Case No: A2/2013/0639 & 0640

Neutral Citation Number: [2013] EWCA Civ 1342

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION
MR JUSTICE TUGENDHAT
HQ12X00132

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2013

Before:

MASTER OF THE ROLLS
LORD JUSTICE MAURICE KAY
and
LADY JUSTICE SHARP

- -

Between:

A3/2013/0639

AJA **ARB** **THOMAS FOWLER**	**Appellants**
- and -	
COMMISSIONER OF POLICE FOR THE METROPOLIS	**1st Respondent**
- and –	
CHIEF CONSTABLE OF SOUTH WALES POLICE	**2nd Respondent**
- and -	
ASSOCIATION OF CHIEF POLICE OFFICERS	**3rd Respondent**

A3/2013/0640

AKJ **KAW** **SUR**	**Appellants**
- and –	
	1st Respondent
COMMISSIONER OF POLICE FOR THE METROPOLIS	**2nd Respondent**
- and –	
ASSOCIATION OF CHIEF POLICE OFFICERS	

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A3/2013/0639

Heather Williams QC and Alex Gask (instructed by **Tuckers Solicitors**) for the **Appellants**

Monica Carss-Frisk QC and David Pievsky (instructed by **The Metropolitan Police Service Directorate of Legal Services and Association of Chief Police Officers Directorate of Legal Services**) for the **First and Third Respondents**

Jeremy Johnson QC (instructed by **South Wales and Gwent Police Joint Legal Services**) for the **Second Respondent**

A3/2013/0640

Phillippa Kaufmann QC and Charlotte Kilroy (instructed by **Birnberg Pierce & Partners**) for the **Appellants**

Monica Carss-Frisk QC and David Pievsky (instructed by **the Commissioner of Police for the Metropolis Directorate of Legal Services**) for the **Respondents**

Hearing dates: 15 & 16 October 2013

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Judgment

Master of the Rolls: this is the judgment of the court.

1. At the heart of this appeal lies the question of whether the Investigatory Powers Tribunal ("the IPT") created pursuant to section 65 of the Regulation of Investigatory Powers Act 2000 ("RIPA") has jurisdiction to decide claims by the appellants that their rights under the European Convention of Human Rights ("the Convention") have been violated by police officers for whom the respondents are said to be responsible. The claims arise from allegations that officers established and maintained intimate sexual relationships with all the appellants (except Mr Fowler) for the covert purpose of obtaining intelligence. The appellants allege that such conduct was contrary to section 6(1) of the Human Rights Act 1998 ("HRA") in that it was in breach of their rights under articles 3 and 8 of the Convention. Article 3 provides that no-one shall be subject to torture or to inhuman or degrading treatment. Article 8(1) provides that everyone has the right to respect for his private and family life. The appellants also allege that the same conduct was unlawful at common law in that it involved the commission of the torts of deceit, misfeasance in public office, assault and negligence. The appellants further allege that there were breaches of the Data Protection Act 1998.

2. This appeal is not concerned with whether the appellants have good claims for breach of their Convention rights or in tort. The respondents did not, for the purpose of this appeal, contend that any of the claims were unarguable.

3. The first issue that arises is whether the IPT has jurisdiction to determine the claims brought under section 7(1) of the HRA. This turns on whether the establishing or maintaining of an intimate sexual relationship by a covert human intelligence source ("CHIS") was "conduct to which Part II [of RIPA] applies". If it was not conduct to which Part II applies, the claims are not subject to the jurisdiction of the IPT. The judge held that the alleged conduct was conduct to which Part II applies and that the IPT therefore has jurisdiction to decide the human rights claims.

4. The second issue arises from the fact that, for reasons that we shall describe in detail later in this judgment, the judge stayed these proceedings pending the determination of the HRA claims by the IPT. The appellants submit that he was wrong to do so. The respondents submit that this was a case management decision which was not plainly wrong and with which this court should not interfere.

The facts

5. There are two groups of claimants. The first comprising AKW, KAW and SUR are represented by Birnberg Pierce & Partners (referred to as "the Birnberg claimants"). The second comprising AJA, ARB and Thomas Fowler are represented by Tuckers (referred to as "the Tuckers claimants"). The factual allegations relating to the Birnberg claimants can be summarised as follows. They are all committed environmental activists. Mark Kennedy ("MK"), a married police officer with two children, used a false identity

which was provided to him by the first respondent to deceive all three claimants into embarking on intimate sexual relationships with him while he was performing his duties as an undercover officer. These relationships lasted between seven months and, in the case of one claimant, seven years. He knew that none of the claimants would have entered into the relationship and consented to sex with him if they had known his true identity and his true purpose. He encouraged all three claimants to become emotionally dependent on him. He attended intimate family gatherings and went on private holidays with them. He used his sexual relationships with the claimants to enable him to gather intelligence and/or for personal gratification. These relationships were known about or suspected by other police officers including other undercover officers, his day to day handler and his managers in the National Public Order Intelligence Unit.

6. The factual allegations made by the Tuckers claimants can be summarised as follows. They are all members of the Cardiff Anarchists Network ("CAN") which is a body of locally-based individuals who are engaged in direct action and political protest in relation to domestic and international issues. MJ (alleged to be a police officer) first met members of CAN in 2004. He told the claimants that he was a truck driver and that he was separated from his former partner. Between 2005 and 2009, he formed close relationships with all three claimants, including sexual relationships with the first and second claimant. He instigated a sexual relationship with the second claimant when she was in a relationship with the third claimant. During these relationships, MJ purported to be a confidant, empathiser and source of close support to each of them. For example, he attended the funeral of the second claimant's father. He exploited their vulnerabilities and sought to encourage them to rely on him emotionally. None of the claimants would have entered into these relationships with MJ had they been aware of his true identity as a police officer. He used the respondents' resources to conceal his identity and to further the intimate relationships that he had initiated.

RIPA

Introduction

7. RIPA was introduced principally to ensure that covert investigatory powers were used in compliance with article 8 of the Convention. When introducing the Bill on its Second Reading, Home Secretary Jack Straw said:

> "Part II of the Bill covers the use of intrusive surveillance, directed surveillance and covert human intelligence sources. Those are not new powers, but the provisions in this part of the Bill will put their use on a statutory basis. Part II does not create any illegality in the use of Part II techniques, but it will ensure that the use of the powers is properly regulated. Where such actions are authorised properly under the provisions of the Bill, that will be an answer to any subsequent assertion based on article 8 of the European Convention

that a person's privacy has been invaded without justification."

8. RIPA sets out regulatory requirements for the exercise of six covert investigatory powers. These powers are: (i) the interception of communications; (ii) the acquisition of communications data (both of which are dealt with in Part I); (iii) intrusive surveillance; (iv) directed surveillance; (v) the use of CHIS (all three of which are dealt with in Part II); and (vi) the demands for decryption (dealt with in Part III). It is an important part of the case advanced by all the appellants that RIPA established a hierarchy of powers; and that the powers considered to be most intrusive are available in more limited circumstances, to fewer public bodies and subject to more stringent requirements than is the case in relation to the powers that are considered to be less intrusive. In descending order of intrusiveness, the hierarchy is: (i) interception of communications, (ii) intrusive surveillance, (iii) demands for decryption, (iv) CHIS and (v) directed surveillance and acquisition of communications data. The three investigatory powers considered to be the most intrusive have the following distinct features: (i) authorisation is granted by warrants signed in person by the Secretary of State, authorisations by the Secretary of State or prior approval from a Surveillance Commissioner or judge (with limited exceptions in the case of demands for decryption); (ii) authorisation may be sought only by a core of investigating authorities (for interception only the intelligence services, the police, HMRC and SOCA and in addition for the other two powers the OFT, HM Armed forces and the MOD (with limited exceptions in the case of demands for decryption)); (iii) authorisation may be sought only for the purpose of national security, the prevention or detection of serious crime and the economic well-being of the UK; and (iv) there is a statutory requirement that those authorising the use of the power must consider whether the information could reasonably be obtained by other means.

9. By contrast, the three investigatory powers considered to be the least intrusive, which include the use of CHIS (i) have no requirement for warrants or prior approval; (ii) can be authorised by relatively low-ranking officials in a wide range of public authorities; (iii) can be used for a wide range of purposes such as non-serious crime, public safety and public health; and (iv) have no requirement for those authorising the use of the power to consider whether the information could reasonably be obtained by other means.

The relevant provisions

10. Section 26 is entitled "Conduct to which Part II applies". So far as material, section 26 provides:

> "(1) This Part applies to the following conduct –
>
> (a) directed surveillance;
>
> (b) intrusive surveillance; and

(c) the conduct and use of covert human intelligence sources.

……

(7) In this Part –

(a) references to the conduct of a covert human intelligence source are references to any conduct of such a source which falls within any of paragraphs (a) to (c) of subsection (8), or is incidental to anything falling within any of those paragraphs; and

(b) references to the use of a covert human intelligence source are references to inducing, asking or assisting a person to engage in the conduct of such a source, or to obtain information by means of the conduct of such a source.

(8) For the purposes of this Part a person is a covert human intelligence source if –

(a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);

(b) he covertly uses such a relationship to obtain information or to provide access to any information to another person; or

(c) he covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.

(9) For the purposes of this section –

(a) surveillance is covert if, and only if, it is carried out in a manner that is calculated to ensure that persons who are subject to the surveillance are unaware that it is or may be taking place;

(b) a purpose is covert, in relation to the establishment or maintenance of a personal or other relationship, if and only if the relationship is conducted in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the purpose; and

(c) a relationship is used covertly, and information obtained as mentioned in subsection (8)(c) is disclosed covertly, if and only if it is used or, as the case may be, disclosed in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the use or disclosure in question."

11. Section 27 is entitled "Lawful surveillance". Subsection (1) provides that conduct to which Part II applies shall be lawful "for all purposes" if

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

12. Section 29 is entitled "Authorisation of covert human intelligence sources". Subsection (2) provides:

> "A person shall not grant an authorisation for the conduct or the use of a covert human intelligence source unless he believes—
>
> (a) that the authorisation is necessary on grounds falling within subsection (3);
>
> (b) that the authorised conduct or use is proportionate to what is sought to be achieved by that conduct or use."

13. Subsection (3) provides that an authorisation is necessary on grounds falling within the subsection if it is necessary in various public interests including the interests of national security. By section 29(7) the Secretary of State may by order prohibit the authorisation under section 29 of any such conduct or uses of CHIS as may be described in the order and may impose requirements, in addition to those provided for by section 29(2), that must be satisfied before an authorisation is granted. Only two orders (both currently in force) have been made under this subsection.

14. The jurisdiction of the IPT is governed by section 65 and the schedules to which it refers. Section 65 is a long and complex provision. Subsection (2) provides that the IPT is the only appropriate tribunal for the purposes of proceedings under section 7(1)(a) of the HRA which fall under subsection (3). Subsection (3) provides that proceedings fall within the subsection if "(a) they are proceedings against any of the intelligence services….(d) they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5)". Subsection (5) provides: "subject to subsection (6), conduct falls within this subsection if (whenever it occurred) it is….(d) [other] conduct to which Part II applies". Subsection (7) provides:

> "For the purposes of this section conduct takes place in challengeable circumstances if—
>
> (a) it takes place with the authority, or purported authority, of anything falling within subsection (8); or
>
> (b) the circumstances are such that (whether or not there is authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought."

Subsection (8)(c) provides that an authorisation under Part II of the Act falls within the subsection.

The first issue: does the IPT have jurisdiction over the human rights claims?

The appellants' case

15. Ms Kaufmann QC submits that the expression "personal relationship" in section 26(8)(a) of RIPA cannot be understood as encompassing an intimate sexual relationship. Her definition of "an intimate sexual relationship" is:

> "a relationship in which sexual acts are an integral and necessary aspect of that relationship.
>
> The question of when an act is sexual can be identified by reference to the definition in section 78 of the Sexual Offences Act 2003 which states:
>
> 'For the purposes of this Part … penetration, touching or any other activity is sexual if a reasonable person would consider that –
>
> (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual;
>
> (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual'.
>
> The acts encompass only intercourse and other sexual touching."

16. Her case (which is adopted by Ms Williams QC on behalf of the Tuckers claimants) is as follows. First, the establishing and/or maintaining of an intimate sexual relationship for the covert purpose of obtaining intelligence would, if permitted, be the most intrusive form of covert investigatory technique. It would amount to a gross invasion of an individual's

fundamental common law right to personal security: see Blackstone Commentaries (Vol 1, First Edition, pp 123-130); *GG v Secretary of State for the Home Department* [2009] EWCA Civ 786, [2010] QB 585 at paras 10 to 13; *Collins v Wilcock* [1984] 1 WLR 1172, 1178 C-E and Clerk & Lindsell on Torts (20th edition) para 15.01. It would also amount to a breach of "a most intimate aspect" of the rights to privacy under article 8 of the Convention: see *Dudgeon v UK (No 2)* (1982) 4 EHRR 149 at para 52. There are no express words in Part II of RIPA permitting the gross infringement of the fundamental right to personal security and privacy occasioned by engaging in intimate sexual acts in order to obtain intelligence and, in the light of the statutory scheme as a whole, it cannot be said that this power arises by necessary implication. The principle of legality thus requires the court to interpret the general words "personal or other relationship" in section 26(8)(a) as being limited by the fundamental rights of the individual.

17. Secondly, the hierarchy to which we have referred at para 8 above shows that Parts I to III of RIPA provide a regime for the use of a range of covert investigatory techniques from the most to the least intrusive with a CHIS being considered among the least intrusive. Thus, for example, investigation by a CHIS does not require a warrant signed or authorised by the Secretary of State or any particularly high-ranking official; a CHIS can be used for a wide range of purposes; and there is no requirement for those authorising the use of a CHIS to consider whether the information could reasonably have been obtained by other means. Low-level operatives within numerous different authorities empowered to deploy a CHIS are charged with determining the necessity and proportionality of its use for a wide range of purposes. In short, it is inconceivable that Parliament would have designed RIPA in the way that it did if it had intended sections 26 and 29 to cover the use of intimate sexual relationships to obtain intelligence. Parliament did not intend to permit the authorisation of the use of a covert technique that would result in an interference that is *necessarily* more intrusive than its place in the hierarchy of regulation justifies.

18. Thirdly, a further indication that Parliament was not aware of the possible use of sex as an undercover investigatory technique (and did not intend it to be so used) is the fact that neither the 2002 nor the 2010 Code of Practice issued under section 71 of RIPA makes any mention of such possible use or provides any guidance on when it might be appropriate to use it. This is to be contrasted with the use of surveillance under RIPA which interferes with privileged communications. In *McE v Prison Service of Northern Ireland* [2009] UKHL 15, [2009] 1 AC 908, the House of Lords considered it to be significant that a code of practice had been issued making detailed provision for the authorisation of monitoring legally privileged communications, thereby demonstrating that such interference with a fundamental right had been specifically in the contemplation of Parliament when enacting RIPA.

19. Fourthly, there is nothing in the legislative history to indicate that Parliament squarely confronted the use of such an invasive investigative technique. This again contrasts with the use of surveillance under RIPA which interferes with privileged communications. In *McE*, the House of Lords considered it

significant that Parliament had already authorised interference with the privilege in earlier statutes and so had already expressly confronted the issue.

Discussion

20. In *R (A) v Director of Establishments of Security Service* [2009] UKSC 12, [2010] 2 AC 1, the Supreme Court held that section 65(2)(a) of RIPA conferred on the IPT exclusive jurisdiction to hear claims under section 7(1)(a) of the HRA. As Lord Brown explained at para 14, a powerful pointer against the proposition that Parliament had intended to leave it to a complainant to choose whether to bring proceedings in court or before the IPT was:

> "the self-evident need to safeguard the secrecy and security of sensitive intelligence material, not least with regard to the intelligence services. It is to this end, and to protect the 'neither confirm nor deny' policy….that the Rules are as restrictive as they are regarding the closed nature of the IPT's hearings and the limited disclosure of information to the complainant (both before and after the IPT's determination)".

21. The question raised by the first issue is whether the alleged conduct of which complaint is made in these proceedings is conduct to which Part II of RIPA applies, on the footing that the conduct is the establishing and maintaining of a "personal or other relationship" within the meaning of section 26(8)(a). If an intimate sexual relationship is not a personal or other relationship, the IPT has no jurisdiction to entertain the human rights claims and they must, therefore, be determined by the court. What is meant by "personal or other relationship"? These are ordinary words. A personal relationship is a relationship between persons. As a matter of ordinary language, a sexual relationship is an example of such a relationship. At first sight, it seems obvious that the IPT has jurisdiction to deal with the human rights claims. We must therefore examine the reasons given by Ms Kaufmann as to why a personal or other relationship does not include an intimate sexual relationship.

The principle of legality

22. We accept that the establishing and/or maintaining of an intimate sexual relationship for the covert purpose of obtaining intelligence is a seriously intrusive form of investigatory technique. We do not think that it is in issue that it amounts to an invasion of an individual's common law right to personal security and of a most intimate aspect of the right to privacy under article 8 of the Convention.

23. The principle of legality is that fundamental rights cannot be overridden by general or ambiguous statutory words: see per Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131. In *Ex parte Simms*, the question was whether section 47(1) of the

Prison Act 1952 enabled the Secretary of State to make rules restricting the fundamental right of prisoners to communicate with journalists. The subsection enabled the making of rules for, amongst other things, "the regulation and management of prisons….and for the classification, treatment, employment, discipline and control of persons required to be detained therein". It was held by the House of Lords that this general power to make rules for the regulation and management of prisons was insufficiently clear to authorise the infringement of the basic rights of prisoners.

24. In *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, an inspector of taxes sought the consent of a special commissioner to issue a notice requiring disclosure by the bank of its instructions to and advice of counsel in relation to a tax avoidance scheme. The relevant statute provided:

> "Subject to this section, an inspector may by notice in writing require a person (a) to deliver to him such documents as are in the person's possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to (i) any tax liability to which the person is or may be subject, or (ii) the amount of any such liability…."

25. It was common ground that legal professional privilege was a fundamental human right. Lord Hoffmann said at para 8 that the courts would:

> "construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication".

He noted that the relevant statutory provision contained no express reference to legal professional privilege and the question therefore was whether its exclusion must necessarily be implied.

26. In *Secretary of State for the Home Department v GG* [2009] EWCA Civ 786, [2010] QB 585, the question concerned the lawfulness of a control order whose terms required the controlee to submit to a search of his person within his home. This court said that the fundamental common law rights of personal security and personal liberty prevented any official search of an individual's person without explicit statutory authority. Applying the principle of legality, it held that section 1(3) of the Prevention of Terrorism Act 2005 was insufficiently clear to indicate that Parliament intended to abrogate the controlee's fundamental rights that were in play. Section 1(3) 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 restarting involvement by that individual in terrorism-related activity."

27. It can be seen that in each of these cases (and there are other examples), the statutory words were broad and general. On a literal interpretation, they were wide enough to confer the power that was sought to be exercised. In each case, however, there was nothing to indicate that Parliament intended that the general power could be exercised in such a way as would infringe fundamental rights. The rationale for the existence of the principle of legality that was enunciated by Lord Hoffmann in *Simms* was:

> "The constraints on the [exercise of Parliamentary sovereignty] are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process."

28. The principle of legality is an important tool of statutory interpretation. But it is no more than that. When an issue of statutory interpretation arises, ultimately the question for the court is always to decide what Parliament intended.

29. In *McE,* the issue was whether RIPA permitted covert surveillance of communications between persons in custody and their legal or medical advisers. This turned on whether such surveillance could be permitted as having been authorised in accordance with section 29 of RIPA and as being "lawful for all purposes" in accordance with section 27(1). At para 61, Lord Hope said that section 27(1) is expressed in clear and simple language and it must be taken to mean what it says (i.e. that conduct to which Part II applies shall be lawful "for all purposes"). He continued:

> "It does not refer to legal 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 fundamental rights and to render this invasion of a person's private life unlawful. To achieve this result it must be able to meet any objections that may be raised 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."

30. At para 62, Lord Hope referred to *Simms* and acknowledged that fundamental obligations could not be overridden by general or ambiguous words. He then said:

> "In my opinion that cannot be said to have been so in the case of RIPA. Far from being general and ambiguous, the very essence of its provisions was to enable fundamental privacy rights to be overridden to an extent that was no more than necessary under precise conditions that were sufficiently strict and carefully regulated."

31. In other words, the House of Lords held that the general words "lawful for all purposes" were sufficiently clear to indicate that Parliament intended them to bear their natural and ordinary meaning, despite the fact that such an interpretation involved overriding essential privacy rights. An important part of the reasoning was that the whole point of the system of authorisation under RIPA was to enable state agents to interfere with an individual's fundamental rights, provided that the conditions of necessity and proportionality stated in section 29(2) were satisfied. The protection for the individual afforded by these conditions meant that giving the words "lawful for all purposes" their plain and ordinary meaning would not produce startling or unreasonable consequences which Parliament could not have intended.

32. We consider that similar reasoning should be applied in the present context. The phrase "personal or other relationship" in section 26(8)(a) forms part of the definition of the type of conduct which can be authorised under section 27 and which, if it is carried out in "challengeable circumstances", may be the subject of human rights proceedings before the IPT under section 65. In its plain and ordinary meaning, it includes intimate sexual relationships. In the principle of legality cases, there was a general power which was capable of being used for many purposes. There was doubt as to whether Parliament intended that it should be capable of being used so as to override fundamental rights. In the present context, there is no doubt that, in enacting RIPA, Parliament intended to override fundamental human rights subject to certain protections. Most pertinently, these include the requirement for necessity and proportionality. It can fairly be said that Parliament may not have foreseen in precisely what way those human rights might be overridden and there is certainly nothing to suggest that Parliament contemplated that surveillance by a CHIS might be conducted by using the extraordinary techniques that are alleged to have been used in the present case. But none of that matters. To give "personal or other relationships" its ordinary meaning so as to include intimate sexual relationships does not produce any startling or unreasonable consequences which Parliament cannot have intended. That is why we do not consider that the principle of legality requires the words to be given a narrower meaning than they naturally bear.

The hierarchy and the other points made by Ms Kaufmann

33. We accept that Parts I to III of RIPA provide a comprehensive regime for the use of a range of investigatory techniques from the most to the least intrusive and that, in general terms, CHIS is at the less intrusive end of the spectrum. Thus the level of official entitled to grant authorisation is or at least includes officials who have a lower ranking than those entitled to grant authorisation for the interception of communications; and the range of organisations that may grant authorisation is wider. Ms Kaufmann placed before the court a helpful table which summarised all the differences between the six types of investigatory technique.

34. We acknowledge that these differences exist in the statutory scheme and that they reflect an appreciation of the fact that some types of investigative technique are more intrusive than others and that, in general terms, they suggest that use of a CHIS is at the less intrusive end of the spectrum. But the fact that use of a CHIS is at the less intrusive end of the spectrum is not a sufficient reason for giving a meaning to the phrase "personal or other relationship" which it cannot bear. In any event, use of a CHIS to establish or maintain intense and prolonged non-sexual relationships between individuals can in some instances be extremely intrusive. And yet it is conceded by the appellants that such conduct involves the establishing or maintaining of a personal or other relationship. So the argument based on hierarchy carries no weight as regards *that* kind of conduct. It is difficult to see why the hierarchy argument should carry any more weight where the relationship is sexual.

35. Nor do we consider that the other points made by Ms Kaufmann carry much weight. We accept that, if the Codes of Practice made reference to the establishing or maintaining of sexual relationships and gave guidance as to the circumstances in which they might be used, that would fortify the case that personal or other relationships include sexual relationships. But the converse is not true. The absence of any reference to such relationships in the Codes of Practice cannot be invoked to support the proposition that personal or other relationships do not include sexual relationships.

36. Finally, we agree that there is nothing in the legislative history to indicate that Parliament squarely confronted the use of sexual relations as a covert surveillance technique. The fact that there was something in the legislative history that was considered to be significant by the House of Lords in *McE* does not mean that the absence of such a history is necessarily significant in a different context. At most, it was one of a number of factors that was considered to be relevant in that case. We do not consider that it formed a decisive part of the reasoning.

Conclusion on the first issue

37. So far, we have explained why we do not accept the reasons advanced by Ms Kaufmann in support of her submission that the phrase "personal or other relationship" should not bear its ordinary meaning. But there are further reasons why we cannot accept her interpretation of the phrase.

38. First, the distinction between sexual and non-sexual relationships is critical for the purposes of the Sexual Offences Act 2003 (which deals only with sexual offences). But it is an arbitrary distinction to draw in the present context. Relationships between human beings are infinitely varied and complex. For some individuals, non-sexual relationships may be regarded as more intense, passionate, meaningful and intimate than sexual relationships. Sexual relationships vary in their intensity and intimacy. A person who is subject to surveillance by a CHIS with whom he or she has enjoyed a long and intense platonic relationship might feel more betrayed, outraged and traumatised on discovery of the true facts than another (perhaps more robust) person who is subject to surveillance by a CHIS for a short period during which there has been a modest amount of sexual touching. There is no rational basis for saying that the former conduct should be capable of being authorised under section 27, but that the latter should not be. No reason has been suggested as to why Parliament would have intended to draw such a distinction. The Convention does not require a line to be drawn in such an arbitrary way, since the conditions of necessity and proportionality provide a mechanism for ensuring that no surveillance may be authorised which will unjustifiably interfere with human rights.

39. Secondly, if it were necessary for an undercover operative to form a relationship (including sexual contact) with a dangerous terrorist, in order to maintain cover, discover sensitive information and save lives, Ms Kaufmann says that any human rights proceedings about such a relationship would have to be brought in court and defended by reference to the common law doctrine of necessity. But as Ms Carss-Frisk QC points out, it makes no sense to require a human rights case, which involves the use of covert operations for the purpose of preventing a terrorist from endangering life, to be heard in open court (when other similar cases must go to the IPT) simply because sex was one of the tactics which is alleged to have been used. This cannot have been intended by Parliament.

40. Thirdly, if Ms Kaufmann is right, then the IPT is the sole forum for dealing with claims for breaches of Convention rights arising from non-sexual relationships established or maintained by CHIS, but it does not even have jurisdiction to deal with claims for breaches of Convention rights arising from sexual relationships. That is absurd and the court should be slow to impute such absurdity to Parliament. No attempt has been made to justify it before us. Instead, Ms Kaufmann submits that the interpretation of "personal or other relationship" cannot be influenced by section 65 of RIPA which is concerned with the jurisdiction of the IPT and the forum for proceedings under section 7(1)(a) of the HRA. In short, she submits that the meaning of the substantive provisions of RIPA must be determined without regard to the procedural provisions of the Act.

41. We do not accept this submission. The provisions of RIPA should be construed, so far as possible, so as to produce a coherent scheme. That was the view expressed in a different context by the IPT itself in *C v Police* IPT/03/32/H, 14 November 2006 and we agree with it. In that case, the IPT had to decide whether the activities of agents of the police fell within the

RIPA definition of "directed surveillance". For a number of reasons, it concluded that they did not fall within the definition. At para 80, it said that "a coherent RIPA scheme includes the special procedures for dealing with claims and complaints about the use of investigatory powers….The special procedures are not required for and do not fit a case like this". Thus the IPT relied on the statutory procedures for dealing with claims and complaints as support for its conclusion as to the meaning of the substantive provision under consideration in that case.

42. Parliament clearly intended that human rights proceedings about the establishing or maintaining of relationships by undercover police officers should only be determined by the IPT. The proposition that sex is the thing that makes all the difference between a case that is sensitive enough to be required to be heard in a special tribunal and a case which is not so sensitive is absurd. The reason why the case needs to be heard in the special tribunal is because it relates to undercover operations, arising out of personal or other relationships. Nor does the absurdity stop there. It is clear that a virtually identical claim to that made by the Birnberg and Tuckers claimants, if brought in respect of the conduct of the intelligence services, would go to the IPT: see section 65(3)(a). There is no explanation as to why Parliament should have intended a different allocation of jurisdiction in police CHIS cases.

43. For all these reasons, which in large measure are the same as those which were given by the judge, we decide the first issue in favour of the respondents. Accordingly, the IPT has jurisdiction to determine the human rights claims made by all the appellants and is the appropriate forum for their determination.

The second issue: was the judge wrong to stay the high court proceedings pending the outcome of the proceedings before the IPT?

44. The respondents' primary submission before the judge was that the court should strike out the appellants' common law and HRA claims in the High Court as an abuse of process. After the hearing, and before judgment, the respondents withdrew their strike-out applications against the Birnberg claimants on the basis that the information already in the public domain made this an exceptional case and some further information provided in response to allegations made by MK himself. They said, however, that this did not preclude the possibility of a further strike-out application or affect the application against the Tuckers claimants.

45. Two grounds were relied on. First it was said the common law claims were based on the same (alleged) facts as the HRA claims which could only be pursued in the IPT. Secondly, it was said that the respondents were unable to have a fair trial of the common law claims in the High Court for a number of reasons. It was acknowledged that the court could not adopt a closed procedure and the claims had to be tried in open court: see *Al Rawi v Secretary of State* [2012] 1 AC 531, [2011] UKSC 34. But it was argued that this gave rise to insuperable difficulties. It was the respondents' policy to "neither confirm nor deny" (NCND) matters concerning alleged undercover officers; and consistently with that policy the respondents could neither

confirm nor deny some matters which were central to their defence of the claims by the Tuckers claimants. Further, there might be difficulties with disclosure: a successful claim for public interest immunity might mean that sensitive material would not have to be disclosed, but that would not assist the respondents in defending the claims. It would simply mean there would be no material before the court to support their defence. In that event, there would or might be such unfairness to the respondents that the claims could not be justly tried at all: see *Carnduff v Rock and Chief Constable of West Midlands Police* [2001] 1 WLR 1786, [2001] EWCA Civ. 680 per Laws LJ at para. 36.

46. The judge dismissed the strike-out applications. The first ground fell away because the judge had already found that the IPT had no jurisdiction in respect of the common law claims. He also doubted whether, in the particular circumstances, it would be an abuse for the claimants to pursue both sets of claims because those in the High Court were complicated and likely to give rise to numerous factual issues on both liability and damages, whereas the claims before the IPT would be determined by the application of judicial review principles in accordance with ss. 67 (2) and (3) of RIPA. He said "at the present stage of these proceedings it cannot be said with confidence that the application of those principles would provide a fair means of resolving the issues in this case." Additionally, he thought that it was not clear that the compensation the IPT could award under s. 65(7) of RIPA would provide an effective remedy for the non-HRA claims which fell outside its jurisdiction.

47. As regards the second ground, the judge accepted the importance of the NCND policy, but he concluded that the application failed for want of evidence. He said there was no evidence before the court at that stage (before service of defence) which could lead it to conclude that the claimants' rights to bring their High Court claims were outweighed by the public interest in ensuring that information about police operations was not disclosed to the public at large.

48. If their strike-out application failed, the respondents' alternative submission was that the High Court claims should be stayed pending the resolution of the HRA claims by the IPT (the IPT had by then directed that proceedings before it were stayed until 14 March 2013 or the conclusion of the proceedings brought by the claimants in the High Court whichever was earlier). The judge dealt with the stay issue relatively briefly.

49. He decided that, as Ms Carss-Frisk and Mr Johnson QC had submitted, it was in the interests of justice that the IPT proceedings should be dealt with first. At para 222, he said:

> "If there is a defence under s 27, then there will be no obstacle to the [first and second defendants] advancing their cases to that effect in the IPT. It is not for this court to speculate as to how the IPT would make known to the parties, and so to the High Court, what decision it had reached on the HRA claims in a manner which would assist the parties and the High Court in the subsequent advancement of the non-HRA claims. But the IPT must

> be given the opportunity to do what it considers to be just and appropriate. I decline to assume that the IPT will be unable to overcome perceived difficulties in circumstances where it has not been asked to do it. It seems to me that there is at least a possibility that a decision of the IPT will be of assistance in resolving difficult procedural issues that arise in cases such as *Al-Rawi* and the present cases. As to s 67(7), that corresponds to HRA s 8 under which no damages may be awarded by the High Court unless the court is satisfied that the award is necessary to afford just satisfaction."

50. It is common ground that the judge's decision was one of case management which involved an exercise of discretion and that it can only be overturned by this court if it was wrong in principle or one which no judge could reasonably have made. Ms Williams submits that the judge's reasoning was flawed and his decision was plainly wrong. For the reasons that follow, we agree with that submission.

51. The Court's general power to stay proceedings under CPR r.3.1 (2) (f) is not unfettered. It must only be used to stay civil proceedings pending the determination of proceedings in another jurisdiction where justice between the parties requires it, and where the party seeking the stay can point to a real risk of injustice: see *Panton v Financial Institutions Services Ltd* [2003] LRC 768 para 11. The appellants are entitled to have their common law claims decided by the court. It is for the respondents to show why the vindication of that right should be delayed. The onus is on them to persuade the court that there is a real risk that they would suffer prejudice if the court proceedings took precedence over the IPT proceedings. The 'default' position is that a party has a right to have its civil claim decided without delay unless the party seeking the stay can show otherwise.

52. The starting point in this case is the preservation by RIPA of the civil court's jurisdiction over common law claims arising from conduct such as that complained of by the appellants. It is to be noted that although s.65(2)(d) of RIPA would have allowed the Secretary of State to bring common law claims relating to such conduct within the IPT's jurisdiction, that provision has not been brought into force, so that the current position is that Parliament has not abrogated the civil court's jurisdiction in this respect. The legislation gives no priority to the IPT proceedings. The issues raised by the claims are acknowledged to be novel and difficult. As the judge said, they seem likely to give rise to numerous issues of fact on both liability and damages. These are matters which the ordinary litigation process is apt to resolve and which the judge concluded in broad terms could be fairly resolved by the High Court, at least on the evidence before him at this stage. His conclusions in this respect are not subject to (a cross) appeal.

53. The judge referred to the "difficult procedural issues that arise in cases such as *Al Rawi"*. This is not a case (or at least, not yet) where the court is required to resolve what has been described as the *Carnduff* dilemma, an issue touched on by Lord Brown in *Al Rawi* at paras 86 and 87. As Ms Williams

acknowledged, however, it is possible that the respondents will make a *Carnduff* application at some stage and the issue of public interest can be kept under review.

54. The essential reason why the judge exercised his discretion to grant a stay was that he said that it was *possible* that a decision of the IPT would be of "assistance" to the court in resolving the "difficult procedural issues that arise in cases" such as the present case. We find it difficult to see how a decision of the IPT would assist in resolving *procedural* issues arising in the court proceedings. The judge did not explain how it might do so. There are important differences between the procedures that apply in the two fora. The IPT's procedure is distinctly more restrictive than that of the court for obvious reasons: for example, oral hearings before the IPT are discretionary and may take place in the absence of the applicants; applicants have no right to the disclosure of evidence relied on by the opposing party or to know the case against them; there is no right to cross-examine opposing witnesses or to representation or funded representation; there is no right to a reasoned judgment and no right of appeal. Ms Williams highlighted these matters as important derogations from the natural justice principle, which, together with the principle of open justice is fundamental to our system of justice, and to the maintenance of public confidence in the judicial process itself : see *Al Rawi* at paras 10 to 14, 22, 35, 39, 41, 47 to 48, 49, 67 to 69, 72, 83 to 84, 88 and 93, where the issue was considered in relation to the lawfulness of the closed procedure in civil cases.

55. How could these different procedures assist in the resolution of the procedural difficulties that would arise in the High Court proceedings? Presumably, what the judge meant was that it was possible that a decision of the IPT would be of assistance to the court in deciding the *substantive* issues arising in the court proceedings. But there are several difficulties with this.

56. First, the judge did not decide the stay issue on the basis that two different civil courts were at risk of issuing public judgments analysing the same evidence and reaching different conclusions, or where the findings of one set of proceedings would be determinative of the outcome of the other proceedings. If that had been the basis for his decision, he would have been required to explain why the IPT proceedings should take priority. There is clearly an overlap between the two sets of proceedings, but they are by no means coincident. On any view, the appellants will pursue their claims in the High Court, whatever the outcome of the IPT proceedings. Moreover, if the appellants are successful the IPT will do no more than issue a "summary" of its "determination, including any findings of fact" (IPT Rules 2000, r 13(2)). There will be no identification of witnesses or their evidence. If the appellants are unsuccessful, the position is mandated by section 68(4)(b) of RIPA, which permits the IPT to provide only a "statement that no determination has been made in his favour". Either way, it is possible (to put it no higher) that the decision of the IPT will amount to little more than a "yes" or "no". It is difficult to see how such a decision will assist the court.

57. Secondly, whilst the IPT Rules provide that the IPT may hear evidence in closed session (IPT Rules 2000, r. 9(6)), the basic principles of the common

law by which the High Court is bound do not: *Al Rawi* at paras 10-17 and elsewhere. We acknowledge that the IPT Rules have been held to be compatible with the rights protected by article 6 (1) of the Convention: see *In the Matter of Applications Nos. IPT/01/62 and IPT/01/77*, 23 January 2003, at paras. 184 to 191; and *Kennedy v United Kingdom* (2011) 52 E.H.R.R. 4, p. 307. The IPT has the power to hold an adversarial hearing and there is a wide-ranging duty of disclosure in respect of any application. We accept that the IPT can modify its own procedure to avoid or minimise unfairness. But (to put it no higher) there is no guarantee that the procedures adopted by the IPT in any particular case will satisfy the common law requirements of natural justice. There is, therefore, a real risk that, if the High Court relied on findings expressed by the IPT, it would itself be acting in breach of natural justice.

58. Thirdly, the IPT's jurisdiction is equivalent to that exercised by a court on an application for judicial review (section 67(2) of RIPA). It is ill-suited to the determination of claims that involve many issues of fact relevant to both liability and damages.

59. The judge failed to take account of these difficulties in exercising his discretion. More fundamentally, however, he failed to apply the test to which we have referred at para 51 above. He did not ask himself whether the respondents had shown that there was a real risk of prejudice to them if the High Court proceedings took precedence over the IPT proceedings. Instead, he decided whether there was at least a possibility that a decision of the IPT would be of assistance in resolving the procedural issues that arise in court proceedings of this kind. That was a question of little (if any) relevance.

60. Ms Carss-Frisk submitted that this experienced judge sought to strike a balance to ensure on the one hand that the police could defend themselves properly in the right forum, and on the other hand that the appellants would have the opportunity to prove their common law claims in the High Court. But it seems to us that her submissions were in substance a reiteration of those which had failed to persuade the judge that the High Court claims could not fairly be tried and should therefore be struck out. She also submitted that there was a potential "settlement" benefit if the IPT proceedings are dealt with first. Her point was that the respondents are more likely to settle the subsequent proceedings if they lose in the IPT, than if they lose in the High Court because of the difficulties they might have in defending themselves there. This was not an argument mentioned by the judge, and in our view carries little weight on the question of the stay.

61. It is possible that the judge did not have the benefit of the arguments addressed to us on this aspect of the appeal. However, with respect to the judge (who produced a careful and otherwise excellent judgment), we consider for the reasons that we have given that his decision on the issue of a stay was flawed and plainly wrong.

62. All parties agreed that if the appeals on the stay issue were successful, then this court should decide the matter afresh rather than remit it to the judge; and

we agree that this is the right course to adopt. We have all the material that is necessary for a decision to be made.

63. Mr Johnson submitted that this is a difficult case and that it is sensible to proceed slowly before the tribunal most suited to deal with sensitive material. The IPT can see all the evidence, analyse the issues and, to the extent necessary, modify its procedures and proceed accordingly. It might take the view that it was appropriate for the High Court claims to go first, in which case it could say so.

64. In our judgment, however, this argument fails to address the central question which the court must consider when determining whether a claim should be stayed, that is, whether it is in the interest of justices that the claim should be stayed. This involves looking at the interests of both sides: whether the party seeking the stay can point to a real risk of injustice if the claim is not stayed and the prejudice that any stay may cause to the opposing party.

65. It is clear that there are substantial issues of fact relevant to liability and quantum which overlap in the two sets of proceedings; and that departures from the usual procedures of civil litigation may be necessary wherever these issues are to be determined. The court is also not blind to the tactical advantages the parties might have in mind in seeking the resolution of one set of proceedings before the other. But the non-HRA claims are serious ones, they are validly constituted, and the appellants wish to litigate them. As matters currently stand, in our view the respondents cannot point to a real risk of injustice if the High Court proceedings continue; and certainly not one which outweighs the appellants' right to have their claims heard in open court in accordance with procedures which have been developed and designed to provide a fair route to a just result. In short, for the present, the respondents' arguments do not demonstrate that it is in the interests of justice to stay the High Court proceedings and the appellants should therefore be allowed to proceed with them.

Overall conclusion

66. We therefore dismiss the appellants' appeal on the first issue and allow it on the second issue. The stay on the High Court proceedings will be lifted.