intrusive and is undertaken—
>
> (a) for the purposes of a specific investigation or a specific operation;
>
> (b) in such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); and
>
> (c) otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under this Part to be sought for the carrying out of the surveillance."

[29] Intrusive surveillance is dealt with in section 26 (3) which provides: -

> "(3) … surveillance is intrusive for the purposes of this Part if, and only if, it is covert surveillance that—
>
> (a) is carried out in relation to anything taking place on any residential premises or in any private vehicle; and

(b) involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device."

[30] For surveillance to be lawful it must be authorised and it must be conducted in accordance with the authorisation that has been obtained. Section 27 (1) (a) and (b) contain the relevant provisions. They provide: -

"**27. Lawful surveillance etc.**

(1) Conduct to which this Part applies shall be lawful for all purposes if -

(a) an authorisation under this Part confers an entitlement to engage in that conduct on the person whose conduct it is; and
(b) his conduct is in accordance with the authorisation."

[31] Section 28 (1) gives power to designated persons to grant the necessary authorisations and subsections (2) to (4) set out the constraints to be applied on the granting of authorisations and the manner in which they may be used. The relevant subsections are these: -

"(2) A person shall not grant an authorisation for the carrying out of directed surveillance unless he believes –

(a) that the authorisation is necessary on grounds falling within subsection (3); and
(b) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.

(3) An authorisation is necessary on grounds falling within this subsection if it is necessary –

(a) in the interests of national security;
(b) for the purpose of preventing or detecting crime or of preventing disorder;
(c) in the interests of the economic well-being of the United Kingdom;
(d) in the interests of public safety;
(e) for the purpose of protecting public health;

(f) for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; or
(g) for any purpose (not falling within paragraphs (a) to (f)) which is specified for the purposes of this subsection by an order made by the Secretary of State.

(4) The conduct that is authorised by an authorisation for the carrying out of directed surveillance is any conduct that -

(a) consists in the carrying out of directed surveillance of any such description as is specified in the authorisation; and
(b) is carried out in the circumstances described in the authorisation and for the purposes of the investigation or operation specified or described in the authorisation."

[32] Section 30 deals with the grant of authorisations. Subsection (1) provides that the persons designated for the purposes of section 28 are the individuals holding such offices, ranks or positions with relevant public authorities as are prescribed for the purposes of the subsection by an order under section 30.

[33] Subsection (3) makes provision for restrictions that may be imposed by an order designating individuals to make authorisations. It provides: -

"(3) An order under this section may impose restrictions—

(a) on the authorisations under sections 28 and 29 that may be granted by any individual holding an office, rank or position with a specified public authority; and

(b) on the circumstances in which, or the purposes for which, such authorisations may be granted by any such individual."

[34] In relation to authorisations for intrusive surveillance section 36 (2) provides: -

> "(2) Subject to subsection (3), the authorisation shall not take effect until such time (if any) as—
>
> > (a) the grant of the authorisation has been approved by an ordinary Surveillance Commissioner; and
> >
> > (b) written notice of the Commissioner's decision to approve the grant of the authorisation has been given, in accordance with subsection (4), to the person who granted the authorisation."

[35] Section 45 requires the person who granted or, as the case may be, last renewed an authorisation under Part II to cancel it if he is satisfied that the authorisation is one in relation to which the requirements of section 28(2)(a) are no longer fulfilled.

[36] Section 72(1) requires the person exercising any power or duty which may be provided for by a code of practice to have regard to the provisions of the code. A Code of Practice was issued by the Secretary of State for the Home Department under section 71.

The Code of Practice

[37] Paragraph 3.1 of the Code deals with confidential information obtained on foot of an authorisation. It provides: -

> "3.1 The 2000 Act does not provide any special protection for 'confidential information'. Nevertheless, particular care should be taken in cases where the subject of the investigation or operation might reasonably expect a high degree of privacy, or where confidential information is involved. Confidential information consists of matters subject to legal privilege, confidential personal information or confidential journalistic material. So, for example, extra care should be given where, through the use of surveillance, it would be possible to acquire knowledge of discussions between a minister of religion and an individual relating to the latter's spiritual welfare, or where matters of medical or journalistic confidentiality or legal privilege may be involved."

[38] Paragraph 3.2 of the Code requires that in cases where it is likely that knowledge of confidential information will be acquired, a higher level of authorisation must be obtained. Annex A of the Code specifies that in the case of Northern Ireland this should be a Deputy Chief Constable of the Police Service.

[39] On the question of which matters are covered by legal privilege, paragraph 3.3 refers to various provisions applicable in each of the jurisdictions of the United Kingdom. The relevant provision in Northern Ireland is stated to be article 12 of the 1989 PACE Order. It provides: -

> "**Meaning of 'items subject to legal privilege'**
>
> **12.** — (1) Subject to paragraph (2), in this Order "items subject to legal privilege" means—
>
> (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
>
> (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
>
> (c) items enclosed with or referred to in such communications and made—
>
> (i) in connection with the giving of legal advice; or
>
> (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,
>
> when they are in the possession of a person who is entitled to possession of them.
>
> (2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege."

[40] Paragraphs 3.5 to 3.9 contain special provisions in relation to legally privileged information. They provide: -

> "3.5 The 2000 Act does not provide any special protection for legally privileged information. Nevertheless, such information is particularly sensitive and surveillance which acquires such material may engage Article 6 of the ECHR (right to a fair trial) as well as Article 8. Legally privileged information obtained by surveillance is extremely unlikely ever to be admissible as evidence in criminal proceedings. Moreover, the mere fact that such surveillance has taken place may lead to any related criminal proceedings being stayed as an abuse of process. Accordingly, action which may lead to such information being acquired is subject to additional safeguards under this code.
>
> 3.6 In general, an application for surveillance which is likely to result in the acquisition of legally privileged information should only be made in exceptional and compelling circumstances. Full regard should be had to the particular proportionality issues such surveillance raises. The application should include, in addition to the reasons why it is considered necessary for the surveillance to take place, an assessment of how likely it is that information subject to legal privilege will be acquired. In addition, the application should clearly state whether the purpose (or one of the purposes) of the surveillance is to obtain legally privileged information.
>
> 3.7 This assessment will be taken into account by the authorising officer in deciding whether the proposed surveillance is necessary and proportionate under section 28 of the 2000 Act for directed surveillance and under section 32 for intrusive surveillance. The authorising officer may require regular reporting so as to be able to decide whether the authorisation should continue. In those cases where legally privileged information has been acquired and retained, the matter should

be reported to the relevant Commissioner or Inspector during his next inspection and the material be made available to him if requested.

3.8 A substantial proportion of the communications between a lawyer and his client(s) may be subject to legal privilege. Therefore, any case where a lawyer is the subject of an investigation or operation should be notified to the relevant Commissioner during his next inspection and any material which has been retained should be made available to him if requested.

3.9 Where there is any doubt as to the handling and dissemination of information which may be subject to legal privilege, advice should be sought from a legal adviser within the relevant public authority before any further dissemination of the material takes place. Similar advice should also be sought where there is doubt over whether information is not subject to legal privilege due to the "in furtherance of a criminal purpose" exception. The retention of legally privileged information, or its dissemination to an outside body, should be accompanied by a clear warning that it is subject to legal privilege. It should be safeguarded by taking reasonable steps to ensure there is no possibility of it becoming available, or its contents becoming known, to any person whose possession of it might prejudice any criminal or civil proceedings related to the information. Any dissemination of legally privileged material to an outside body should be notified to the relevant Commissioner or Inspector during his next inspection."

[41] Paragraph 4.16 of the Code of Practice sets out the material that must be contained in an application for authorisation for directed surveillance. It provides: -

"4.16 A written application for authorisation for directed surveillance should describe any conduct to be authorised and the purpose of the investigation or operation. The application should also include:

> • the reasons why the authorisation is necessary in the particular case and on the grounds (*e.g.* for the purpose of preventing or detecting crime) listed in Section 28(3) of the 2000 Act;
>
> • the reasons why the surveillance is considered proportionate to what it seeks to achieve;
>
> • the nature of the surveillance;
>
> • the identities, where known, of those to be the subject of the surveillance;
>
> • an explanation of the information which it is desired to obtain as a result of the surveillance;
>
> • the details of any potential collateral intrusion and why the intrusion is justified;
>
> • the details of any confidential information that is likely to be obtained as a consequence of the surveillance.
>
> • the level of authority required (or recommended where that is different) for the surveillance; and
>
> • a subsequent record of whether authority was given or refused, by whom and the time and date."

[41] The authorisation ceases to have effect after three months unless renewed (paragraph 4.19 of the Code). Regular reviews of authorisations should be undertaken to assess the need for the surveillance to continue (paragraph 4.21). Particular attention is drawn to the need to review authorisations frequently where the surveillance provides access to confidential information.

The arguments

[42] Mr Barry Macdonald QC, who appeared with Ms Fiona Doherty for the applicants C, A, W and McE, submitted that while section 28 of RIPA provides for the authorisation of 'directed surveillance' there was no explicit

mention in the legislation of the legal professional privilege rights enshrined in the Terrorism Act, PACE and the Prison and Young Offenders Centre Rules (NI) 1995. Accordingly, he contended, on the application of the statutory principle *generalia specialibus non derogant,* the general powers contained in RIPA must yield to the specific rights to a confidential legal consultation contained in the earlier legislation.

[43] Mr Macdonald argued further that the general words of RIPA could not override common law rights to legal professional privilege or those afforded by articles 6 and 8 of the Convention since '[a]n intention to override such rights must be expressly stated or appear by necessary implication' (*per* Lord Hoffman in the *Morgan Grenfell* case at paragraph 8). He submitted that the refusal to provide an assurance had the same "chilling effect" on the exchange of information between client and solicitor as a supervised consultation or knowledge of surveillance would have. This undermined the efficacy of any advice that could be proffered in that neither the client nor the legal adviser could feel secure that the advice would remain confidential. The applicants' right to legal advice was thereby rendered theoretical and illusory rather than practical and effective.

[44] For M, Ms Quinlivan, who appeared with Mr McTaggart, submitted that this applicant was entitled to a confidential medical examination as someone who had to be treated as a mentally disordered person for the purposes of the Code of Practice under the Terrorism Act. She also argued, however, that his entitlement to a private consultation with Dr McDonald arose as a species of legal professional privilege. She asserted that such a medical consultation would constitute communications between the applicant and "any other person … in connection with or in contemplation of legal proceedings and for the purposes of … proceedings" as defined by article 12 (1) (b) of the 1987 Order.

[45] A separate and discrete argument was raised by Ms Quinlivan concerning the vires of paragraphs 3.1 to 3.10 of the RIPA Code of Practice. She submitted that these paragraphs were ultra vires section 71 of the Act. The prefatory words in paragraph 3.1 that "the 2000 Act does not provide any special protection for 'confidential information'" were, she submitted, misconceived. The assumption underlying the succeeding paragraphs that there could be surveillance of legally privileged consultations was, she said, likewise misconceived. On its proper construction RIPA had implicitly acknowledged that legally privileged information could not be the subject of any of the forms of surveillance contemplated by the Act. A Code of Practice which purported to invest public authorities with the power to authorise such surveillance was *ipso facto* ultra vires.

[46] For the respondents, the Police Service for Northern Ireland and the Northern Ireland Prison Service, Mr Gerald Simpson QC, who appeared with

Mr Coll, submitted that that in appropriate circumstances law enforcement agencies must be entitled to carry out surveillance, under RIPA, of communications between a solicitor and client or between a doctor and a detained person or between a prisoner and legal representatives. Relying on the judgment of Lord Taylor of Gosforth in *R* v. *Derby Magistrates' Court, ex parte B* [1996] AC 487 he asserted that for a communication to attract the protection of the privilege it must be for an appropriate purpose as identified in the authorities cited by Lord Taylor - *e.g.* 'with a view to his defence or to the enforcement of his rights' (*Bolton* v. *Liverpool Corp* (1833) 1 My & K 88, 39 ER 614).

[47] Such surveillance, to be effective, has to be secret, Mr Simpson argued. If the police or the Prison Service were required to give assurances that no surveillance was taking place, this would have the inevitable consequence that ill-intentioned persons would know that it was happening when the assurance was not forthcoming. This would substantially reduce the effectiveness of the use of surveillance in the detection of crime.

[48] Mr Simpson claimed that the statutory recognition of the right to private communication in paragraph 7 of Schedule 8 to the Terrorism Act and article 59 of PACE, could not override the established common law principle that privilege for such a communication does not exist where there was a dishonest intention. Praying in aid the principle of statutory interpretation that the law should be altered deliberately rather than casually, Mr Simpson submitted that it cannot have been the intention of Parliament to confer a right of confidentiality to communications 'in furtherance of a criminal purpose' which Stephens J in *R* v. *Cox &Railton* (1884) 14 QBD 153 stated did not "come within the ordinary scope of professional employment".

[49] On the impact that a refusal to give an assurance might have on the fairness of the trial, counsel for the respondents argued that this was a matter for the trial itself. In any event, Mr Simpson claimed, there was no reason to suppose that for a trial to be fair an accused person must have a guarantee that nothing that passed between him and his lawyer would ever be the subject of surveillance. The Code of Practice recognised that legally privileged information obtained by surveillance was extremely unlikely to be admissible as evidence in criminal proceedings.

[50] Mr Simpson contended that the refusal to give the assurances sought did not constitute a breach of article 6 or article 8 of ECHR. Nothing in the jurisprudence of the Strasbourg court suggested that the right to a confidential consultation with one's legal adviser was absolute. On the contrary, it was clearly implicit from ECtHR's judgment in such cases as *S v Switzerland* that, provided there were sufficiently strong grounds for doing so, surveillance of privileged communications would not infringe article 6. In relation to article 8, surveillance would only be undertaken in circumstances

where one or more of the purposes identified in article 8 (2) required to be protected and this, taken in conjunction with the safeguards explicitly required by the Code of Practice, should ensure that no violation would occur.

[51] The challenge to the Code of Practice was framed in terms of a claim that certain of its provisions were incompatible with ECHR. This prompted the service of a notice of incompatibility on the Secretary of State for Northern Ireland and the Home Secretary. As Mr McCloskey QC, who appeared for both Secretaries of State, pointed out, however, the power of the court under section 4 of the Human Rights Act 1998 to make a declaration of incompatibility applies only to primary legislation. Even if one were to find that the Code could be applied or interpreted in a way that conflicted with a Convention right, this would not be an occasion for a declaration of incompatibility. It was the duty of the public authorities to whom the Code was directed to apply it in a manner that was Convention compliant, Mr McCloskey said.

Submissions from intervening parties

[52] On an application by the General Council of the Bar of Northern Ireland, the court granted leave to the Bar Council to make a written submission concerning directed surveillance of legal consultations in prisons. The Council suggested that surveillance of this type posed risks to the administration of justice in this jurisdiction. It was submitted that, in the absence of express statutory provision, the right of a prisoner to a private legal consultation should not be qualified. The mere possibility that consultations would be subject to surveillance "could have a chilling effect on the free flow of information from client to counsel, inhibiting the relationship of openness that must exist for the proper and effective operation of the justice system".

[53] British Irish Rights Watch, an independent non-governmental organisation that describes its activities as "monitoring the human rights dimension of the conflict and the peace process in Northern Ireland since 1990" also made a written submission with the leave of the court. In addition to points made on behalf of the applicants, BIRW dealt with the professional duty of solicitors, referring to the obligations of the members of the Law Society of Northern Ireland under the Declaration of Perugia and the International Code of Ethics of the International Bar Association, both of which are appended to the Law Society's Regulations. It asserted that a solicitor faced with a covert surveillance policy, having a professional obligation to clients, had no option but to assume that there was a possibility that interviews with clients would be intercepted. Once that assumption was made, the only proper course of action open to the solicitor was to advise the client to refrain from giving the solicitor any instructions until such time as

they could consult under the guarantee of confidentiality, and not to answer any questions from the police until such time as the solicitor could offer candid, confidential advice.

Have the statutory rights to a private consultation with a legal adviser been affected by RIPA?

[54] The need for a legal adviser and his client to be secure in the knowledge that what passes between them is and will remain confidential is both obvious and incontestable. This prosaically stated principle has been the subject of more elegant expression in many decided cases. In *Holmes v. Baddeley* (1844) 1 Ph. 476, 480-481 Lord Lyndhurst L.C. said this about the need to keep private what a client says to his lawyer and the advice that the lawyer gives: -

> "The principle upon which this rule is established is that communications between a party and his professional advisers, with a view to legal proceedings, should be unfettered; and they should not be restrained by any apprehension of such communications being afterwards divulged and made use of to his prejudice. To give full effect to this principle it is obvious that they ought to be privileged, not merely in the cause then contemplated or depending, but that the privilege ought to extend to any subsequent litigation with the same or any other party or parties. . . . The necessary confidence will be destroyed if it be known that the communication can be revealed at any time."

[55] This was said, of course, about civil litigation but the rule holds equally good for criminal proceedings; indeed, if anything, what the Lord Chancellor described as 'the necessary confidence' requires even more urgent protection in the criminal sphere. An accused person must be able to have complete faith in the integrity and discretion of those who advise him of his legal rights. In the *Derby Magistrates' Court* case after reviewing *Holmes* and other authorities, Lord Taylor CJ said at page 507: -

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule

> of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

[56] The fundamental significance of the rule to the administration of justice is reflected in the fact that the right of an accused person to privately consult a legal adviser is enshrined in the Terrorism Act and the PACE Order. It is also reflected in the importance that ECtHR has placed on its role in ensuring a fair trial and on the prominence given to it in the various international instruments that I have referred to earlier.

[57] The first issue to be addressed, therefore, is whether such a fundamental right has been affected by RIPA. It is true, as counsel for the applicants have emphasised, that no express reference is made in section 28 to the rights given special protection in paragraph 7 of Schedule 8 to the Terrorism Act and article 59 of the PACE Order but I have concluded that this cannot be regarded as determinative of the issue.

[58] The maxim *generalia specialibus non derogant* on which the applicants relied is dealt with in Volume 44 (1) of Halsbury's Laws of England at paragraph 1300 as follows: -

> "**1300. Implied repeal of particular enactment by general enactment.**
>
> It is difficult to imply a repeal where the earlier enactment is particular, and the later general. In such a case the maxim *generalia specialibus non derogant* (general things do not derogate from special things) applies. If Parliament has considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to interfere with that provision; and therefore, if such an enactment, although inconsistent in substance, is capable of reasonable and sensible application without extending to the case in question, it is prima facie to be construed as not so extending. The special provision stands as an exceptional proviso upon the general. If, however, it appears from a consideration of the general enactment in the light of admissible circumstances that Parliament's true intention was to establish thereby a rule of universal application,

> then the special provision must give way to the general."

[59] RIPA does not repeal the provisions that enshrine the right to confidential legal consultation. In particular circumstances, interference with that right may take place but it is not extinguished. Certain statutory conditions must be fulfilled and the steps outlined in the Code of Practice must be taken before directed surveillance of legal consultations may occur. It may only be authorised by a senior police officer and must be reported to a Surveillance Commissioner. In all other circumstances the right remains intact and unaffected by RIPA.

[60] That the right of an accused person to consult privately with a legal adviser is not absolute was not disputed by the applicants. It was accepted that this right could be abrogated by legislation – indeed, the burden of the applicants' argument was that RIPA was not effective to achieve the modification of the right, not that it could never be changed or affected. Likewise, it was not asserted that the right to a fair trial guaranteed by article 6 of ECHR or the right to respect for a private life provided for in article 8 required that in every circumstance the consultation between an accused person and his legal adviser must remain immune from surveillance. That this should be so is not surprising. If serious crime can be detected and prevented by such surveillance, it would be startling to find that this could never be permitted to occur. Therefore, although the fundamental nature of the right must be reflected in any examination of whether it may legitimately be overridden in a particular case, provided sufficient safeguards are in place and the need for surveillance is meticulously established, it is, in my view, indisputable that the right will have to yield to that need.

[61] I have concluded that it was Parliament's intention that section 28 of RIPA could be applied to consultations between legal advisers and clients. I do not consider that application of the maxim *generalia specialibus non derogant* requires that such consultations be deemed exempt from its provisions. It follows that, in my opinion, the argument advanced by Ms Quinlivan in relation to the vires of the Code of Practice must also be rejected.

The circumstances in which the assurances were refused

[62] Presently, it will be necessary to say something of the adequacy of the safeguards provided by the Code of Practice but I turn first to examine the particular refusal to provide the assurances sought in the present case. When the applicants' solicitors asked the custody sergeant for confirmation that the consultation with his clients would not be the subject of surveillance, they were handed what is described as a pro forma statement which is in the following terms: -

> "It is not our policy to discuss confidential matters and no inference is to be drawn from this."

[63] No further exchange between the police officer and the solicitors took place and, from affidavits filed on behalf of the respondents, the reasons for this quickly became clear. Chief Superintendent William Woodside has sworn a number of affidavits in the proceedings. In these he explained the purpose of the pro forma document. The following paragraphs from the chief superintendent's affidavit in C's case are broadly the same as appear in affidavits in the cases of A and W: -

> "5. The purpose of this [pro forma] document is to ensure a uniform response by police officers in receipt of requests for such assurances. It is deemed by the PSNI to be of vital importance that in response to requests for assurances regarding covert surveillance that a standard and non-indicative position is put forward. This applies not only in the specifics of this case, but also on general application.
>
> 6. Where covert surveillance is in operation its efficacy is essentially dependent upon its subject being unaware of its existence.
>
> 7. If the PSNI was to enter into a process of providing assurances of this nature on one or more occasions in which covert surveillance was not being employed, the inevitable knock on affect (*sic*) would be to remove the effective ability to employ covert surveillance in these circumstances in respect of and gathering of evidence in regard to serious crime. Once assurances are given in any particular case the result of a failure/refusal to provide a similar assurance in any subsequent case would be tantamount to warning a suspect of covert surveillance that it is fact to take place. This would have a serious detrimental impact upon the PSNI's ability to investigate serious crime, protect the public and safeguard national security."

[64] These averments clearly betoken a policy on the part of PSNI to refuse *all* requests for an assurance that covert surveillance will not take place. While the precise meaning of the phrase, 'a standard and non-indicative position' may be somewhat elusive, the clear import of this and the following sentence is that no exceptions to this policy will be considered. Nor was it suggested

by counsel for the respondents that any exemption from the rule would be contemplated in an individual case, whatever its circumstances.

Article 6

[65] Although in *S v Switzerland* the European Court held that there had been a violation of article 6 (3) (c) of the Convention, it is clear from the judgment that the court reached that conclusion on the basis of the particular facts of the case and did not pronounce that, in every circumstance, surveillance of an accused person's consultation with his lawyer would amount to a breach of article 6. Indeed, the court was prepared to consider the proffered defence of the government that the possibility of collusion between defence lawyers justified the interference with the article 6 (3) (c) right. At paragraph 49, the court said: -

> "49. The risk of 'collusion' relied on by the Government does, however, merit consideration. According to the Swiss courts there were 'indications pointing to' such a risk 'in the person of defence counsel'; there was reason to fear that Mr. Garbade would collaborate with W.'s counsel, Mr. Rambert, who had informed the Winterthur District Attorney's Office that all the lawyers proposed to co-ordinate their defence strategy. Such a possibility, however, notwithstanding the seriousness of the charges against the applicant, cannot in the Court's opinion justify the restriction in issue and no other reason has been adduced cogent enough to do so."

[66] In *Brennan v UK* the court made clear that whether a breach of article 6 (3) (c) had been established will depend on the impact that restriction of access to a lawyer had on the fairness of the hearing. At paragraph 58 of its judgment the court said: -

> "… the Court's case law indicates that the right of access to a solicitor may be subject to restrictions for good cause and the question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing. While it is not necessary for the applicant to prove, assuming such were possible, that the restriction had a prejudicial effect on the course of the trial, the applicant must be able to claim to have been directly affected by the

> restriction in the exercise of the rights of the defence."

[67] In this case it is not known whether surveillance of the applicants' consultations with their lawyers in fact took place. No evidence has been adduced about the impact that the possibility of surveillance might have had on the trial of any of the applicants. In fact, none of the applicants, C, A or W was charged or served with a summons. In the case of M it has not been suggested that the fact that he was not examined by Dr McDonald deprived him of a fair hearing. McE had pleaded guilty to a number of charges before the launch of the judicial review proceedings. On the material presented to the court it is impossible to say that the fairness of the trial of any of the applicants has been affected by the refusal to give the assurances sought. It has not been shown, therefore, that there was a violation of article 6. Nor has it been shown that, if there had been surveillance of the private consultations that the applicants had or wished to have with their lawyers or, in the case of M, Dr McDonald, a violation of article 6 would have occurred. For reasons that I will discuss in the following paragraphs the situation under article 8 is different.

Article 8

[68] Directed surveillance of a private consultation between a detained person and his legal adviser or of an examination of such a person by a medical consultant would unquestionably give rise to an interference with his article 8 rights. As Lord Hoffman pointed out in the *Morgan Grenfell* case, ECtHR has ruled that a breach of lawyer/client confidentiality constitutes an interference with article 8 protection of the right to respect for private life.

[69] Although it has not been shown that the applicants were in fact the subject of surveillance, by analogy with the judgment of ECtHR in *Klass v Germany*, I consider that the applicants satisfy the requirement of victimhood imposed by section 7 of the Human Rights Act 1998 and article 34 of the Convention. Section 7 (1) provides: -

> "7. - (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

[70] Article 34 of ECHR provides: -

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

[71] In the *Klass* case the court discussed the requirement of victimhood in the context of article 25 (the precursor of article 34) which dealt with admissibility of applications to the European Commission of Human Rights. At paragraph 34 of the judgment the court said: -

> "Article 25, which governs the access by individuals to the Commission, is one of the keystones in the machinery for the enforcement of the rights and freedoms set forth in the Convention. This machinery involves, for an individual who considers himself to have been prejudiced by some action claimed to be in breach of the Convention, the possibility of bringing the alleged violation before the Commission provided the other admissibility requirements are satisfied. The question arises in the present proceedings whether an individual is to be deprived of the opportunity of lodging an application with the Commission because, owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him. In the Court's view, the effectiveness (*l'effet utile*) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious. The Court therefore accepts that an individual may, *under certain conditions,* claim to be the victim of a violation

> occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures."

[72] The court then proceeded to consider whether the applicants in that case met the necessary requirement of victimhood and concluded in paragraph 37 as follows: -

> "As to the facts of the particular case, the Court observes that the contested legislation institutes a system of surveillance under which all persons in the Federal Republic of Germany can potentially have their mail, post and telecommunications monitored, without their ever knowing this unless there has been either some indiscretion or subsequent notification in the circumstances laid down in the Federal Constitutional Court's judgment (see para. 11 above). To that extent, the disputed legislation directly affects all users or potential users of the postal and telecommunication services in the Federal Republic of Germany. Furthermore, as the Delegates rightly pointed out, this menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8."

[73] Employing the same reasoning, it appears to me that the applicants in the present case can claim that, if directed surveillance of consultations with a legal adviser or medical consultant (under the regime by which such surveillance is currently authorised) constitutes a breach of article 8, they could suffer a violation of those rights without ever becoming aware of it if they were unable to assert their entitlement to a declaration that the withholding of the assurances that they sought was unlawful.

[74] The essential issue in relation to article 8 is whether the interference with the applicants' rights can be justified under article 8 (2). In order to qualify for the exemption that this paragraph allows it must be shown that the

interference is in accordance with the law and is necessary in a democratic society to protect the interests therein outlined. For the reasons that I have given, I consider that directed surveillance of a private consultation with either a legal adviser or medical consultant is prescribed by law. The sole remaining question to be addressed, therefore, is whether this is necessary in the sense of being proportionate both in terms of the interference that the surveillance involves and the degree of protection for the interests that can be achieved.

[75] Not only must the circumstances in which surveillance may take place be prescribed by law, the quality of the law which permits this type of interference with an individual's privacy must be compatible with the rule of law – see *Kopp v Switzerland* [1999] 27 EHRR 91 where, at paragraph 64, the European Court said: -

> "The Court reiterates in that connection that Article 8 § 2 requires the law in question to be "compatible with the rule of law". In the context of secret measures of surveillance or interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures (see, as the most recent authority, the above-mentioned *Halford* judgment, p. 1017, § 49)."

[76] Whether directed surveillance which is authorised in the manner prescribed by the legislation and the Code of Practice is "necessary in a democratic society, in the interests of national security etc" is for the court to assess by making an objective value judgment – see *R (on the application of Begum) v Governors of Denbigh school* [2006] 2 All ER 487, paragraph [30]. The intensity of the review that the court is to conduct is greater than that previously applied by conventional judicial review norms and more critical even than the 'heightened scrutiny' test adopted by the Court of Appeal in *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 554 – see again paragraph [30] of *Begum*.

[77] Under the Police Act 1997, entry on or interference with property or with wireless telegraphy is unlawful unless permitted by an authorisation under Part III of the Act. By virtue of section 97, if the action authorised is likely to

result in any person acquiring knowledge of matters subject to legal privilege, authorisation must be obtained in advance from a Commissioner appointed under section 91 (1) of the Act. Such a person must hold or have held high judicial office. By virtue of section 97 (5) authorisation shall be approved if, and only if, the Commissioner is satisfied that there are reasonable grounds for believing that the matters specified in section 93 (2) obtain. These are (a) that it is necessary for the action specified to be taken on the ground that it is likely to be of substantial value in the prevention or detection of serious crime, and (b) that what the action seeks to achieve cannot reasonably be achieved by other means.

[78] These provisions can be contrasted with the manner in which directed surveillance can be authorised. A similar and obvious contrast also exists between the means by which intrusive surveillance is to be authorised and that required for directed surveillance. Intrusive surveillance under RIPA and interference with property or wireless telegraphy under the Police Act require to be authorised by the Surveillance Commissioner, whereas directed surveillance is authorised by an officer in PSNI, the very organisation seeking the authorisation in the case of C, A, W and McE.

[79] Is it necessary in a democratic society that directed surveillance be authorised by a member of the same force as will conventionally be seeking the authorisation? Or would the protection of the interests provided for in article 8 (2) be adequately catered for by requiring that directed surveillance should, like intrusive surveillance and activity authorised under the Police Act, be authorised by an independent person with a judicial background? No reason has been proffered on behalf of the respondents to justify the discrepancy in the levels of authorisation required. It appears to me to be self evident that interference with the fundamentally important right arising under article 8 to consult a legal adviser or a medical adviser privately will be more readily justified where there is a demonstrable measure of independence on the part of the authorising agency. Moreover, the confidence that a legal/medical adviser and his client/patient can have in giving advice and providing information would be commensurately increased by the knowledge that no monitoring of their consultations will take place unless this has been shown to the satisfaction of an independent person to be strictly necessary.

[80] In the absence of an enhanced authorising regime, monitoring of confidential lawyer/client or doctor/patient consultations cannot be justified under article 8 (2). Because the assurances sought were refused, private consultations such as the applicants were entitled to under article 8 did not take place. I would therefore grant declarations that the monitoring of consultations of each of the applicants' legal or medical consultations would be unlawful and that the refusal of the respondents to give the assurances that

no such monitoring would take place constituted a violation of the applicants' article 8 rights.

CAMPBELL LJ

[1] These applications for judicial review concern the right of a person in custody to consult in private with a legal adviser and, in one case, with a medical adviser and the statutory duty of the police under the Police (Northern Ireland) Act 1998 to prevent the commission of offences and where an offence has been committed, to take measures to bring the offender to justice. When the solicitors and a medical adviser retained by the applicants sought an assurance or undertaking that this right would be respected during consultations with their clients the police service was unable to provide such assurance.

[2] The Lord Chief Justice in his judgment has described the factual background and has referred to the legislation that is relevant to the applications. It is therefore unnecessary for me to repeat them and allows me to proceed to the main issues that have been raised.

[3] The fundamental human right of a person held in custody on suspicion of an offence to consult a solicitor is well recognised by statute, at common law and, by implication, under the ECHR. This right is provided for in paragraph 7 of Schedule 8 to the Terrorism Act 2000, article 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989 and rule 71 of the Prison and Young Offenders Centre Rules (NI) 1995 and the question is whether the right has been qualified by the Regulation of Investigatory Powers Act 2000 (RIPA) which was passed subsequently. There is no reference in RIPA either to this right or to the earlier legislation by which it is protected. It is referred to in the Code of Practice on Covert Surveillance issued under section 71 of the Act. As Steyn LJ made clear in *Oxfordshire CC v M* [1994] Fam. 151 at 163 "a strong privilege, such as legal professional privilege, cannot be taken away pursuant to subordinate legislation" and so it is to RIPA itself that one must turn initially to decide if the privilege has, by necessary implication, been limited.

[4] In *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax and another* [2003] 1 AC 563 Lord Hoffman having referred to legal professional privilege as a fundamental human right long established in the common law, continued at (para 8);

> "…the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having

> been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication. "

Lord Hobhouse said of a necessary implication in *Morgan Grenfell* (at para 45)

> "… it is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

In the context of Human Rights Lord Hoffman said in *ex p Simms* [2000] 2 AC 115, 131;

> "Fundamental rights cannot be overridden by general or ambiguous words. This is because there is a great 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."

[5] Counsel for the applicants relied also on the general principle of statutory interpretation, *generalia specialibus non derogant,* (a general provision does not derogate from a special one). Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects dealt with by earlier legislation, the earlier legislation is not repealed or altered without an indication of an intention on the part of the legislature to do so - *The Vera Cruz* (1884) 10 App Cas 59 at 68. This maxim was described by Lord Cooke of Thorndon (*Effort Shipping Company v Linden*

Management [1998] AC 605 at 627) as representing simple common sense and ordinary usage.

[6] In the Police Act 1997 the legislature paid particular attention to the possibility of someone acquiring knowledge of matters subject to legal privilege (which includes communications between a professional legal adviser and his client) where entry on or interference with property was authorised. It did so by providing that the approval of an independent Commissioner appointed under the Act was required. Against the background of this and the other legislation to which I have referred in which the right is recognised and protected it is argued that as none of this legislation is referred to in RIPA it was the intention of Parliament to leave the right untouched.

[7] The Secretary of State was required by section 71 (4) of RIPA to lay the code of practice in draft before both Houses of Parliament. The code having acknowledged that RIPA does not provide any special protection for 'confidential information' proceeds (in paras. 3.5 to 3.9) to deal with communications subject to legal privilege. It states (para 3.6) that in general, an application for surveillance which is likely to result in the acquisition of legally privileged information should only be made in "exceptional and compelling circumstances" and that full regard should be had to the proportionality issues such surveillance raises. Reference is made also to the need for extra care where, matters of medical confidentiality may be involved. The status of the code is confirmed by section 72(1) of RIPA to the extent that a person exercising or performing any power or duty covered by a code of practice must have regard to it. Section 72(4) provides that if any provision of a code of practice appears to a court conducting any civil or criminal proceedings to be relevant to any question arising in the proceedings that provision of the code shall be taken into account in determining that question. Before the code could be brought into force an order had to be laid in draft by the Secretary of State before Parliament and approved by a resolution of each House. The Regulation of Investigatory Powers (Covert Surveillance Code of Practice) Order 2002 (SI 2002/1993) was so approved as required by section 71 (9) of RIPA. Lord Morris observed in *Institute of Patent Agents v Lockwood* [1894] A.C. 347 at 366 when considering the vires of rules made under the Patents, Designs and Trademarks Act 1888 ;

> "As regards the question of their receiving any further sanction from the fact of their being laid before both Houses of Parliament. That is a matter of precaution; they do not receive any imprimatur from having been laid before both Houses of Parliament; it is only that an opportunity is given to somebody or other, if he chooses to take advantage of it, of moving that they be annulled. It is a precaution which in

> ninety- nine cases out of a hundred would be practically a sufficient precaution... "

If it was the intention of the legislature that legal professional privilege was to remain untouched by RIPA it could be regarded as surprising if the references to legal professional privilege in the draft code "passed unnoticed" when it was laid before both Houses of Parliament and later when the Order bringing it into force was before each House.

[8] In *Reg v Home Secretary, Ex p Leech* [1994] 198 an appeal concerning censorship of correspondence between a prisoner and his solicitor, Steyn LJ said at 212;

> "It will be a rare case in which it could be held that such a fundamental right was by necessary implication abolished or limited by statute. It will, we suggest, be an even rarer case in which it could be held that a statute authorised by necessary implication the abolition or limitation of so fundamental a right by subordinate legislation."

When considering if RIPA provides one of these rare cases it has to be accepted that Part II of the Act is comprehensive in its terms. Conduct to which that Part applies is declared in the Act to be lawful for all purposes if an authorisation under it confers on that person an entitlement to engage in that conduct and his conduct is in accordance with the authorisation. The implication of this is that the authorisation will comply with the Convention and it is through the code that this is achieved. This is in favour of implying that situations subject to legal professional privilege are not excluded. The privilege is essential to the administration of justice and no provision is made in the Statute to protect it by requiring authority from an independent person before the exercise of the right may be impeded by covert surveillance. Having weighed up the competing arguments I consider that it is necessarily and properly to be implied that it was the intention of the legislature that this fundamental right should come within the scope of Part II of RIPA.

[9] The submission made on behalf of the applicants is that the refusal by the police and prison service to give an undertaking that there would be no covert surveillance is a violation of article 6 of the Convention. Article 6 is essentially procedural and interception by the police of a conversation that is subject to legal professional privilege violates "one of the basic requirements of a fair trial in a democratic society" (*S v Switzerland* (1991) 14 EHRR 670 at para 48). It is not for this court to speculate what the outcome may have been if the undertaking that was requested had been given by the police and there is no evidence that the possibility of covert surveillance taking place had a

bearing on any subsequent trial. For the reasons given by the Lord Chief Justice in his judgment and in the passage to which he has referred from the judgment of the court in *Brennan v UK* (2002) 34 EHRR 18 at para 58 I find that there has been no violation of article 6.

[10] Article 8 (1) of the Convention provides that "Everyone has the right to respect for his private and family life, his home and his correspondence". As the protection of the article extends to covert surveillance of a suspect being charged in a cell in a police station (*PG & JH v UK* App. No. 44787/98), it extends also to an interview room in police premises or in a prison. Since by its nature covert surveillance makes it difficult for an individual to know if he has been the subject of it the court decided in *Klass v Germany* (1979-1980) 2 EHRR 214 that all users or potential users of the postal and telecommunications service were 'directly affected' and potential 'victims'. In the present case the 'potential victims' likely to be affected are restricted to those receiving legal advice in a police station or a prison. In the absence of any undertaking by either the Police Service or the Prison Service that interviews in the police station or prison will not be subject to covert surveillance they qualify as 'victims' under article 34 of the Convention as they are able to show that there is a reasonable likelihood that it may take place. In *Klass v Germany* the court said;

> "[In] the mere existence of the legislation itself, there is involved, for all those to whom the legislation could be applied, a menace of surveillance: this menace necessarily strikes at the freedom of communication between users of the postal and telecommunications services and thereby constitutes an 'interference by a public authority' with the exercise of the applicant's right to respect for family and private life and for correspondence."

[11] In *Klass* the court accepted that the existence of some legislation granting powers of secret surveillance is under exceptional circumstances necessary in a democratic society. But this power may not be unfettered and as the court expressed it in *Malone v UK* (1985) 7 EHRR 14, a case concerning telephone tapping;

> "…the 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 this secret and potentially dangerous interference with the right to respect for private life and correspondence"

If RIPA and the code are read together the circumstances and conditions in which covert surveillance may take place are made sufficiently clear.

[12] Before surveillance can be justified under article 8(2) of the Convention it has to be not only 'prescribed by law' but also necessary in a democratic society and proportionate. As appears from *Klass* for interception measures to be regarded as 'necessary in a democratic society' there must be safeguards in place to prevent abuse. The code provides in annex A that where confidential information is likely to be acquired before 'directed' surveillance takes place authority must be given by a Deputy Chief Constable of the Police Service. It is submitted that an authorisation granted by a senior officer in the same force for covert surveillance of an interview between a client and his lawyer in a police station does not provide a safeguard sufficient to meet the requirement of article 8(2).

[13] In *Rotaru v Romania* App. No. 28341/95 the Court stated the requirement in these terms;

> " in order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure"

The only independent element of supervision of 'directed' surveillance is described in the code where it is stated that in any case where a lawyer is the subject of an investigation or operation this should be notified to the relevant Commissioner (a person who holds or has held high judicial office appointed under section 91 of the Police Act 1997) during his next inspection and any material which has been retained should be made available to him if requested. In *Klass* the Court held that the exclusion of judicial control was not necessarily fatal provided that the person given the task was of sufficient independence to give an objective ruling. However, in *Kopp* (1998) 27 EHRR 91 (at para 58) it was critical of the absence of judicial supervision where a lawyer's telephone had been tapped.

[14] If covert surveillance is to take place under the Police Act 1997 and the action authorised is likely to result in any person acquiring knowledge of matters subject to legal privilege the Act provides in section 97 that authorisation does not take effect (save in a case of urgency) until it has been approved by a Commissioner. This provides an example of the degree of independence that is required to meet the requirements of article 8(2) of the Convention. If covert surveillance of an interview between a person under arrest in a police station and his legal adviser takes place it is likely that knowledge of matters subject to legal professional privilege will be obtained. In such circumstances I do not regard the authority of a senior police officer, however detached he may be from the matter under investigation, to provide a sufficient safeguard for the purposes of article 8.

[15] Dr McDonald, a consultant psychiatrist, asked for an assurance that a medical consultation with M that had been arranged to take place at Antrim Police Station would not be the subject of covert surveillance. The police service was unable to provide such assurance. It is clear that the only kind of privilege that domestic law recognises is that of legal adviser and client. It does recognise the doctor patient relationship as a confidential one and will only order disclosure of information gained in the course of it when it is relevant and necessary in the interests of justice. Lord Denning MR in *Attorney-General v Foster* [1963] 2 Q.B. 477 said at p489;

> "The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer but of his client. Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge".

Lord Denning continued at pp 489-490;

> "Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered."

[16] Provision is made in the code of practice made under the Terrorism Act at paragraph 9.6 for a detained person to be examined as soon as practicable by a medical officer if a request is made by them for a medical examination. They may be examined by a practitioner from the practice with which they are registered and the medical officer must be present at such

examination. Unlike the code issued under the Police and Criminal Evidence Order (Northern Ireland) 1989 no provision is made for those in custody to be examined by a medical practitioner of their own choice at their own expense. The obligation on the authorities is to protect the health of persons deprived of liberty (see *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79) and the lack of appropriate medical care may amount to treatment contrary to Article 3 (*İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000). Provided all necessary medical attention was provided for him the Police Service was not under any obligation to allow M to be seen by Dr McDonald. Once it had agreed to do so it had to accept that a confidential relationship between the doctor and M would exist.

[17] It was likely that in the course of a medical examination by the psychiatrist matters concerning M's family and private life would be discussed and any covert surveillance would therefore require article 8(2) justification. In my judgment a greater degree of independence than could be provided by a Deputy Chief Constable is required for the purposes of article 8(2).

[18] For these reasons I agree with the order that is proposed by the Lord Chief Justice.

GIRVAN LJ

Introduction

[1] Since I can gratefully accept the Lord Chief Justice's statement of the factual background and his references to the relevant statutory and Convention provisions it is not necessary to expatiate further on those aspects of the applications. His judgment also sets out clearly the thrust of the competing arguments which were presented to the court by counsel and which bring into focus the issues raised.

Strasbourg Jurisprudence

[2] In paragraphs [10] to [21] of his judgment the Lord Chief Justice sets out the text of Articles 6 and 8 of the Convention and refers to S v Switzerland (1991) 14 EHRR 670, Brennan v United Kingdom (2002) 34 EHRR 18. Ocalan v Turkey (203) 37 EHRR 10, Klass v Germany (1979-1980) 2 EHRR 214 and Erdem v Germany (2002) 55EHRR 383. A recurrent theme in the Convention case law is that covert surveillance represents a threat to democracy and freedom. Once applied to an individual surveillance represents an interference

by a public authority with the exercise of the individual's right to respect for his private and family life. In Klass at para [42] the Court said:

> "Powers of secret surveillance of citizens characterising as they do the police state are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions."

Such legislation of its very nature presents a menace of surveillance the Court stating at paragraph [41]:

> "In the mere existence of the legislation itself, there is involved, for all those to whom the legislation could be applied, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunications services and thereby constitutes an "interference by a public authority" with the exercise of the applicants' right to respect for private and family life and for correspondence. "

All persons in Germany could potentially be subject to the disputed surveillance without them ever knowing unless there was some indiscretion or notification in the circumstances determined by the Federal Court's judgment. Accordingly, the disputed legislation directly affected all users of the communication services. The menace of surveillance could be claimed in itself to restrict freedom of communication through the postal and telecommunications services thereby constituting for all users and potential users a direct interference with the Article 8 right. The Court thus concluded that each of the applicants was entitled to claim to be a victim of a violation. The question whether the applicants were actually the victims of any violation of the Convention involved determining whether the contested legislation was in itself compatible with the Convention.

[3] In its approach to the issues raised the Court in Klass accepted that surveillance regulations such as those impugned were, under exceptional circumstances, necessary in a democratic society in the interests of national security or the prevention of crime. The legislature enjoys a certain but not unlimited discretion in fixing the conditions under which the system of surveillance was to be operated. Such a system must provide adequate and effective guarantees against abuse. If the limits of necessity in a democratic state were not to be exceeded in a field where abuse was potentially so easy it was in principle desirable to entrust supervisory control to a judge in accordance with the rule of law since judicial control offered the best guarantee

of independence and proper procedure. In the case of the German legislation the court concluded that the overall mechanisms provided sufficed to provide adequate safeguards and guarantees for the individual's rights. Failure to inform an individual after the event that he had been subject to surveillance was not in principle incompatible with the Convention although, as noted, the Federal Court held that under domestic German law the target had to be notified after the event as soon as notification could be made without jeopardising the purpose of the operation.

[4] In S v. Switzerland (1991) 14 EHRR 670 the applicant was arrested and remanded in custody. This arose out of his alleged involvement in violent political activities relating to the sale of a nuclear power station to a Latin American regime. All his communications with his lawyers were overseen or intercepted. He contended that this violated his right to defend himself by means of legal assistance under Article 6(3)(c) and prevented him from speedily being able to challenge the lawfulness of a detention within the meaning of Article 5(4). Under the Zurich Criminal Procedure Code an accused person was entitled to consult defence counsel freely and without supervision once his detention exceeded fourteen days unless there was special reasons, in particular a danger of collusion. After the close of the investigation the accused had that right without restriction. At paragraph 48 of its judgment the court said –

> "The Court notes that, unlike some national laws and Article 8(2)(d) of the American Convention on Human Rights, the European Convention does not expressly guarantee the right of a person charged with a criminal offence to communicate with defence counsel without hindrance. That right is set forth, however, within the Council of Europe, in Article 93 of the Standard Minimum Rules for the Treatment of Prisoners (annexed to Resolution (73)5 of the Committee of Ministers). The Court considers that an accused's right to communicate with his advocate out of the hearing of a third person is one of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c) of the Convention. If a lawyer were unable to confer with his client and received confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective".

The Court appears to have accepted that if the risk of collusion were made out that might justify interference with the right to communicate freely with the lawyer. It concluded that the mere possibility could not justify the restriction.

The professional ethic of the lawyer and the lawfulness of his conduct had not been called into question in that case. Judge Matsche in a separate opinion stressed that the principle of the right to free communication between lawyer and client without surveillance is not an absolute principle. There are exceptional situations where surveillance of the defendant's communications with his counsel may be necessary and compatible with the principle stated and he cited the not so infrequent cases of serious collusion between lawyers and persons in custody which have occurred in several countries in recent years. He criticised the main judgment of the court in not explicitly allowing for the possibility of exceptions. Judge de Meyer, on the other hand, in a judgment concurring with the main judgment considered it advisable to emphasise the freedom and inviolability of communications between a person charged with a criminal offence and his counsel, a principle to which he considered there was to be no exception. These two additional opinions demonstrate the clear difference of view which can be taken on the question whether the right to privacy of communication between a lawyer and an accused person is an absolute or a qualified right and, if qualified, how the qualification is to be determined.

[5] In Campbell v United Kingdom (1992) 15 EHRR 137 the European Court had to consider the question of the opening of a prisoner's correspondence with his solicitor. Rule 74(4) of the relevant Prison Rules provided that every letter to or from a prisoner should be read by the governor or by an officer deputed by him for that purpose. The rule was designed to ensure that correspondence did not contain material of a criminal nature and so pursued to the legitimate aim of preventing disorder and crime. With regard to the applicant's correspondence with his solicitor the client/lawyer relationship was in principle privileged in order to maintain its usefulness. Correspondence concerning matters of a private and confidential nature should not be read. Reasonable checks could be devised to ensure that the privilege was not being abused and there was in that case no reason to suspect the integrity of the legal adviser concerned or that he had breached the rules of his profession. At paragraphs 46 and 47 of the judgment the court stated:

> "46. It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer/client relationship is in principle privileged. Indeed, in its S v Switzerland judgment … the Court stressed the importance of a prisoner's right to communicate with counsel out of earshot of the prison authorities. It was considered, in the context of Article 6, that if a lawyer were unable to confer with his client

> without such surveillance and receive confidential instructions from him his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.
>
> 47. In the Court's view similar considerations apply to a prisoner's correspondence with a lawyer concerning contemplated or pending proceedings where the need for confidentiality is equally pressing, particularly where such correspondence relates, as in the present case, to claims and complaints against the prison authorities. That such correspondence be susceptible to routine scrutiny, particularly by individuals or authorities there may have a direct interest in the subject matter contained therein is not in keeping with the principles of confidentiality and professional privilege attaching to relations between a lawyer and his client."

[6] In paragraph 48 the court went on to rule that the reading of prisoner's mail to and from a lawyer on the other hand should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as reasonable cause will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused.

[7] In a telephone tapping case Valenzuela Contreras v Spain (Judgment of 30 July 1998) the Court pointed out that where the power of the executive is exercised in secret the risks of arbitrariness are evident. The requirement of foreseeability implies that the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to take any such secret measures. It is essential to have clear, detailed rules on the subject. The following minimum safeguards should be in place to avoid abuses of the power: a definition of the categories of people liable to have their phone tapped by judicial order, the nature of the offences which may give rise to such an order, a limit on the duration of the tapping, the procedure for drawing up reports containing intercepted conversations, the precautions to be taken in order to communicate the recordings intact and in their entirety

for possible inspection by the judge and by the defence and the circumstances in which recordings must be erased or the tapes destroyed.

[8] In Kopp v Switzerland [1999] 27 EHRR 91 the applicant's law firm was the subject of official telephone tapping during the course of criminal investigations against him or his wife. In accordance with Swiss law he was informed of the fact of the telephone tapping with details of its duration. The tapping arose out of an investigation to identify the person working in the Federal Department of Justice who might have disclosed official secrets. The applicant was monitored as a third party not as a suspect. In paragraph 64 of its judgment the Court stated:

> "The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances and conditions under which public authorities are empowered to resort to any such secret measures."

At paragraph 72 the Court went on to point out that such a serious interference must be based on a law that is particularly precise. It is essential to have clear detailed rules on the subject. Under the relevant Swiss law lawyers could not be required to give evidence about secrets confided to them on account of their profession. In that case the relevant authorisation of the phone tap stated that "the lawyers' conversations are not to be taken into account." Under the Swiss practice a specialist Post Office official had listened to the tape in order to identify any conversations relevant to the proceedings in progress. The European Court at paragraph 73 stated that though the case law established the principle that legal professional privilege covered only the relationship between a lawyer and his client the Swiss law did not clearly state how, under what conditions and by whom the distinction was to be drawn between matters specifically connected with the lawyer's work under instructions and those relating to activity other than that of counsel. It went on to state:

> "74. Above all in practice it is to say the least astonishing that this task should be assigned to an official of the Post Office's legal department who is a member of the executive without supervision by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his client which directly concern the rights of the defence."

It concluded that Swiss law did not indicate with sufficient clarity the scope and manner of the exercise of the authority's discretion on the matter and the

applicant thus did not enjoy the degree of protection secured by the rule of law in a democratic state.

[9] It is possible to deduce from the Strasbourg case law in the surveillance context some principles which are of relevance in the present case. Where Article 8(1) is in play interference with the right must be in accordance with law. This necessitates the existence of a legal entitlement for the public authority to carry out the surveillance. It must be demonstrated that the interference is necessary in a democratic society in the interests of one of the permitted matters. It has to be ascertained whether the means provided under the impugned legislation is for the achievement of the relevant aim and falls in all respects within the bounds of what is necessary in a democratic society. There must exist adequate and effective guarantees and safeguards against abuse. The relevant law must be clear and precise and it is essential to have clear detailed rules on the subject (see in particular Kopp). Where surveillance involves surveillance of communications between a lawyer and a client the law needs to clearly state how, under what conditions and when the distinction is to be drawn between matters specifically connected with the lawyers work under instructions and activities which are not protected by legal professional privilege. Considerable care needs to be taken in ensuring that this task is carried out by a person, with proper independence and experience. Clearly the European Courts preference is that this should be a matter assigned to someone of the standing or experience of a judge but other equivalent safeguards may be sufficient if they protect the interests of the citizen in a way equivalent to that which would be provided by judicial oversight.

Relevant domestic surveillance legislation

[10] The Police Act 1997 in Part III provides an authorisation framework which legalises entry into premises and interference with property or wireless telegraphy. Whilst in all cases the authority of an authorising officer is required in certain cases there is superimposed on the basic authorisation a further requirement for approval by a Surveillance Commissioner who has held high judicial office. It is significant that prior approval by a Surveillance Commissioner is required where what is proposed is entry into a dwelling, hotel bedroom or office premises and also where the action authorised is likely to result in any person acquiring knowledge of matters subject to legal privilege. The Police Act 1997 would not appear to be of relevance in relation to surveillance carried out within a police station itself where there is no entry into premises which would be otherwise unlawful. None of the parties sought to argue that the authorisation methods under the Police Act came into play in the context of these applications. The requirement to obtain prior approval from a Surveillance Commissioner under the 1997 Act when legal privilege is going to be potentially affected provides a protection not available under the RIPA 2000. The Intelligence Services Act 1994 and the Security

Services Act 1989 must be mentioned for the sake of completeness. However, they contain no special rules relating to intelligence and security organisations and are not relevant in the present context.

[11] The RIPA 2000 in Part II covers three areas, namely *directed* surveillance, *intrusive* surveillance and *covert human intelligence sources* and provides authorisation procedures in each of those areas. The Act does not impose any form of legal duty or obligation on public authorities to obtain prior approval of surveillance. The penalty which a public authority might face if it failed to follow the procedures in Part II would be the risk of the activities in question being found to be in breach of Articles 6 and/or 8 of the Convention or of having evidence excluded by a court. The use of covert *human intelligence sources* and of *directed* surveillance are subject to an internal form of authorisation and record keeping process within the public body carrying out the surveillance which is subject to post hoc oversight by the Surveillance Commissioner. By contrast *intrusive* surveillance is subject to an authorisation process with a higher degree of supervision. *Directed* surveillance is surveillance which is covert but not intrusive surveillance. Surveillance is intrusive only if it is covert surveillance that is carried out in relation to anything taking place in any residential premises or on any private vehicle and involves surveillance devices or involves the presence of an individual on the premises or in the vehicle. Surveillance carried out in a police station with a view to monitoring consultation between a solicitor and a client would not qualify as intrusive surveillance for the purposes of the Act and hence does not attract the added protections of prior approval by a Surveillance Commissioner.

[12] If the appropriate authorisation process is followed and the activities are carried out in accordance with the authorisation then that conduct is deemed lawful for all purposes under Section 7(1). In cases where it is thought that confidential information (which includes matters subject to legal privilege) may be revealed the Covert Surveillance Code of Practice requires a higher level of authorisation than would normally be the case. In the case of PSNI authorisation the authorisation has to be by the Deputy Chief Constable. The power to grant an authorisation for directed surveillance does not arise unless the designated person believes that the authorisation is "necessary" and that the surveillance proposed is "proportionate to what is sought to be achieved by carrying it out." (see section 28(2)). The designated person must record in the prescribed form why the directed surveillance sought is necessary and proportionate.

[13] Greater statutory protection exists in relation to the carrying out of *intrusive* surveillance. Subject to special provisions relating to urgent matters, where a person grants the police authorisation for the carrying out of intrusive surveillance he must give notice to a Surveillance Commissioner in writing and as soon as reasonably practicable after the grant of the

authorisation (section 35). The authorisation does not take effect until such time (if any) as the grant of the authorisation has been approved by a Surveillance Commissioner and written notice of approval has been given. The Surveillance Commissioner has power to quash or cancel authorisations. Appeals to the Chief Surveillance Commissioner may be brought arising out of a decision of a Surveillance Commissioner refusing, quashing or cancelling authorisation of intrusive surveillance.

[14] The Chief Surveillance Commissioner, whose post was created by the Police Act 1997 in relation to authorisations permitting an interference with property and telegraphs, is given additional functions in the form of duties to review and report on (inter alia) the exercise and performance of powers and duties under Part II of RIPA 2000.

[15] Section 65 and 70 of RIPA 2000 create the Investigatory Powers Tribunal. It has exclusive jurisdiction for the purposes of section 7(1)(c) of the Human Rights Act 1998 in relation to certain types of conduct. A person who alleges that a public authority has unlawfully interfered with any of his Convention rights and who wishes to sue by means of Section 7 must do so via the Tribunal. However, it would appear that persons who are unaware that they have been subject to surveillance will not have an effective right to take the matter to the Tribunal.

The Code

[16] Under Section 71 of RIPA 2000 the Secretary of State must issue one or more Codes of Practice relating to the exercise of powers and duties under (inter alia) Part II of the Act. The Covert Surveillance Code of Practice 2002 ("the Code") was duly made and applies to every authorisation of covert surveillance. The Code provides (inter alia) for a centrally retrievable record of authorisations to be held by each public authority and regularly updated. Where the product of surveillance could be relevant to pending or future criminal proceedings it should be retained in accordance with established disclosure requirements for a suitable further period commensurate to any subsequent review. Each public authority must ensure that arrangements are in place for the handling, storage and distribution of material obtained through the use of covert surveillance.

[17] Section 3 of the Code sets out special rules on authorisations relating to confidential information which includes matters subject to legal privilege and confidential personal information. Paragraph 3.1 provides:

> "3.1 The 2000 Act does not provide any special protection for "confidential information". Nevertheless, particular care should be taken in cases where the subject of the investigation or

> operation might reasonably expect a high degree of privacy, or where confidential information is involved. Confidential information consists of matters subject to legal privilege, confidential personal information or confidential journalistic materialistic material. So, for example, extra care should be given where, through the use of surveillance, it would be possible to require a knowledge of discussions between a minister of religion and an individual relating to the latter spiritual welfare, or where matters of medical or journalistic confidentiality or legal privilege may be involved.
>
> 3.2 In cases where through the use of surveillance it is likely that knowledge of confidential information will be acquired the use of surveillance is subject to a higher level of authorisation. Annex A lists the authorising officer for each public authority permitted to authorise such surveillance."

Paragraph 3.6 provides that:

> "In general, an application for surveillance which is likely to result in the acquisition of legally privileged information should only be made in exceptional and compelling circumstances. Full regard should be had to the particular proportionality issues such surveillance raises. The application should include, in addition to the reasons it is considered necessary for the surveillance to take place, an assessment of how likely it is that information subject to legal privilege will be acquired. In addition, the application should clearly state whether the purpose (or one of the purposes) of the surveillance is to obtain legally privileged information."

Paragraph 3.8 goes on to point out that a substantial proportion of communications between a lawyer and his client may be subject to legal privilege. Therefore any case where a lawyer is the subject of an investigation or operation should be notified to the relevant Commissioner during his next inspection and any material which as been retained should be made available to him if requested. Where there is any doubt as to the handling and

dissemination of information which may be the subject of legal privilege, advice should be sought from a legal adviser within the relevant public authority before any further dissemination of the material takes place. Similar advice should also be sought where there is doubt over whether information is not subject to legal privilege due to the in furtherance of a criminal purpose exception. The retention of legally privileged information or its dissemination to an outside body, should be accompanied by a clear warning that it is subject to legal privilege. It should be safeguarded by taking reasonable steps to ensure there is no possibility of it becoming available or its contents becoming known to any person whose possession of it might prejudice any criminal or civil proceedings relating to the information. Any dissemination of legally privileged material to an outside body should be notified to the relevant commissioner or inspector during his next inspection.

Legal Privilege

[18] As counsel for the applicants argued, access to legal advice in police detention is required as a fundamental right. Lord Bingham in Cullen v. Chief Constable [2003] 1 WLR 176 pointed out that the common law recognised a general right in an accused person to communicate and consult privately with his solicitor outside the interview room provided that in such a case no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice by his doing so. The point is reiterated in R (Morgan Grenfell & Co Limited) v. Special Commissioner of Income Tax [2003] 1 AC 563, Lord Hoffman stating:

> "Legal professional privilege is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before his adviser without fear that it may afterwards be disclosed and used to his prejudice."

Lord Hoffman went on to point out that this is an aspect of the right of privacy guaranteed by Article 8 of the Convention. Entitlement to access to legal advice in police custody and legal professional privilege have now been put on a statutory basis by the relevant provisions of the TA 2000 and PACE referred to earlier.

[19] R v Cox [1884] 14 QBD 153 makes clear that legal privilege only applies to communications between solicitor and client if there are present both professional confidence and professional employment. If the solicitors and/or the client have a criminal object in mind one of those elements will

inevitably be absent. In that event no privilege can be claimed for a communication between a solicitor and a client which is a step towards the commission of a criminal offence. Evidence of such a communication is admissible on the prosecution of the client or the solicitor. In each case, where privilege is claimed for evidential material arises, the court must determine on the facts actually given in evidence or proposed to be given in evidence whether it seems probable that the accused person may have consulted his legal adviser not after the commission of the crime for the legitimate purpose of being defendant but before the commission of the crime for the purpose of being guided or helped in committing it. Stephen J at 75 stated:

> "We were greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers as that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose will greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept. We were earnestly pressed to lay down some rule as to the manner in which this consequence should be avoided. The only thing which we feel authorised to say upon this matter is that in each case the court must determine upon the facts actually given in evidence or proposed to be given in evidence whether it seems probable that the accused person may have consulted his legal adviser not after the commission of the crime for the legitimate purpose of being defended but before the commission of the crime for the purpose of being guided or helped in committing it … Courts in every instance must judge for themselves on the special facts of each case. The power ought to be used with the greatest care not to hamper prisoners in seeking to make their defence and not to enable unscrupulous persons to acquire knowledge to which they have no right and every precaution should be taken against compelling unnecessary disclosures."

[20] In R v Derby Magistrates Court (ex parte B) [1996] AC 487 the House of Lord reiterated in clear terms the policy behind the principle of legal privilege. It promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers. It does this by keeping secret the communications thereby inducing

the clients to retain the solicitor and seek his advice and encouraging the client to be frank. Any claim to relaxation of the privilege must be approached with the greatest circumspection. Lord Nicholls stated that:

> "Confidence in non-disclosure is essential if the privilege is to achieve its raison d'être"."

In rejecting the argument that the principle of legal privilege should not be absolute but should yield to some other consideration of even greater importance Lord Taylor stated:

> "Once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything that the client might say would never in any circumstances be revealed without his consent would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had any recognisable interest in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined. I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege once established."

The House recognised that R v. Cox provided a well recognised exception to the absolute nature of legal professional privilege.

[21] In Barclay's Bank plc v. Eustice [1995] 4 All ER 511 the court held that where the dominant purpose of legal advice was not to explain the legal effect of what had already been done and had subsequently become the subject of existing or imminent litigation but to structure a transaction which had yet to be carried out and which had plainly been devised to prejudice the interests of a creditor the purpose of seeking the advice was sufficiently iniquitous for public policy to require that communications between the legal advisers and their client in relation to the setting up of the transaction should be discoverable. In the instant case it was evident that the dominant purpose of the legal advice sought by the defendants in setting up the transaction at an under value was to stop the bank from interfering with use of what they regarded as family assets and thereby to prejudice the interests of the bank as a creditor. That purpose was sufficiently iniquitous for public policy to require disclosure. The court concluded that the case revealed a "strong prima facie case" of a transaction to defraud creditors. Schiemann LJ said –

> "I do not consider that the public interest requires these communications to be kept secret. If the strong prima facie case turns out to be correct the defendants have deliberately indulged in sharp practice. I do not consider that the result of upholding the judge's order in the present case will be to discourage straightforward citizens from consulting their lawyers. These lawyers should tell them that what is proposed is liable to be set aside and the straightforward citizen will then not do it and so the advice will never see the light of day."

Conclusions

[22] The applicants' primary submission is that they had a statutory right to a private consultation and that this necessarily excluded any surveillance of the consultation under RIPA 2000. It is thus necessary to determine whether the right to a private consultation is unqualified or whether it is subject to the right of the public authorities to carry out covert surveillance under RIPA 2000. This raises issues of construction of the relevant legislation. The issues of construction include the question whether RIPA 2000, if read in the manner contended by the respondent and the Crown, would itself be compatible with the Convention. This brings into play the question of the effect of section 3 of the Human Rights Act 1998 on the proper approach to RIPA 2000.

[23] Unquestionably the apparent privacy of a consultation intended to be truly private would be undermined by covert surveillance. The effect of the surveillance would be to effectively frustrate the privacy of the consultation just as much as the presence of police officers sitting within ear shot of the consultation would do so. The Strasbourg authorities make clear that the Article 6 rights of accused persons include the right to communication with their legal representative out of the hearing of a third party (see Őcalan). If the accused and the solicitor are in fact being overheard then they are not in reality having a private consultation.

[24] Neither the TA nor PACE makes provision for the circumstances in which the privacy of the consultation may be undermined. RIPA 2000 permits covert surveillance that is duly authorised and section 27 of the Act provides that conduct to which Part II applies shall be lawful for all purposes if it is duly authorised and is in accordance with authorisation. Surveillance of its nature represents an intrusion into privacy. RIPA 2000, accordingly, purports to make lawful intrusions into privacy which would otherwise be unlawful and thus would cover surveillance of private communications between a solicitor and client unless RIPA falls to be construed as not applying to the private consultations provided for in the TA and PACE.

[25] The interpretation principle *generalia specialibus non derogant* is based on the principle that where a state of facts falls within the literal meaning of a wide provision where there is an earlier unrepealed statute obviously intended to cover the state of facts in greater detail and where the effect of the two enactments is not precisely the same it is presumed that Parliament intended the earlier provision to continue to apply:

> "Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation you are not to hold that earlier and special legislation indirectly repealed, altered or derogated it from merely by a force of such general words without any indication of a particular intention to do so."

(per Lord Selborne LJ in The Vera Cruz 1884 10 Appeal Cas 59 at 68)."

[26] RIPA 2000 is framed in extremely wide terms to apparently permit surveillance (and hence intrusion) into all manners of private and confidential communications. If the apparently wide and sweeping provisions of RIPA were to apply to communications between a lawyer and his client in the course of a private consultation under TA or PACE this would represent a significant interference with the strictness of the rule relating to legal professional privilege and the statutory right to privacy. Bearing in mind the fundamental nature of the right to such privacy it would require clear and explicit language to qualify what Lord Hoffman described as a fundamental human right. The wide and general words of RIPA would have conferred a power on the authorising officers under the Act to undermine that fundamental right in the absence of a clear enunciation of principle to that effect by the legislature. In R v Secretary of State for the Home Department ex parte Pierson [1998] AC 539 Lord Browne-Wilkinson stressed that the 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 legal rights of citizens or the basic principles on which British law is based unless the state makes it clear that such is the intention of Parliament. In ex parte Simms Lord Hoffman stated that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general and ambiguous words. This is because there is too great a risk that that the full implications of the unqualified words may have passed unnoticed in the democratic process. In the absence of express language or necessary implication even the most general words are intended to be subject to the basic rights of the individual.

[27] The provisions of RIPA form part of a wider body of surveillance law. The Police Act 1997 contains express provisions that deal clearly with surveillance which interferes with legal professional privilege (see sections

97(1) and (2).) It contains more specific and clearer safeguards than RIPA does in relation to directed surveillance. The Surveillance Commissioner must be satisfied that there are reasonable grounds for believing that the surveillance is necessary for the purpose of preventing or detecting serious crime and that the action is proportionate. Since Parliament in the 1997 Act though not in the RIPA 2000 has laid down express, clear and limited powers with concomitant duties in the context of surveillance which impact on legal professional privilege I conclude that the more generalised provisions of RIPA 2000 cannot have been intended to interfere with legal professional privilege in a wider context.

[28] Intrusion into the confidentiality of communications between a solicitor and his client in the TA and PACE contexts brings into the play the potential applicability of Articles 6 and 8. RIPA contains permissive powers allowing the carrying out of surveillance which will be deemed to be lawful if properly authorised. In exercising the permissive power of surveillance the relevant authority (in this case the police) must act in a manner which protects and is consistent with the Convention rights of the accused. The rights of the accused to a private consultation provided for in the TA and PACE to which he is entitled as part of his Article 6 rights is subject to the qualification stated in Őcalan and Brennan that he may be denied that right if the relevant authorities have "good cause" to withhold the right of private access. Őcalan and Brennan do not themselves spell out what constitutes good cause. In the context of surveillance Strasbourg case law indicates the matters which need to be taken into account if invasion of privacy rights is to be legitimate. The legal basis for the use of surveillance must be such that there exists an adequate and effective guarantee against abuse. The legal basis for the surveillance must be clear and precise. Where surveillance involves surveillance of communication between lawyer and client the law must, in particular, clearly state how, under what conditions and when the distinction is to be drawn between matters specially connected with a lawyer's work and activities not protected by legal profession of privilege. That task must be carried out by someone with proper independence and experience. The question arises as to whether the provisions of RIPA and the Code satisfy the requirements of Convention law. If they do not the PSNI as a public authority could not use a permissive power under that Act to carry out surveillance of communications between a solicitor and client in the course of a private consultation under the TA or PACE. In the context of the Human Rights Act there is a distinction between a statutory mandatory duty to act and a permissive power. If a statutory provision imposes a duty to act and that statutory power is incompatible with Convention rights the court may grant a declaration of incompatibility but pending changes in the law consequent on such a declaration the duty to act continues to be binding. Where, on the other hand, a statute confers a permissive power but not a duty to act then the power must be exercised in a manner compatible with Convention rights and if the permissive power is so framed that its safeguards fall short of what is required by Convention law the power cannot be exercised

lawfully for otherwise its exercise would infringe the Convention rights concerned. Its exercise would not satisfy the requirements of proportionality.

[29] The carrying out of surveillance of solicitors' communications in the context of the TA and PACE in the manner contemplated by RIPA and the Code would conflict in a number of respects with Convention rights under Article 8. While the requirement of Article 8(2) that interference with the Article 8(1) right be "in accordance with law" would be satisfied in the sense that there would be a legal basis for the action under RIPA regard must be had to the "quality of the law". While such surveillance would have a basis in law, the law must be particularly clear, detailed and accessible. It must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions under which the authorities empowered to resort to the provision (see Kopp at paragraph 64 and 71, in particular). Interception of communications between a lawyer and his client in a police station during a private consultation which is a necessary ingredient of the citizen's rights under Article 6 constitutes a serious interference with the private life of the client and also that of the solicitor.

[30] The designated decision maker in relation to authorisation is himself a senior officer of the organisation which wishes to carry out the surveillance and hence could not be regarded as a truly independent official. The statutory precondition that he considers it "necessary" for one of the reasons set out in Section 28(3) in this respect seeks to follow the wording of Article 8(2). The authorisation for the surveillance must in his view be "proportionate." Where the interference with privacy is in connection with legal communications the Code introduces certain safeguards. An application should only be made in "exceptional" and "compelling" circumstances. Full regard must be had to particular proportionality issues raised by the surveillance. An assessment should be made of how likely the information will be subject to legal professional privilege. The authorising officer may require regular reporting so as to be able to decide whether the authorisation should continue. Where legally privileged information has been acquired or retained the matter should be reported to the relevant Commissioner or Inspector during his next inspection. Where there is any doubt as to handling and dissemination of information which may be subject to legal privilege advice should be sought from a legal adviser within the relevant authority before any further dissemination takes place. Any dissemination of legally privileged material by an outside body should be notified to the relevant commissioner or inspector during his next inspection. The authorisation procedures require (inter alia) reasons to be given for their authorisation, why it is considered proportionate, the nature of the surveillance and explanations of the information which it is desired to obtain as the result of surveillance, details of any confidential information likely to be given. Regular reviews of authorisations should be undertaken. If objectively the authorising official's belief in the necessity and proportionality of the surveillance is, in fact, unfounded then, by definition,

there has been an unnecessary and disproportionate interference with the rights of the individuals concerned. The conferring of what is effectively an untrammelled power on the authorising official to determine necessity and proportionality means that the state has handed over to the authorising official the function of determining what is proportionate without laying down the state's democratic choices of the considerations that must be applied in order to arrive at a decision which is proportionate. Nor is there an effective mechanism to review the proportionality and necessity of the action. "Proportionality must be judged objectively by the court" (per Lord Bingham in R(Begum) v Denbigh High School [2006] 2 All ER 487 at 500). The intensity of review called for in cases where there is interference with fundamental human rights (described by Lord Bingham in Begum as greater even than the heightened scrutiny test) highlights the dangers which would arise if the state were to leave it entirely to the discretion of the authorising official to fix the parameters of proportionality in the surveillance context. The ex post facto reviewing powers of the Surveillance Commissioner do not fully or adequately meet the problem because he can give no effective remedy to the person whose rights have been infringed. Furthermore there is no clear indication in the legislation as to what test is being applied by the Commissioner in carrying out his review or oversight duties. Thus the question is unresolved as to whether the Commissioner would be testing simply the genuineness of the authorising official's belief in the necessity and proportionality of the surveillance or the rationality of the authorising official's view or whether he would be applying the level of scrutiny indicated in Begum. Whatever test he applies the question arises as to what effectively the Commissioner is being required to do by his oversight. It may be that he is supposed to prevent repetition of breaches; to improve the system for the future; or to lay down guidelines for the future. He is not empowered to give any effective remedy to a party whose rights have been infringed.

[31] There are significant differences between an authorisation procedure where the surveillance falls within the definition of *intrusive* surveillance as compared to *directed* surveillance. In particular the prior approval of the Surveillance Commissioner is normally required in case of intrusive surveillance. Moreover, where surveillance is effected under the Police Act 1997 warrants to enter offices (which would include a solicitor's office) require prior approval by the Commissioner. The same prior approval is required for warrants for actions which are likely to result in any persons acquiring knowledge of matters subject to legal privilege. The definition of intrusive surveillance in RIPA 2000 is limited. The definition of residential premises refers to premises used, however temporarily, for residential purposes. It could, thus, include a police cell in which a prisoner is temporarily housed. However, the wording of the definition would not appear to include a room in a police station in which a defendant is consulting his solicitor prior to interview or during a break in interview. It appears to be illogical to provide for the protection of the intrusive surveillance safeguards in the case of a

prisoner in his cell in a police station when he is, for example, detained overnight but to withhold those safeguards when he is consulting his solicitor prior to interview or during breaks in interviews. Likewise, it appears to be illogical to give the protection of the Police Act in the case of intrusions into the privacy of a solicitor in his office or car but to withhold them in the case of surveillance in police premises during a consultation between a solicitor and his client prior to or during breaks in interviews. The state has not demonstrated the necessity to provide in relation to communications between solicitor and client in the TA and PACE context a surveillance regime which provides significantly less safeguards than those that apply in the context of communications between solicitor and client in the solicitor's own office or home. Indeed, the need for safeguards is heightened not lessened by the potential for surveillance to undermine the privacy of legal consultations demanded by TA and PACE and by the nature of the need for such consultations to be private having regard to the Article 6 rights of the defendant.

[32] In *overt* factual situations on an ex post facto analysis of actions and events a court will be able to determine whether actions were, in fact, necessary and proportionate and, if they are not, the citizen will have his remedy. In the case of *covert* actions of which the individual affected is and is likely to remain unaware it is impossible to analyse the actions and motivations of the decision-maker to test the true necessity or proportionality of his actions or those carrying out the surveillance or to subject the decision maker's reasoning to scrutiny. The Code throws unto the authorising officer the function of determining necessity and proportionality. The jurisdiction of the Surveillance Commissioner in his reviewing exercise does provide some means ex post facto of guarding against unnecessary or disproportionate actions of the decision-maker and those carrying out surveillance but as noted the powers and duties of the Commissioner are not themselves spelt out with precision or clarity in this context and are, as noted, to be exercised after the event. Any criticism of procedures by the Commissioner will not be in the public domain nor would it give the injured party an effective remedy. While surveillance over potentially legally privileged communications is intended under the Code to be something that should only happen in exceptional and compelling circumstances neither the Code nor the statutes spell out the threshold which must be crossed before such exceptional surveillance can properly take place. There is a marked distinction on the one hand between deciding *after* the event and in the light of all the known circumstances whether discovery of potentially legal privileged documents should be ordered and, on the other hand, deciding *before* the event whether surveillance should take place of a conversation between a solicitor and client. In the case of an order for discovery as in R v. Cox and in Barclays Bank v. Eustice the court will be operating in the context of a matrix of evidential material which leads to a clear inference that relevant documents are not in fact legally privileged. In Eustice there was "strong prima facie" evidence that the documents were not privileged. In R v. Cox the Court, while

declining to state a general rule, posed the question whether it was "probable that the accused consulted his solicitor to be helped or guided in committing a crime". In the case of surveillance directed before the event a question of policy arises as to how high the appropriate threshold test should be before surveillance could properly be carried out. The threshold test could range from a mere suspicion that the solicitor and/or client may commit a criminal offence in the course of the interview through suspicion based on reasonable grounds that such actions are likely to or may occur, to a threshold based on a probability that the solicitor and/or client will participate in criminal actions during the interview. Different authorising officers may set their threshold at different levels. The level at which the threshold is set may itself raise a question whether it is too low to be compatible with Article 8. The question arises as to whether the statement of the Code that there must be "exceptional and compelling reasons" satisfies the Convention requirement enunciated in Kopp that the serious interference with private life involved in such surveillance is based on a law which is "particularly precise" with "clear detailed rules". The legislature has not addressed the policy question of the appropriate threshold whereas it had done so under the Police Act 1997. The fact that it has done so under that Act but has not done so under RIPA is an added indication that Parliament cannot have intended that the 2000 Act should impinge on legal professional privilege cases. If it does not then the subordinate provisions of the Code could not do so. If Parliament left it to the Code to provide the necessary protections the Code has failed to do so.

[33] The criticisms levelled against the Swiss system in Kopp at paragraph 73 to 75 of the Court's judgment would appear to apply to the UK system if public authorities used RIPA 2000 and the Code as a legal basis for surveillance of communication between solicitor and client. In Kopp the Swiss law did not clearly state how, under what conditions and by whom the distinction was to be drawn between matters specifically connected with the lawyer's work qua lawyer and those relating to activities other than that of counsel. In that case the Court criticised in strong terms the delegation to an official of the Post Office's legal department without the supervision of an independent judge of the function of determining the distinction between confidential legally privileged material and material that was not so privileged. Under RIPA and the Code, if applied in the present context, it is to be presumed that a member of PSNI would be or at least might be charged with the task which in Kopp the Court considered had been inappropriately assigned to the Post Officer's legal department. Whilst ex post facto review during a Commissioner's inspection might highlight shortcomings in the approach adopted, such an ex post facto system falls short of ongoing supervision during the surveillance itself and would appear to fall foul of the Court's criticisms of the Swiss law in Kopp. Nor would it, as already noted, provide an effective remedy for the individual whose rights have unknown to him been infringed.

[34] Having regard to these considerations, if the PSNI or Prison Service applied the directed surveillance provisions of RIPA to communications between lawyer and client in the police station or prison they would infringe the Article 8 rights of the solicitor and client. The use of the provisions would have the potential in individual cases of infringing the Article 6 rights of the individual though it has not been demonstrated that in these cases a breach of that Article has actually occurred.

[35] If the PSNI is entitled legitimately to use the legislative power for the purpose of carrying out surveillance of communications between a solicitor and client a refusal to comment on whether the power was being exercised or not in any given case would be justifiable since it would frustrate the power to have to reveal whether it was being exercised. The reasoning in Klass in relation to ex post facto disclosure applies a fortiori to prior disclosure. However, I have concluded that the power cannot be so exercised. Inasmuch as PSNI is seeking to reserve to itself the right in appropriate cases to use those powers when it considers it appropriate to do so under the Code, the applicants are entitled as victims in these proceedings (in the sense discussed in Klass) to establish that those powers are not exercisable against them in practice or in theory. These conclusions, accordingly, determine the applications of C, A and W which relate to the lawfulness of surveillance of communications between lawyer and client during consultations under TA or PACE. I consider that there is no difference in principle in the case of McE.

[36] The special position that prevails in relation to communications between solicitor and client do not arise in the context of communications between a medical attendant and an accused person, the function and the role of the medical attendant being different. However, the Act and the Code fail to state the relevant threshold for determining when surveillance is appropriate in the case of medical attendants on accused persons. Nor has it been demonstrated that it is necessary in such a case to have lesser safeguards than those which apply in the case of the surveillance of communications between a doctor and patient in the doctor's surgery or the patient's home. For those reasons I conclude that in the case of M he is likewise entitled to establish that the PSNI could not carry out surveillance of communications between the medical attendant and the applicant under RIPA and the relevant Code.

[37] In the applications the relief initially sought by the applicants was a declaration that the refusal of the respondents to give the assurances sought constituted a violation of the applicants' Article 8 rights. Implicit in their claims there was a challenge to the right of the PSNI and the Northern Ireland Prison Service to rely on the provisions of RIPA 2000 and the Code to justify any directed surveillance of communications between the applicants and their solicitors during consultations under TA and PACE or, in the case of McE, during prison visits and, in the case of M, during a consultation between the applicant and his medical attendant. The applicants amended their Order 53

Statements to widen the declaratory relief sought. In view of the conclusions which I have reached on the legal issues discussed above I agree with the form of the declaratory relief proposed by the Lord Chief Justice in his judgment. If, contrary to the conclusions I have reached, there is a right in law to carry out the impugned form of surveillance the refusal to give the assurances sought would not be unlawful. If, as I conclude, there is no such right then the refusal to give an assurance, which implies in the circumstances that the right exists, would be unlawful.