Neutral Citation Number: [2021] EWHC 27 (Admin)

Case No: CO/2368/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/01/2021

Before :

LORD JUSTICE BEAN
&
MRS JUSTICE FARBEY

- -

Between :

PRIVACY INTERNATIONAL	**Claimant**
- and -	
INVESTIGATORY POWERS TRIBUNAL	**Defendant**
- and -	
SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS	
- and -	**Interested**
GOVERNMENT COMMUNICATION HEADQUARTERS	**Parties**

Ben Jaffey QC and **Tom Cleaver** (instructed by **Bhatt Murphy**) for the **Claimant**
The Defendant Tribunal did not appear and was not represented.
Sir James Eadie QC and **Richard O'Brien** (instructed by **Government Legal Department**) for the **Interested Parties**

Hearing dates: 8-9 December 2020

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Approved Judgment

Lord Justice Bean and Mrs Justice Farbey:

1. This is the judgment of the court to which we have both contributed.

2. The Claimant applies for judicial review of the judgment of the Investigatory Powers Tribunal ("the Tribunal") dated 12 February 2016. It invites the court to quash the judgment and to grant relief in the form of a declaration as to the scope of section 5 of the Intelligence Services Act 1994 ("the 1994 Act"). The question raised in the claim relates particularly to computer network exploitation ("CNE"), colloquially known as computer hacking. The question posed in the Statement of Facts and Grounds is: "Does section 5 of [the 1994 Act] permit the issue of a 'thematic' computer hacking warrant authorising acts in respect of an entire class of people or an entire class of such acts?"

3. We heard submissions from Mr Ben Jaffey QC (with Mr Tom Cleaver) on behalf of the Claimant and Sir James Eadie QC (with Mr Richard O'Brien) on behalf of the Interested Parties. We repeat the thanks that we gave at the hearing for their excellent oral and written advocacy.

4. The three UK intelligence agencies ("the Agencies") are the Security Service, generally known as MI5; the Secret Intelligence Service, generally known as MI6; and Government Communication Headquarters ("GCHQ"). Before 1989, the functions and indeed the existence of the Agencies were not officially acknowledged: this was a somewhat artificial state of affairs since, for example, in the mid-1980s GCHQ featured twice in litigation which reached the House of Lords (*Waite v Government Communication Headquarters* [1983] 2 AC 714; *Council of Civil Service Unions v Minister of the Civil Service* [1985] AC 374). The activities of the Agencies were not the subject of statutory regulation.

5. By section 1(1) of the Security Service Act 1989, Parliament acknowledged the existence of the Security Service. At the same time, its functions were placed on a statutory footing as being the protection of national security, the safeguarding of the economic well-being of the United Kingdom, and the support of law enforcement agencies in the prevention and detection of serious crime (section 1(3)).

6. The Secret Intelligence Service was acknowledged by the 1994 Act. Its function was established as obtaining and providing information relating to the actions or intentions of persons abroad for national security and other reasons (section 1). GCHQ was acknowledged by section 3(1). Its function is, so far as relevant to the present case, to monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions. This function is exercisable only in the interests of national security, the economic well-being of the United Kingdom, and the support of the prevention or detection of serious crime (section 3(2)).

7. CNE is a set of techniques through which an individual or organisation gains covert and remote access to equipment (including both networked and mobile computer devices) typically with a view to obtaining information from it. CNE can be a critical tool in investigations into the full range of threats to the United Kingdom such as terrorism, serious and organised crime, and other national security threats. As the Tribunal observed at para 3 of their judgment: "[t]he particular significance of the use of CNE is that it addresses difficulties for the Intelligence Agencies caused by the

ever increasing use of encryption by those whom the Agencies would wish to target for interception." Its value to the protection of those who live in the United Kingdom from individuals engaged in (among other things) terrorist attacks, espionage and serious organised crime is beyond dispute.

8. In July 2014, the Claimant, along with others, issued proceedings in the Tribunal against the Interested Parties. The Claimant challenged various aspects of the arrangements under which the Agencies were believed to make use of CNE including the use of thematic warrants. A preliminary hearing took place on points of law on 1-3 December 2015. At that open hearing, the extent and scope of the use of thematic warrants in practice was not considered. It was however common ground that GCHQ had obtained warrants in respect of CNE under section 5 of the 1994 Act.

9. The Tribunal were asked to rule on ten issues of law. It will help to give an overview of the hearing before them to set out their conclusions:-

> "Issue 1: An act (CNE) which would be an offence under s.3 of the CMA is made lawful by a s.5 warrant or s. 7 authorisation, and the amendment of s. l0 CMA was simply confirmatory of that fact.
>
> Issue 2: An act abroad pursuant to ss.5 or 7 of the ISA which would otherwise be an offence under ss.1 and/or 3 of the CMA would not be unlawful.
>
> Issue 3: The power under s.5 of ISA to authorise interference with property encompasses intangible property.
>
> Issue 4: A s.5 warrant is lawful if it is as specific as possible in relation to the property to be covered by the warrant, both to enable the Secretary of State to be satisfied as to legality, necessity and proportionality and to assist those executing the warrant, so that the property to be covered is objectively ascertainable, and it need not be defined by reference to named or identified individuals.
>
> Issue 5: There might be circumstances in which an individual claimant might be able to claim a breach of Article 8/10 rights as a result of a s.7 authorisation, but that does not lead to a conclusion that the s.7 regime is non-compliant with Articles 8 or 10.
>
> Issue 6: A s.5 warrant which accords with the criteria of specification referred to in Issue 4 complies with the safeguards referred to in [the decision of the European Court of Human Rights in] **Weber** (1) to (3), and consequently with Articles 8 and 10 in that regard.
>
> Issue 7: If information were obtained in bulk through the use of CNE, there might be circumstances in which an individual

> complainant might be able to mount a claim, but in principle CNE is lawful.
>
> Issue 8: The s.5 regime since February 2015 is compliant with Articles 8/10.
>
> Issue 9: The s.5 regime prior to February 2015 was compliant with Articles 8/10.
>
> Issue 10: So far as concerns the adequacy of dealing with LPP, the CNE regime has been compliant with the Convention since February 2015."

10. The Claimant applied for judicial review of the Tribunal's conclusions on Issue 4. The Interested Parties raised the question of whether section 67(8) of the Regulation of Investigatory Powers Act 2000 ("RIPA"), the statute which created the Tribunal, ousted the supervisory jurisdiction of the High Court to quash a judgment of the Tribunal for error of law. On 17 June 2016 Lang J granted permission for judicial review but directed that jurisdiction should be tried as a preliminary issue. The Divisional Court and Court of Appeal held that there was no jurisdiction but on 15 May 2019 the Supreme Court, by a majority of 4-3, allowed the Claimant's appeal and held that this court does indeed have jurisdiction ([2020] AC 491; [2019] UKSC 22).

11. In October 2019 an application was made to amend the claim to seek judicial review of the Tribunal's conclusion on Issue 9, namely whether the use of CNE by GCHQ prior to publication of the draft Equipment Interference Code in February 2015 had been in contravention of Article 8 and/or Article 10 of the European Convention on Human Rights ("the Convention"). On 8 January 2020 Steyn J approved a consent order under which the question of whether leave to amend should be granted would be dealt with on a rolled-up basis together with the existing judicial review claim for which permission had been given in 2016.

The relevant statutes

12. Section 5(2) of the 1994 Act is the crucial provision in this case. As originally enacted in 1994, it provided that the Secretary of State could issue a warrant:-

> "authorising the taking ... of such action as is specified in the warrant in respect of any property so specified or in respect of wireless telegraphy so specified if the Secretary of State:
>
> (a) thinks it necessary for the action to be taken on the ground that it is likely to be of substantial value in assisting ...
>
> (iii) GCHQ……
>
> in carrying out any function which falls within Section 3(l)(a) and
>
> (b) is satisfied that what the action seeks to achieve cannot reasonably be achieved by other means and

> (c) is satisfied that satisfactory arrangements are in force under . . . section 4(2)(a) above with respect to the disclosure of information obtained ... and that any information obtained under the warrant will be subject to those arrangements".

13. From 25 September 2000, section 5(2)(b) was amended to substitute a requirement that the Secretary of State must be satisfied that the taking of the action is proportionate to what it seeks to achieve: this change was made by RIPA, which came into effect on 2 October 2000, the same day as the Human Rights Act.

14. We set out the relevant provisions of sections 5, 6 and 7 of the Intelligence Services Act 1994 as they were in force at the date of the Tribunal's judgment on 12 February 2016 (there have been some amendments since that time, but they are not material to the issues before us), omitting provisions relating to Scotland:- [emphasis added]

> **5 Warrants: general**
>
> (1) No entry on or interference with property or with wireless telegraphy shall be unlawful if it is authorised by a warrant issued by the Secretary of State under this section.
>
> (2) The Secretary of State may, on an application made by . . . GCHQ, issue a warrant under this section authorising the taking, subject to subsection (3) below, of *such action as is specified in the warrant in respect of any property so specified* or in respect of wireless telegraphy so specified if the Secretary of State –
>
> (a) thinks it necessary for the action to be taken for the purpose of assisting
>
> ...
>
> (iii) GCHQ in carrying out any function which falls within section 3(J)(a) above; and
>
> (b) is satisfied that the taking of the action is proportionate to what the action seeks to achieve;
>
> (c) is satisfied that satisfactory arrangements are in force under section 2(2)(a) of the [Security Service Act 1989 ("the 1989 Act")] (duties of the Director-General of the Security Service), section 2(2)(a) above or section 4(2)(a) above with respect to the disclosure of information obtained by virtue of this section and that any information obtained under the warrant will be subject to those arrangements.
>
> (2A) The matters to be taken into account in considering whether the requirements of subsection (2)(a) and (b) are satisfied in the case of any warrant shall include whether what

it is thought necessary to achieve by the conduct authorised by the warrant could reasonably be achieved by other means.

(3) A warrant issued on the application of the Intelligence Service or GCHQ for the purposes of the exercise of their functions by virtue of section . . . 3(2)(c) above may not relate to property in the British Islands.

(3A) A warrant issued on the application of the Security Service for the purposes of the exercise of their function under section 1 (4) of the Security Service Act 1989 may not relate to property in the British Islands unless it authorises the taking of action in relation to conduct within subsection (3B) below.

(3B) Conduct is within this subsection if it constitutes (or, if it took place in the United Kingdom, would constitute) one or more offences, and either –

(a) it involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose; or

(b) the offence or one of the offences is an offence for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more.

(4) Subject to subsection (5) below, the Security Service may make an application under subsection (2) above for a warrant to be issued authorising that Service (or a person acting on its behalf) to take such action as is specified in the warrant on behalf of the Intelligence Service or GCHQ and, where such a warrant is issued, the functions of the Security Service shall include the carrying out of the action so specified, whether or not it would otherwise be within its functions.

(5) The Security Service may not make an application for a warrant by virtue of subsection (4) above except where the action proposed to be authorised by the warrant-

(a) is action in respect of which the Intelligence Service or, as the case may be, GCHQ could make such an application; and

(b) is to be taken otherwise than in support of the prevention or detection of serious crime.

6 Warrants: procedure and duration, etc.

(1) A warrant shall not be issued except-

(a) under the hand of the Secretary of State or…….

(b) in an urgent case where the Secretary of State has expressly authorised its issue and a statement of that fact is endorsed on it, under the hand of a senior official; or…….

(d) in an urgent case where the Secretary of State has expressly authorised the issue of warrants in accordance with this paragraph by specified senior officials and a statement of that fact is endorsed on the warrant, under the hand of the specified officials.

(1A) But a warrant issued in accordance with subsection (1)(d) may authorise the taking of an action only if the action is an action in relation to property which, immediately before the issue of the warrant, would, if done outside the British Islands, have been authorised by virtue of an authorisation under section 7 that was in force at that time.

(1B) A senior official who issues a warrant in accordance with subsection (l)(d) must inform the Secretary of State about the issue of the warrant as soon as practicable after issuing it.

(2) A warrant shall, unless renewed under subsection (3) below, cease to have effect-

(a) if the warrant was under the hand of the Secretary of State, ……..at the end of the period of six months beginning with the day on which it was issued; and

(b) in any other case, at the end of the period ending with the second working day following that day.

(3) If at any time before the day on which a warrant would cease to have effect the Secretary of State considers it necessary for the warrant to continue to have effect for the purpose for which it was issued, he may by an instrument under his hand renew it for a period of six months beginning with that day.

(4) The Secretary of State shall cancel a warrant if he is satisfied that the action authorised by it is no longer necessary.

(5) In the preceding provisions of this section "warrant" means a warrant under section 5 above.

7. Authorisation of acts outside the British Islands

(1) If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be

done by virtue of an authorisation given by the Secretary of State under this section.

(2) In subsection (1) above "liable in the United Kingdom" means liable under the criminal or civil law of any part of the United Kingdom.

(3) The Secretary of State shall not give an authorisation under this section unless he is satisfied –

(a) that any acts which may be done in reliance on the authorisation or, as the case may be, the operation in the course of which the acts may be done will be necessary for the proper discharge of a function of the Intelligence Service or GCHQ; and

(b) that there are satisfactory arrangements in force to secure-

(i) that nothing will be done in reliance on the authorisation beyond what is necessary for the proper discharge of a function of the Intelligence Service or GCHQ; and

(ii) that, in so far as any acts may be done in reliance on the authorisation, their nature and likely consequences will be reasonable, having regard to the purposes for which they are carried out; and

(c) that there are satisfactory arrangements in force under section 2(2)(a) or 4(2)(a) above with respect to the disclosure of information obtained by virtue of this section and that any information obtained by virtue of anything done in reliance on the authorisation will be subject to those arrangements.

(4) Without prejudice to the generality of the power of the Secretary of State to give an authorisation under this section, such an authorisation-

(a) *may relate to a particular act or acts, to acts of a description specified in the authorisation or to acts undertaken in the course of an operation so specified*;

(b) *may be limited to a particular person or persons of a description so specified*; and

(c) may be subject to conditions so specified.

(5) An authorisation shall not be given under this section except-

(a) under the hand of the Secretary of State; or

(b) in an urgent case where the Secretary of State has expressly authorised it to be given and a statement of that fact is endorsed on it, under the hand of a senior official.

(6) An authorisation shall, unless renewed under subsection (7) below, cease to have effect-

(a) if the authorisation was given under the hand of the Secretary of State, at the end of the period of six months beginning with the day on which it was given;

(b) in any other case, at the end of the period ending with the second working day following the day on which it was given.

(7) If at any time before the day on which an authorisation would cease to have effect the Secretary of State considers it necessary for the authorisation to continue to have effect for the purpose for which it was given, he may by an instrument under his hand renew it for a period of six months beginning with that day.

(8) The Secretary of State shall cancel an authorisation if he is satisfied that any act authorised by it is no longer necessary.

(9) For the purposes of this section the reference in subsection (1) to an act done outside the British Islands includes a reference to any act which-

(a) is done in the British Islands; but

(b) is or is intended to be done in relation to apparatus that is believed to be outside the British Islands, or in relation to anything appearing to originate from such apparatus;

and in this subsection "apparatus" has the same meaning as in [RIPA].

(10) Where-

(a) a person is authorised by virtue of this section to do an act outside the British Islands in relation to property,

(b) the act is one which, in relation to property within the British Islands, is capable of being authorised by a warrant under section 5,

(c) a person authorised by virtue of this section to do that act outside the British Islands, does the act in relation to that property while it is within the British Islands, and

> (d) the act is done in circumstances falling within subsection (11) or (12),
>
> this section shall have effect as if the act were done outside the British Islands in relation to that property.
>
> (11) An act is done in circumstances falling within this subsection if it is done in relation to the property at a time when it is believed to be outside the British Islands.
>
> (12) An act is done in circumstances falling within this subsection if it-
>
> (a) is done in relation to property which was mistakenly believed to be outside the British Islands either when the authorisation under this section was given or at a subsequent time or which has been brought within the British Islands since the giving of the authorisation; but
>
> (b) is done before the end of the fifth working day after the day on which the presence of the property in the British Islands first becomes known.
>
> (13) In subsection (12) the reference to the day on which the presence of the property in the British Islands first becomes known is a reference to the day on which it first appears to a member of the Intelligence Service or of GCHQ, after the relevant time-
>
> (a) that the belief that the property was outside the British Islands was mistaken; or
>
> (b) that the property is within those Islands.
>
> (14) In subsection (13) 'the relevant time' means, as the case may be –
>
> (a) the time of the mistaken belief mentioned in subsection (12)(a); or
>
> (b) the time at which the property was, or was most recently, brought within the British Islands.

Sir Mark Waller's report

15. Prior to the coming into force of the provisions of the Investigatory Powers Act 2016 establishing the office of the Investigatory Powers Commissioner, there was an Intelligence Services Commissioner appointed pursuant to RIPA. In 2014 and 2015 the holder of this office was the Rt Hon Sir Mark Waller, a former Lord Justice of Appeal. In his report for the year 2014 laid before Parliament and published on 25 June 2015, he said:-

"**Thematic Property Warrants**

I have expressed concerns about the use of what might be termed "thematic" property warrants issued under section 5 of ISA. ISA section 7 makes specific reference to thematic authorisations (what are called class authorisation) because it refers "to a particular act" or to "acts" undertaken in the course of an operation. However, section 5 is narrower, referring to "property so specified".

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

- section 5 does not expressly allow for a class of authorisation; and

- the words "property so specified" might be narrowly construed, requiring the Secretary of State to consider a particular operation against a particular piece of property as opposed to property more generally described by reference for example to a described set of individuals.

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

I accept the agencies' interpretation is very arguable. I also see in practical terms the national security requirement.

The critical thing however is that the submission and the warrant must be set out in a way which allows the Secretary of State to make the decision on necessity and proportionality.

Thus, I have made it clear:

- A Secretary of State can only sign the warrant if they are able property to assess whether it is necessary and proportionate to authorise the activity.

- The necessity and proportionality consideration must not be delegated

- Property warrants under the present legislation should be as narrow as possible; and

- Exceptional circumstances where time constraints would put national security at risk will be more likely to justify "thematic" warrants.

This has led to one of the agencies withdrawing a thematic property warrant in order to better define the specified property. We remain in discussion to find a way to do so but I am anxious to ensure that they are not missing intelligence opportunities which might endanger national security.

I made five recommendations at each of the intelligence agencies and warrantry units in relation to what might be termed thematic property warrants.

(1) for any warrants which might be considered to be thematic to be highlighted in the list provided for my selection;

(2) the terms of a warrant and the submission must always be such as to enable the Secretary of State to assess the necessity and proportionality;

(3) the assessment to proportionality and necessity should not be delegated;

(4) property warrants should be as narrow as possible but circumstances where time constraints and national security dictate may allow a more broadly drawn "thematic" warrant; and

(5) as the agencies and the Secretary of State have made clear to me is the case, thematic or broadly drawn warrants should not be asked for simply for administrative convenience."

The Investigatory Powers Act 2016

16. The Investigatory Powers Act 2016 creates a new regime for the authorisation of warrants for certain purposes. Sections 99, 101 and 102 provide for "targeted equipment interference warrants". Section 99(2) defines a targeted equipment interference warrant as one which authorises or requires the addressee to secure interference with any equipment for the purpose of obtaining communications, equipment data or any other information. Section 101(1) provides:-

> "(1) A targeted equipment interference warrant may relate to any one or more of the following matters—
>
> (a) equipment belonging to, used by or in the possession of a particular person or organisation;
>
> (b) equipment belonging to, used by or in the possession of a group of persons who share a common purpose or who carry on, or may carry on, a particular activity;
>
> (c) equipment belonging to, used by or in the possession of more than one person or organisation, where the interference is for the purpose of a single investigation or operation;
>
> (d) equipment in a particular location;
>
> (e) equipment in more than one location, where the interference is for the purpose of a single investigation or operation;
>
> (f) equipment which is being, or may be, used for the purposes of a particular activity or activities of a particular description;
>
> (g) equipment which is being, or may be, used to test, maintain or develop capabilities relating to interference with equipment for the purpose of obtaining communications, equipment data or other information;
>
> (h) equipment which is being, or may be, used for the training of persons who carry out, or are likely to carry out, such interference with equipment."

17. Notwithstanding the coming into force of these powers in the 2016 Act, Issue 4 decided by the Tribunal in 2016, unlike Issue 9, is not of merely historical significance. Section 5 of the 1994 Act remains the governing regime in respect of:-

    a) covert entry and search of premises or goods

    b) interference with goods

    c) interference with intellectual property rights; and

    d) computer hacking where the aim is not to acquire data, but to destroy or otherwise manipulate the functioning of electronic systems.

The Tribunal's judgment on issue 4

18. After referring to the submissions of Mr Jaffey QC for the Claimants, including his reliance on 18th century authorities on general warrants to which we shall come later, and to those of Mr Eadie QC (as he then was) for the Respondents, the Tribunal said:-

"37. Eighteenth century abhorrence of general warrants issued without express statutory sanction is not in our judgment a useful or permissible aid to construction of an express statutory power given to a Service, one of whose principal functions is to further the interests of UK national security, with particular reference to defence and foreign policy. The words should be given their natural meaning in the context in which they are set.

38. The issue as to whether the specification is sufficient in any particular case will be dependent on the particular facts of that case. The courts frequently have to determine such questions for example in respect of a warrant under the Police Act 1997 s.93, when the issues, by reference to the particular facts would be fully aired in open. That is not possible in relation to a s.5 warrant, but it may still be subject to scrutiny by the Intelligence Services Commissioner, by the ISC and, if and when a complaint is made to this Tribunal, then by this Tribunal. But the test is not in our judgment different -Are the actions and the property sufficiently identified? The Home Secretary's own words as recorded in paragraph 42 of the ISC Report, set out in paragraph 32 above, relating to a s.8(1) warrant, are applicable here also. It is not in our judgment necessary for a Secretary of State to exercise judgment in relation to a warrant for it to be limited to a named or identified individual or list of individuals. The property should be so defined, whether by reference to persons or a group or category of persons, that the extent of the reasonably foreseeable interference caused by the authorisation of CNE in relation to the actions and property specified in the warrant can be addressed.

39. As discussed in the course of argument, the word under consideration is simply specified, and this may be contrasted with other statutes such as those relating to letters of request, where the requirement of the Evidence (Proceedings in Other Jurisdictions) Act 1975 is for "particular documents specified". There is no requirement here for specification of particular property, but simply for specification of the property, which in our judgment is a word not of limitation but of description, and the issue becomes one simply of sufficiency of identification.

40. The statute does not fall to be interpreted by reference to the underlying Code, in particular one which, like the E I Code, has been in draft waiting to be approved by Parliament. But what is of course important is what is put in the applications to the Secretary of State, so that he can exercise his discretion lawfully and reasonably. Both in the Property Code, in place since 2002, (at paragraphs 7.18-7.19) and now in the EI Code (at paragraph 4.6), there is a lengthy list of what is required to be included in an application to the Secretary of State for the

issue or renewal of a s.5 warrant. Apart from a description of the proposed interference and the measures to be taken to minimise intrusion, at the head of the list in both Codes is a requirement to specify "the identity or identities, where known, of those who possess [or use] the [equipment] that is to be subject to the interference" and "sufficient information to identify the [equipment] which will be affected by the interference" (the square bracketed parts are the changes from the Property Code to the draft EI Code).

41. We are entirely satisfied that Mr Jaffey's submissions have confused the property to be specified with the person or persons whose ownership or use of the equipment may assist in its identification. We do not accept his submission (Day 2/12) that the Secretary of State has to consider, by reference to each individual person who might use or own such equipment, whether CNE would be justified in each individual case. Questions of necessity and proportionality to be applied by the Secretary of State must relate to the foreseeable effect of the grant of such a warrant, and one of the matters to be considered is the effect and extent of the warrant in the light of the specification of the property in that warrant.

42. As originally enacted, s.5(2) authorised the Secretary of State to issue a warrant "authorising the taking ... of such action as is specified in the warrant in respect of any property so specified or in respect of wireless telegraphy so specified if the Secretary of State: (a) thinks it necessary for the action to be taken on the ground that <u>it is likely to be of substantial value in assisting</u> ... [our underlining] (iii) GCHQ in carrying out any function which falls within Section 3(l)(a) and (b) is satisfied that what the action seeks to achieve cannot reasonably be achieved by other means and (c) is satisfied that satisfactory arrangements are in force under . . . Section 4(2)(a)above with respect to the disclosure of information obtained ... and that any information obtained under the warrant will be subject to those arrangements".

43. "Specified" must mean the same in relation to each action, property and wireless telegraphy. "Wireless telegraphy" as defined by s.1l(e) of ISA meant "the emitting or receiving over paths which are not provided by any material substance constructed or arranged for that purpose, of electro magnetic energy or frequency not exceeding 3 million megacycles per second ... ". (s.19(1) Wireless Telegraphy Act 1949).

44. Given the width of meaning contained in the words "action" and "wireless telegraphy" and, at least potentially, in the word "property", specified cannot have meant anything more restrictive than 'adequately described'. The key purpose of specifying is to permit a person executing the warrant to know

> when it is executed that the action which he is to take and the property or wireless telegraphy with which he is to interfere is within the scope of the warrant.
>
> 45. It therefore follows that a warrant issued under s.5 as originally enacted was not required: i) to identify one or more individual items of property by reference to their name, location or owner or ii) to identify property in existence at the date on which the warrant was issued. Warrants could therefore, for example, lawfully be issued to permit GCHQ to interfere with computers used by members, wherever located, of a group whose activities could pose a threat to UK national security, or be used to further the policies or activities of a terrorist organisation or grouping, during the life of a warrant, even though the members or individuals so described and/or of the users of the computers were not and could not be identified when the warrant was issued.
>
> 46. The amendment of s.7 in 2001 to add GCHQ cannot alter the meaning of s.5, which has, in all respects relevant to this Issue, remained unchanged.
>
> 47. In our judgment what is required is for the warrant to be as specific as possible in relation to the property to be covered by the warrant, both to enable the Secretary of State to be satisfied as to legality, necessity and proportionality and to assist those executing the warrant, so that the property to be covered is objectively ascertainable."

The Claimants' submissions

19. Mr Jaffey submitted that the Tribunal had misdirected itself in concluding that a section 5 warrant would be lawful provided that it "adequately described" property which was the target of the warrant. In contradistinction to section 7 of the 1994 Act, section 5(2) requires the property to be "specified", not "described." The natural meaning of "specified" connotes the identification of particular, ascertained things rather than a general or collective description of a class of things.

20. Mr Jaffey relied on the principle of legality as elucidated in cases such as *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115. That principle means that the courts will, when interpreting the provisions of a statute, presume that Parliament did not intend to legislate in a manner which overrides fundamental common law rights. The common law has an aversion to general warrants that leave significant matters of judgment and discretion to the person executing the warrant rather than to the person legally or constitutionally responsible for issuing it. In order to prevent the unlawful delegation of discretion from the Secretary of State (who issues warrants) to officials in GCHQ (who execute them), the word "specify" imposes a requirement to be specific about the person or property that will be subject to interference. The principle of legality would otherwise be breached.

21. In view of the importance of the constitutional principle that there can be no interference with property without clear and specific legal authorisation, the words of an enactment must be unambiguous before the court may interpret Parliament as intending to override rights. There are no such unambiguous words in section 5. The national security context makes no difference as otherwise the courts would sanction wide powers to override fundamental rights.

22. Turning to the proposed new ground, Mr Jaffey submitted that the Tribunal had further erred in concluding that the use of the section 5 power to engage in CNE was lawful before the publication of the draft Equipment Interference Code in February 2016. Prior to the Code's publication, almost nothing about the arrangements governing CNE was publicly acknowledged. The Property Code existed but there was nothing to suggest that it was being treated by the Agencies as applicable to CNE. In the absence of published arrangements for the exercise of the section 5 discretion, domestic law was insufficiently clear and precise to bestow the necessary qualities of legality and foreseeability required by Article 8(2) of the Convention (*Association for European Integration and Human Rights v Bulgaria* (6250/00, 28 June 2007, para 75; *Weber & Saravia v Germany* (2008) 46 EHRR SE5, paras 93-95).

23. Mr Jaffey explained the reasons for the delay in raising this ground by reference to the progress of the Claimant's various challenges both in the domestic courts and in the European Court of Human Rights. The lack of clarity, until the Supreme Court's judgment, as to the scope for a domestic remedy had led to some complexity as to the appropriate forum for this particular Article 8 argument to be ventilated. Acknowledging the passage of years since the publication of the Equipment Interference Code and since the Tribunal's judgment, as well as legislative changes, Mr Jaffey submitted that the argument still raised an important point of public interest. There would be no prejudice to the Interested Parties in allowing this ground to be pursued. For these reasons, the court should extend time and exercise its discretion to permit the Claimant to amend its grounds.

The Interested Parties' submissions

24. Sir James Eadie submitted that there was no error of law in the Tribunal's carefully reasoned ruling. The national security context was critical to the proper interpretation of section 5. Directing our attention to various passages in the evidence, he emphasised the extent of the terrorist threat against the United Kingdom and the importance of CNE to GCHQ in combatting that threat. The Government's counter-terrorism operations inevitably function in a world without certainties. When enacting section 5, Parliament would have been aware of, and should be presumed to have legislated consistently with, the operational realities. Any interpretation of section 5 should not require such specificity that its operational effectiveness would be limited and its protective purpose undermined.

25. The Tribunal's interpretation does not lead to over-broad powers. On a natural reading of section 5, the mechanisms for the control of the Agencies' discretion are the requirements of necessity and proportionality, which the Secretary of State is expressly directed to consider in section 5(2). Those fundamental safeguards are the core considerations when issuing a warrant. Provided that the property is described to a sufficient level of particularity so as to enable the Secretary of State to make a

proper assessment of necessity and proportionality, all relevant statutory controls are satisfied.

26. Section 5 permits the Agencies to provide levels of particularity to a greater or lesser extent, depending on their state of knowledge in any given situation. As made clear by section 6 of the 1994 Act, it may be necessary to act very urgently within the confines of the section 5 procedure. In this context, the Tribunal were right to conclude that "specified" cannot have meant anything more restrictive than "adequately described."

27. The touchstone for the lawfulness of the warrant cannot be whether or not the exercise of judgement is involved by those officials executing the warrant: every warrant will need officials to exercise judgement to some lesser or greater degree, in order to ensure that the right person and property are targeted in accordance with the words of the warrant. Nor is it possible to infer the meaning of section 5 from the different words of section 7: each section has a different function and the breadth of powers under section 7 has no counterpart in section 5. The two sections fall to be separately interpreted.

28. The common law cases on general warrants are not relevant to the interpretation of a statutory power. In any event, the Tribunal rightly held that the property covered by a warrant must be "objectively ascertainable" which imposes a restraint that was lacking in the eighteenth century cases, on which the Claimant relied, and which related to truly general warrants.

29. Sir James submitted that the principle of legality is of no assistance in the present case. The principle of legality is an important tool of statutory interpretation but no more than that: the task of the court is always to decide what Parliament intended (*AJA v Commissioner of Police of the Metropolis* [2013] EWCA Civ 1342, [2014] 1 WLR 285, para 28, per Lord Dyson). The principle has no role where Parliament's intention is clear from the ordinary or natural meaning of a statutory provision read in the context of the legislative scheme as a whole (*R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 11, [2006] 2 AC 307, para 15, per Lord Bingham of Cornhill).

30. As to Article 8 of the Convention, Sir James pointed to the considerable delay in bringing this particular aspect of the challenge and to the considerable legislative and other changes that have brought about a different landscape. There was no good reason for the court to hear argument on historic matters. The Tribunal had considered all relevant elements of the Article 8 claim and had reached conclusions that were reasonably open to it. The Claimants had failed to identify a reviewable error of law.

The application to amend to allege breach of Article 8 before February 2015

31. Having considered the oral and written submissions on this topic, we refuse permission to amend. We do so because although the grounds of claim originally lodged raised a number of Article 8 issues, this one was not raised until more than three years later and more than four years after the period of alleged unlawfulness prior to February 2015. The delay has been so substantial that the regime for granting warrants under section 5 of the 1994 Act is no longer in force in respect of CNE for

the purpose of obtaining information, having been materially replaced by provisions of the Investigatory Powers Act 2016 with effect from 31 May 2018. We do not think that the court should give a ruling on a complaint relating to a state of affairs which had ceased to exist more than four years before the complaint was made. We also bear in mind that the Supreme Court held that judicial review should only be granted in respect of decisions of the Tribunal of general significance. Issue 9 is in our view of historical significance only.

Discussion of Issue 4

The relevant principles of statutory interpretation

32. In construing the words of section 5(2), our task is to "ascertain the intention of Parliament as expressed in the words it has chosen" (*R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, para 38, per Lord Millett). The court acts under the "banner of loyalty to the will of Parliament" in that its task is to "give effect to the true meaning of what Parliament has said" (ibid, para 8, per Lord Bingham of Cornhill).

33. What Parliament has said will be derived from the meaning of individual words read in the context of the enactment as a whole. Ascertaining the statutory context does not involve an assessment of evidence relating to the asserted advantages of two competing interpretations. We do not therefore regard GCHQ's written evidence as to the national security benefits of thematic warrants as a legitimate interpretative tool. Nor do we regard the Claimant's evidence, which criticises the use of CNE on privacy grounds, as relevant to our task.

34. Ascertaining the statutory context will instead involve the court in a legal determination of the purpose of the Act. It is the court's duty "to favour an interpretation of legislation which gives effect to its purpose rather than defeating it" (*Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 47, para 155, per Lord Reed and Lord Hodge). If the enactment is ambiguous, the meaning which relates the scope of the Act to the mischief it is intended to cure should be adopted rather than a different or wider meaning which the situation before Parliament did not call for (*Black-Clawson International Ltd v Papierwerke Waldhof Aschaffenburg AG* [1975] AC 571 at 614C-D). In the present case, the Tribunal held that the words of section 5(2) should "be given their natural meaning in the context in which they are set." To the extent that the Tribunal meant that it was legitimate to consider the statutory purpose, we agree.

35. The purpose of the 1994 Act was (among other things) to place the existence and functions of GCHQ on a statutory footing. In doing so, Parliament intended that GCHQ (together with the other Agencies) should continue to protect the United Kingdom's national security and economic well-being, and play its part in the prevention of serious crime. We accept that those vital interests form the context of the statute as a whole.

36. Nevertheless, there is a distinction between (on the one hand) ascertaining the purpose of an enactment and (on the other hand) deploying the statutory context to bestow on the Agencies the widest possible powers that the language may sustain. The

Interested Parties respectively have constitutional responsibility for and expertise in operational matters relating to national security. However, the construction of the provisions of an Act is for the court and for no one else (*Black-Clawson* at 614F per Lord Reid). If the court were to be moved by the view of the Interested Parties on the extent of the powers which they regard as necessary, it would risk departing from what Parliament has said. Far from acting under the banner of loyalty to Parliament, the court would risk frustrating Parliament's intention. Even in the critically important sphere of national security, the court would overstep its function.

37. Nor do we regard the national security context as implying that Parliament was not concerned with the fundamental rights of those whose property may be the subject of CNE. Parliamentary sovereignty means that Parliament may legislate to override fundamental rights. However, Parliament is and must be subject to political constraints: if Parliament decides to enact legislation that is contrary to fundamental rights, it must squarely confront what it is doing and accept the political cost. That Parliament has confronted a breach of rights may be demonstrated not only in the express language of a statute but also by necessary implication. In the absence of either of those mechanisms, the courts will presume that fundamental rights are untouched. This is the well-established principle of legality (*R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115, 130D-F and 131D-G).

38. The next question is whether section 5(2) of the 1994 Act engages fundamental rights. In our view it plainly does, because of the longstanding aversion of the common law to general search warrants.

The aversion of the common law to general warrants

39. The aversion of the common law to general warrants was established by the time of William Blackstone. In his *Commentaries on the Laws of England*, Book IV, he wrote (in the form published by Clarendon Press in 1769 but using modern spelling):

> "A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion."

40. In his *History of the Pleas of the Crown* (1736), Sir Matthew Hale cited earlier authority to the effect that a general warrant to apprehend anyone suspected of a crime was void and would give rise to a false imprisonment (First American Edition, Philadelphia, 1847, Vol 1, p.580).

41. In *Huckle v Money* (1763) 2 Wilson 205, the Secretary of State (Lord Halifax) had granted a warrant that directed four messengers to apprehend "the printers and publishers" of an edition of a paper called the *North Briton* which contained a "seditious libel" against King George III. No person was named in the warrant. One of the King's messengers to whom the warrant was directed – Carrington – suspected that the printer was a man called Leach and directed the defendant to execute the warrant on the plaintiff who was one of Leach's journeymen. The plaintiff was kept

in custody for about six hours. Following a trial, the jury awarded £300 damages (the equivalent in 2021 terms of £60,000). A new trial was sought on the grounds that the damages were excessive. Refusing to order a new trial, Pratt CJCP (the future Lord Camden) described the warrant as a general warrant because no individual was named in it. Such a warrant amounted to the exercise of arbitrary power and was unlawful. The "daring attack" upon the liberty of the subject had justified the grant of exemplary damages.

42. The *North Briton* seditious libel was further considered in *Money v Leach* (1765) 3 Burrow 1742, which concerned an action in trespass brought by Leach against three King's messengers who had broken into his home and imprisoned him for four days. The case report shows that Lord Halifax had issued the warrant "in writing under his hand and seal," authorising the messengers on behalf of the King to make "strict and diligent search for the said authors, printers, and publishers of the aforesaid seditious libel…; and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before [Lord Halifax], to be examined concerning the premises, and to be further dealt with according to law".

43. Lord Mansfield CJKB considered an objection to the warrant on the grounds of the "incertainty of the person, being neither named nor described." He held:

> "It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain discretions to the officer…Hale and all others hold such an uncertain warrant void".

Lord Mansfield was here saying that the officer who executed a warrant could not lawfully exercise a discretion as to who was to be apprehended: a general warrant which did not specify its target was void.

44. Similarly, in *Wilkes v Wood* (1763) Lofft 1, Lord Camden CJCP held that a general warrant enabling the King's messengers to exercise their own discretion in interfering with property was a breach of the right to liberty:

> "The defendants claimed a right, under precedents, to force persons houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."

45. We take from Blackstone, Hale and the general warrant cases that it is a fundamental right of an individual under the common law that he or she should not be apprehended, or have property seized and searched, save by decision of the person legally charged with issuing the warrant. Expressed in modern legal language, a general warrant is one which requires the exercise of judgment or discretion by the

official executing the warrant as to which individuals or which property should be targeted. It follows that a general warrant gives rise to an unlawful delegation of authority by the legally entrusted decision-maker to the executing official. This unlawful delegation breaches a fundamental right.

46. We appreciate that the Secretary of State in the general warrant cases was exercising common law or prerogative powers not authorised by statute, and that two of those cases involved - at least partly - the physical liberty of the subject. Nevertheless, Mr Jaffey was correct to say that the right not to have property searched other than by the authority of the law has always been treated as a fundamental right. The great case of *Entick v Carrington* (1765) 19 State Tr 1029 held that the Secretary of State could not order searches of private property without authority conferred by an Act of Parliament or the common law. In doing so, the court emphasised the connection between property and privacy: a person's papers (containing private information) are their owner's "dearest property" whose secret nature cannot be the subject of intrusion without legal authority.

47. *Entick v Carrington* and the other general warrant cases of the 1760s are not a mere historical footnote, nor, as Sir James put it, of only "marginal relevance". Some of the language used by Lord Camden, comparing general search warrants to the practices of the Spanish Inquisition, seems overblown to modern eyes; and no one today would be awarded exemplary damages at the rate of £10,000 per hour for six hours' wrongful detention. But the fundamental message remains good law. Indeed, the common law's insistence that the Government cannot search private premises without lawful authority has been recently confirmed by a unanimous Supreme Court as having the status of a constitutional principle (*R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, [2020] AC 373, para 40).

48. We have for these reasons concluded that the principle of legality expounded in *Simms* extends to the issuing of general warrants whether in relation to physical liberty or in relation to interference with property. The aversion to general warrants is one of the basic principles on which the law of the United Kingdom is founded. As such, it may not be overridden by statute unless the wording of the statute makes clear that Parliament intended to do so (*AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, para 152, per Lord Reed, citing Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 575). Unambiguous words are required (*Ahmed v Her Majesty's Treasury* [2010] 2 AC 534, para 204).

49. The proper protection of the citizen against terrorist attack is of the greatest importance, and there can be little doubt that technological capabilities operated by the Agencies lie at the very heart of the efforts of the State to safeguard the citizen against terrorist attack. But we do not accept the suggestion in Sir James' argument that for this reason powers conferred on the Secretary of State in statute, such as the power in section 5(2) of the 1994 Act, must be given the widest possible construction. This may not be what Lord Atkin described as an argument "which might have acceptably been addressed to the Court of King's Bench in the time of Charles I", but it is entirely contrary to the authorities we have cited in the last paragraph.

50. Sir James repeatedly emphasised that the "control" on over-broad use of section 5 warrants is the requirement for the Secretary of State to be satisfied of the necessity

and proportionality of the authorisation sought. We note, however, that there was no such requirement in the 1994 Act until the amendments made by RIPA to ensure compliance with the Human Rights Act. The only requirement was for the Secretary of State to "think it necessary for the action to be taken on the ground that it is likely to be of substantial value" in assisting the relevant Agency in carrying out any of its functions and to be satisfied that what the action sought to achieve could not "reasonably be achieved by other means". In any event the value judgment about necessity and proportionality entrusted to the Secretary of State does not in our view assist in consideration of why Parliament used the word "specified" in relation to the contents of the warrant.

51. A recent and striking example of the courts' approach to powers of search in the context of the fight against terrorism is *Secretary of State for the Home Department v GG* [2009] EWCA Civ 786, [2010] QB 585. The question was whether a person subject to a control order under the Prevention of Terrorism Act 2005 could be required to submit to a personal search. Section 1(3) of the Act provided that:

> "The obligations that may be imposed by a control order made against an individual are any obligations that the Secretary of State or (as the case may be) the court considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity."

Section 1(4), beginning with the words "these obligations may *include*, in particular" [emphasis added], went on to set out in 16 subparagraphs what obligations might be imposed, such as:

> "(j) a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access;"
>
> (k) a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened;
>
> (l) a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force;….."

The Court of Appeal held that these provisions did not permit the inclusion in a control order of a requirement that the controlee submit to a personal search. Dyson LJ said at para 44 that "general statutory words will not suffice to permit an invasion of fundamental rights unless it is clear from the whole statutory context that Parliament intended to achieve that result."

Application of these principles to section 5(2) of the 1994 Act

52. On the basis of these principles, even looking at section 5(2) in isolation, we would conclude that Parliament deliberately used the word "specified" rather than "of a specified description" or "described", and that the provision as drafted does not permit the issue of a general warrant. But that becomes even clearer when one reads the 1994 Act as a whole.

The contrast with section 7(4)

53. There is a striking contrast between sections 5(2) and 7(4) of the 1994 Act. The latter, which only applies to acts done outside the British Islands, permits authorisations which "may relate to a particular act or acts, to acts of a description specified in the authorisation or to acts undertaken in the course of an operation so specified", and "may be limited to a particular person or person of a description so specified"; and, for good measure, the opening words of the subsection say that these provisions are "without prejudice to the generality of the power of the Secretary of State to give an authorisation" under section 7. There is no such wording in section 5. If Parliament had wished to use the phrase "property of a description specified in the warrant" in section 5(2) it could have done so. "Specified" and "of a specified description" are not synonyms, and we consider that the use of different words in the two provisions is highly significant.

The contrast with the 2016 Act

54. There is also a contrast between section 5 of the 1994 Act and the regime established by sections 99-102 of the Investigatory Powers Act 2016 for targeted equipment interference warrants for the purpose of obtaining communications, equipment data or any other information. The subject matter to which such warrants may relate is set out in great detail in section 101(1). It includes, for example, "equipment belonging to, used by or in possession of a group of persons who share a common purpose or who carry on, or may carry on, a particular activity (section 101(1)(b)) or "which is being, or may be, used for the purposes of a particular activity or activities of a particular description" (section 101(1)(f)). As with section 7 of the 1994 Act, the contrast between these very broad powers and the use of the word "specified" in section 5 of the 1994 Act is striking. It is also to be noted that, as we have said, section 5 of the 1994 Act is still in force in relation to CNE for the purpose of disrupting or destroying a target's electronic capability, as well as for activities such as interference with vehicles or other tangible property. The fact that Parliament left its wording unaltered while using entirely different wording for creating new powers of equipment interference strongly suggests to us a deliberate decision to maintain a distinction between the breadth of the relevant powers. It may be that, as Sir James submits, a later statute cannot generally be used to interpret an earlier one; but we do not consider that this rule applies where the later statute has partly replaced the earlier provision but partly left it in force.

Conclusions on Issue 4

55. The Tribunal's formulation was that the warrant must be "as specific as possible… so that the property to be covered is objectively ascertainable"; the latter phrase not being derived from the statute but from Sir James' submissions. They said that this requirement was for two reasons: (1) to enable the Secretary of State to make a

decision as to legality, necessity and proportionality and (2) to assist those executing the warrant.

56. With respect, we do not follow the logic of the first of these two reasons. It is the application, not the warrant itself, which the Secretary of State has to consider. Section 5 does not lay down requirements about the application for the warrant, but as to the content of the warrant itself, which is the Secretary of State's document.

57. The real point, as it seems to us, is whether the warrant is on its face sufficiently specific to indicate to individual officers at GCHQ – who for these purposes are the successors to the King's Messengers in the 1760s – whose property, or which property, can be interfered with, rather than leaving it to their discretion. That is what we understand by the words "objectively ascertainable" (though they are not used in the statute).

58. The requirement for warrants (except pursuant to the urgency provisions) to be "under the hand of the Secretary of State" and thus be the product of a decision taken by him or her personally further emphasises that Parliament regarded it as impermissible to delegate to an official the decision as to whose property is to be interfered with.

59. As Mr Jaffey accepted, a warrant under section 5(2) may properly be issued in respect of one or more mobile phones or other devices with listed serial numbers; those used by one or more named individuals; those located or being used at one or more sets of premises, such as 1 and 2 Acacia Avenue; any device used (in his example) by "persons who at today's date are on the FCDO Syrian diplomatic list"; and any device used (again, in his example) by "the blonde haired man, name unknown, seen leaving 1 Acacia Avenue on 1 December 2015".

60. Turning to location, Mr Jaffey was prepared to concede that the whole of Acacia Avenue could be included, but not a large area such as Birmingham. He did not agree that a warrant could properly cover anyone who was not within its scope (for example, by being on the FCO Syrian diplomatic list, or being in residence at 1 Acacia Avenue) on the date of issue of the warrant, but who came within it at some future point during the period for which it was in force.

61. We do not agree with Mr Jaffey that a warrant could never lawfully permit the use of CNE across a broad geographical area (such as a town or city). The boundaries of a geographical area, at least if it is a local authority area (such as the city of Birmingham, or the county of Kent), are capable of being specified in a warrant under section 5(2). Whether the issue of a warrant to allow interference with every mobile phone in Birmingham could ever be justified as being necessary and proportionate is a different question, which does not arise in these proceedings.

62. We do not regard section 5 as limited to factual situations as at the date of the warrant: that is not what the section means. A warrant in respect of "any device used at the Acacia Avenue Internet Café during the period of six months from the date of issue of the warrant" would in our view be sufficiently specific, as would "anyone who appears on the FCDO Ruritanian diplomatic list during the period of six months from the date of the warrant".

63. However, we consider that a warrant which referred to the property of anyone engaged in an activity (for example "the mobile phone of any person conspiring to commit acts of terrorism") would be insufficiently specific to satisfy the requirements of section 5(2). Whether a warrant which refers to the property of anyone suspected of being a member of an organisation, but not named or otherwise identified in the warrant, is sufficiently specific will be a fact-sensitive question, the answer to which will depend on whether a person's membership of the organisation is objectively ascertainable.

64. We would therefore answer the question of law in Issue 4 by declaring that a warrant under section 5 of the 1994 Act will be lawful if it is sufficiently specific for the property concerned to be objectively ascertainable on the face of the warrant, in the sense we have set out in paragraphs 57 to 64 of this judgment.

IN THE HIGH COURT OF JUSTICE **Case No: CO/2368/2016**

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

Lord Justice Bean and Mrs Justice Farbey

8 January 2021

BETWEEN:

PRIVACY INTERNATIONAL

Claimant

– and –

INVESTIGATORY POWERS TRIBUNAL

Defendant

– and –

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

Interested Parties

ORDER

UPON the Claimant's application for judicial review of the decision of the Defendant ("**the Tribunal**") dated 12 February 2016 ("**the Decision**")

AND UPON hearing Ben Jaffey QC and Tom Cleaver for the Claimant and Sir James Eadie QC and Richard O'Brien for the Interested Parties (the Tribunal not appearing by counsel)

IT IS ORDERED THAT:

1. The Tribunal's preliminary ruling on 'Issue 4' (as defined in the Decision) is quashed.

2. It is declared that a warrant issued under section 5 of the Intelligence Services Act 1994 must, in order to be lawful, be sufficiently specific for the property concerned to be objectively ascertainable on the face of the warrant, in the sense set out in paragraphs 57 to 64 of the judgment of the Divisional Court handed down on 8 January 2021 ("**the Judgment**").

3. The Claimant's application for permission to amend the claim to seek judicial review of the Defendant's conclusion on Issue 9 (as defined in the Decision) is dismissed.

4. The Tribunal's determination under section 68(4) of the Regulation of Investigatory Powers Act 2000 is quashed and is remitted to the Tribunal for reconsideration in light of the Judgment.

5. The parties shall file and exchange written submissions as to the costs of the proceedings (except in so far as already ordered by the Supreme Court in its order of 10 June 2019) by 4pm on 11 January 2021.

6. Time for the Claimant or the Interested Parties to make any application to the Divisional Court for permission to appeal to the Court of Appeal be extended from 4pm on 11 January 2021 to 4pm on 1 February 2021.

7. The Claimant and the Interested Parties shall have liberty to apply for any further extension of time to make any application referred to in paragraph 6.

8. Time for any application by the Claimant or the Interested Parties to the Court of Appeal for permission to appeal be extended to 21 days from the date of any decision by the Divisional Court on any application referred to in paragraph 6.