SPECIAL IMMIGRATION APPEAL COMMISSION

Field House,
Breams Buildings
London

Friday 14th November 2014

BEFORE:

MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE PERKINS
MR STEPHEN PARKER

BETWEEN:

ZZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - -

MR H SOUTHEY QC and MR N ARMSTRONG (instructed by Public Law Project) appeared on behalf of the appellant.

MR T EICKE QC and MR D CRAIG (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State.

MR A UNDERWOOD QC AND MR M GOUDIE (instructed by Special Advocates' Support Office) appeared as Special Advocates

- - - - - - -

Transcribed by Harry Counsell
Tel: 020 7269 0370

- - - - - - - -

RULING

MR JUSTICE IRWIN:

1. The background to this case is well known. We will not repeat it for the purpose of this judgment. This is a case with an extremely long history. There was to be a substantive hearing this week, which has had to be adjourned until 8th December. In order to maintain that hearing date, we are therefore delivering today an oral judgment dealing with matters that have been raised. We are grateful to the parties for returning at short notice this morning.

2. Some of the issues that have been raised in the applications made to date in this case may be relevant to other pending SIAC appeals. A transcript of the judgment will be placed at the disposal of the parties and on the SIAC website.

3. Late last week, in the course of proceedings before the Investigatory Powers Tribunal ("the IPT") in the case of *Belhadj and Another* IPT/13/132-9/H, there were disclosed two policies of the Security Service dealing with legal professional privilege and undertakings which had been sought and obtained in the proceedings before the Tribunal. Those documents represented confirmation that, on occasion, material is obtained by the Security Services which is covered by "LPP". The undertakings in the proceedings before the Tribunal arose in the context of complaints under the Tribunal's statutory jurisdiction by Mr Belhadj and Mr Al Saadi, and in the context of civil claims brought by them and by other individuals.

4. The undertakings in those proceedings, and the policy advice disclosed, were intended to allay concern that those representing the Security Service, the Secret Intelligence Service, GCHQ and other respondents might be tainted by knowledge of the legally privileged material. There is a difference between the matters before the IPT, and the relevant civil claims, on the one hand, and these proceedings on the other hand. In those proceedings, the Security Service is a party and conduct of the proceedings is in the hands of in-house Security Service lawyers. In the present proceedings, the Security Service is not a party, and conduct of the proceedings is in the hands of the Treasury Solicitors and independent counsel.

5. The appellant in this case has sought similar undertakings before SIAC. It is not necessary to read the draft undertakings sought into the record of this ruling. They are in similar terms, although not identical, to the undertakings sought and obtained before the IPT.

6. The appellant submits that SIAC should make a full inquiry into the potential use of LPP material, a term which we shall hereafter use in this judgment as shorthand, and in the absence of undertakings being granted, rule on the question of whether an abuse of process has taken place.

7. On Tuesday 11th November, following initial open submissions, the Commission held a closed procedure. As a consequence of the closed procedure, a note was passed into open, part of which it is helpful to read into this ruling. The text reads as follows:

> "In the light of the submissions made by the open advocates for ZZ in writing on 10th November and orally on 11th November, SIAC, in the course of a

closed hearing, on the afternoon of 11th November, further considered what scenarios/questions might potentially arise in the context of proceedings before it, where the issue of LPP is raised. As a result, and without having been shown the relevant policy documents, SIAC identified that, at least in principle/theory, the following six scenarios/questions may potentially arise in the context of the impact of LPP and SIAC proceedings:

> 1. Inculpatory material relied on by the SSHD protected by LPP, even if reliance were permissible under the policy and the material was handled in accordance with the policy.
>
> 2. Inculpatory material which is held but not relied upon or disclosed by the SSHD protected by LPP, even if handled in compliance with the policy.
>
> 3. Exculpatory material that has been disclosed in open or closed by the SSHD protected by LPP, even if disclosure were permissible under the policy and the material was handled in compliance with the policy.
>
> 4. Exculpatory material which is held but not disclosed by the SSHD, protected by LPP, even if handled in compliance with the policy.
>
> 5. The practice policy and/or protocols adopted by lawyers with conduct of the case at the following levels:
>
> (a) Agency
>
> (b) Departmental
>
> (c) Treasury Solicitors
>
> (d) Counsel
>
> 6. The relevance/impact of the reply to 1 to 5 (on the facts of this case).
>
> In relation to those matters, and without prejudice to the fact that the SSHD neither confirms nor denies that she has in her possession any LLP material relating to this appellant or this case, the position, as it appears to SIAC, is that there is in this case no documentation falling into categories 1 or 3. SIAC has asked that the open advocates direct any submissions that they wish to make in relation to this matter to the categories identified above."

8. Yesterday open submissions were made following that communication. We attempt to distil the important submissions made by both sides.

9. The cardinal points made by the appellant can be summarised as follows. Firstly, legal professional privilege is of prime importance. It is vital to confidence in the legal system. Secondly, in relation to LLP, it is not a question of balancing the desirability or requirement for LLP to be maintained against other public interests. There is no

balancing exercise such as that conducted where the court is considering public interest immunity. The appellant relies on the speech of Lord Taylor of Gosforth in *Regina -v- Derby M*agistrates Ex Parte B [1996] 1 AC 487 at page 508D/E. A key justification, says the appellant, for the importance of the doctrine is the "chilling effect", long recognised by the courts, which will arise if the doctrine is weakened, or to the extent that it is set aside.

10. The need for vigorous protection of LPP and the risk of a "chilling effect", says the appellant, are accentuated in the context of proceedings before SIAC, because, firstly, the background to or nature of the appeals means there is a context of mistrust of legal systems and of authority, often generated by the experience of the appellants in countries other than the United Kingdom; secondly, that the closed procedure which obtains in SIAC may give rise to an accentuation of concern, and to a feeling of inequality of arms between the appellant and the respondents.

11. Mr Southey QC, for the appellant, concedes that the agencies may have to acquire some LPP material, because, until the material is scrutinised, it will not be clear whether privilege subsists or whether communications ostensibly made in pursuance of LPP, in fact cannot retain the protection of LPP, because the communications are of such a nature that the privilege falls away, the lawyer planning a crime with the client being the paradigm example. But, says Mr Southey, once assessed, absent the loss of privilege for such a reason, it cannot be legitimate for the agencies to retain LPP material for intelligence use. Any justification would depend upon specific and focused considerations. In short, the acquisition of such material may or may not be unlawful but, unless there is at common law an abrogation of legal professional privilege, then the starting point must be that retention is unlawful, absent a very strong justification.

12. Thirdly, he submits, that the utilisation of any such material, even if it can properly be retained in the course of SIAC proceedings, would amount to an abuse of process.

13. Mr Eicke, for the Secretary of State, emphasises that the lawfulness or otherwise of the obtaining of LPP material, and the use of LPP material, are discrete questions and must be held separate in the consideration of the Commission. He submits that neither question is for SIAC. He submits that both questions fall within the exclusive province of the IPT, even where, but for the exclusive statutory jurisdiction of the IPT, SIAC could entertain an abuse of process application based on such material.

14. We begin by examining that proposition as to the extent and rigour of the IPT jurisdiction and whether it sets aside the jurisdiction of SIAC.

15. The Security Service Act 1989, in section 1, set out for the first time on a statutory basis the function of the Security Service. Section 1, in its relevant parts, reads as follows:

> (1) There shall continue to be a Security Service (in this Act referred to as 'The Service') under the authority of the Secretary of State.
>
> (2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions

intended to overthrow or undermine Parliamentary democracy by political, industrial or violent means.

(3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of person outside the British Islands."

Section 2, in its relevant parts, reads as follow:

"Director General

(1) The operations of the Service shall continue to be under the control of the Director General appointed by the Secretary of State.

(2) The Director General shall be responsible for the efficiency of the Service and it shall be his duty to ensure - (a) that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of [the prevention or detection of] serious crime [or for the purpose of any criminal proceedings]."

16. Mr Eicke submits, and we agree, that the functions set out in section 1 are those functions which are the focus of section 2 in relation to the obtaining and holding of information.

17. By section 1 of the Regulation of Investigatory Powers Act 2000 ("RIPA") unlawful interception was made a criminal offence. Section 1(1) reads:

"It shall be an offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of (a) a public postal service; or (b) a public telecommunications system."

18. Section 4 of RIPA sets out a power to provide for lawful interception of telecommunications services or the other services of communications which are relevant for the exercise of interception lawfully.

19. Section 5 deals with interception with a warrant. Section 5(3) reads as follows:

"Subject to the following provisions of this section, a warrant is necessary on grounds falling within this sub-section if it is necessary –
(a) in the interests of national security,
(b) for the purpose of preventing or detecting serious crime,
(c) for the purpose [in circumstances appearing to the Secretary of State to be relevant to the interests of national security] of safeguarding the economic well-being of the United Kingdom."

20. Section 6 of the Act permits warrants to be applied for by a named sequence of individuals, relevant to the proceedings in hand; that list includes the Director General of the Security Service, the Chief of the Secret Intelligence Service, the Director

21. Section 65 of RIPA is the foundation in statute for the Investigatory Powers Tribunal. Section 65 reads, in its material parts:

> "(1) There shall, for the purpose of exercising the jurisdiction conferred on them by this section, be a tribunal consisting of such number of members as Her Majesty may by Letters Patent appoint.
>
> (2) The jurisdiction of the Tribunal shall be –
>
> > (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1988 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section.
> >
> > (b) to consider and determine any complaints made to them which, in accordance with subsection (4) [...] are complaints for which the Tribunal is the appropriate forum;
> >
> > (c) to consider and determine any reference to them by any person that he has suffered detriment as a consequence of any prohibition or restriction by virtue of section 17 on his relying in, or for the purposes of, any civil proceedings on any matter; and
> >
> > (d) to hear and determine any other such proceedings falling within sub-section (3) as may be allocated to them in accordance with provision made by the Secretary of State by order;
>
> (3) Proceedings fall within this subsection if –
>
> > (a) they are proceedings against any of the intelligence services;
> >
> > (b) they are proceedings against any other person in respect of any conduct or proposed conduct by or on behalf of any of those services;
> >
> > (c) they are proceedings brought by virtue of section 55(4): [or]
> >
> > (ca) ...
> >
> > (cb) ...]
> >
> > (d) They are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5)

(4) The Tribunal is the appropriate forum for any complaint if it is a complaint by a person who is aggrieved by any conduct falling within sub-section (5) which he believes: --

(a) to have taken place in relation to him, to any of his property, to any communications sent by or to him, or intended for him, or to his use of any postal service, telecommunications service of telecommunications system; and

(b) to have taken place in challengeable circumstances or to have been carried out by or on behalf of any of the intelligence services.

[4A) ...

(5) Subject to subsection (6), conduct falls within this sub-section if (whenever it occurred) it is –

(a) conduct by or on behalf of any of the intelligence services;

(b) conduct for or in connection with the interception of communications in the course of their transmission by means of a postal service or telecommunications system;

(c) conduct to which Chapter II of Part I applies;

([(ca] the carrying out of surveillance by a foreign police or customs officer (with the meaning of discrimination 76A):]

(d) [other] conduct to which Part II applies;

(e) the giving of a notice under section 49 or any disclosure or use of a key to protected information;

(f) any entry on or interference with property or an interference with wireless telegraphy."

22. It will be necessary later in this judgment to look more closely at the text of the Act.

23. Section 65 (2)(a) reserves to the jurisdiction of the Tribunal the right to be:

"the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within sub section (3) [of RIPA]"

Section 7(1)(a) of the Human Rights Act 1998 reads as follows:

(7) Proceedings

(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."

24. Thus, there are three routes to the exclusive jurisdiction of the IPT. Firstly, proceedings under section 7(1)(a) of the Human Rights Act - that is to say proceedings against [emphasis added] the authority - as distinct from section 7(1)(b), where a person claims that a public authority has acted unlawfully and relies on his Convention right. Section 7(1)(a) and section 65(2)(a) of RIPA, taken together, grant exclusive jurisdiction to the IPT where proceedings are "against" the relevant public authority.

25. The second exclusive route derives from section 65(2)(d) of RIPA, that is to say the jurisdiction of the tribunal shall be:

"... (d) to hear and determine any other such proceedings falling within sub section (3) as may be allocated to them in accordance with provision made by the Secretary of State by order.

Section 65(3) reads:

"Proceedings fall within this sub section if –

(a) they are proceedings against any of the intelligence services;

(b) they are proceedings against any other person in respect of any conduct, or proposed conduct, by or on behalf of any of those services."

The remainder of subsection (3) is not relevant.

26. Therefore, the second route to the exclusive jurisdiction of the IPT is where the proceedings are against any other person in respect of the conduct or proposed conduct of the intelligence services.

27. This appeal before SIAC is neither an action capable of being brought within the first exclusive jurisdiction route nor the second.

28. The third exclusive jurisdictional route derives from the combination of section 65(3)(d) and 65(5)(a) and (b). Section 65(3)(d) is concerned with "proceedings relating to the taking place in any challengeable circumstances of any conduct falling within sub section 5."

Sub-section (5) reads as follows:

> "Subject to sub-section (6) conduct falls within this subsection if (when it occurred) it is –
>
> (a) conduct by or on behalf of any of the intelligence services;
>
> (b) conduct for or in connection with the interception of communications in the course of their transmission by means of a postal service or telecommunication system."

The remainder of the sub-section is not relevant to the instant case. Sub-section (6) confines the relevant conduct (for present purposes) to "conduct by or on behalf of a person holding any office, rank or position with … any of the intelligence services".

29. Thus, the question must be whether the instant appeal could be thought to be proceedings "relating to" (within the meaning of section 65(3)(d)) the relevant "conduct by or on behalf of any of the intelligence services" or "conduct for or in connection with the interception of communications in the course of their transmission, falling within subsection (6)".

30. We have considered this carefully and we conclude that, although the conduct of the intelligence services, and conduct for or in connection with the interception of communications in the course of their transmission, might arise as part of the evidence to be considered by SIAC in the appeal, these are "not proceedings relating to them." The phrase in the Act is not, as it might have been, "proceedings involving consideration of" such conduct or such communications.

31. We reach that conclusion partly by reference to the phraseology in the statute, but partly also with regard to other considerations that bear on the point. Courts must be able to protect themselves against abuse of process. SIAC is a creature of statute, but it has never been suggested that, as a creature of statute, SIAC has no power to consider abuse of its own process. That would, in truth, be an extraordinary proposal. The closed procedures of SIAC do emphasise the need for this Tribunal, perhaps as much or more than any, to be careful that closed material procedures are conducted with maximum fairness and without any possible abuse of the process by any party. The SIAC Procedure Rules, Rule 4(3) enjoins the Tribunal to be sure that it has all relevant or material evidence before it, and thus the Commission has a specific duty to ensure that all evidence that bears on an appeal is seen. That emphasises the need to police the processes by which such evidence is garnered.

32. We are also fortified in that view by the helpful remarks, in a slightly different context, of Lord Hoffmann in the well-known authority of *A and others -v- Secretary of State for the Home Department (No 2)* [2006] 2 AC 221. The case is familiar. It involved consideration of SIAC's jurisdiction, albeit where evidence which was or might have been obtained by torture abroad arose for consideration, rather than evidence which was or might be obtained by way of incursion upon legal professional privilege. But their Lordships in the course of the case had to consider how SIAC could manage to deal with such highly problematic questions as arose in that case and, in paragraph 95 of the judgment, Lord Hoffmann said this:

> "In my opinion, Parliament, in setting up a court to review the question of whether reasonable grounds exist for suspicion or belief, was expecting the court to behave like a court. In the absence of clear express provision to the contrary, that would include the application of the standards of justice which have traditionally characterised the proceedings of English courts. It excludes the use of evidence obtained by torture, whatever might be its source."

33. In our judgment, those remarks fortify the approach we take, underlying the need for SIAC to be able to exercise an abuse of process jurisdiction where that properly arises. There would need to be the clearest possible statutory language to debar SIAC from considering an abuse of process where that might credibly be thought to arise. We do not consider that any of the language which we have looked at from RIPA, achieves such clarity. We, therefore, reject the submission from the Secretary of State that material of this kind is excluded from the consideration of SIAC, if and when a properly-founded application in relation to abuse of process arises.

34. What is the ambit of SIAC's powers in relation to abuse of process, where intercept, surveillance or other similar material, involving legal professional privilege may arise?

35. If an abuse of process jurisdiction subsists, then it must be relevant for SIAC to consider the use in SIAC proceedings of any such material. More difficult is the question as to whether SIAC could, in the context of an abuse of process application, where the proper foundation exists, consider the obtaining of such information, as opposed to its use in SIAC proceedings.

36. In our view, if such information were ever to be sought to be used before SIAC, the Commission might have to consider how the information was obtained. If it could be shown that it was illegally obtained, then consideration of its use might hardly need to arise. If, inadvertently or despite the best efforts of those preparing a case for SIAC, information of this kind may have fed into SIAC proceedings unlawfully, then SIAC must also be in a position to consider such a question.

37. Information obtained in breach of legal professional privilege can be used by the intelligence agencies, for their own legitimate purposes. Lord Bingham made that clear in *A (No. 2*). Paragraphs 47 and 48 of *A (No. 2)* read as follows:

> "47. I am prepared to accept (although I understand the interveners represented by Mr Starmer not to do so) that the Secretary of State does not act unlawfully if he certifies, arrests, searches and detains on the strength of what I shall for convenience call foreign torture evidence. But by the same token it is, in my view, questionable whether he would act unlawfully if he based similar actions on intelligence contained by officially-authorised British torture. If under such torture a man revealed the whereabouts of a bomb in the House of Parliament, the authorities could remove the bomb and, if possible, arrest the terrorist who planted it. There would be a flagrant breach of article 3 for which the United Kingdom would be answerable, but no breach of article 5(4) or 6. Yet the Secretary of State accepts that such evidence would be inadmissible before SIAC. This suggests that there is no

correspondence between the material on which the Secretary of State may act and that which is admissible in legal proceedings.

48. This is not an unusual position. It arises whenever the Secretary of State (or any other public official) relies on information which the rules of public interest immunity prevent him adducing in evidence: *Makanjuola -v- Comr of Police of the Metropolis* [1992] 3 All ER 617, 623 e to j; *R -v- Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274; 295F-297C. It is a situation which arises where action is based on a warranted interception and there is no dispensation which permits evidence to be given. This may be seen as an anomaly, but (like the anomaly to which the rule in *R -v- Warickshall* gives rise) it springs from the tension between practical common sense and the need to protect the individual against unfair incrimination. The common law is not intolerant of anomaly."

38. The distinction being made in the course of *A (No. 2)* by Lord Bingham is between the obtaining and use for intelligence purposes of such material, and its introduction into any proceedings, including in proceedings of SIAC. Similar points are made by Lord Nicholls at pages 276A-F, 277G-278A and paragraph 78 on page 278. A similar approach was taken to the material by Lord Hoffmann, Lord Hope and Lord Carswell. In paragraph 149, Lord Carswell emphasised the distinction between the two functions, the use outwith and use in proceedings. He said this:

> "In so holding, I am very conscious of the vital importance in the present state of global terrorism of being able to muster all material information in order to prevent the perpetration of violent acts endangering the lives of our citizens. I agree with the frequently expressed view that this imperative is of extremely high importance. I should emphasise that my conclusion relates only to the process of proof before judicial tribunals such as SIAC and is not intended to affect the very necessary ability of the Secretary of State to use a wide spectrum of material in order to take action to prevent danger to life and property. In the sphere of judicial decision making, there is another imperative of extremely high importance, the duty of states not to give any countenance to the use of torture. Recognising this is in no way to be 'soft on terrorism', a gibe too commonly levelled against those who seek to balance the opposing imperatives."

39. In the course of argument, despite acknowledging the high importance of considering the implications of information obtained by means of torture, Mr Southey attempted to suggest that holding and using information obtained by means of torture was less problematic than holding and using material obtained by means of incursion on legal professional privilege. We have considered this argument, but in the end we fail to follow it. One of the most stark difficulties facing any agency seeking to prevent crime and save life must arise, morally and legally, from information derived from torture.

40. We understand part of Mr Southey's submission. There is never a realistic question of torture carried out at the hands of the security services of the United Kingdom, whereas the obtaining of information by means of breach of or incursion upon legal professional privilege may be at the hands of the intelligence services of the United Kingdom. But,

in the passage we have quoted from *A (No. 2),* a passage relied on by Mr Eicke and not the subject of direct response from Mr Southey, Lord Bingham expressed the view that, even if the torture was at the hands of the United Kingdom authorities, it would still be lawful to use the information in the restrictive ways he indicated. We regard the approach of the court in *A (No. 2*) as authoritative on this issue.

41. Earlier in this judgment we considered the statutory basis of the Security Service. It is not necessary to repeat the relevant passages from section 1 and section 2 of the Security Service Act 1989. There is no mention of legal professional privilege in the course of that statute. However, section 47 of RIPA confers powers on the Secretary of State to make regulations bearing on those functions.

42. The preparation of this hearing was necessarily extremely rapid, and we are grateful to counsel for all parties for the real effort that has been put in to assisting the Tribunal. We have been able to see the relevant order in relation to surveillance and LPP, produced pursuant to the Act. That is the Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010 made pursuant to section 47. The order addresses the issue of legal consultations. A "legal consultation" is defined - it is not necessary to repeat the definition here, since it is hardly controversial - and by paragraph 3 of the Regulation, directed surveillance that is carried out in relation to such consultations is specified and shall be treated for the purposes of Part II of RIPA as "intrusive surveillance."

43. Similar Regulations we understand to have been laid in relation to interception. What may be of some significance is that the Act determines that regulations of this kind, dealing with surveillance, interception or, indeed, any other process by which intrusive activities are mounted, have to be laid before Parliament. These orders, therefore, have within our constitutional theory, obtained the approval of Parliament. Similarly, section 71 of RIPA directs the Secretary of State to issue codes of practice in relation to the exercise of powers under the Act. We were given the statutory Code of Conduct in relation to Interception of Communications. Placed before us during the hearing, but too late for any comment by counsel, is the relevant Code of Conduct for Covert Surveillance and Property Interference.

44. The Code of Practice in Interception of Communications was published in 2002. Paragraphs 3.4 to 3.8 read:

> "3.4 Legal privilege does not apply to communications made with the intention of furthering a criminal purpose (whether the lawyer is acting unwittingly or culpably). Legally privileged communications will lose their protection if there are grounds to believe, for example, that the professional legal advisor is intending to hold or use the information for a criminal purpose. But privilege is not lost if a professional legal advisor is advising a person who is suspected of having committed a criminal offence. The concept of legal privilege applies to the provision of professional legal advice by any individual, agency or organisation qualified to do so.
>
> 3.5 The Act does not provide any special protection for legally privileged communications. Nevertheless, intercepting such communications is particularly sensitive and is therefore subject to additional safeguards under

this Code. The guidance set out below may in part depend on whether matters subject to legal professional privilege have been obtained intentionally or incidentally to some other material which has been sought.

3.6. In general, any application for a warrant which is likely to result in the interception of legally privileged communications should include, in addition to the reasons why it is considered necessary for the interception to take place, an assessment of how likely it is that communications which are subject to legal privilege will be intercepted. In addition, it should state whether the purpose (or one of the purposes) of the interception is to obtain privileged communications. This assessment will be taken into account by the Secretary of State in deciding whether an interception is necessary under section 5(3) of the Act and whether it is proportionate. In such circumstances, the Secretary of State will be able to impose additional conditions such as regular reporting arrangements so as to be able to exercise his discretion on whether a warrant should continue to be authorised. In those cases where communications which include legally privileged communications have been intercepted and retained, the matter should be reported to the Interception and Communications Commissioner during his inspections and the material be made available to him if requested.

3.7 Where a lawyer is the subject of an interception, it is possible that a substantial proportion of the communications which will be intercepted will be between the lawyers and his client(s) and will be subject to legal privilege. Any case where a lawyer is the subject of an investigation should be notified to the Interception of Communications Commissioner during his inspections and any material which has been retained should be made available to him if requested.

3.8 In addition to safeguards governing the handling and retention of intercept material as provided for in section 15 of the Act, caseworkers who examine intercepted communications should be alert to any intercept material which may be subject to legal privilege. Where there is doubt as to whether the communications are subject to legal privilege, advice should be sought from a legal advisor within the intercepting agency. Similar advice should also be sought where there is doubt over whether communications are not subject to legal privilege due to the 'in furtherance of a criminal purpose' exception."

45. The relevant Code of Practice adopts a similar approach in relation to surveillance.

46. The Codes of Practice clearly make it public, that there will be lawful intercepts of legally privileged material. That is absolutely clear from paragraphs 3.4 to 3.8 of the Interception of Communications Code of Practice, which has been in the public domain since 2002. In that sense, the material revealed in the *Belhadj* complaint proceedings is simply not news. What was new arising from the *Belhadj* complaint was disclosure of the two policies from 2011 and 2014, setting out the safeguards adopted, which must be seen, in our view, as complementary to the Codes of Practice.

47. A relevant Code of Practice arose for consideration in the House of Lords in the case of *McE -v- The Prison Service of Northern Ireland* [2009] 1 AC 908. The headnote, part of which it is helpful to quote, makes the context clear.

> "The applicant in the first case, a remand prisoner in Northern Ireland, complained to the Prisoner Ombudsman about his suspicion that visits by his solicitor were the subject of surveillance. The Prison Ombudsman in his report concluded that the Regulation of Investigatory Powers Act 2000 empowered the Prison Service to conduct surveillance and directed surveillance during legal consultations. The applicants in the second case were each arrested under section 41 of the Terrorism Act 2000 and taken to a police station in Northern Ireland, where their solicitors asked for an assurance that the consultations with their clients would not be monitored. The police would neither confirm nor deny that any monitoring would take place and refused to give the assurances sought. The applicant in the third case was also arrested under section 41 and taken to the same police station where arrangements were made for him to be medically examined in order to ascertain his fitness for police interview. The consultant psychiatrist asked to examine him for this purpose sought an assurance that no covert surveillance of the consultation would take place, but the police refused to give such an assurance.

The headnote further reads:

> "... The Divisional Court of the Queen's Bench Division in Northern Ireland held that the current practice as to the authorisation of such surveillance under section 28 of the Regulation of Investigatory Powers Act 2000, and the Code of Practice issued by the Secretary of State for the Home Department under the requirements of section 71 of the Act, did not provide sufficient safeguards under article 8(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, but, by a majority, held that the Act itself had displaced the protection afforded to consultations between detainees and their legal (and by analogy medical) advisors by both common law legal professional privilege and statutory rights to consult a solicitor privately. The court accordingly made declarations that the monitoring of each applicant's legal or medical consultations would be unlawful and that the refusal of the relevant authorities to give the assurances that no such monitoring would take place constituted a violation of their article 8 rights.
>
> On appeal by the applicants against the declaration as to the ambit of the Act --
>
> *Held*, dismissing the appeal, that the 2000 Act permitted covert surveillance of communications between persons in custody and their legal or medical advisors, notwithstanding that such communications enjoyed legal professional privilege and (Lord Phillips of Worth Matravers dissenting) despite such person's statutory rights to consult a solicitor privately, provided that the surveillance was carried out in accordance with the Act and the Code of Practice issued thereunder, and did not violate Convention rights; that covert, directed surveillance of such communications carried out under section 28 of the Act and the Code of Practice currently in force infringed the

rights of the person in custody under article 8 of the Convention and was therefore unlawful; that, since the Act had been intended to achieve compliance with article 8(2) of the Convention and had intended that authorisations would only be given in circumstances in which the surveillance would be both necessary and proportionate to one of the legitimate aims permitted by article 8(2), such authorisation for surveillance as the Act permitted had to be made at an enhanced level, such as pursuant to the intrusive surveillance provisions of section 32 of the Act; and that, accordingly, the declarations made by the Divisional Court would stand (post, paragraph 35, 42, 54, 55, 61, 62, 66, 67, 68, 70, 94, 100-105, 106, 107-108, 110, 112, 113, 114, 116, 117, 118, 120)."

48. Lord Phillips dissented in the decision, but his history of the interception of communications and surveillance contained in the judgment is extremely useful:

> "14. Article 8 of the Convention, to which the United Kingdom was one of the original subscribers, provides that everyone has the right to respect for his private life and his correspondence. This right is qualified by article 8(2), which permits interference with it 'in accordance with the law' in so far as necessary for the purposes there specified. Prior to 1984 this country failed to comply with article 8, in as much as the police and the security services intercepted mail and telecommunications and carried out electronic surveillance in accordance with executive discretion that was not subject to statutory regulation. Interception had to be authorised by a warrant issued by the Secretary of State. The intelligence acquired was used for detecting and preventing serious crime and not for gathering evidence for use in prosecutions. For this reason no issue of LPP arose in relation to it. Surveillance must, on occasion, have disclosed to the authorities communications between lawyers and their clients, but no attempt appears to have been made to use such material as evidence, so once again no issue in relation to LPP appears to have arisen.
>
> 15. The United Kingdom practice in relation to the interception of telecommunications was successfully challenged before the Strasbourg Court in *Malone -v- United Kingdom* [1984] 7 EHRR 14. The court found that there was obscurity and uncertainty as to the extent to which interception was subject to rules of law rather than executive discretion, so that the interference with Mr Malone's private life did not satisfy the requirement of being 'in accordance with the law'. This led to the enactment of the Inception of Communications Act 1985. No mention is made in that Act of LPP, but problems in relation to this were unlikely to arise as the Act continued the policy of precluding the use as evidence of the product of interception.
>
> 16. The United Kingdom remained in breach of the requirements of article 8(2) in relation to covert surveillance of private property in as much as this was not subject to any statutory regulations. Adverse decisions at Strasbourg led to the Security Services Act 1989 and the Intelligence Services Act 1994; which regulated surveillance by the Security Services. These statutes made no reference to LPP. Nor did they cover surveillance by the police. This was carried out, in accordance with Home Office Guidelines on a very substantial scale. In 1995 there were approximately 2,100 authorisations by chief

officers of intrusive surveillance operations in the United Kingdom carried on by the police and the customs service (Hansard (HC debates), 21 January 1997, written answer, col 512).

17. In contrast to material obtained by interception, the fruits of covert surveillance were admissible in evidence. Mr Sultan Khan unsuccessfully challenged, up to the House of Lords, the admission of such evidence in circumstances where a listening device had been placed in his home by trespass, and then took his case to Strasbourg: *Khan -v- United Kingdom* [2000] 31 EHRR 1016. The court held that the admission of the evidence had not violated Mr Khan's right to a fair trial under article 6 of the Convention. There had, however, been infringement of his rights under article 8 in that the requirements of article 8(2) had not been satisfied. There had at the material time been no statutory regulation of the use of listening devices."

49. In paragraph 19 he said this:

> "It is inevitable that the interception of communications or covert surveillance will from time to time disclose to the authorities conducting it the content of communications between lawyer and client. I do not consider that at the time that the 1997 Act was enacted it was considered that such an occurrence constituted an infringement of the common law right to LPP. Because no attempt had ever been made to adduce such communications in evidence the issue had not, so far as I am aware, arisen for judicial determination. What was quite clear by the time of RIPA was that this was an area that required statutory regulation."

50. He then considered the Code in question in that case in paragraph 61 of the judgment as follows:

> "Section 27(1) is expressed in clear and simple language, and it must be taken to mean what it says. It does not refer to legal professional privilege or to any other kind of right or privilege or special relationship which would otherwise be infringed by the conduct that it refers to. But the generality of the phrase 'for all purposes' is unqualified. The whole point of the system of authorisation that the statute lays down is to interfere with the fundamental rights and to render this invasion of a person's private life lawful. To achieve this result it must be able to meet any objections that may be caused on the ground of privilege. I would hold therefore that, provided the conditions in section 27(1) which render it lawful for all purposes are satisfied, intrusive surveillance of a detainee's consultation with his solicitor cannot be said to be unlawful because it interferes with common law legal privilege. It seems to me that the phrase 'for all purposes' which section 27(1) uses is a clear indication that this was Parliament's intention."

51. Lady Hale in paragraph 70 said this:

> "Other kinds of covert surveillance, including bugging police stations with police consent, did not involve any infringement of private rights under domestic law and remained unregulated until RIPA was passed in 2000. But the Human Rights Act had been passed in 1998, turning the rights protected under the European Convention into rights protected in UK domestic law. It was due to come into force in October 2000. Legislation was clearly required

> to authorise and regulated all forms of official 'snooping' which might otherwise fall foul of the Convention rights, in particular the right to respect for private life and correspondence which is protected by article 8. I accept the submission of Mr Fordham QC, for the Secretaries of State, that Part II of RIPA has to be seen alongside Part III of the 1997 Act. The scheme is intended to be comprehensive. Both Acts contemplate that privileged or confidential information may be obtained as a result. Both must be taken to qualify, though not to override, the statutory rights of private consultation with a lawyer. Section 27(1) is intended to mean that the covert surveillance which is authorised under the scheme is 'in accordance with the law' for the purpose of the Convention principle of legality. What may be done with the information thus obtained is a separate question."

52. In paragraph 74, Lady Hale went on to emphasise the distinction between the obtaining, and the use of such material in proceedings. In his opinion, particularly in paragraphs 111, 112 and 118, Lord Neuberger made similar comments.

53. In our view, the expressions of opinion in the House of Lords in *McE* mean that the wide claims made for the common law on behalf of this appellant by Mr Southey QC cannot be right. It was his suggestion that the common law conferred protection to a high degree preventing the obtaining of, or use for non-litigation purposes, of information as an incursion upon LPP. It seems to us there is a very strong tension between those submissions and the expressions of view in *McE*. We, therefore, reject that rather high claim advanced on behalf of the appellant.

54. Clearly, the House of Lords emphasised the need for proper regulation of information obtained as an incursion upon LPP, founded upon Convention rights, and in *McE* they criticised the Code then existing as being insufficient. Detailed criticisms may still be made of the relevant Codes and may properly be advanced in proceedings before the IPT. It is difficult, though, for SIAC to engage in shadow or collateral litigation of that kind. A direct challenge to the exercise by the intelligence services of their functions of this kind is properly, in our view, within the purview of the IPT. A direct challenge to the Codes as being an inadequate safeguard would, it appears to us, fall directly within that remit. Such an attack would almost always require the relevant agencies to be parties. Even if they were not made parties, the burden of the challenge would be to the "conduct by or on behalf of any of the intelligence services", within RIPA S65(5) and S65(6). Such an attack mounted before SIAC would seem to us to be an incursion upon the reserved jurisdiction of the IPT.

55. The appellant has cited one or two further cases which we mention very briefly. Firstly, *Campbell -v- UK* [1992] 15 EHHR 137. That was a case concerning a breach of legal professional privilege in the context of a prisoner. It was cited in argument in *McE*, but not referred to in any opinion in the House of Lords. We consider, with respect to Mr Southey, that it adds nothing to this debate.

56. The appellant also cited the case of *Golovan -v- Ukraine,* Case 41716/06, in which judgment of the European Court of Human Rights was given on 5th October 2012. That case postdates *McE*. It involved violations by the Ukrainian authorities of lawyer/client privilege. In the course of the judgment, the court emphasised the

importance of legal professional privilege and the need for safeguards. The context of the case was again very different from the context of this case before SIAC. Again, we are not convinced that *Golovan* alters the position in relation to English law, or bears directly on the safeguards represented by the statutory regulatory regimes and the Codes of Practice.

57. We have considered this morning very brief further written submissions from Mr Southey, wherein he points out that the Regulations provided late yesterday by the Secretary of State relate to the Surveillance Code rather than on the Intercept Code. That is correct, but, for reasons which we have already explained, the regulatory underpinning of the Codes is identical. The Regulations are laid before Parliament in each case. This is a distinction without a difference.

58. Mr Southey also submits that the Code considered in *McE* was amended as a consequence, but that the Intercept Code was not amended. We accept for present purposes that that may be so. However, for the reasons that we have just given, those points do not take the matter farther.

59. Where does that leave us? Firstly, that there may be material obtained and used by the Security Service or other agencies which represents an incursion on LPP is simply not new. Secondly, we fully accept the importance of legal professional privilege for the reasons we have indicated. Nevertheless we accept that it is of particular importance in SIAC, given the nature of this jurisdiction. We accept that the safeguards must be rigorous.

60. Nevertheless, we consider that proceedings which represent a direct challenge to the procedures and safeguards, including the successive policies now revealed within the Security Service, are for the IPT, not for us.

61. However, that does not preclude an application in SIAC for an abuse of process, where such application is founded in the specific facts revealed to SIAC. SIAC must have the power to protect itself from abuse. If, on the facts, it could be shown in a given case that information was obtained in breach of the safeguards, obtained deliberately in an unlawful manner, then that might well be a relevant matter for SIAC in an abuse of process application. But, provided that the material is not sought to be relied on, the only form of abuse which would be relevant would be what is described as *Bennett/Mullen* abuse after the well known cases of *R(Bennett) v Horseferry Road Magistrates* [1994] 1AC A2 and *R v Mullen* [1999] 2 CAR 143. Where material is not relied on, and cannot therefore affect the outcome on the evidence which is relied on, it would only be when misconduct by the authorities was so bad or so blatant that *Bennett/Mullen* abuse arose, that SIAC could consider evidence bearing on the obtaining of information not sought to be deployed.

62. SIAC's principal concern must be to ensure that its own process is protected from the use of material obtained by an incursion on LPP. We accept there exists a hypothetical risk that material gained in breach of LPP might be used to gain a tactical advantage, although not introduced into evidence. As it was put by Mr Southey, it might be an expression of concern about the strength of this or that part of an appellant's position, which he says might stimulate those who represent the Secretary of State to mount an argument or to raise a point. We have considered that with some care but we find it a

tenuous proposition. If it was demonstrated, then, of course, it might be the basis for an appropriate application. But in order for it to arise, in practice, the intercepted material would need to be brought before the lawyers with conduct of the action. If intercept material was brought directly to the attention of the lawyers with conduct, then, of course, all sorts of other difficulties would arise. It is precisely to avoid that risk that the policies that we have seen appear to have been drafted. The alternative is that tactical suggestions based on the LPP material might cross the barrier to those with conduct. That is a theoretical risk, but no more.

63. We return to the communication made in this case from closed proceedings into open to which we have referred. As that makes clear, on the basis of considering the closed material, it appears to SIAC that there is no documentation in this case falling within categories 1 or 3. We intend to consider the issue of category 4 in that note in closed and we may consider category 5 in closed if that appears to be relevant. We see no basis at the moment on which any lawyer with conduct of the case for the Secretary of State could properly be said to be tainted or compromised. We see no basis in this case for *Bennett/Mullen* type of abuse of process.

64. There is one other matter which we will pursue in closed although we can say no more about it, save that it derives from paragraph 29 of the 2014 policy.

65. We do not see the basis, for those reasons, for any successful application for abuse of process in this case, on the information before us at this stage. In contrast with the lawyers in *Belhadj*, the lawyers with conduct in this appeal are not employed by the relevant agency or agencies. There is no basis for a claim that they have seen material obtained by incursion upon LPP. We do not see the foundation for requiring the undertakings sought. The case will proceed.