Neutral Citation Number: [2021] EWHC 902 (Admin)

Case No: CO/3955/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Manchester Civil Justice Centre
1 Bridge Street West, Manchester, M60 9DJ.

Date: 16/04/2021

Before :

LORD JUSTICE SINGH
and
MR JUSTICE JULIAN KNOWLES

- -

Between :

THE QUEEN (on the application of MARINA SCHOFIELD)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
CHIEF CONSTABLE OF GREATER MANCHESTER POLICE	**Interested Party**

- -
- -

Mr Leslie Thomas QC and Mr Adam Straw (instructed by **Farleys Solicitors**) for the **Claimant**
Mr Julian Milford QC, Mr Luke Ponte and Mr Daniel Isenberg (instructed by the **Government Legal Department**) for the **Defendant**
Ms Anne Whyte QC (Instructed by **GMP Legal Services**) for the **Interested Party**

Hearing dates: 10 - 11 March 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10 a.m. on Friday, 16 April 2021.

Lord Justice Singh:

Introduction

1. This claim for judicial review concerns a challenge to the statutory bar on the admissibility of intercept evidence in legal proceedings. The statutory bar and exceptions to it are contained in section 56 of, and Sch. 3 to, the Investigatory Powers Act 2016 ("IPA"). Since this is primary legislation the principal remedy which the Claimant seeks is a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("HRA").

2. Permission to bring this claim was granted by Kerr J in an order made on 8 April 2020.

3. At the hearing we heard submissions from Mr Leslie Thomas QC and Mr Adam Straw for the Claimant; and from Mr Julian Milford QC for the Secretary of State. Ms Anne Whyte QC also attended the hearing on behalf of the Interested Party but in the end did not need to make any submissions. We are grateful to all counsel and those instructing them for their assistance.

Factual Background

4. On 3 March 2012, Mr Anthony Grainger, the Claimant's son, was fatally shot by a Greater Manchester Police ("GMP") officer. The shooting occurred during an operation that was planned and controlled by GMP.

5. On 27 June 2013, a report was produced by the Independent Police Complaints Commission ("IPCC"), which concluded that there had been serious organisational failings by GMP.

6. Criminal proceedings were brought against Sir Peter Fahy, the Chief Constable of GMP, in January 2014. The offence charged was failing to discharge his duty under section 3(1) of the Health and Safety at Work Act 1974, in contravention of section 33(1)(a) of that Act. The burden of proof in relation to this offence is placed on the defendant.

7. On 16 January 2015, the Crown Prosecution Service ("CPS") informed the Claimant that the prosecution was being discontinued. The defendant in the prosecution submitted that he was not able properly to discharge the burden against him without deploying, in court, material of a sensitive nature. The court ruled that the defendant had to have the sensitive material available to him and the ability to deploy it in evidence. The prosecution was not able to comply with that order and so the proceedings could not continue.

8. The Claimant corresponded with the CPS in January 2015 regarding the decision to discontinue the proceedings. The CPS was unable to provide the information sought by the Claimant, preventing her from challenging the decision.

9. On 15 April 2015, the Claimant issued a claim for judicial review. Permission was refused by Wilkie J on 12 June 2015 on the ground that the claim was premature. He

indicated that the claim could be brought after the inquest into the death of Mr Grainger.

10. In May 2015, HHJ Teague QC was appointed to conduct the inquest into the death. He concluded that there was information which could not be disclosed or relied upon at the inquest. This would prevent the inquest from determining the circumstances which surrounded the death of Mr Grainger. However, the information could be relied upon at a public inquiry, so the inquest was converted into a public inquiry by the Secretary of State on 17 March 2016.

11. The conclusion of the public inquiry was highly critical of the planning and conduct of the operation by GMP. It found that the conduct of the armed deployment was contrary to Article 2 of the European Convention on Human Rights ("ECHR").

12. In the present proceedings, the Secretary of State is content for this Court to proceed on the assumption that the sensitive material which could not be disclosed in the prosecution of Sir Peter Fahy was intercept material within the scope of section 56(1) of the IPA. In accordance with normal practice in this context, the Secretary of State "neither confirms nor denies" that the sensitive material in question was in fact intercept material.

13. Although the facts of Mr Grainger's case have given rise to these proceedings, the nature of the claim is a generic one. The challenge is to the compatibility of primary legislation with the Convention rights under the HRA. We are not therefore concerned with the question whether there has been a breach of the HRA on the individual facts of this case.

The basic scheme of the IPA

14. The basic structure of the IPA can be set out briefly for present purposes. Section 3 makes it an offence for a person to intercept a communication, for example in a telecommunication system, without lawful authority.

15. Section 19 creates the system by which the Secretary of State has power to issue "a targeted interception warrant" and, so far as material, provides:

> "(1) The Secretary of State may, on an application made by or on behalf of an intercepting authority mentioned in section 18(1)(a) to (g), issue a targeted interception warrant if—
>
> (a) the Secretary of State considers that the warrant is necessary on grounds falling within section 20,
>
> (b) the Secretary of State considers that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct,
>
> (c) the Secretary of State considers that satisfactory arrangements made for the purposes of sections 53 and 54

> (safeguards relating to disclosure etc.) are in force in relation to the warrant, and
>
> (d) except where the Secretary of State considers that there is an urgent need to issue the warrant, the decision to issue the warrant has been approved by a Judicial Commissioner.
>
> …"

16. The grounds on which warrants may be issued by the Secretary of State are set out in Section 20, which, so far as material, provides:

> "(1) This section has effect for the purposes of this Part.
>
> (2) A targeted interception warrant … is necessary on grounds falling within this section if it is necessary—
>
> (a) in the interests of national security,
>
> (b) for the purpose of preventing or detecting serious crime, or
>
> (c) in the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security (but see subsection (4)).
>
> …
>
> (5) A warrant may not be considered necessary on grounds falling within this section if it is considered necessary only for the purpose of gathering evidence for use in any legal proceedings."

17. Section 53 requires safeguards to be in place in relation to the retention and disclosure of material:

> "(1) The issuing authority must ensure, in relation to every targeted interception warrant … issued by that authority, that arrangements are in force for securing that the requirements of subsections (2) and (5) are met in relation to the material obtained under the warrant. This is subject to subsection (9).
>
> (2) The requirements of this subsection are met in relation to the material obtained under a warrant if each of the following is limited to the minimum that is necessary for the authorised purposes (see subsection (3))—
>
> (a) the number of persons to whom any of the material is disclosed or otherwise made available;

> (b) the extent to which any of the material is disclosed or otherwise made available;
>
> (c) the extent to which any of the material is copied;
>
> (d) the number of copies that are made.
>
> (3) For the purposes of this section something is necessary for the authorised purposes if, and only if—
>
> (a) it is, or is likely to become, necessary on any of the grounds falling within section 20 on which a warrant under Chapter 1 of this Part may be necessary,
>
> (b) it is necessary for facilitating the carrying out of any functions under this Act of the Secretary of State, the Scottish Ministers or the person to whom the warrant is or was addressed,
>
> (c) it is necessary for facilitating the carrying out of any functions of the Judicial Commissioners or the Investigatory Powers Tribunal under or in relation to this Act,
>
> (d) it is necessary to ensure that a person ('P') who is conducting a criminal prosecution has the information P needs to determine what is required of P by P's duty to secure the fairness of the prosecution, …"

The statutory bar

18. At the relevant time of the facts of this case the statutory bar was contained in sections 17-18 of the Regulation of Investigatory Powers Act 2000 ("RIPA"). The current provisions are contained in the IPA, which, for relevant purposes, came into force on 27 June 2018. The statutory bar is now contained in section 56 of the IPA, which, so far as material, provides:

> "(1) No evidence may be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings or Inquiries Act proceedings which (in any manner)—
>
> (a) discloses, in circumstances from which its origin in interception-related conduct may be inferred—
>
> (i) any content of an intercepted communication, or
>
> (ii) any secondary data obtained from a communication, or

(b) tends to suggest that any interception-related conduct has or may have occurred or may be going to occur.

This is subject to Schedule 3 (exceptions)."

19. Para. 20 of Sch. 3, so far as material, provides:

"(1) Section 56(1) does not apply in relation to any proceedings for a relevant offence.

(2) 'Relevant offence' means—

(a) an offence under any provision of this Act;

(b) an offence under section 1 of the Interception of Communications Act 1985;

(c) an offence under any provision of the Regulation of Investigatory Powers Act 2000;

(d) an offence under section 47 or 48 of the Wireless Telegraphy Act 2006;

(e) an offence under section 83 or 84 of the Postal Services Act 2000;

(f) an offence under section 4 of the Official Secrets Act 1989 relating to any such information, document or article as is mentioned in subsection (3)(a) or (c) of that section;

(g) an offence under section 1 or 2 of the Official Secrets Act 1911 relating to any sketch, plan, model, article, note, document or information which—

(i) incorporates, or relates to, the content of any intercepted communication or any secondary data obtained from a communication, or

(ii) tends to suggest that any interception-related conduct has or may have occurred or may be going to occur;

(h) an offence of perjury committed in the course of any relevant proceedings;

(i) an offence of attempting or conspiring to commit an offence falling within any of paragraphs (a) to (h);

(j) an offence under Part 2 of the Serious Crime Act 2007 in relation to an offence falling within any of those paragraphs;

> (k) an offence of aiding, abetting, counselling or procuring the commission of an offence falling within any of those paragraphs;
>
> (l) contempt of court committed in the course of, or in relation to, any relevant proceedings."

20. It will be readily apparent from the express terms of para. 20 that the exception to the statutory bar in it is a narrow one: it relates to the sort of offences which are likely to arise in the context of interception of communications itself. It is difficult to see how a criminal prosecution in that context could be effectively brought if there were no exception to the statutory bar.

21. Para. 21 of Sch. 3, so far as material, provides:

> "(1) Nothing in section 56(1) prohibits—
>
> (a) a disclosure to a person ('P') conducting a criminal prosecution that is made for the purpose only of enabling P to determine what is required of P by P's duty to secure the fairness of the prosecution, or
>
> (b) a disclosure to a relevant judge in a case in which the judge has ordered the disclosure to be made to the judge alone.
>
> (2) A relevant judge may order a disclosure under sub-paragraph (1)(b) only if the judge considers that the exceptional circumstances of the case make the disclosure essential in the interests of justice.
>
> (3) Where in any criminal proceedings—
>
> (a) a relevant judge orders a disclosure under sub-paragraph (1)(b), and
>
> (b) in consequence of that disclosure, the judge considers that there are exceptional circumstances requiring the judge to make a direction under this sub-paragraph,
>
> the judge may direct the person conducting the prosecution to make for the purposes of the proceedings any admission of fact which the judge considers essential in the interests of justice.
>
> (4) But nothing in any direction under sub-paragraph (3) may authorise or require anything to be done in contravention of section 56(1)."

22. The exception to the statutory bar in para. 21 is an important one, since it helps to ensure that the prosecution of a criminal offence is conducted fairly, but it is an even narrower exception than the one in para. 20: it is made clear by its terms that, even where this exception applies, intercept material still cannot be used directly as evidence in criminal proceedings.

The Human Rights Act 1998

23. The relevant Convention rights are set out in Sch. 1 to the HRA. Article 2, so far as material, provides:

> "1. Everyone's right to life shall be protected by law. …
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

24. Article 6 provides:

> "1. In the determination … 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:
>
> …
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> …"

25. Section 4 of the HRA confers power on certain courts, including the High Court, to grant a declaration of incompatibility in respect of primary legislation. It provides, so far as material:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

26. Subsection (6) makes it clear that such a declaration is not binding:

> "(6) A declaration under this section ('a declaration of incompatibility')—
>
> (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
>
> (b) is not binding on the parties to the proceedings in which it is made."

The Claimant's grounds

27. The submissions for the Claimant are succinctly set out as follows, at paras. 4-5 of the Skeleton Argument filed on her behalf:

> "4. By this claim, the Claimant seeks a further exception to that prohibition [the statutory bar]. Intercept material which remains in existence at the time of a prosecution for a lethal criminal offence by a state agent should be admissible, if that will not cause unjustifiable harm to the public interest. She seeks a declaration of incompatibility, that the prohibition is incompatible with the positive and procedural duties within article 2 ECHR. A summary of the reasons why a declaration would be appropriate is as follows:
>
> a. Article 2 requires the state to bring about an effective investigation into a death caused by lethal force used by state agents. In such cases, it is of great importance that the proceedings are capable of leading to the conviction and punishment of state agents who committed criminal offences leading to the death. The authorities must take all reasonable steps to secure and adduce the relevant evidence.
>
> b. The ban on the admission of intercept is contrary to those requirements. It means that, where a prosecution would depend on intercept evidence, the proceedings will not be capable of ensuring criminal penalties are applied.

> c. There will be a number of cases in which intercept material can be adduced without causing harm to an important public interest, or where measures can be imposed to prevent harm. That will regularly be the case in respect of killings by the police, in part because the police will often have themselves been involved in, or been aware of, the interception. The Defendant appears to accept this. Yet even in those cases, the ban prevents the intercept being relied upon at trial. It prevents reasonable steps being taken to adduce the relevant evidence, which is incompatible with article 2.
>
> 5. The Government has given anxious consideration to this issue. The most recent report, in 2014, concluded that admitting intercept as evidence would either cost a great deal or would undermine the operations of the intercepting agencies, which are matters of the utmost importance. But that conclusion was centrally based on the misunderstanding that, if intercept were admissible, article 6 ECHR would require the agencies to retain all potentially relevant intercept product, to listen to, transcribe, translate, catalogue and disclose it to the defence. That understanding of the law was incorrect: article 6 would not require the agencies to significantly alter their existing operational methods."

28. The Claimant accordingly seeks a declaration of incompatibility, that the prohibition on the admission of intercept material in criminal proceedings, in section 56(1) of, and para. 21(4) of Sch. 3 to, the IPA is incompatible with Article 2 of the ECHR.

29. The submissions for the Claimant on Article 2 were made at the hearing by Mr Thomas. He submits that Article 2 of the ECHR requires an effective investigation into a death caused by state agents through the use of lethal force. Such an investigation is not conducted for the sake of it; it must be capable of leading to a conviction. The authorities must take all reasonable steps to ensure that relevant evidence is obtained and adduced. He submits that the prohibition on the admissibility of intercept evidence does not meet those requirements.

30. He also submits that, in many cases of killings by the police, adducing intercept material will not cause harm to an important public interest, since the police will often have been aware of, or involved in, the interception. The ban in those cases is therefore not compatible with Article 2.

31. The submissions for the Claimant on Article 6 were made by Mr Straw. He submits that the conclusions of the Government's 2014 review of whether intercept evidence should be permitted are based on a misunderstanding of the requirements of Article 6 of the ECHR. Contrary to what the review said, compliance with Article 6 would not require intercepting agencies to alter their operational methods significantly. He submits that the error of law committed in the process leading up to the decision to maintain the statutory bar is one that should be corrected by this Court.

The evidence for the Secretary of State

32. The Court has before it evidence on behalf of the Secretary of State from Mr Jonathan Emmett, who is the Head of the Investigatory Powers Unit at the Home Office.

33. In his evidence Mr Emmett sets out the history of the statutory bar. Before 1985 there was no statutory bar, since interception of communications was not governed by legislation. Nevertheless, as the 1957 Report of the Committee of Privy Counsellors chaired by Lord Birkett (Cmnd 283) noted, it had been the settled policy of the Home Office that, save in the most exceptional cases, information obtained by the interception of communications should be used only for the purposes of detection, and not as evidence in a court or in any other inquiry. Although at that time the Committee did not have in mind considerations under Article 6 of the ECHR, they observed that the general practice was to select and transcribe only those parts of the material that were relevant to the inquiry in hand. In the great majority of cases this was a small proportion of the total material recorded. The material that was not selected and transcribed was destroyed.

34. In 1985 both the interception of communications and the non-admissibility of intercept material in legal proceedings were put on a statutory footing in the Interception of Communications Act 1985 ("IOCA"). Mr Emmett states that, between the enactment of the IOCA and 2014, the Government commissioned no fewer than eight separate reports into the issue whether (and if so in what form) any exclusion on intercept material being used in court should be continued. Of particular note in the present proceedings have been the Privy Council Review, which reported in 2008 and was followed by a programme of work to implement its recommendations; the report in 2009 which was the result of that work; and the Home Office review of 2014.

35. At para. 38, Mr Emmett states that interception under the IPA provides both tactical and strategic information for the intelligence and law enforcement agencies. He quotes from the 2008 report 'Intercept as Evidence', at para. 16:

> "Tactical interception provides real-time intelligence on plans and actions of individual terrorists, criminals and other targets, which allows the agencies to disrupt their plans and frustrate their actions. …"

36. At para. 40, Mr Emmett states that the value of intercept material exists notwithstanding the inability to deploy such material as evidence in criminal proceedings. Its value lies in intelligence, in disruption, and in the detection and investigation of crime. Intercept material is often of greatest value in enabling law enforcement agencies to intervene at the most opportune moment when there is reason to believe that an offence will be committed. It is also an invaluable investigative tool, facilitating the collection of non-intercept evidence, which of course *can* be used in criminal proceedings. It is therefore hugely important in tackling serious and organised crime. He notes that, in 2015, Lord Anderson of Ipswich QC noted in his report 'A Question of Trust', at para. 9.20, that interception warrants were issued to assist in dealing with serious crime at an average rate of about five a day.

37. As Mr Emmett points out, one of the concerns which has been expressed in the various reports is the risk of disclosure of intelligence methods and capabilities. He says that, in order to ensure a fair trial, the defence would have to be given the ability to probe the integrity of intercept product but this could give rise to the risk that intercept capabilities and techniques would have to be disclosed and would become public.

38. Mr Emmett describes the nine operational requirements which were first set out in the 2008 report and which remain applicable to any system in which intercept evidence could be admissible. It is quite clear that a great deal of work has been done in these various reviews, including modelling of various possible reforms in the future and the use of mock trials to see how a new regime might work in practice. The concerns for operational requirements include the following.

39. First, the sheer volume of material that would need to be kept, and the additional costs and difficulties of transcribing, recording and storing it in a way that would enable it to be searchable by third parties.

40. Secondly, and critically, the impact of introducing intercept material as evidence upon the operational effectiveness of the intercepting agencies. Mr Emmett states that this is not simply a theoretical possibility. Terrorists and sophisticated criminal gangs are known to take a keen interest in the capabilities and practices of the authorities that may be seeking to discover their plans. The Government has had experience of information about surveillance methods being put into the public domain, leading directly to the loss of important sources of intelligence. It is equally important that information is not revealed as to any *gaps* that might exist in those capabilities. The key risk associated with the admissibility of intercept material as evidence is the potential (indeed likely) disclosure of interception capabilities.

41. Mr Emmett also considers in his evidence the possibility of adopting a public interest immunity ("PII") model for dealing with intercept material as evidence. He says, at para. 147, that this availability is not considered to be a remotely sufficient answer to the above concerns about the revelation of sensitive capabilities.

42. First, the very fact of making a PII application could itself reveal the sensitive capability which it seeks to conceal. As he says, criminals are no fools. It may very well be possible for them to infer merely from the fact of a PII application being made that a particular method of communication has been "blown", because they will know when and how they have communicated.

43. Secondly, the effect of replacing a blanket rule such as the current statutory bar with the individual judgement of the court in any particular case would create the risk of inconsistency of decision-making and uncertainty as to whether a particular capability would be fully protected. He also points out the "jigsaw effect", by which criminals can and do piece together small scraps of information in order to form an accurate picture of the authorities' capability and weaknesses.

44. Thirdly, the risk of PII being an insufficient protection for important capabilities for either or both of the above reasons would itself create a likelihood of prosecutions being discontinued simply in order to ensure protection for those capabilities.

Importantly therefore the admissibility of intercept as evidence could lead to fewer, not more, prosecutions.

45. Mr Emmett also points out that there may be other situations in which PII would be an inadequate protection. In criminal proceedings one outcome can be for the prosecution to be discontinued to avoid disclosure of the sensitive material. That option is not available in other kinds of proceedings, for example family proceedings. It is not unusual for interception to take place on family premises and for it to disclose the existence of vulnerable children or indeed to record matters that might be material to a custody battle.

46. Finally in this context, Mr Emmett states that the operation of PII in a potentially large number of cases would have very serious cost and resourcing implications.

47. Mr Emmett also expresses concern about the impact that a change to the statutory bar would have on the close co-operation and trust which currently exists between law enforcement bodies and the UK intelligence community. It is the very fact that the agencies know that intercept material will not be admissible in court proceedings that enables the current degree of co-operation to take place.

48. In his evidence Mr Emmett also addresses the possibility of having a "carve out" for Article 2 prosecutions. He does not understand how that could be feasible. If intercept material were to be generally admissible in criminal proceedings, it would need to be retained and stored on a blanket basis, which would have all the practical disadvantages he has already identified. Importantly, he points out, it cannot be anticipated in advance that there will be a state killing. The present case would in fact be an example of that fact. Assuming that there was relevant intercept evidence, it would have been obtained from a separate inquiry into criminal activities in which Mr Grainger was suspected of involvement, not evidence from any inquiry into a state killing itself. If all of the relevant material were not retained, the state authorities would be left open to allegations of "cherry picking" the best evidence to suit the prosecution.

49. Mr Emmett also addresses the suggestion on behalf of the Claimant that there would often be no good reason to withhold intercept evidence in cases of state killings because the defendants will already be aware of it. He says that it is unlikely to be *their* knowledge of the intercept which would create the danger in such cases. The danger would rather be the possibility of techniques or capabilities being disclosed to the target of interception. In any case, Mr Emmett points out, there is no basis for distinguishing in advance between those cases where the defendant is so aware and those where he is not. This is because state killings cannot be predicted in advance.

The 2014 Report

50. The report 'Intercept as Evidence' of December 2014 contained the following executive summary:

> "1. Interception of communications is one of the most important techniques used in the investigation of terrorism and

serious and organised crime. But interception is an intrusive power and is therefore only used by a small number of UK security and law enforcement agencies for a specified range of purposes. While interception supports criminal investigations by providing vital intelligence, the law currently prohibits the use of intercept material as evidence in criminal proceedings.

2. Evidence from overseas jurisdictions, particularly the USA and Australia, suggests that intercept material can be valuable evidence at trial. The Coalition agreement therefore set out an intention to find a practical way to allow the use of intercept evidence in court. A review of this issue (the eighth review since 1993) was commissioned and conducted by the Home Office, drawing on expertise from across the eight intercepting agencies and specialist legal advice. It was overseen and endorsed by a cross-party group of Privy Counsellors. This report summarises the work of the review and the Government's conclusions.

3. Under British law defendants must receive a fair trial under conditions that do not place them at a disadvantage compared to the prosecution. In practice this means the defence should have access to all material on which the prosecution relies, as well as any material which is capable of undermining the prosecution case or assisting the defence. The prohibition on using intercept as evidence is consistent with the right to a fair trial because neither the defence nor the prosecution can rely on intercept material.

4. For the use of intercept material as evidence to be consistent with a fair trial, all relevant material collected by an intercepting agency in the course of a given investigation would need to be retained to an evidential standard and made available to the defence.

5. All previous reviews of intercept as evidence have also recognised that an intercept as evidence regime must not significantly impede the operational activity of the intercepting agencies. The 2008 Privy Council review of intercept as evidence proposed nine 'operational requirements' which would need to be met by an intercept as evidence model. The present review recognised the continued validity of these operational requirements. They include the requirements that the intercepting agencies should select whether and for how long to retain intercept material in a given case and that the agencies should not be required to alter their operational monitoring or transcription arrangements.

6. The review concluded that the legal requirements for an intercept as evidence regime regarding the review, retention and disclosure of intercepted material cannot, as a matter of

principle, be reconciled with the operational requirements set out in 2008, notably that the intercepting agencies should be able to determine how intercept material is transcribed and selected for retention. This assessment was confirmed by consideration of the specific models which have been previously proposed for an intercept as evidence regime, including models developed for the purpose of this review. The models are summarised in this report.

7. The review did identify a legally compliant model for intercept as evidence. This model would not be consistent with the agency operational requirements identified in 2008. The review considered the costs and benefits of this model. The cost would be between £4.25bn and £9.25bn over 20 years depending on assumptions about developing communications technology and usage, and technology costs. On some assumptions the model could lead to an increase in convictions; but on others the model could lead to fewer convictions than at present, due mainly to the compromise of sensitive techniques and the inability to prosecute cases where these techniques had been used.

8. Deriving highest benefit from an intercept as evidence model would be possible only if additional funding were made available to cover the additional costs. Under a flat funding scenario there would be no benefit from a legally compliant intercept as evidence regime because agency resources would have to be diverted away from operational work to staff and fund the intercept as evidence process.

9. The Government has concluded that although it is feasible to design a legally compliant intercept as evidence regime it would not be consistent with previous operational requirements, would incur significant costs and risks, and that the benefits would be uncertain. The Government therefore intends to make no change to the current arrangements which permit intercept material from this country to be used for intelligence purposes only.

10. The Government will keep under review any changes that might affect the conclusions of this review, including changes to the legal requirements that would reduce the burden of examination, retention and review on the intercepting agencies, and the development of new technologies that could reduce the need for manual translation and transcription of intercept material."

Attorney General's guidelines on disclosure

51. The current version of the Attorney General's guidelines on disclosure for investigators, prosecutors and defence practitioners dates from December 2020. The guidelines which were in force at the relevant time dated from 2013. They gave guidance on the application of the disclosure regime contained in the Criminal Procedure and Investigations Act 1996 ("CPIA"). At p. 4, the importance of disclosure was noted in the following terms:

> "The CPIA aims to ensure that criminal investigations are conducted in a fair, objective and thorough manner, and requires prosecutors to disclose to the defence material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused."

52. The guidelines also stated that every accused person has the right to a fair trial, a right long embodied in our law and guaranteed by Article 6 of the ECHR. Fair disclosure to the accused was described as "an inseparable part of a fair trial."

The CPIA Code of Practice

53. The CPIA Code of Practice states, at para. 4.1:

> "If material which may be relevant to the investigation consists of information which is not recorded in any form, the officer in charge of an investigation must ensure that it is recorded in a durable or retrievable form …"

54. At para. 4.2 reference is made to destruction of material but that must apply after a judgement has been made by the investigator that the material is not relevant to the investigation.

The CPS Disclosure Manual

55. The current version of the CPS Disclosure Manual is dated 14 December 2018. Chapter 3 begins with the following. It notes that the CPIA Code of Practice:

> "requires investigators to record and retain material obtained in a criminal investigation which may be relevant to the investigation. This includes a responsibility to record and retain relevant material obtained or generated by them during the course of the investigation and the requirement for the

> disclosure officer to create schedules of relevant unused material retained during an investigation and submit them to the prosecutor."

56. At p. 17 of the same document, under the heading 'Retention', it is said:

> "Where material was retained in the course of an investigation because the investigator originally considered it potentially relevant, but it has in fact no bearing on the offence, the offender or the surrounding circumstances, it need not be retained further."

Mr Straw relied on that passage but it is also important to note the following sentence:

> "However the investigator should err on the side of caution in coming to this conclusion and seek the advice of the prosecutor as appropriate, noting that in the early stages of a case all of the issues may not be apparent."

Analysis

57. Although a large number of authorities were referred to in oral submissions, and even more in written submissions, I will first set out what I consider to be the correct legal analysis of the issues before this Court as a matter of principle. I will then consider the main authorities which were cited to us.

58. Much of the argument that was presented to this Court consisted of a critique of the reports which the Government has commissioned over many years and, in particular, the 2014 report. The oral submissions on this point were made by Mr Straw. He submits that the 2014 report was based on a fundamental misunderstanding about the requirements of Article 6.

59. The difficulty with this approach is that, even if the argument were correct, it would not lead to the conclusion that the statutory bar is incompatible with the Convention rights. It would simply clear out of the way a possible argument that reform of the current law would be incompatible with Article 6. When this Court is asked to make a declaration of incompatibility under section 4 of the HRA its function is an important but limited one. In this exercise the Court is not performing its usual judicial review function. Even if Mr Straw were right and the Government has proceeded on a misunderstanding of Article 6, as a matter of process, that would not demonstrate that the resulting primary legislation is incompatible with the Convention rights. The question for a court when it is asked to make a declaration of incompatibility under section 4 of the HRA is whether the primary legislation ultimately enacted by Parliament is or is not compatible with the Convention rights; the court is not concerned with whether there may have been errors in the process leading up to that enactment.

60. This leads to the submissions of Mr Thomas about Article 2. This is said to be the source of the obligation which requires the statutory bar to be removed because it is incompatible with the duty to have an effective investigation and (if appropriate) prosecution and conviction in a killing for which the state is responsible.

61. The fundamental difficulty with this submission is that Mr Thomas was unable to show us any decision of the European Court of Human Rights which establishes that there is such an incompatibility. To the contrary, the consistent caselaw of that Court makes it clear that what rules of evidence should be adopted is a matter left to national legal systems and falls within the margin of appreciation afforded to Contracting States.

62. Returning to the submissions made by Mr Straw, in my view, his analysis of the caselaw on Article 6 is in any event wrong. His submissions depend on assuming that what Article 6 requires would remain the same if the statutory bar were removed. In my view, that is based on a fundamental misunderstanding of the principle of equality of arms. The reason why the current statutory bar has been held in a number of cases to be compatible with Article 6 is that it prevents *both* parties from relying on intercept material as evidence in a criminal trial. Since the prosecution is not permitted to rely on that material, there is currently no requirement that they must retain all the material collected even as unused material. If the statutory bar were removed, it cannot be assumed that what Article 6 requires would remain the same. Once that equality of arms is distorted in favour of the prosecution, it is inevitable that the defence will argue (in my view justifiably) that there has been unfairness in the overall process.

63. To illustrate this I can take a hypothetical example if the statutory bar were removed. A defendant is prosecuted using evidence obtained by an intercept. The defendant wishes to argue that the apparently incriminating material was in truth innocent when considered in the light of numerous other communications he had which would exculpate him. But the exculpatory material was never kept by the relevant agency. It may never have been read or transcribed. This was the reason why the 2014 report concluded that any future reform of the current legislation would have to entail a radical change in the practices of the agencies concerned and unused material would have to be retained. This would be consistent with the general obligations which apply to material that is obtained during the course of an investigation, even if it is unused material, for example in accordance with the guidelines issued by the Attorney General and the CPS, which I have set out earlier.

64. Mr Straw sought to meet this objection by submitting that his proposed model of reform would not require any change to current practice. He submits that all that would be required is that the material which is already retained because it may have to be shown to the prosecutor or to the trial judge (under para. 21 of Sch. 3 to the IPA) should also be capable of being shown to the defence. He submits that any national security objections could be met by not permitting disclosure in an individual case where there is good reason not to do so.

65. In my view, this argument proceeds on a fundamentally incorrect basis. As I have said earlier, it fails to take into account the "new world" scenario in which the issue would arise in the future if the statutory bar is removed and the prosecution are permitted to use intercept material as evidence to support their case. If they are to be

permitted to use it in that way, it seems to me to be inevitable that there will no longer be an equality of arms and there will be potential unfairness to the defence.

66. Against that background of principle I will now turn to consider the main authorities that were cited to us.

Authorities on Article 6

67. In a number of decisions the European Court of Human Rights has considered the law in this country by reference to Article 6 of the ECHR. In *Jasper v United Kingdom* (2000) 30 EHRR 441, the Court held that the fact that the prosecution had not disclosed certain evidence on the grounds of PII did not infringe the right to a fair trial.

68. The position was summarised in the following way in *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, at paras. 60-61:

> "60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6(1) requires, as indeed does English law, that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.
>
> 61. However, as the applicants recognised, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities."

69. The above caselaw was applied by the European Court of Human Rights in *Natunen v Finland* (2009) 49 EHRR 32. In that case the applicant was charged with importing a large amount of amphetamine. He and others were convicted. The applicant appealed on the ground that, had confidential material been disclosed, it would have established that the defendants had discussed matters on the telephone other than drugs. Only a fraction of the telephone records had been released and had created a misleading impression. The prosecution said that the undisclosed material had been destroyed in accordance with the provisions of domestic law. All retained material had been disclosed. The applicant then complained to the European Court of Human Rights. The Court distinguished cases such as *Jasper* because, in that context the process was at all times under the assessment of the trial judge. In contrast, in the case of *Natunen*, the decision regarding the undisclosed evidence was made in the course of the pre-trial investigation without providing the defence with the opportunity to participate in the decision-making process: see para. 48. At para. 47 the Court said:

> "Even though the police and the prosecutor were obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the investigating authority itself, even when co-operating with the prosecution, attempts to assess what may or may not be relevant to the case, cannot comply with the requirements of art.6(1). Moreover, it is not clear to what extent the prosecutor was, in fact, involved in the decision to destroy those recordings which were not included in the case file. In this case, the destruction of certain material obtained through telephone surveillance made it impossible for the defence to verify its assumptions as to its relevance and to prove their correctness before the trial courts."

70. That decision formed one of the foundations for the analysis set out in the Home Office report of 2014. Mr Straw submits that the 2014 report misunderstood the true effect of *Natunen*.

71. I disagree. In my view, the Government correctly appreciated that, if the statutory bar were removed in the future, the effect of decisions such as *Natunen* is that the current "equality of arms" would no longer apply, because the prosecution would be able to rely on intercept material as evidence in support of their case. It would therefore follow that there would in future be an obligation to retain much more material than is currently retained so as to ensure fairness to the defence. There would also be an obligation to disclose more material by way of unused material and this could create the risks which Mr Emmett describes in his evidence, for example the risk of putting into the public domain techniques and capabilities used by intercepting agencies.

72. Mr Straw also placed reliance on the decision of the Court in *Sigurđur Einarsson v Iceland* (2020) 70 EHRR 3: see in particular paras. 85-86, where the Court set out general principles on this aspect of the case, and paras. 87-93, where the Court applied those principles to the facts of that case and concluded that there had been no violation of Article 6.

73. That was a decision which concerned very specific facts. The Court did not depart from its well-established jurisprudence in this area; to the contrary it reiterated those principles by reference to authorities which specifically included *Natunen*, which it quoted at para. 86. The Court then considered the application of those principles to the various categories of data which had been collected by the Icelandic authorities when investigating allegations of fraud in the context of a bank during the financial crisis of 2008. The Court distinguished between the following categories of data. First, there was the "evidence in the case", which had been disclosed to the defence in the normal way and so no issue arose under Article 6. Secondly, there was the "investigation file". A list of these documents was submitted to the trial court and the defence were given the opportunity to consult this file. This was akin to what would be called "unused material" in this jurisdiction. Again, the Court held that no issue arose under Article 6: see para. 88. The applicants' focus was on a mass of other data, which had been collected and which was called the "full collection of data". There was a sub-category of this which had been "tagged" as the result of an electronic search exercise using Clearwell technology. Importantly, the Court distinguished in principle between the general mass of data and the "tagged" data.

74. At para. 90, the Court accepted that the general mass of data included material that was not *prima facie* relevant to the case. It was willing to accept that, when the prosecution is in possession of a vast mass of unprocessed material, it "may" be legitimate for it to sift the information in order to identify what is likely to be relevant and thus reduce the file to manageable proportions. Even then, the Court said that in principle it would be an important safeguard for the defence to be provided with an opportunity to be involved in the definition of the criteria for what may be relevant. However, the applicants were unable to point to any specific issue which could have been clarified by further searches. In those circumstances, the Court considered that the mass of data was more akin to evidence which had never been collected at all than to evidence which was known to the prosecution and which it had refused to disclose to the defence.

75. Importantly, that was not the attitude which the Court took to the "tagged data". This material had been further reviewed by the investigating authorities and it was they who had decided what was or was not relevant for the purpose of inclusion in the investigation file. The Court repeated what it had said in earlier cases, that in principle that exercise of deciding what is relevant cannot be conducted by the prosecution alone without judicial supervision of the process: see para. 91. However, on the facts of the case, the Court held that there had been no violation of Article 6, because the applicants had never sought access to the full collection of data or asked for any further searches to be made, as in principle they could have done under domestic criminal procedure.

76. In those circumstances, it seems to me that that decision provides no support for the submissions made by Mr Straw. It was a decision on its own particular facts. In reaching that decision, the Court re-affirmed the general principles in earlier cases such as *Natunen*. This therefore provides no support for the submission that the Government's 2014 review was conducted on the basis of an erroneous understanding of what Article 6 requires.

77. In order to meet these difficulties Mr Straw cited a number of other authorities. He relied on the decision of the House of Lords in *R v Preston and Ors* [1994] 2 AC 130.

That case arose at a time when the IOCA was the relevant legislation. A telephone interception warrant had been issued under section 2(2)(b) of the IOCA. The defendants were charged with conspiracy to evade the prohibition of the importation of cannabis. Following their convictions, they appealed on the ground that the prosecution's failure to disclose details of the interceptions amounted to a material irregularity. The main speech in the House of Lords was given by Lord Mustill.

78. The House of Lords held that the prohibition in section 9 of the IOCA against adducing evidence tending to suggest that an interception warrant had been issued was insufficient reason for an investigating authority to refuse to disclose information which might assist a defendant. Nevertheless, in dismissing the appeals, the House of Lords held that the power of the Secretary of State to issue a warrant under section 2(2)(b) "for the purpose of preventing or detecting serious crime" did not extend to the amassing of evidence with a view to the prosecution of offenders; the investigating authority were therefore under a duty under section 6 of the Act to destroy all material obtained by means of an interception warrant as soon as its retention was no longer necessary for the prevention or detection of serious crime, and they did not have to retain the material until trial for disclosure to the defence. Although the policy underlying sections 2 and 6 was in contradiction to the duty to give complete disclosure of unused material, the intention of the Act to keep surveillance secret prevailed.

79. In my view, the decision in *Preston* is of no material assistance in the present context. First, it long pre-dates relevant decisions of the European Court of Human Rights and the incorporation of the ECHR into domestic law by the HRA. Next, if anything, it seems to me that it tends to support the arguments for the Secretary of State rather than those for the Claimant advanced by Mr Straw. The reason why the police in that case did not have to retain more by way of unused material was precisely because of the statutory bar which was then in place and is still in place now. The decision in *Preston* does not say anything about what the situation would be if the statutory bar were to be removed or modified.

80. Mr Straw also relied upon the decision of the Divisional Court in *R (Ebrahim) v Feltham Magistrates' Court* [2001] EWHC Admin 130; [2001] 1 WLR 1293. In that case, which considered two separate cases which had been before the Magistrates' Court and the Crown Court, the Divisional Court held that, before it could be said that the right to a fair trial has been breached because of non-disclosure by the prosecution, there must first have been a duty on the police or prosecutor to obtain and/or retain that material.

81. That much, with respect, appears to be clear and obvious. However, it begs the question of when there is a duty to retain evidence. The decision in *Ebrahim* does not have any material bearing on the issues in the present case. The Court did not, because it did not have to, consider the HRA or any of the Strasbourg caselaw to which reference has been made in the present proceedings.

82. It is well established in the caselaw of the European Court of Human Rights that, while Article 6 guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law: see e.g. *Schenk v Switzerland* (1991) 13 EHRR 242, at para. 46. Mr Straw appeared to submit before us that this general principle has the consequence

that it would be open to the UK to enact a statutory regime under which only admissible evidence needed to be retained by the state.

83. I do not accept that submission. The general principle as to the admissibility of evidence being a matter primarily for regulation by national law does not undermine the fundamental obligation to afford every criminal defendant a fair trial. One of the requirements of fairness is the disclosure of unused material which may point away from guilt and may point towards the innocence of that defendant. It seems to me that this distinction between admissibility of evidence and materiality for the purposes of retention of unused material is made plain by Lord Mustill in *Preston*, at pp. 163-164. In that passage he said:

> "… The fact that an item of information cannot be put in evidence by a party does not mean that it is worthless. Often, the train of inquiry which leads to the discovery of evidence which is admissible at a trial may include an item which is not admissible, and this may apply, although less frequently, to the defence as well as to the prosecution. … It is of help to the defendant to have the opportunity of considering all of the material evidence which the prosecution have gathered and from which the prosecution have made their own selection. In my opinion the test is materiality, not admissibility."

84. Mr Straw also submitted that it would be possible in principle to devise court procedures which would protect the interests of national security. In that context he drew attention to the decision of the Court of Appeal (Criminal Division) in *In re Guardian News and Media Ltd and Others* [2016] EWCA Crim 11; [2016] 1 WLR 1767. As that case illustrates, it can be possible to conduct even a criminal trial with safeguards such as holding a hearing *in camera*; having accredited representatives of the media present to report on proceedings and so on.

85. To my mind, none of this comes anywhere close to supporting the submissions made by Mr Straw in the present context. It may well be that, if Parliament were to be invited to reconsider the statutory bar, these are the sorts of policy considerations which it might bear in mind in deciding whether a reform of the current law is possible or desirable. That does not mean that the current law is incompatible with the Convention rights.

86. In support of his submissions Mr Straw then relied on the decision of the European Court of Human Rights in *Kennedy v United Kingdom* (2011) 52 EHRR 4. He submits that decisions such as *Kennedy* show that a procedure by which national security material can be protected, for example by excluding certain persons from a hearing or holding it in private, may be compatible with the Convention. *Kennedy* itself concerned the proceedings of the Investigatory Powers Tribunal. That is a very different context from the present. First, as Mr Straw accepts, it is a civil rather than criminal context. Secondly, there can be no question in the criminal context of excluding persons such as the defendant or their legal representatives. By way of contrast, in certain tribunal and court proceedings, it is permissible for there to be an alternative way of protecting the interests of the applicant, for example the use of

Special Advocates (as in the Special Immigration Appeals Commission) or Counsel to the Tribunal (as in the Investigatory Powers Tribunal).

87. Finally in the context of Article 6, I would note that there is authority which supports the Secretary of State's position, that the current statutory bar is not incompatible with Article 6. In *Price v United Kingdom* (2017) 64 EHRR 17, at paras. 101-104, the European Court of Human Rights said the following:

> "101. In *Jasper*, the applicant had alleged that his trial was unfair because, inter alia, the product of a telephone intercept had been withheld from the defence without being placed before the trial judge. In holding that there had been no violation of art.6(1) of the Convention, the Court found that it had not been established that any such material existed at the time of the trial. Moreover, since both the prosecution and the defence were prohibited from adducing any evidence which might tend to suggest that calls had been intercepted by the state authorities, the principle of equality of arms had been respected. Furthermore, on the facts of that case the Court noted that it would have been open to the applicant himself to testify, or to call evidence from other sources, as to the existence and contents of the telephone call in question.
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> …
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> 103. Although the relevant domestic law in *Jasper* was the Interception of Communications Act 1985, under RIPA it remains the case that both the prosecution and the defence are prohibited from adducing any evidence which might tend to suggest that calls had been intercepted by the state authorities. In fact, the only relevant amendment introduced by RIPA was the addition of an extra layer of protection namely, the possibility for the trial judge to review the intercept evidence in exceptional cases.
>
> 104. In light of the foregoing, the Court does not consider that the present case can be distinguished from that of *Jasper*. It therefore considers that the applicant's complaint concerning the failure to disclose the intercept evidence is manifestly ill-founded and, as such, must be rejected pursuant to art.35(3)(a) of the Convention."

Authorities on Article 2

88. It is well established in the caselaw of the European Court of Human Rights that Article 2 requires not only that the state must refrain from taking human life in circumstances which are in breach of Article 2 but also imposes positive obligations. The first of those positive obligations is to have in place a framework of domestic law which protects the right to life. But the caselaw has gone further in order to give

practical effect to that right and imposes a procedural obligation. As the Court put it, for example, in *Jordan v United Kingdom* (2003) 37 EHRR 2, at para. 105:

> "The obligation to protect the right to life under Art.2 of the Convention, read in conjunction with the State's general duty under Art.1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures."

89. As the Court went on to state, at para. 107:

> "The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard."

90. The Court (Grand Chamber) addressed the issues further in *Öneryildiz v Turkey* (2005) 41 EHRR 20. At paras. 94-96 the Court said the following:

> "94. To sum up, the judicial system required by Art.2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of

> a dangerous activity if and to the extent that this is justified by the findings of the investigation. In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, first, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the state officials or authorities involved in whatever capacity in the chain of events in issue.
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> 95. That said, the requirements of Art.2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts; the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law.
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> 96. It should in no way be inferred from the foregoing that Art.2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence. …"

91. So much is common ground. What Mr Thomas was unable to show us is any authority in Strasbourg which has held that Article 2 requires the removal or modification of the statutory bar. He cited a number of decisions but, in my view, they concerned issues which were very different from the one that arises in this case.

92. Mr Thomas relied on the decision of the European Court of Human Rights in *Benzer and Others v Turkey* (judgment of 24 March 2014, Application No. 23502/06), in particular at paras. 186-198. In my view, that was simply a decision where on the facts the authorities were found by the Court to have investigated deaths in an inadequate way. That takes matters no further in the present context. The mere fact that Parliament has thought fit to enact and maintain in place the statutory bar on the use of intercept evidence in criminal proceedings does not preclude adequate investigation in other ways, for example in an inquiry of the sort which was conducted in the present case by HHJ Teague QC.

93. Next, Mr Thomas relied on the decision of the Grand Chamber in *Makaratzis v Greece* (2005) 41 EHRR 49, in particular at paras. 73-79. It is true that there, for example at para. 74, the Court emphasised that an effective investigation into a death requires that the authorities must have taken reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness. The Court went on to find on the facts of that case there had been striking omissions in the conduct of the investigation: see para. 76. In my view, that case was again one decided on its facts and concerned the particular deficiencies in the investigation concerned. It did not concern a national legislative measure of the type with which we are concerned in the present case. In any event, I would observe that the Court

there referred to "the reasonable steps available to them to secure the evidence": see para. 74. One of the restrictions on what those reasonable steps are will be the legal framework of the state concerned. This includes the rules which that legal system has in place concerning the admissibility of evidence in criminal proceedings.

94. Mr Thomas also relied upon the decision in *Mocanu v Romania* (2015) 60 EHRR 19, in particular at para. 326, where the Court said that in cases concerning torture or ill-treatment inflicted by state agents, criminal proceedings ought not to be discontinued on account of a limitation period, and also that amnesties and pardons should not be tolerated in such cases. Furthermore, the manner in which the limitation period is applied must be compatible with the requirements of the Convention. It is therefore difficult to accept inflexible limitation periods admitting of no exceptions. First, it is clear from that passage that limitation periods in criminal proceedings are not as such impermissible under the Convention. They, like amnesties and pardons, will not be tolerated in cases concerning torture or ill-treatment inflicted by state agents. Secondly, in any event, that context is far removed from the present one. In my view, it provides no assistance to Mr Thomas' submissions.

95. The Court expressed its disapproval of amnesties in the context of killings by the state which amounted to grave breaches of fundamental human rights in *Marguš v Croatia* (2016) 62 EHRR 17. The Court noted, at para. 139, that there is a growing tendency in international law to regard such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of states to prosecute and punish grave breaches of fundamental human rights. Again, in my view, this case does not provide any assistance to Mr Thomas in the present context.

96. Mr Thomas also relied upon the decision of the European Court of Human Rights in *Hasan Köse v Turkey* (judgment of 18 December 2018, Application No. 15014/11). Under the Turkish Code of Criminal Procedure, it was possible for a trial court to suspend the pronouncement of its judgment in certain circumstances, for example where the defendant was sentenced to the payment of a fine or to a term of imprisonment shorter than two years. This meant that the suspended judgment had no legal consequences for the defendant.

97. The applicant complained that he had been shot by a police officer and that the perpetrator had been protected by the trial court's decision to suspend the pronouncement of the judgment. Although the applicant had not died, the Court considered that the use of force against him and the ensuing injury were potentially fatal and therefore the application could properly be considered under Article 2. The Court concluded that there had been a violation of Article 2 because, although the trial court had found the police officer guilty of the offence of causing a life-threatening injury by using excessive force, domestic law permitted that court to suspend the pronouncement of its judgment. The application of the relevant provision in the Turkish Criminal Procedure Code meant that the judgment was deprived of all its legal consequences, including the sentence, provided that the offender abided by the supervision order. The Court concluded that in this regard the Turkish criminal legal system proved to be far from rigorous and had little deterrent effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant. In my view, those facts are far removed from the present context. The decision of the Court in that case has no material bearing on the issues which arise in the present context.

98. In this context, it is simply not the case that the UK, through its Parliament, has been prepared to stand by and see possible violations of Article 2 by the state go unpunished. To the contrary, as the Claimant's submissions acknowledge, anxious consideration has been given, in numerous reviews conducted over many years, to the question whether the statutory bar should be continued or not. The result of that anxious consideration has been to maintain the statutory bar in place but to keep this issue under review. I have reached the clear conclusion that the position of the UK, as reflected in primary legislation, is not incompatible with the procedural obligation in Article 2.

The *Ullah* principle

99. In *D v Commissioner of Police of the Metropolis* [2018] UKSC 11; [2019] AC 196, at paras. 153-153, Lord Mance DPSC considered the principle first established by Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. Lord Mance said that those "well-known cautionary remarks" mean that the general aim of the HRA was to align domestic law with Strasbourg law. Domestic courts should not normally refuse to follow Strasbourg authority, although circumstances can arise where this is appropriate and a healthy dialogue may then ensue. Conversely, domestic courts should not, at least by way of interpretation of the Convention rights as they apply domestically, "forge ahead", without good reason. This follows not merely from *Ullah* but from the ordinary respect attaching to the European Court of Human Rights and the general desirability of a uniform interpretation of the Convention in all member States. At para. 153, Lord Mance continued that there are, however, cases where the English courts can and should, as a matter of domestic law, go with confidence beyond existing Strasbourg authority. If the existence or otherwise of a Convention right is unclear, then it may be appropriate for domestic courts to make up their minds whether the Convention rights should or should not be understood to embrace it. However, where the European Court of Human Rights has left a matter to a state's margin of appreciation, then domestic courts have to decide what the domestic position is, what degree of involvement or intervention by a domestic court is appropriate, and what degree of institutional respect to attach to any relevant legislative choice in the particular area.

100. In my view, applying those salutary words to the present context, there is no good reason to forge ahead beyond what Strasbourg has already said. Furthermore, there is every good reason to leave it to Parliament to decide whether to modify the longstanding bar on the use of intercept material as evidence, a bar which it has chosen to keep in place after numerous considered reviews.

101. In *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559; [2021] Fam 77 (reported as *TT*), the judgment of the Court of Appeal was given by Lord Burnett of Maldon CJ, King LJ and Singh LJ. Although that was a case about whether a legislative provision was justified under Article 8(2) of the ECHR, what the Court said at paras. 81-82 is nevertheless of more general importance. The Court said that the margin of judgement which is to be afforded to Parliament rests upon two foundations. First, there is the relative institutional competence of the courts as compared to Parliament:

> "The court necessarily operates on the basis of relatively limited evidence, which is adduced by the parties in the context of particular litigation. Its focus is narrow and the argument is necessarily sectional. In contrast, Parliament has the means and opportunities to obtain wider information, from much wider sources. It has access to expert bodies, such as the Law Commission, which can advise it on reform of the law. It is able to act upon draft legislation, which is usually produced by the Government and often follows a public consultation exercise, in which many differing views can be advanced by members of the public. Both Government and Members of Parliament can be lobbied by anyone with an interest in the subject in hand. The political process allows legislators to acquire information to inform policy decision from the widest possible range of opinions."

102. At para. 82 the Court said that the second foundation is that Parliament enjoys a democratic legitimacy in our society which the courts do not:

> "In particular, that legitimises its interventions in areas of difficult or controversial social policies. That is not to say that the court should abdicate the function required by Parliament itself to protect the rights which are conferred by the HRA. The courts have their proper role to play in the careful scheme of the HRA … in appropriate cases that can include making a declaration of incompatibility under section 4 in respect of primary legislation where an incompatibility between domestic legislation and Convention rights has been established … Democratic legitimacy provides another basis for concluding that the court should be slow to occupy the margin of judgement more appropriately within the preserve of Parliament."

Conclusion

103. For the reasons I have given I have reached the following conclusions:

(1) The statutory bar on the use of intercept evidence in criminal proceedings is not incompatible with the Convention rights. There is therefore no basis on which this Court could make a declaration of incompatibility under section 4 of the HRA.

(2) Nor is there any basis for making a declaration that the Government or Parliament have proceeded on the basis of an error of law as to the requirements of Article 6 of the ECHR. There has been no error of law.

104. I would therefore dismiss this claim for judicial review.

Mr Justice Julian Knowles:

105. I agree.