HOUSE OF LORDS

SESSION 2008–09

[2009] UKHL 15

on appeal from: [2007]NIQB 101

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

In re McE (Appellant) (Northern Ireland)
In re M (Appellant) (Northern Ireland)
In re C (AP) and another (AP)(Appellants) (Northern Ireland)

Appellate Committee

Lord Phillips of Worth Matravers
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Neuberger of Abbotsbury

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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

Introduction

1. On 6 February 2006 a solicitor called Manmohan Sandhu appeared before the Antrim Magistrates' Court charged with incitement to murder, and four counts of doing acts tending and intended to pervert the course of justice. The court was told that the case against Mr Sandhu was based on covert electronic surveillance carried out by the police of conversations between himself and clients who were purporting to consult him in the serious crime suite at Antrim Police Station. The fact that the case against Mr Sandhu was based upon such evidence received considerable media coverage and comment. It also led to requests being made of the police on behalf of each of the appellants for assurances that no such monitoring was taking place in respect of consultations that they were about to have with their lawyers or, in the case of M, his consultant psychiatrist. The police declined to give such assurances.

2. My noble and learned friend Lord Carswell has described in more detail the circumstances in which these assurances were sought, the applications that were then made to the Divisional Court in Northern Ireland, the decision of that court, the reasons for that decision, the questions certified and the unusual circumstances in which the appellants were given permission to appeal to this House notwithstanding that they had obtained orders in their favour. I happily adopt that description and endorse his comments in respect of the grant

of permission to appeal. The appeal raises, none the less, two issues of general importance:

i) What impact, if any, does the Regulation of Investigatory Powers Act 2000 ("RIPA") have on the common law right of legal professional privilege ("LPP")?

ii) What impact, if any, does RIPA have on the right accorded by a number of statutory provisions of a person detained in a police station or in prison to consult a lawyer *privately*?

In order to answer these questions it is relevant to consider the law in relation to LPP prior to RIPA, the extent of the relevant statutory rights to private consultation with a lawyer prior to RIPA and the requirements of the European Convention on Human Rights in respect of covert surveillance and the protection of LPP.

Legal Professional Privilege

3. LPP describes special protection that the law gives to communications between a lawyer and his client. The protection is owed to the client. LPP is his privilege. It has its origin in the sixteenth century. Thus, for most of its history it has applied in circumstances where the only way a client could communicate with his lawyer was either orally face to face or by manuscript communications. The circumstances in which LPP was typically asserted were when an attempt was made by legal process to obtain disclosure of the privileged communication. This might be, for instance, by the process of discovery in civil litigation or by a witness summons in criminal proceedings or by seeking to require a witness to give evidence of matters subject to LPP.

4. This led to a period when LPP was considered as a procedural right that formed part of the law of evidence. In *Parry-Jones v Law Society* [1969] 1 Ch 1 the Law Society had, for regulatory purposes, exercised a power under the Solicitors Act 1957 to call upon a solicitor, the plaintiff/appellant, to produce for inspection accounts and other information relating to the conduct of his clients' affairs. He sought an injunction restraining the Law Society from requiring him to produce documents that were subject to LPP without the consent of the clients to whom the privilege related. His claim was rejected at first instance and on appeal. Diplock LJ stated at p. 9:

> "So far as Mr Parry-Jones' point as to privilege is concerned, privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence."

A similar view of the nature of LPP was taken by the Law Reform Committee that produced the Sixteenth Report, *Privilege in Civil Proceedings*, (1967) (Cmnd 3472).

5. Privilege provided immunity against disclosure. It did not render privileged material inadmissible if a party, or prosecuting authority, managed to obtain it, even if it was improperly obtained: *Calcraft v Guest* [1898] 1 QB 759; *R v Tompkins* (1977) 67 Cr App R 181; *Butler v Board of Trade* 1971 Ch 680.

6. In recent times the courts have recognised LPP as not merely a procedural right but an important substantive right. Lord Hoffmann said this of the right in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 at paragraph 7:

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

7. In *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 Lord Scott of Foscote at paragraph 25 commented that the privilege was absolute and could not be overridden by "some supposedly greater public interest". It could only be overridden by legislation. He added at paragraph 26 that, while there was some debate as to whether the privilege was a procedural or substantive right, the debate was sterile as it was both.

8. Furthermore, the law today gives a considerable degree of protection against the admissibility of evidence subject to LPP where it has been improperly obtained, or even accidentally disclosed – see CPR 31.20 for civil proceedings and section 78 of the Police and Criminal Evidence Act 1984 for criminal proceedings.

9. In *Morgan Grenfell* at para 30 Lord Hoffmann criticised the reasoning of the Court of Appeal in *Parry-Jones* but expressed the view that they had none the less reached the right result. He said, at para 32:

> "I think that the true justification for the decision was not that Mr Parry-Jones's clients had no LPP, or that their LPP had been overridden by the Law Society's rules, but that the clients' LPP was not being infringed. The Law Society were not entitled to use information disclosed by the solicitor for any purpose other than the investigation. Otherwise the confidentiality of the clients had to be maintained. In my opinion, this limited disclosure did not breach the clients' LPP or, to the extent that it technically did, was authorised by the Law Society's statutory powers. It does not seem to me to fall within the same principle as a case in which disclosure is sought for a use which involves the information being made public or used against the person entitled to the privilege."

10. The editors of *Phipson on Evidence*, 16th ed (2005) observe at 23-22–23-26 that this is a novel approach to privilege and express the hope that it will not be followed. For myself I find that Lord Hoffmann's approach illuminates the issues that arise in the present case. The rationale underlying LPP is the fundamental requirement that a man should not be inhibited in speaking freely and frankly to his lawyer by concern that what he says may subsequently be disclosed to his prejudice. This appeal involves the tension between the importance of

covert surveillance in the fight against terrorism and serious crime and the importance of LPP. In this context it is necessary to consider not merely whether and in what circumstances surveillance of communications subject to LPP should be permitted but the use that should be permitted of communications subject to LPP that are disclosed by such surveillance. This is a topic to which I shall return at the end of this opinion.

The Iniquity Exception

11. I have adopted the expression "the iniquity exception" to describe the principle that consultations or communications between a lawyer and his client that are in furtherance of crime or fraud are not protected by LPP. It is questionable whether this is properly to be described as an *exception* to LPP. The fact remains that disclosure of such communications will normally be based on a provisional conclusion that the communications were in furtherance of crime or fraud. If, after the documents have been disclosed this proves not to be the case, the protection of LPP will have been lost. *R v Cox and Railton* (1884) 14 QBD 153 is the case usually cited as establishing this principle. In that case Stephen J explained why communications in furtherance of crime were not covered by the rule of LPP at p 167:

> "The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not 'come into the ordinary scope of professional employment".

Powers of search and LPP

12. Before considering surveillance it is instructive to look at LPP in the context of another type of invasion of privacy – the powers given to the police to search private premises. These powers are necessarily statutory, for absent statutory powers the search of private premises will

constitute the tort of trespass. In general, when granting powers of search and seizure Parliament has been careful expressly to exclude from their ambit communications that are protected by LPP. Thus section 8 of PACE gives a justice of the peace the power to issue a search warrant for material likely to be of substantial value to the investigation of a serious arrestable offence provided that there are reasonable grounds for believing that the material in question "does not consist of or include items subject to legal privilege". Section 19, which makes provision for powers of seizure provides that no power of seizure conferred on a constable under any enactment is to be taken to authorise the seizure of an item which he has reasonable grounds for believing to be subject to legal privilege. Section 2(9) of the Criminal Justice Act 1987 gives protection to documents covered by LPP against the issue of a search warrant to the Serious Fraud Office. The powers to obtain search warrants under the Prevention of Terrorism (Temporary Provisions) Act 1989 were similar to those in PACE and contained similar protection in respect of documents covered by LPP. The same is true of the Terrorism Act 2000. The power of a circuit judge to make an access order under section 55 of the Drugs Trafficking Act 1994 does not apply to material subject to legal privilege.

13. Section 10 of PACE defines "items subject to legal privilege" to include communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client. The definition is expressly subject to the iniquity exception, for section 10(2) provides "items held with the intention of furthering a criminal purpose are not items subject to legal privilege".

Interception of communications and surveillance

14. Article 8 of the Convention, to which the United Kingdom was one of the original subscribers, provides that everyone has the right to respect for his private life and his correspondence. This right is qualified by Article 8(2) which permits interference with it "in accordance with the law" in so far as necessary for the purposes there specified. Prior to 1985 this country failed to comply with Article 8 in as much as the police and the security services intercepted mail and telecommunications and carried out electronic surveillance in accordance with executive discretion that was not subject to statutory regulation. Interception had to be authorised by a warrant issued by the Secretary of State. The intelligence acquired was used for detecting and preventing serious crime and not for gathering evidence for use in

prosecutions. For this reason no issue of LPP arose in relation to it. Surveillance must, on occasion, have disclosed to the authorities communications between lawyer and their clients, but no attempt appears to have been made to use such material as evidence, so once again no issue in relation to LPP appears to have arisen.

15. The United Kingdom practice in relation to the interception of telecommunications was successfully challenged before the Strasbourg Court in *Malone v United Kingdom* (1984) 7 EHRR 14. The Court found that there was obscurity and uncertainty as to the extent to which interception was subject to rules of law rather than executive discretion so that the interference with Mr Malone's private life did not satisfy the requirement of being "in accordance with the law". This led to the enactment of the Interception of Communications Act 1985. No mention is made in that Act of LPP, but problems in relation to this were unlikely to arise as the Act continued the policy of precluding the use as evidence of the product of interception.

16. The United Kingdom remained in breach of the requirements of Article 8(2) in relation to covert surveillance of private property in as much as this was not subject to any statutory regulation. Adverse decisions at Strasbourg led to the Security Services Act 1989 and the Intelligence Services Act 1994, which regulated surveillance by the Security Services. These statutes made no reference to LPP. Nor did they cover surveillance by the police. This was carried out, in accordance with Home Office Guidelines on a very substantial scale. In 1995 there were approximately 2,100 authorisations by chief officers of intrusive surveillance operations in the United Kingdom carried on by the police and the customs service (HC Debs, written answer, col 512, 21 January 1997).

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

18. The passage of *Khan* through the courts stimulated adverse judicial and media comment on the absence of satisfactory regulation of surveillance and led to amendments to the Police Bill that was passing through Parliament. In consequence sections 92 and 93 of Part III of the Police Act 1997 required authorisation by a chief constable or officer of similar seniority of entry on or interference with property or with wireless telegraphy. Section 97 required such authorisation to be approved by a Commissioner, who had to hold or have held high judicial office, where the person giving the authorisation believed:

> "(a) that any of the property specified in the authorisation—
>
> (i) is used wholly or mainly as a dwelling or as a bedroom in a hotel, or
>
> (ii) constitutes office premises, or
>
> (b) that the action authorised by it is likely to result in any person acquiring knowledge of—
>
> (i) matters subject to legal privilege,
>
> (ii) confidential personal information, or
>
> (iii) confidential journalistic material."

Section 98 defined matters subject to legal privilege.

19. These provisions were directed at making lawful actions that would otherwise have constituted trespass. They did not extend to require authorisation of covert surveillance that could be carried out without infringement of civil law. Furthermore the express provisions made in relation to LPP implicitly recognised that LPP did not confer an absolute right to privacy in respect of communications between a lawyer and his client. It is inevitable that the interception of communications or covert surveillance will from time to time disclose to the authorities conducting it the content of communications between lawyer and client. I do not consider that, at the time that the 1997 Act was enacted it was considered that such an occurrence constituted an infringement of the common law right to LPP. Because no attempt had ever been made to adduce such communications in evidence the issue had not, so far as I am aware, arisen for judicial determination. What was quite clear by the time of RIPA was that this was an area that required statutory regulation.

The right of a detained person to have access to a lawyer in private

20. This appeal is concerned with the effect of RIPA on statutory rights of a person detained to consult a lawyer privately. These statutory rights were preceded by similar rights at common law – see *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763 at para 5. The earliest of the statutes is PACE. Section 58 of PACE provides:

> "(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time."

This was reproduced in identical terms as article 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)). In the context of terrorism it was repeated, in very similar terms, in relation to detention in a police station, in section 15 of the Northern Ireland (Emergency Provisions) Act 1987 and in Schedule 8 to the Terrorism Act 2000.

21. Rule 71 of the Prisons and Young Offenders Centres Rules (Northern Ireland) 1995 provides:

> "71. –(1) Reasonable facilities shall be allowed for the legal adviser of a prisoner who is party to legal proceedings, civil or criminal, to interview the prisoner in connection with those proceedings in the sight but not in the hearing of an officer.
>
> (2) A prisoner's legal adviser may, with the Secretary of State's permission, interview the prisoner in connection with any other legal business in the sight but not in the hearing of an officer."

22. The right to private consultation given by these statutes is a public law right: *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763.

23. What is the ambit of the right to consult a lawyer *privately* in these legislative provisions? Its natural meaning is that no one should be permitted to listen to the consultation, and this precludes both overt and covert monitoring of the consultation. Covert surveillance of such consultation for the general purpose of gleaning information that will assist prevention of terrorism or crime is clearly an invasion of that privacy. Is the right to private consultation implicitly subject to the right of the police to carry out surveillance for such purposes? More specifically is the statutory right to privacy subject to the iniquity exception, so that it will not preclude covert surveillance where the consultation is not for the purpose of protecting the interests of the detained person but for the purpose of furthering crime or terrorism?

24. Mr Sandhu made a pre-trial application to the Crown Court at Belfast to have the proceedings against him stayed on the grounds of abuse of process because the police subjected the private consultations between the defendant and his clients to intrusive surveillance. The House was provided with the judgment dismissing this application on 5 September 2008. The point was not made that the right to privacy was that of the clients, not of Mr Sandhu as their solicitor. The judge proceeded on the basis that the right to private consultation could be equated with LPP. He ruled that the product of the surveillance was capable of being submitted in evidence because it fell within the exception laid down in *R v Cox and Railton* and thus was not covered by legal professional privilege.

25. I do not share the judge's reasoning, although I agree with the result that he reached. The rationale for granting a detained person the right to consult a lawyer *privately* is the same as that which underlies LPP. It does not follow from this that the former is subject to the qualifications on the latter. I have pointed out that the Police Act 1997 recognised that LPP did not confer an absolute privacy right in as much as communications between lawyer and client could lawfully be subjected to surveillance. No such qualification was, however, placed on the express statutory rights of detained persons to consult a lawyer *privately* that are under consideration, and I do not consider that any such qualification fell to be implied. Had Parliament wished to qualify the right to privacy of legal consultation in detention by permitting covert surveillance in the interest, say, of combating terrorism or serious crime it would have had to state this expressly.

26. An area of doubt remains, however, in relation to the iniquity exception. The Prisons and Young Offenders Centres Rules expressly

restrict the purpose of the private consultation permitted to legal proceedings or business. It is at least arguable that the other statutory rights under consideration should be interpreted so as to confer a right to private consultation only where the consultation is for legal purposes and not where the object of conferring with the lawyer is the furtherance of crime. The problem with such an interpretation is a practical one. How is it to be determined that the conference has such an ulterior motive without listening to it? There are statutory provisions for deferring the right to consult a lawyer in specified circumstances which would appear to envisage the possibility that the lawyer might collude with the detainee in defeating the interests of justice. These would seem to recognise the fact that the statutory right to private consultation carries with it a risk of such behaviour. For these reasons I would interpret the statutory right to consult a lawyer privately as one that confers on the detainee an absolute right to privacy that precludes covert surveillance in any circumstances.

The requirements of the Convention

27. The relevant Strasbourg jurisprudence covers interception of communications, covert surveillance and the right to private consultation with a lawyer. The cases demonstrate that there is no absolute prohibition on surveillance in any of these situations. Both article 6 and article 8 of the Convention may be engaged. So far as article 6 is concerned, surveillance on communications between lawyer and client will not necessarily interfere with the absolute right to a fair trial. So far as article 8 is concerned, the issue is whether interference can be justified under article 8(2).

28. *Klass v Germany* (1978) 2 EHRR 214 established the right of applicants to complain of secret surveillance, notwithstanding that the nature of such surveillance was such that they were unable to establish that they individually had been subjected to it. The case involved laws permitting interception of communications, but Mr Fordham QC for the Secretary of State accepted that the approach of the Court was of general application to covert surveillance. The Court accepted that, in order to counter threats of espionage and terrorism, it was necessary to accept powers of secret surveillance. There had, however, to be adequate guarantees safeguarding individual rights "which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure" – para 55. In *Malone* at para 67 the Court made the

following observation in relation to the requirement of foreseeability implicit in the phrase "according to law" in article 8(2):

> "Undoubtedly, as the Government rightly suggested, the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence."

29. In para 68 the Court observed that where a legal discretion was conferred on the executive the law had to indicate the scope of the discretion and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

30. In *Weber and Saravia v Germany* (Application no 54934/00, Admissibility Decision 29 June 2006), para 95 the Court summarised the case law on the minimum safeguards that should be set out in statute law in order to avoid abuses of power involving interception of communications:

> "The nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed."

31. The Strasbourg Court has, on a number of occasions, emphasised the importance that attaches to confidentiality between lawyer and client. In two cases on telephone tapping brought against France, *Huvig v France* (1990) 12 EHRR 528 and *Kruslin v France* (1990) 12 EHRR 547 the Court recognised the importance of the principle that telephone tapping had to be carried out in such a way that the exercise of the rights of the defence could not be jeopardised, and that the confidentiality of the relations between the suspect or the person accused and his lawyer had to be respected, as did the lawyer's duty of professional confidentiality. The importance of protecting this professional confidentiality was emphasised by the Court in *Kopp v Switzerland* (1998) 27 EHRR 91.

32. In another line of cases the Strasbourg Court has emphasised, in the context of article 6 of the Convention, the importance of an accused being able to confer with his advocate in private. In *S v Switzerland* (1991) 14 EHRR 670 the Court stated at para 48:

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

Discussion

33. In the light of this background, I turn to the issues raised by this appeal. First I shall consider whether the Act impacted on LPP at common law. Lord Carswell has drawn attention to the relevant provisions of the Act. They make no reference to LPP. The Code makes detailed provision, however, in relation to LPP on the premise that surveillance of communications covered by LPP can be authorised so as to be "lawful for all purposes" under section 27 of the Act. The issue is whether that premise is correct.

34. RIPA was, as its name indicated, designed to regulate the use of investigatory powers. These included interception of communications

and covert surveillance. The Act needed to satisfy the requirements of the Convention, which were about to become part of our domestic law under the Human Rights Act 1998. Had LPP conferred at common law an unqualified right to privacy of lawyer/client communications so that surveillance of such communications was unlawful and the product of unlawful surveillance inadmissible in legal proceedings, articles 6 and 8 of the Convention would have been satisfied. There would have been nothing in this respect that required regulation by RIPA. In such circumstances there would have been strong grounds for contending that RIPA should not be construed as implicitly authorising a diminution of LPP. That was not, however, the position.

35. As I have explained, the Police Act 1997 implicitly recognised that surveillance which disclosed communications protected by LPP was not contrary to domestic law. The Strasbourg jurisprudence demonstrated, however, the importance of the professional confidence between lawyer and client and the need for the law to regulate any interference with this in a manner that complied with article 8(2). It was essential that RIPA should do this. It is reasonable to conclude that Parliament intended that this matter should be dealt with in the Code. For this reason I have concluded that regulation of the way in which surveillance interacts with LPP fell within the ambit of RIPA and could properly be addressed by the Code. Thus far I am in agreement with the conclusions reached by all members of the Committee. This is not the case, however, in respect of the next question to which I turn.

36. That question is whether RIPA impacted on the express statutory rights given to a person detained to consult a lawyer privately. Very different considerations apply to this question. This was one area where English law had fully addressed the requirements of article 8 and also the requirements of article 6. The statutory right of a detainee to consult a lawyer privately was an important one. Just how important it was in the eyes of the courts is evident from the reaction of the Court of Appeal in *R v Grant* [2006] QB 60. Listening devices placed in the exercise yard resulted in the recording of conversations between Grant and his lawyers. The court held that this called for a stay of the proceedings on the ground of abuse of process even without proof of any prejudice to the defendant.

37. I have drawn attention to the importance that the Strasbourg Court has attached to the right of a client to consult a lawyer in private.

38. RIPA draws a distinction between directed surveillance and intrusive surveillance. Lord Carswell has outlined the differences between the two. As he points out, intrusive surveillance is governed by a regime that imposes stricter controls and requires a higher level of authorisation. If Parliament had intended RIPA to override the express statutory rights of those in custody to consult lawyers in private I find it hard to conceive that the surveillance in question would not have been placed within the category of intrusive surveillance.

39. The appellants have understandably invoked the principle of legality in urging that RIPA did not detract from their statutory rights to consult lawyers privately. Lord Carswell has cited the well known statement of this principle by Lord Hoffmann in *R v Secretary of State for the Home Department, Ex Simms* [2000] 2 AC 115. Even more pertinent, having regard to its context, was the following statement of that principle made by Lord Hoffmann in *Morgan Grenfell* at para 8, to which Lord Carswell has already referred:

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

40. The application of that principle leads to the conclusion that RIPA should only be interpreted as qualifying the statutory rights of detainees to consult their lawyers privately if such an interpretation must necessarily be implied from the terms of the Act. There is no necessity for such an interpretation.

41. There is no difficulty in reading the general provisions of RIPA, and in particular section 27, as subject to the express statutory rights of private consultation with a lawyer of those in custody. For the reasons that I have given I have concluded that this is the correct approach. Contrary to the majority view, I consider that this is a case for the application of the maxim *generalia specialibus non derogant.* While RIPA enables authorisation of surveillance of communications to which LPP attaches at common law it does not, in my view, enable authorisation of invasion by covert surveillance of the express rights given by statute to a detainee to consult a lawyer privately. It would not be incompatible with the Convention for power to be granted in

exceptional circumstances to carry out such surveillance, but I consider that the power should be granted by a statute that adequately defined those circumstances and prescribed who was to ascertain that they existed. It seems likely that the Strasbourg Court would expect such persons to have judicial status.

42. For these reasons I would answer the first question certified by the Divisional Court as follows:

Question 1(i): 'yes'.

Question 1(ii): 'no'.

43. M relied, not on any statutory right, but on an analogy with the common law right to LPP. Accordingly I would answer the second question certified by the Divisional Court 'no'.

44. The third question certified was answered affirmatively by the Divisional Court in the appellants' favour, and there is no appeal against that decision. The majority of the Divisional Court held that the provisions made by the Code for authorisation of the surveillance in issue were inadequate. Miss Quinlivan, who appeared for M, sought to persuade the House to carry out a general audit in respect of other alleged shortcomings of the Code. I do not consider that that would be appropriate. It may, however, be helpful to draw attention to one problem that the Code does not appear to meet.

45. The rationale for LPP is not that it is in the interests of justice in the individual case that what has passed between a lawyer and his client should not be made public and, where appropriate, admitted in evidence. Often it would be in the interests of justice in the individual case that this should occur – see, for instance, the facts of *R v Derby Magistrates' Court, Ex p B* [1996] AC 487. The rationale for LPP is that it is necessary if clients are not to be inhibited from being frank with their lawyers. As Lord Hoffmann pointed out in *Morgan Grenfell*, the concern that may inhibit frank communication by a client to his lawyer is not so much that the matter communicated may be disclosed but that the matter may then be used to the detriment of the client. If regulations are to be made that authorise surveillance that may disclose communications which are subject to LPP, those regulations must address not merely the circumstances in which such surveillance is to be authorised, and by whom, but also the use that may be made of such communications if disclosed.

46. To a degree the Code attempts to do this, but it does so in a manner that lacks coherence. Thus, paragraph 1.8 provides:

> "Material obtained through covert surveillance may be used as evidence in criminal proceedings. The proper authorisation of surveillance should ensure the admissibility of such evidence under the common law, section 78 of the Police and Criminal Evidence Act 1984 and the Human Rights Act 1998."

47. Paragraph 3.5 provides:

> "…Legally privileged information obtained by surveillance is extremely unlikely to be admissible as evidence in criminal proceedings"

48. Paragraph 3.9 provides:

> "…The retention of legally privileged information, or its dissemination to an outside body, should be accompanied by a clear warning that it is subject to legal privilege. It should be safeguarded by taking reasonable steps to ensure there is no possibility of it becoming available, or its contents becoming known, to any person whose possession of it might prejudice any criminal or civil proceedings related to the information".

49. The draughtsman of the Code appears to have proceeded on the premise that:

> (i) It is undesirable that communications subject to LPP which are disclosed in consequence of authorised surveillance should be used in criminal or civil proceedings;

(ii) Such communications would not be admissible in criminal proceedings;

(iii) Knowledge of such communications could prejudice criminal or civil proceedings.

50. None of these premises is axiomatic. I would expect the Strasbourg Court to require English law to state clearly what use, if any, is permitted to be made of material covered by LPP that is disclosed by surveillance.

51. The majority have held that RIPA permits the Code to authorise surveillance of communications between solicitors and their clients both in custody and outside it in those exceptional circumstances where this will be compatible with the Convention. The Code does not at present do so in a manner that is compliant with the Convention. I would make this observation. Covert surveillance is of no value if those subject to it suspect that it may be taking place. If it is to take place in respect of consultations between solicitors and their clients in prison or the police station, it will be of no value unless this is such a rare occurrence that its possibility will not inhibit the frankness with which those in custody speak with their lawyers. It would seem desirable, if not essential, that the provisions of the Code should be such as to reassure those in custody that, save in exceptional circumstances, their consultations with their lawyers will take place in private. The chilling factor that LLP is intended to prevent will not then occur.

52. On 30 November 2007 the Divisional Court held that monitoring of legal consultations in police stations or prison cannot lawfully be authorised under the Code in its present form. The reaction of the Secretary of State to that finding was made clear by Mr Fordham in his written case on her behalf. This was that, contrary to the decision of the Divisional Court, the Code covered consultations between legal advisers and their clients. I quote from paragraph 7(4)(5) that case:

"(4) The safeguards contained within RIPA and the Code are sufficient to ensure, in the case of directed surveillance in both of the relevant factual scenarios, the requisite quality of law to satisfy the Art. 8 requirement "in accordance with the law".

> (5) The Secretary of State nevertheless recognises the sensitivities that surround the possible use of directed surveillance in the two factual contexts at issue, and has carefully considered the Divisional Court's concern regarding the adequacy of the safeguards that would apply at the point when any such directed surveillance was authorised. The Secretary of State would wish to make clear at the outset that, as a matter of policy, she considers it desirable to take the steps necessary to remedy the concern identified by the Divisional Court. In effect, directed surveillance of legal consultations in detention would fall to be assimilated to "intrusive surveillance" for the purpose of prior authorisation. That could readily and properly be achieved by an order under RIPA s. 47(1)(b) characterising as "intrusive", surveillance in locations where it is known that consultations are taking place between detainees and their legal advisers."

53. This stance was not satisfactory. The Divisional Court did not express concern. It made a finding of law against the Secretary of State. She chose not to appeal against that finding. In those circumstances it was not open to her to consider as a matter of policy whether to "take the steps necessary to remedy the concern identified by the Divisional Court". The position was simply that unless and until she took the appropriate steps she could not lawfully continue to carry out surveillance on legal consultations in prisons or police stations.

54. There is no reason to depart from the affirmative answer given by the Divisional Court to the third question certified.

LORD HOPE OF CRAIGHEAD

My Lords,

55. I have had the advantage of reading in draft the opinion of my noble and learned friends Baroness Hale of Richmond and Lord Carswell. I agree with them, and for the reasons they give I would answer the certified questions in the way Lord Carswell proposes and dismiss the appeals. I wish to add only a few brief comments.

56. The central question is whether, in enacting the Regulation of Investigatory Powers Act 2000 ("RIPA"), Parliament intended to override or qualify a detainee's right to a private consultation with a solicitor (a) at common law under legal professional privilege and (b) under statute. The right of a person who is detained in a police station in England, Wales or Northern Ireland to a private consultation with a solicitor under para 7(1) of Schedule 8 to the Terrorism Act 2000 Act, unless a direction is given under para 9 that this is to be in the sight and hearing of a qualified officer, is matched in Scotland by an equivalent provision in para 16(8) of that Schedule which also declares that the consultation with the solicitor shall be private unless a direction is given under para 17 that it is to take place in the presence of a uniformed officer: see also section 17(2) of the Criminal Procedure (Scotland) Act 1995 which matches section 58 of the Police and Criminal Evidence Act 1984 and its Northern Irish analogue. Furthermore, although section 46 of RIPA imposes some restrictions on authorisations extending to Scotland which have been granted or renewed under the United Kingdom legislation, legislation corresponding to RIPA to enable surveillance operations to be conducted in Scotland was enacted in the same year by the Scottish Parliament: the Regulation of Investigatory Powers (Scotland) Act 2000, asp 11.

57. The Scottish legislation shares with RIPA the absence of any express provision indicating that it was the intention of the legislature to detract in any way from the detainee's common law or statutory right to a consultation with a solicitor that is private. Like section 27(1) of RIPA, however, it provides in section 5(1) that the conduct to which the Act applies "shall be lawful for all purposes", and the systems which it provides for the authorisation of surveillance are the same as those in Part II of RIPA. A further cross-border element is to be found in section 76 of RIPA which enables an activity that commences in Scotland under an authorisation that has been obtained under the Scottish legislation to continue outside Scotland under the original authorisation for up to three weeks from the time the activity commenced outside Scotland. The problem which has been raised by this case is one which applies throughout the United Kingdom.

58. Mr Macdonald QC for the appellants A and C accepted that covert surveillance was a valuable tool for the gathering of intelligence. But he submitted that it was a threat to justice too. The exercise by a detainee of his right to a private consultation with a solicitor is inhibited if he does not know, and cannot insist on being

told, whether or not his consultation is subject to surveillance. A full and frank disclosure of all he knows is essential if the solicitor is to give proper instructions. It is not just that his defence may be undermined if the conversation is overheard. What he knows may implicate others whose activities have not yet been detected or reveal their identities and whereabouts. Girvan LJ made the same point in para 23 of his opinion in the Divisional Court [2007] NIQB 101, when he said that unquestionably the apparent privacy of a consultation intended to be truly private is undermined by covert surveillance. It frustrates its privacy just as much as the presence of police officers sitting within earshot of the consultation. The detainee can object if he sees that police officers are sitting within earshot. The provisions of section 58(1) of PACE and para 7 of Schedule 8 to the Terrorism Act 2000 that the consultation shall be in private gives him the right to do this. But he has no right to object to covert surveillance that has been authorised under RIPA. Nor, since this would be inconsistent with the covert nature of the conduct where it has been authorised, has he a right to be told whether or not it is being undertaken in his case.

59. The common law does not shut its eyes to the possibility that the communications between the detainee and the solicitor may be fraudulent or criminal. Solicitors are of course expected to, and with rare exceptions do, act with complete propriety. But it would be an abuse of the common law privilege for them to act as instruments or accomplices in the furtherance of the detainee's criminal activity – for example, receiving information from the detainee with the intention of warning others whose criminal activities remain undetected by the police. In *R v Central Criminal Court , Ex p Francis & Francis* [1989] AC 346, 394 Lord Goff of Chieveley said:

> "[It] is well established in the Scots law of confidentiality of communications, as in the English law of legal privilege, that the protection does not apply where the transaction as to which the communication passed is fraudulent or criminal, whether the solicitor in possession of the documents is an innocent instrument or an accomplice: see *Dickson on the Law of Evidence in Scotland* (1887 ed), para 1678, and the *Encyclopaedia of the Laws of Scotland*, vol 4 (1927), pp 350-351, para 795, and cases there cited. Thus it is stated in *Dickson* (a work of authority) that:

> ‘One who consults a legal adviser, with a view to committing a fraud or other crime, makes him either an innocent instrument of his guilt or an accomplice. In neither case will so important a part of the history of the crime be excluded on account of confidentiality; for the ground of policy on which the privilege is founded in ordinary cases must give way, where preserving it would prevent crime from being detected.’ ”

Those observations were made in the context of a case where an order was sought for the production of the solicitors’ files, which the solicitors claimed were subject to legal privilege. But in my opinion they apply generally. To the same effect is Stephen J’s comment that the reason on which the common law rule rests cannot include the case of communications, criminal in themselves, or intended to further a criminal purpose: *R v Cox and Railton* (1884) 14 QBD 153, 167. That all having been said, however, the circumstances in which authorisation may be given for covert surveillance are not confined to situations where the common law privilege is actually being abused in this way. The assumption must be that there will be cases where the detainee is entitled to expect that his conversations will be privileged at common law. The question is whether covert surveillance which has been duly authorised under RIPA is nevertheless lawful.

60. The Secretary of State now accepts that directed surveillance of legal consultations in detention should be treated as intrusive surveillance for the purposes of prior authorisation under Part II of RIPA. Section 32 provides that an authorisation for intrusive surveillance may only be granted if the Secretary of State or the senior authorising officer believes that it is necessary in the interests of national security, for the purposes of preventing or detecting serious crime or in the interests of the economic well-being of the United Kingdom. These concepts, which are similar to those on which the interference with the right to privacy guaranteed by article 8(1) of the European Convention on Human Rights may be justified under article 8(2), go beyond those which provide an exception to legal privilege which the common law would recognise. But section 27(1) provides that conduct to which Part II of the Act applies shall be lawful for all purposes if it is authorised under that Part and the conduct is in accordance with the authorisation.

61. Section 27(1) is expressed in clear and simple language, and it must be taken to mean what it says. It does not refer to legal 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 lawful. To achieve this result it must 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.

62. It cannot be said that Parliament was unaware of the importance of preserving the protection of privilege in other circumstances arising from the provisions of RIPA: see sections 19(6) to (8) and 54 (6) to (8), which provide that it is a defence for a person who discloses information that he ought to have kept secret if it was made to or by a professional legal adviser, so long as this was not for the furtherance of a purpose which was criminal. During the debate at Third Reading on 19 July 2000 the Minister, Lord Bach, said that the House had enjoyed several short debates on Report on the protection due to legally privileged material: Hansard, HL debates, col 1046. None of those debates referred to the provisions of Part II of the Act, which deals with surveillance and covert human intelligence sources. But, as Mr Fordham QC for the Secretary of State pointed out, Parliament was clearly mindful throughout of core rights and interests and of the requirements of the European Convention on Human Rights against the background of which the statute was to be enacted. Neither article 6 nor article 8 imposes an absolute prohibition on covert surveillance of legal consultations, provided it is authorised by law and is proportionate. It was to address these requirements that Part II of RIPA has been enacted, and it does this in great detail. Of course, fundamental rights cannot be overridden by words that are general or ambiguous. Where words of that kind are used their implication may have passed unnoticed in the democratic process, as Lord Hoffmann famously said in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, p 131. 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.

63. The more difficult question, perhaps, is whether the effect of RIPA, and of section 27(1) in particular, is to override the detainee's right to a private consultation under the statutes. Mr Macdonald said that RIPA lacked any manifest intention to do this. It is true that none of its provisions refer to the statutes or any of them. It could have made the position clear by amending them, for example by introducing a further qualification to the right to a consultation that is private to that which is already provided by paras 8 and 9 of Schedule 8 to the Terrorism Act 2000 and, for Scotland, by para 17, and by qualifying the provisions of section 58 of PACE and section 17(2) of the 1995 Act in Scotland. It did not do this. Does the maxim *generalia specialibus non derogant* which the appellants invoke apply, with the consequence that these pre-existing statutory rights must be taken to remain unqualified? The appellants acknowledge that the Code of Practice on Covert Surveillance makes provision for dealing with information obtained that is subject to legal privilege. But the question whether the statutory rights remain unqualified must depend, they say, on the provisions of the Act itself, not the Code that was issued almost two years later under section 71 and, although laid before Parliament, was not scrutinised by it.

64. As Lord Donovan pointed out in the Privy Council in *Woodend (K V Ceylon) Rubber and Tea Co Ltd v Inland Revenue Comr* [1971] AC 321, 333, the maxim is more easy to state than it is, on occasions, to apply: in almost all cases the later statute will contain general words inconsistent with the words of the special statute, otherwise there would be no conflict. In the end the question is what Parliament intended, as he said at p 334. In *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538, 553-554, Lord Wilberforce too acknowledged for the Board that cases are seldom as simple as the maxim suggests, and that whether the earlier statute which deals with a particular and more limited subject matter which is included within the general subject matter with which the subsequent statute is concerned has been left intact or is superseded is one of legislative intention which the courts endeavour to extract from all available indications. So I do not think that the problem can be solved simply by deciding whether the right to privacy under the earlier statutes is the general right, as the Secretary of State submits, or - as I am inclined to think – the generality is to be found in RIPA.

65. For an example of the kind of legislative technique that the appellants suggest should have been adopted, reference may be made to para 5(6) of Schedule 15 to the Terrorism Act 2000, which substitutes for subsections (12) to (18) of section 58 of PACE (access to legal advice) a provision that states that nothing in that section applies to a person arrested or detained under the terrorism provisions. But the very fact that RIPA was intended to be so general in its application did not lend itself to this technique. Nor was it the intention to alter the basic rule that consultations that are private in terms of the statute must take place in private. The choice lay between attempting to deal specifically with every right to privacy that previous legislation had provided for and listing all the other ~~the~~ circumstances with which RIPA's provisions might come into conflict, or resting on the declaration in section 27(1) that conduct of the kind that it refers to shall be lawful for all purposes. This was a matter for Parliament. It was inevitable that covert surveillance of the kind that RIPA was intended to provide for would intrude on conversations that were intended to be private. Privacy under a right given by statute is no exception. To conclude that consultations that were being conducted in private under a statutory right are immune from covert surveillance under RIPA would be wholly at variance with the obvious intention that RIPA should be general in its application, subject to the strict conditions that it lays down.

66. The answer to the question must depend on the Parliamentary intention that is to be derived from the terms of the statute, and I do not think that it is capable of further elaboration. I would hold that, as in the case of conversations that are ordinarily protected by legal professional privilege, conversations between a detainee and his solicitor that are taking place in private in the exercise of a statutory right may be subjected to intrusive surveillance that has been duly authorised under section 32 of RIPA so long as it is conducted strictly in accordance with the conditions which the authorisation lays down. In all other respects the statutory right to privacy must be respected. Your Lordships have not been asked to decide in this case whether information disclosed in private by the detainee to the solicitor that has been obtained by the use of covert intelligence may be used against the detainee in evidence at his trial. All that needs to be said about this is that basic rules of fairness strongly indicate the contrary

BARONESS HALE OF RICHMOND

My Lords,

67. I agree, for the reasons given by my noble and learned friends Lord Hope of Craighead and Lord Carswell, that RIPA does permit the covert surveillance of communications between lawyers and their clients, even though these may be covered by legal professional privilege and notwithstanding the various statutory rights of people in custody to consult privately with their lawyers. This is an unpalatable conclusion, but one to which I am driven both by the plain words of the Act and by the history of legislation on this subject.

68. In a nutshell, section 27(1) of RIPA states that covert surveillance which is carried out in accordance with the Act "shall be lawful for all purposes". The statutory history, as explained by my noble and learned friend Lord Phillips of Worth Matravers, makes plain the "mischief" at which this was aimed. The story goes back to the decision of Sir Robert Megarry VC in *Malone v Commissioner of Police of the Metropolis* [1979] Ch 344. Mr Malone could not complain that the police had tapped his telephone because no private right, whether of privacy or property, was infringed. At that stage, of course, the European Convention on Human Rights conferred no rights in the domestic law of the United Kingdom. Mr Malone took his case to the European Court of Human Rights which held that the legal basis for authorising such interference with his right to respect for his private life was not sufficiently clear and predictable to fulfil the Convention requirement of legality. It was not "in accordance with the law" and thus could not be justified under article 8(2) of the Convention: see *Malone v United Kingdom* (1984) 7 EHRR 14. Parliament therefore enacted the Interception of Communications Act 1985, to put the authorisation of telephone tapping on a statutory basis.

69. Attention then turned to official "bugging" of private conversations. Unless done by or with the consent of the occupier of the premises involved, this would involve a trespass, which was an interference with private rights in domestic law, as well as an unregulated interference with the Convention right to privacy: see *Khan v United Kingdom* (2000) 31 EHRR 1016. Hence Part III of the Police Act 1997 provided a regime for authorising such acts and

section 92 provided that "No entry on or interference with property or with wireless telegraphy shall be unlawful if it is authorised by an authorisation having effect under this Part." The scheme expressly contemplated that authorised bugging might result in the obtaining of privileged or other confidential information and provided extra safeguards where this was likely.

70. Other kinds of covert surveillance, including bugging police stations with police consent, did not involve any infringement of private rights under domestic law and remained unregulated until RIPA was passed in 2000. But the Human Rights Act had been passed in 1998, turning the rights protected under the European Convention into rights protected in UK domestic law. It was due to come into force in October 2000. Legislation was clearly required to authorise and regulate all forms of official "snooping" which might otherwise fall foul of the Convention rights, in particular the right to respect for private life and correspondence which is protected by article 8. I accept the submission of Mr Fordham QC, for the Secretaries of State, that Part II of RIPA has to be seen alongside Part III of the 1997 Act. The scheme is intended to be comprehensive. Both Acts contemplate that privileged or confidential information may be obtained as a result. Both must be taken to qualify, though not to override, the statutory rights of private consultation with a lawyer. Section 27(1) is intended to mean that the covert surveillance which is authorised under the scheme is "in accordance with the law" for the purpose of the Convention principle of legality. What may be done with the information thus obtained is a separate question.

71. It does not follow, however, that because an act of covert surveillance is "lawful" it can never result in a contravention of the Convention rights. The case of *M*, which is not an all fours with the others before us, supplies an example. M was arrested on 30 May 2006 under the Terrorism Act 2000 and taken to Antrim police station for interview. His father and solicitor were both there. The father believed that his son was suffering from mental health problems, had been behaving erratically over the past few days, and might not be fit for interview. A consultation with an independent psychiatrist was arranged, with a view to assessing whether M was fit for interview and any risks to his well being from further detention or interview. The psychiatrist was only willing to perform the examination if he could be assured that there would be no electronic surveillance. This assurance was refused. An application

for leave to apply for judicial review was heard in the evening of 31 May 2006 in the course of which M was released without charge.

72. Interviews with medical advisers are not covered by legal professional privilege in quite the same way as are interviews with legal advisers, nor do the statutory rights of detainees to private consultation with their lawyers apply. But they have been treated as being *in pari materia* with legal consultation. This is partly because they will usually be covered by litigation privilege, and so raise the same legality issue, and partly because they are undoubtedly an aspect of the right to respect for private life, and thus raise the same article 8 issues. But this case also raises a discrete issue under article 6.

73. An important purpose of a medical examination in these circumstances is to ascertain whether the detainee is a vulnerable person for the purpose of the Codes of Practice governing police questioning. Experience has shown that people with mental health problems require extra protection, because they may be more susceptible to suggestion or to pressure which would not be oppression of a person in normal mental health, and their answers may therefore be unreliable. As the current English Code under PACE explains, "although people who are mentally disordered or otherwise mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wanting to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating. Special care should always be taken when questioning such a person, and the appropriate adult should be involved if there is any doubt about a person's mental state or capacity" (2008, Code C, Annex E, para E2).

74. If a mentally disordered person were interviewed without the extra protection which the Code requires, it is possible, even likely, that any incriminating evidence obtained would be excluded at trial. But this would depend upon the evidence available as to his mental state at the time. The possibility certainly cannot be excluded that there would be a breach of his right to a fair trial, including the presumption of innocence, which is guaranteed by article 6 of the Convention. The fact that any surveillance would have been lawful under RIPA does not mean that there could be no breach of article 6 as a result.

75. However, the question does not arise in this case, as M was released without charge, let alone trial. I agree entirely with the observations of Lord Carswell on the granting of leave in this case; but I agree also with the observations of Lord Phillips about the failure of the Secretary of State to take steps to classify such surveillance as "intrusive". The aim of the Act was clearly to ensure that authorisations were only given in circumstances where the surveillance would be both necessary and proportionate to one of the legitimate aims permitted by article 8(2). The Divisional Court held that the directed surveillance regime was not sufficient for this purpose and there has been no appeal against that finding.

LORD CARSWELL

My Lords,

76. These appeals came before the House in a very unusual fashion. The appellants each sought in applications for judicial review declarations that the covert directed surveillance of consultations with solicitors and a medical adviser respectively in a police station or in prison would be unlawful. The Divisional Court (Kerr LCJ, Campbell and Girvan LJJ) held that that would be unlawful, though not for all the reasons advanced by the appellants, who sought declarations that such surveillance of interviews protected by professional privilege could not be carried out at all under the provisions of the Regulation of Investigatory Powers Act 2000 ("RIPA"). Notwithstanding the fact that they had succeeded in their object of establishing that covert directed surveillance of the consultations which they had wished to have with their advisers would be unlawful, the appellants applied for leave to appeal to your Lordships' House.

77. The Divisional Court certified several questions and gave leave to appeal, citing in support the decision in *Secretary of State for Work and Pensions v Morina* [2007] EWCA Civ 749, [2007] 1 WLR 3033. The members of the Appellate Committee entertained doubts about jurisdiction and the usefulness of the appeal, but since leave had been given, and bearing in mind the public importance of the issue, they decided to proceed with the hearing and to decide the issue of the wider declarations sought. I would myself wish, however, to reserve my opinion on whether a successful party in the court below can properly appeal against a "decision" of that court in

a criminal matter and, if so, in what circumstances. I would strongly recommend that courts faced with a similar application for leave to appeal should, if they consider it right to certify that points of law of general importance arose, refuse leave, so that the Appeal Committee of the House can consider it on petition. The Committee will then be in a position to take full account of the importance of the issues, other possible appeals or applications in the same sphere and whether the petitioners retain any interest in the legal sense in pursuing the relief sought. The last-mentioned point is relevant in the present case, because McE pleaded guilty to a number of charges before the judicial review proceedings were commenced, C and A pleaded guilty to explosives offences very soon after leave to appeal to the House of Lords was given, and M was released from police custody before the application for judicial review was decided.

78. The appellants C and A were arrested under section 41 of the Terrorism Act 2000 on 19 April 2006 and taken to Antrim Police Station, where each nominated a solicitor to represent him. The solicitors when they attended each asked for an assurance that the consultations with their clients would not be monitored. The police, in accordance with their regular practice, would neither confirm nor deny that any monitoring would take place and declined to give the assurances sought.

79. M was also arrested under section 41 and taken to Antrim Police Station. Because of concerns which had been expressed about his medical condition, arrangements were made for him to be medically examined in order to ascertain his fitness for police interview. A consultant psychiatrist was asked by M's solicitor to examine him for this purpose and agreed to do so. He asked the solicitor to obtain a similar assurance that no covert surveillance of his consultation would take place, and again the police declined to give such an assurance. The psychiatrist refused to proceed with the consultation without the assurance and M was in the event examined by a medical officer retained by the police, who on two occasions found him fit for interview. It was not in dispute that once the Prison Service had agreed to allow an examination by the psychiatrist engaged on behalf of M, the same issues relating to the discussion of confidential information between M and the psychiatrist might arise as in legal consultations. It was accordingly agreed by the parties that his case could be regarded as being *in pari materia* with those concerned with legal professional privilege.

80. When the appellant McE was on remand in HM Prison, Maghaberry, he attempted to ascertain from the prison authorities whether his legal and other visits were the subject of covert surveillance. The Prison Service replied that as a matter of policy it was not prepared to inform him or any other prisoner about any such surveillance. He complained to the Prisoner Ombudsman, to whom the Prison Service would neither confirm nor deny that covert surveillance had taken place. The Ombudsman concluded in his report that the Prison Service was acting within the law and that it had in place the safeguards required in both the legislation and the associated Code of Practice.

81. Before the enactment of RIPA, both the common law and some statutory provisions recognised the importance of legal professional privilege (to which I shall refer for convenience simply as "privilege") and the confidentiality of all that is said in consultations between lawyers and their clients. The right of a person detained to private consultation with a lawyer was recognised in the Judges' Rules and is now enshrined in section 58 of the Police and Criminal Evidence Act 1984 (and its analogue article 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989), in Schedule 8 to the Terrorism Act 2000 and in rule 71 of the Prison and Young Offenders Centres Rules (Northern Ireland) 1995. Lord Taylor of Gosforth CJ summarised the principle in *R v Derby Magistrates' Court, ex parte B* [1996] AC 487, 507:

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

Neither Lord Taylor nor Lord Nicholls of Birkenhead, who also discussed the principle, considered that any exceptions could be entertained, so long as the privilege lasted. Lord Hoffmann described it in similar terms in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, 606-607, at para 7.

82. It is to be noted that these and other authorities dealing with privilege were all concerned with the *use* of evidence consisting of what was said between legal advisers and clients. The rule preventing that remains absolute, even if that evidence would exculpate another person accused of a criminal offence (the position in *R v Derby Magistrates' Court, ex parte B).* The only exceptions, which may not be true exceptions, are when the privilege is spent (per Lord Nicholls in *Ex parte B* at pages 512-513) or when the communication has been made to a solicitor by his client for the purpose of being guided or helped in the commission of a crime (*R v Cox and Railton* (1884) 14 QBD 153), since the privilege does not attach at all to communications made for such a purpose. As Schiemann LJ expressed it in *Barclays Bank plc v Eustice* [1995] 1 WLR 1238, 1249, "advice sought or given for the purpose of effecting iniquity is not privileged."

83. None of these decisions concerned covert surveillance of legal consultations. Although the privilege is described in terms of a legal right, it is not clear from the decisions whether such surveillance is to be regarded as unlawful *per se* or whether the principle extends only to the protection of the product of legal consultations. I incline to the latter view, which appears to be consonant with the Strasbourg decisions, but I do not find it necessary to reach a definite decision on the point. The inviolability of the rule against the admission in evidence of privileged communications remains whichever way it might be decided.

84. A number of decisions of the European Court of Human Rights deal with surveillance of consultations with legal advisers. It was made clear in *S v Switzerland* (1991) 14 EHRR 670 and *Brennan v United Kingdom* (2001) 34 EHRR 507 that supervision of legal consultations, which would have the effect of preventing the client from giving his lawyer instructions and receiving advice in confidence, entailed a violation of article 6(3)(c) of the European Convention on Human Rights and Fundamental Freedoms ("the Convention") in conjunction with article 6(1): cf also *Ocalan v Turkey* (2003) 37 EHRR 383. In other words, it was the effect of the supervision, not the supervision in itself, which brought about the breach of Convention rights. It was accepted in *Brennan* (para 58) and *Ocalan* (para 146) that the right of access to a solicitor might be subject to restrictions for good cause, the ultimate question in each case being whether the restriction deprived the accused of a fair hearing.

85. Another line of Strasbourg cases, of which *Klass v Germany* (1978) 2 EHRR 214, *Valenzuela Contreras v Spain* (1999) 28 EHRR 483 and *Erdem v Germany* (2002) 35 EHRR 383 are examples, concerns covert surveillance by telephone tapping, but not specifically of legal consultations. Girvan LJ cited these cases, along with *Kopp v Switzerland* (1999) 27 EHRR 91, for the proposition that domestic law must lay down a clear and precise set of rules, giving the citizen adequate indication of the circumstances and conditions under which public authorities may adopt such measures. Mr Macdonald QC for the appellants C and A adopted the same argument, submitting that the provisions of RIPA and the Home Office Covert Surveillance Code of Practice do not satisfy this criterion. Mr Fordham QC for the Prison Service of Northern Ireland and the Secretary of State for the Home Department urged caution in drawing conclusions from this line of authorities. He pointed out that RIPA covers a wider range of actions and circumstances than the discrete matter of telephone tapping. Since Strasbourg has not equated the two in its decisions, he submitted, our courts should regard it as inappropriate to make this equation without much clearer consonance between them. I think that there is substance in this argument, and I should myself be slow to accept that the type of prescription required in telephone tapping cases is necessary for covert surveillance to be valid.

86. What is clear is that the ECtHR contemplates both in the legal consultation cases and the telephone tapping cases that some exceptions to the general prohibition may exist. I have referred to *Brennan v UK* and *Ocalan v Turkey* for this proposition in legal consultation cases, and in *Klass v Germany* and *Erdem v Germany* the Court was prepared to accept the possibility of the existence of exceptional circumstances, which may be related to abuse of the privilege or the interests of national security or the prevention of crime. This approach tends to support the proposition that covert surveillance of legal consultations should not be regarded as prohibited and unlawful in all possible circumstances.

87. RIPA deals with a number of areas in which the state sets out to acquire information about matters going on within or without the jurisdiction and, as its title indicates, is designed to regulate the methods by which information is gathered. The portion which is material for the purposes of these appeals is Part II, entitled "Surveillance and Covert Human Intelligence Sources." It divides the conduct with which this Part deals into three, directed surveillance, intrusive surveillance and the conduct and use of covert

human intelligence sources. Directed surveillance, which by common consent is the head which is material in these appeals, is defined by section 26(2) as follows:

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

Surveillance is defined by section 48(2) as including

> "(a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;
>
> (b) recording anything monitored, observed or listened to in the course of surveillance; and
>
> (c) surveillance by or with the assistance of a surveillance device."

It is defined by section 26(9)(a) as "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".

88. Intrusive surveillance is defined by section 26(3) as follows:

"(3) Subject to subsections (4) to (6), surveillance is intrusive for the purposes of this Part if, and only if, it is covert surveillance that—

(a) is carried out in relation to anything taking place on any residential premises or in any private vehicle; and

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

89. Section 27(1) provides:

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

(a) an authorisation under this Part confers an entitlement to engage in that conduct on the person whose conduct it is; and

(b) his conduct is in accordance with the authorisation."

Section 28 governs the authorisation of directed surveillance. Subsections (1) to (3) provide:

"28 (1) Subject to the following provisions of this Part, the persons designated for the purposes of this section shall each have power to grant authorisations for the carrying out of directed surveillance.

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

(a) that the authorisation is necessary on grounds falling within subsection (3); and

(b) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.

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

(a) in the interests of national security;

(b) for the purpose of preventing or detecting crime or of preventing disorder;

(c) in the interests of the economic well-being of the United Kingdom;

(d) in the interests of public safety;

(e) for the purpose of protecting public health;

(f) for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; or

(g) for any purpose (not falling within paragraphs (a) to (f)) which is specified for the purposes of this subsection by an order made by the Secretary of State."

The persons designated to grant authorisations for the Police Service of Northern Ireland are, by virtue of section 30 and the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003 (SI 2003/3171), specified officers of at least the rank of superintendent.

90. Intrusive surveillance is governed by a distinct regime with stricter controls, requiring a higher level of authorisation. The initial authorisation has to be given by a specified senior officer, in the case of the PSNI the Chief Constable or Deputy Chief Constable (section 32(6)). By section 36 it is not to take effect until its grant has been approved by a Surveillance Commissioner and written notice of the approval has been given. Section 32(2) and (3) provide:

"(2) Neither the Secretary of State nor any senior authorising officer shall grant an authorisation for the carrying out of intrusive surveillance unless he believes—

(a) that the authorisation is necessary on grounds falling within subsection (3); and

(b) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.

(3) Subject to the following provisions of this section, an authorisation is necessary on grounds falling within this subsection if it is necessary—

(a) in the interests of national security;

(b) for the purpose of preventing or detecting serious crime; or

(c) in the interests of the economic well-being of the United Kingdom."

Provision is made in sections 37 to 39 for the quashing of an approval by a Surveillance Commissioner and for appeals to the Chief Surveillance Commissioner against the refusal or quashing of authorisations.

91. Under RIPA section 71 the Secretary of State must issue codes of practice relating to the exercise and performance of the powers and duties conferred or imposed, otherwise than on the Surveillance Commissioners, by various statutory provisions, including Part II of the Act. By subsection (4) the draft code is to be laid before both Houses of Parliament. Section 72 requires every person exercising or performing such duties to have regard to the provisions of every relevant code of practice in force. The Secretary of State issued such a code, which dealt in detail with the procedures to be followed by those concerned with covert surveillance.

92. The Code of Practice so issued makes specific and quite detailed provision for dealing with legally privileged information. Paragraph 3.1 requires particular care to be taken where "confidential information" is involved, defined as including matters subject to legal privilege. A higher level of authorisation must be obtained where it is likely that knowledge of confidential information will be obtained; in the case of PSNI, it is to be obtained from a Deputy Chief Constable (Annex A to the Code). It is to be noted, however, that no provision was made in Annex A for a nomination of a person in the Prison Service from whom that higher level of authorisation should be obtained. The definition of matters covered by legal privilege in article 12 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)) is incorporated by paragraph 3.3, and this clearly extends to the legal consultations in the case of the appellants C, A and McE and by analogy to M's medical consultation. Paragraphs 3.5 to 3.9 contain detailed instructions for dealing with legally privileged information, providing additional safeguards. It is noted in para 3.5 that such information "is extremely unlikely ever to be admissible as evidence in criminal proceedings". An application for surveillance is to be made only in exceptional and compelling circumstances, with detailed reasons being given, and further advice to be obtained and

notification to a Surveillance Commissioner in appropriate circumstances. The details of the handling of the surveillance are not in point in the present appeals, which are concerned with the existence of power to conduct any surveillance of legal consultations. What is quite clear, however, is that those who drafted the code were very clearly aware that surveillance under RIPA was likely to be carried out of legal consultations. The draft was duly laid before Parliament and no objection is recorded as having been taken to the inclusion of legal consultations in RIPA surveillance or the power to do so.

93. The four appellants, together with an applicant known as W who has not appealed to your Lordships' House, brought applications for judicial review, seeking declarations that they were entitled to consult with their legal and medical advisers without being subject to covert surveillance and that the failure of the several authorities concerned to provide assurances that they would not be so subject was unlawful. The Divisional Court gave written judgments on 30 November 2007, whereby they allowed the applications and granted declarations. Kerr LCJ and Campbell LJ held that it was the intention of Parliament that RIPA applied to consultations between legal advisers and their clients. Girvan LJ dissented on this issue and concluded that the more generalised provisions of RIPA could not have been intended to interfere with legal professional privilege in a wider context. All three judges agreed, however, that directed surveillance was not proportionate in terms of the interference that the surveillance involves and the degree of protection for the interests that can be achieved. In the absence of an enhanced authorising regime such as that prescribed for intrusive surveillance, monitoring of lawyer/client or doctor/patient consultations could therefore not be justified under article 8(2) of the Convention. They found no violation of article 6, as there was no evidence that any of the applicants had been deprived of a fair hearing. The court made declarations in the following terms:

> "1. that the monitoring of consultations of each of the applicants' legal or medical consultations would be unlawful;
>
> 2. that the refusal of the respondents to give the assurances that no such monitoring would take place constituted a violation of the applicants' article 8 rights.

The Divisional Court certified in the case of C, A and McE that the following points of law of general public importance arose:

> "1. Does section 28 of the Regulation of Investigatory Powers Act 2000 override or qualify the right of a person to consult in private with a legal adviser (i) at common law; or (ii) under any of the following statutory provisions: (a) article 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989; (b) paragraph 7 of Schedule 8 to the Terrorism Act 2000; and (c) Rule 71 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 by permitting covert directed surveillance of such onsu1tations?
>
> 2. Do paragraphs 3.1 to 3.10 of the Home Office Code of Practice on Covert Surveillance apply to solicitor/client consultations?"

In M's case the following was substituted for paragraphs 1 and 2 above:

> "1. Does section 28 of the Regulation of Investigatory Powers Act 2000 override or qualify the common law right of a person to consult privately with a medical practitioner by permitting covert directed surveillance of such consultation?"

The court certified the following question in relation to all four appeals:

> "3. Would covert directed surveillance of lawyer/client consultations or doctor/patient consultations, carried out under section 28 of the Regulation of Investigatory Powers Act 2000 and in accordance with the Home Office Code of Practice, infringe the rights of the client/patient under article 8 of the European Convention on Human Rights and Fundamental Freedoms, contrary to section 6 of the Human Rights Act 1998?"

94. The appellants have brought this appeal in order to challenge the finding of the majority of the Divisional Court that RIPA was intended to extend to legal or medical consultations. The respondents did not cross-appeal against the making of the declarations, although their counsel did attempt to argue that the surveillance was proportionate, claiming to be able to do so on the terms of the certificate. The Secretary of State has, however, stated that she is willing to make an order under section 47(1)(b) of RIPA characterising surveillance of consultations between detainees and their legal advisers as intrusive surveillance, with the safeguards which go with that level of surveillance. If done, this would make consideration of directed surveillance of such consultations superfluous. It is regrettable, however, that no step has yet been taken to make the necessary order, notwithstanding the fact that the present practice was declared unlawful over a year ago, and no appeal was brought against the court's decision. Having said this, I do not propose to enter into further discussion of the proportionality of directed surveillance of legal or medical consultations, save to say that I agree with the conclusion reached by the Divisional Court.

95. There is a factor peculiar to McE's case which led to a concession by counsel for the Prison Service that the surveillance in his case was not proportionate. As I have said (para 92 above), no officer was specified in Annex A to the Code as being permitted to authorise surveillance in cases likely to result in knowledge of matters subject to legal privilege. In consequence it was difficult for the Prison Service to maintain that there was sufficient basis for claiming that the interference with the exercise by McE of his article 8 rights was "in accordance with the law".

96. The issue on which the Divisional Court was divided was whether Parliament intended RIPA to extend to consultations normally protected by legal professional privilege or a like privilege in a doctor-patient consultation. The appellants relied on two main principles of construction, which may operate together, as indicia of a contrary intention. The first is the presumption known as the principle of legality, that a statute is not generally intended to override fundamental human rights. The second is the maxim of statutory interpretation *generalia specialibus non derogant.*

97. The first principle was reviewed by the House of Lords in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115. The issue was the lawfulness of the Secretary of State's

policy to operate the Prison Service Standing Orders in such a way as to forbid interviews of prisoners by journalists unless the journalists signed written undertakings not to publish any part of the interviews. The House upheld a claim by the appellants that journalists should be entitled to interview them and publish the interviews when investigating the question whether they had been wrongly convicted through a miscarriage of justice. Lord Hoffmann said at page 131:

> "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. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

The same principle was applied in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, where section 20 of the Taxes Management Act 1970, as amended, entitled an inspector of taxes to require a taxpayer to deliver to him such documents as were in his possession or power. Section 20B(8), however, provided that a barrister, advocate or solicitor was not obliged to deliver or make available, without his client's consent, any document with respect to which a claim to professional privilege could be maintained. The House held, relying on the principle of legality, that an exclusion must be implied in section 20 for documents subject to professional privilege.

98. The second principle is summarised in Halsbury's Laws of England, 4th ed, vol 44(1), para 1300:

> "It is difficult to imply a repeal where the earlier enactment is particular, and the later general. In such a case the maxim *generalia specialibus non derogant* (general things do not derogate from special things) applies. If Parliament has considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to

> interfere with that provision; and therefore, if such an enactment, although inconsistent in substance, is capable of reasonable and sensible application without extending to the case in question, it is prima facie to be construed as not so extending. The special provision stands as an exceptional proviso upon the general. If, however, it appears from a consideration of the general enactment in the light of admissible circumstances that Parliament's true intention was to establish thereby a rule of universal application, then the special provision must give way to the general."

The principle descends clearly from decisions of the House of Lords in *The Vera Cruz* (1884) 10 App Cas 59 and the Privy Council in *Barker v Edger* [1898] AC 748, and has been affirmed and put into effect on many occasions. Lord Cooke of Thorndon pointed out, however, in *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605, 627, that the maxim is not a technical rule peculiar to English statutory interpretation, rather it "represents simple common sense and ordinary usage". It is based, like other linguistic canons of construction, "on the rules of logic, grammar, syntax and punctuation, and the use of language as a medium of communication generally" (Bennion, *Statutory Interpretation*, 5th ed (2008), p 1155). It has to be remembered, as Lord Wilberforce observed in *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538, 554, that it is still a matter of legislative intention, which the courts endeavour to extract from all available indications.

99. The appellants submitted that it was not the intention of Parliament that the general surveillance provisions of RIPA should override the specific provisions in the earlier enactments which conferred statutory rights upon persons detained to be interviewed by lawyers in such a manner as to be able to speak in confidence. Section 58 of PACE and its Northern Ireland equivalent provide that a person held in custody in a police station is entitled "to consult a solicitor privately at any time." Paragraph 7 of Schedule 8 to the Terrorism Act 2000 similarly provides that a person detained may consult with a solicitor "privately" as soon as practicable. In both cases the exercise of the right may be deferred in certain circumstances, but subject to that it is not restricted. Rule 71 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 requires reasonable facilities to be allowed for the legal adviser of a prisoner to interview in the sight but not in the hearing of an officer. These provisions are not the classic s*pecialia*, which are most clearly

represented by the statute of Charles II exempting certain lands from all manner of taxes (see *Sinclair v Cadbury Brothers Ltd* (1933) 18 TC 157). As Mr Fordham pointed out in his printed case, RIPA could properly be regarded more as a specific than a general enactment and the privacy of interview provisions as general. Be that as it may, I regard the issue basically as one of attempting to ascertain from all the *indicia* whether Parliament intended to make legal/medical consultations subject to the surveillance provisions.

100. I commence with the wording of RIPA. In its natural and ordinary sense it is capable of applying to privileged consultations and there is nothing in its wording which would operate to exclude them. The reason given by Lord Hoffmann in the passage which I have quoted from *Ex parte Simms* is that the full implications of the unqualified meaning of the statutory words may have passed unnoticed in the democratic process. It seems to me unlikely that the possibility of RIPA applying to privileged consultations could have passed unnoticed. On the contrary, it is an obvious application of the Act, yet no provision was put in to exclude them.

101. Secondly, I do not consider that it is at all a clear case for the application of the maxim *generalia specialibus non derogant.* When the earlier provisions relied on by the appellants were enacted, there was no equivalent of RIPA relating to powers of surveillance. Those provisions were simply designed to ensure that the various categories of detained persons could have professional consultations in private, there being no question that covert surveillance might be carried out. They were not special exceptions to be preserved when a general rule was passed into law.

102. Thirdly, there is the need to incorporate exceptions to the inviolability of privileged consultations. One such is the *Cox & Railton* exception: if it were not possible to exercise covert surveillance of legal consultations where it is suspected on sufficiently strong grounds that the privilege was being abused, the law would confer an unjustified immunity on dishonest lawyers. There may be other situations where it would be lawful to monitor privileged consultations, for example, if it is necessary to obtain information of an impending terrorist attack or to prevent the threatened killing of a child. The limits of such possible exceptions have not been defined and I shall not attempt to do so, but they could not exist if the rule against surveillance of privileged consultations were absolute.

103. Fourthly, the Code makes detailed provision for obtaining authorisation for monitoring consultations covered by legal professional privilege. It was laid before and approved by Parliament, but no point appears to have been taken that RIPA did not cover such consultations. It would be surprising at least that no objection was made to the inclusion of those provisions in the Code if it was thought that Parliament had not intended that the consultations be covered by RIPA.

104. Finally, Girvan LJ pointed in paragraph 27 of his judgment to the specific exception in section 97 of the Police Act 1997 of situations where knowledge of matters subject to legal privilege was likely to be acquired, and contrasted that with the provisions of RIPA, relying on this to support the conclusion that RIPA was not intended to extend to such situations. Subsections (1) and (2) provide as follows:

> "(1) An authorisation to which this section applies shall not take effect until–
>
> (a) it has been approved in accordance with this section by a Commissioner appointed under section 91(1)(b), and
>
> (b) the person who gave the authorisation has been notified under subsection (4).
>
> (2) Subject to subsection (3), this section applies to an authorisation if, at the time it is given, the person who gives it believes–
>
> (a) that any of the property specified in the authorisation–
>
> (i) is used wholly or mainly as a dwelling or as a bedroom in a hotel, or
>
> (ii) constitutes office premises, or
>
> (b) that the action authorised by it is likely to result in any person acquiring knowledge of–
>
> (i) matters subject to legal privilege,
>
> (ii) confidential personal information, or
>
> (iii) confidential journalistic material."

It may be seen from the terms of section 97 that it is intended to be a special provision limiting the general powers conferred by the other provisions of Part III of the Act. It does not follow that the Act would not have applied to privileged consultations without section 97. I therefore do not think that this point assists the appellants' contentions. If anything, it goes the other way.

105. I conclude accordingly that Parliament intended that the covert surveillance provisions of RIPA should extend to the type of lawyer/client and doctor/patient consultations which are ordinarily protected by legal professional privilege. I would therefore answer in the affirmative questions 1 and 2 of the certified questions in the appeals of C, A and McE and question 1 in M's appeal. As I agree with the conclusion of the Divisional Court concerning the proportionality of directed surveillance of such consultations, I would answer the third certified question in the affirmative. I would dismiss the appeals. I have reservations about the appropriateness of the wording of the declarations, but as no appeal has been brought against their grant and none of the certified questions deals with them, I would leave them undisturbed.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

106. In my view, Part II of the Regulation of Investigatory Powers Act 2000 ("RIPA") permits covert surveillance of communications and consultations between a person in custody and his or her lawyer, notwithstanding that such communications enjoy legal professional privilege, and despite such a person's statutory right to consult a solicitor privately. Having had the benefit of reading in draft the opinion of my noble and learned friends Lord Phillips of Worth Matravers and Lord Carswell, which set out all the relevant material, I can express my reasons relatively shortly.

107. I agree with my noble and learned friend, Baroness Hale of Richmond, whose draft opinion I have also seen, that there are two essential features which compel my conclusion. First, there are the clear and wide opening words of section 27(1) of RIPA, which provide that covert surveillance, if carried out in accordance with the

Act, "shall be lawful for all purposes". Secondly, there is the legislative background to RIPA, and in particular the Interception of Communications Act 1985, Part III of the Police Act 1997, and the Human Rights Act 1998, as considered in the context of the European Convention and the relevant Strasbourg jurisprudence.

108. If covert surveillance is carried out in accordance with Part II of RIPA, the natural meaning of the opening words of section 27(1) is that, whatever rights would otherwise be infringed thereby, the surveillance is nonetheless lawful. As Lord Phillips's admirable survey of the law demonstrates, this case involves two rights, which are different, but very closely connected, namely the right of a person to consult a lawyer in private, and the right to legal professional privilege in connection with communications with one's lawyer. Any modern civilised legal system recognises the fundamental importance of these two rights, and therefore one feels an instinctive initial reluctance to hold that section 27(1) permits covert surveillance of such consultations and communications, as it would appear significantly to undermine such important rights.

109. However, while these two rights are very important, neither can possibly be regarded as unqualified. Both rights can self-evidently be abused for improper, even criminal, purposes; indeed, as a result of such abuse, the rights themselves could fall into disrepute. The right to privilege in respect of communications has thus always been subject to the so-called iniquity exception: see *R v Cox and Railton* (1884) 14 QBD 153, 167, and, more recently, *Barclays Bank plc v Eustice* [1995] 1 WLR 1238, 1249 (although, for my part, I would leave open the question of whether the latter case was rightly decided). The right to private consultation must plainly be subject to the same exception, given, as Lord Phillips says, that the rationale underlying both rights is the same, but also because the iniquity exception would be pointless if it were otherwise. Strasbourg jurisprudence also recognises that neither right is absolute, for the same reasons – see e.g. *Klass v Germany* (1978) 2 EHRR 214 and the other cases identified by Lord Carswell in paras 84 to 86.

110. Furthermore, as explained more fully by Baroness Hale in paras 68 to 70, RIPA was enacted ahead of the Human Rights Act 1998 coming into force, and in the context of the previous authorisation of telephone tapping and of surveillance of private conversations by the 1985 Act and Part III of the 1997 Act respectively, to achieve compliance with article 8(2) of the European Convention. This

history appears to me to indicate pretty clearly that "in accordance with the law" in section 27(1) was intended to extend to Convention rights, and indeed all other rights.

111. It must be acknowledged that there are two inherent paradoxical problems in the exercise of intercepting or listening in on privileged communications and private consultations between lawyer and client. First, the authorities cannot know if the privilege and right to privacy are being abused and that the iniquity exception applies, until the interception or listening in has occurred and its results examined. Secondly, the authorities cannot warn the parties in advance that interception or listening in will or will not occur, as to do so would defeat the whole point of the exercise. Further, it is self-evident that knowing that a consultation or communication may be the subject of surveillance could have a chilling effect on the openness which should govern communications between lawyer and client, and is the very basis of the two rights. However, none of these problems can call into question the lawfulness of the statutory authorising of the surveillance of privileged communications, although they underline the fundamental requirement of clear and stringent rules governing the authorisation, circumstances, manner, and control over the fruits, of any such surveillance.

112. Accordingly, there is nothing intrinsically objectionable in a statute which authorises surveillance of communications and consultations between a lawyer and client, provided that the statute includes safeguards which ensure that such authorisation complies in all respects with the requirements of the Convention. Additionally, I see no reason why the safeguards cannot be in a Code of Practice, at least if the statute provides that such a code has to be created and complied with (as is the position here – see sections 71 and 72 of RIPA); that is all the more true where, as here, the code has to be laid before Parliament.

113. The Divisional Court decided that, if private consultations between lawyers and clients could be the subject of surveillance, the controls over such surveillance under RIPA and the Code were insufficient to satisfy article 8(2) of the Convention. In effect, they held that such surveillance must at least be classified as intrusive surveillance, not directed surveillance. That decision, which appears to me to be plainly right, has realistically not been challenged by the Secretary of State. The difficult issue on which your Lordships are divided, and on which the Divisional Court was also divided, is the

logically anterior question of whether section 27(1) of RIPA overrides the right to consult privately with a solicitor ("the PACE right"), contained in article 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)), which is in the same terms as section 58(1) of the Police and Criminal Evidence Act 1984 in England and Wales, and section 17(2) of the Criminal Procedure (Scotland) Act 1995 in Scotland.

114. As already mentioned, the natural meaning of section 27(1) of RIPA and the history of the earlier statutory provisions both appear to me to support the notion that the section overrides the PACE right. I also agree with all your Lordships that it is unlikely that Parliament overlooked the possibility of Part II of RIPA applying to privileged communications, not least because it was clearly considered in the 1997 Act, as Lord Phillips explains in para 18. (Indeed, if, which I greatly doubt, it is permissible to look at *Hansard* for present purposes, it appears that the issue was considered and discussed during the passage of RIPA through your Lordships' House, as my noble and learned friend, Lord Hope of Craighead, whose opinion I have seen in draft, mentions in para 62). It must therefore follow that, when enacting RIPA, Parliament envisaged that the Code would acknowledge and deal with the importance of the professional confidence between lawyer and client. On that basis, it seems to me to be very likely that Parliament also intended that the right to consult a lawyer privately, including pursuant to the PACE right, should also be subject to section 27(1).

115. I am not much impressed with the invocation of the maxim *generalia specialibus non derogant* in this case. One could make out a reasonable case for saying that, when it comes to those in prison, it is section 27(1), rather that the PACE right, that is the *speciale*. However, more importantly, while maxims have their uses, the other factors to which I have referred are more important in assisting in the resolution of the present problem. As Lord Hope says, we are ultimately concerned with deriving Parliament's intention from the wording of RIPA, and in particular section 27(1), which has to be read in its legislative, Convention, and case-law context.

116. Although I agree with the majority of your Lordships that section 27(1) effectively overrides the PACE right, I must confess to having been a little troubled by the contrary argument, particularly by the point made by Lord Phillips at para 38, namely that, if Parliament had had in mind the right to consult a lawyer in private when passing

RIPA, it would have provided that listening into such consultations constituted intrusive surveillance rather than directed surveillance. However, it does not seem to me particularly unlikely that Parliament took the view, albeit mistakenly, that the fact that there was a right to a consultation in private should not, of itself, be sufficient to render surveillance intrusive. All the more so if one accepts that Parliament appreciated that privileged communications would be caught by RIPA: it must have therefore concluded that surveillance of privileged communications could be characterised as directed rather than intrusive.

117. Furthermore, as a matter of policy, provided (and it is a vital proviso) that the Code ensures that all aspects of any surveillance and its consequences comply with the Convention, it seems to me proper that section 27(1) should override the PACE right. It is a melancholy fact that there are dishonest lawyers, and it is therefore positively consistent with the permissible purpose of RIPA, and indeed with the public interest, that their freedom of action be curtailed, and that their abuse of their clients' rights of privilege and rights to privacy be exposed, and, where appropriate, punished. That applies as much to lawyers with clients in custody as to those with clients at liberty. It also appears to me that it would be unsatisfactory if a person in custody should be free from the risk of surveillance when consulting a lawyer, when a person who is at liberty does not have the same benefit. Not only would it be an indefensible inconsistency, but, in many ways, a person in custody, who is not free to do what he wants, is more likely to try and abuse the privilege for nefarious purposes than a person who is at liberty.

118. Lord Phillips has characterised the nature of the decision of the majority of your Lordships as being that RIPA permits the Code to authorise surveillance of communications between lawyers and their clients, whether or not in custody. That is indeed as far as our decision in this case goes, and we should not, I think, be taken as thereby endorsing the provisions of the Code, as we are not directly concerned with those provisions, and, in particular, whether they comply with the requirements of the Convention. Indeed, in my view, it must be highly questionable whether the Code sufficiently clearly identifies (or limits) either the circumstances in which surveillance may or may not occur, or how the information thereby obtained may or may not be used. At least as at present advised I share the doubts and concerns about the Code expressed by Lord Phillips at paras 49 to 51. The question of the use of material obtained by surveillance could have arisen in one of the cases before

us, namely that of M, had he not been released without charge, and, in that connection, I agree with Baroness Hale's observations at paras 71to 74.

119. I also respectfully agree with what Lord Phillips says at paras 52 and 53. Having decided not to appeal the Divisional Court's decision that surveillance of privileged and private consultations under the present regime is unlawful, the Secretary of State should have ensured that such surveillance did not take place or she should have promptly changed the regime so as to comply with the Divisional Court's decision. As Lord Carswell points out, more than a year has elapsed since that decision, and your Lordships were told that the Secretary of State was not even in a position to produce a draft regulation embodying the changes to ensure that such surveillance was carried out legally. Unless no surveillance of privileged and private consultations has been going on for the past year in the United Kingdom (which appears most unlikely), this strongly suggests that the Government has been knowingly sanctioning illegal surveillance for more than a year. If that is indeed so, to describe such a state of affairs as "regrettable" strikes me as an understatement.

120. For these reasons, which I believe fully accord with the more fully reasoned opinion of Lord Carswell, as well as with the opinions of Lord Hope and Baroness Hale, and indeed most of the reasoning of Lord Phillips, I would concur in making the orders proposed by Lord Carswell.