
Ruling on the Application of the Statutory Prohibition in Section 56 of the Investigatory Powers Act 2016

Introduction

1. This ruling seeks to address the proper application, within the context of the proceedings in this Inquiry, of the statutory prohibition on the admissibility of intercept evidence found in section 56(1) of the Investigatory Powers Act 2016 (“the IPA”).
2. This provision governs conduct for the purposes of, or in connection with, any legal proceedings or proceedings conducted under the Inquiries Act 2005 (“the 2005 Act”). Although I will come to examine the import of the provision in more detail, it may help to take as an introduction to its effect a statement from the decision of the Court of Appeal as delivered by Lord Justice Gross in the case of *R v Gohil* [2018] 1 WLR 3697 at paragraph 89:

“... the prohibition ... is absolute and binds this court just as it does any other body or person; no one may disclose the content of any intercepted communication if the disclosure is made in circumstances from which its origin as intercept may be inferred.”
3. In *Gohil* the court was addressing the almost identically worded prohibition then found in section 17 of the Regulation of Investigatory Powers Act 2000. Section 56 of the IPA now expressly applies to Inquiries Act proceedings in a manner which is identical to any other legal proceedings.

Background

4. The background which has given rise to the question of how the statutory provision should be applied can be gleaned from an account of the following events. In the latter months of 1997, and throughout the first half of 1998, a number of attacks or attempted attacks involving improvised explosive devices were mounted by dissident republican groups. On 1 August 1998, a car bomb was detonated in Banbridge, County Down. Along with extensive damage, many injuries were caused. The Omagh bombing occurred on 15 August 1998, two

weeks after the Banbridge bomb. The dissident republican group known as the Real IRA subsequently claimed responsibility for this attack.

5. On 14 September 2008, an article authored by a highly regarded journalist, Mr. John Ware, was published in the Sunday Telegraph. That article claimed that intercept activity had been undertaken by GCHQ on 1 and 15 August 1998 and purported to give an account of some of the communications monitored of those engaged in each of the bombings which occurred on those dates. It also made various claims about the techniques and capabilities said to have been available to GCHQ at that time. The following evening, Mr. Ware presented an edition of the BBC Panorama programme, in which the claims set out in the article were repeated and expanded upon. In his statement to this Inquiry, Mr. Ware has explained that the information which he set out in both the Sunday Telegraph article and in the Panorama programme was provided to him by confidential sources, whose identities he was not prepared to reveal.
6. Following on from the broadcast, the then Prime Minister invited Sir Peter Gibson, who at that time was the Intelligence Commissioner, to conduct a review with the following remit:

“to review any intercepted intelligence material available to the security and intelligence agencies in relation to the Omagh bombing and how this intelligence was shared”.

Sir Peter Gibson’s Report

7. Sir Peter presented his report to the Prime Minister on 18 December 2008. At paragraph 3 of his report, Sir Peter stated this:

“I would not recommend that my report be published in the form in which it was presented on 18 December as to do so would damage national security and would be in breach of legal restrictions on disclosure of material relating to security and intelligence. However, very serious and damaging allegations have been made publicly, as a result of which expectations may have been raised among the families of the victims of the bombing. In the circumstances the Government has decided that it is necessary and lawful to publish the following summary of my review, justified by the exceptional and serious matters raised and the weight of public interest. This summary contains as much information as it is possible to publish in light of the restrictions on disclosure mentioned above and the general requirement of national security to maintain secrecy in relation to the work of the security and intelligence agencies.”
8. The published summary of the report (hereinafter referred to as “The Gibson Report”) runs to 16 pages and I shall come to examine some of

its contents shortly. It was entirely a matter for the Government of the day to decide to what extent the content of The Gibson Report could be published without causing any disproportionate damage to national security. The exercise carried out by Sir Peter was a non-statutory review and did not fall to be classed as either legal or inquiry proceedings. Neither the conduct of Sir Peter's investigation, nor the publishing of his report, engaged the section 56 statutory provision (which at that time was to be found in section 17 of the Regulation of Investigatory Powers Act 2000). However, should The Gibson Report be introduced into evidence in the Inquiry, the question of whether certain statements within it would engage section 56(1) of the IPA arises, as does the question of what the consequence would be. The same questions would arise if Mr. Ware was to give evidence outlining the matters set out in his article and broadcast.

9. In order to ventilate these issues in advance of any evidence, the Inquiry Legal Team ("the ILT") issued two notes to those acting for each of the Core Participants in the Inquiry ("CPs"). Those notes set out a review of the legislation along with a preliminary assessment of its apparent import. The notes invited written submissions answering certain questions as to how the legislation was perceived to operate. I then heard open oral submissions from the representatives of those CPs who wished to contribute.

The statutory prohibition

10. The introductory statement of the effect of section 56 of the IPA set out in paragraph 2 above recognises that the statutory bar prohibits disclosure for the purposes of proceedings under the 2005 Act of the content of any intercepted communication. However, the prohibition extends well beyond this simple statement. The terms of the provision are as follows:

"56 Exclusion of matters from legal proceedings etc.

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

This is subject to Schedule 3 (exceptions).”

11. Interception-related conduct is defined in section 56(2). For the purposes of this discussion, it includes the interception of telephone communications as authorised by a warrant issued under Chapter 1 of Part 2 of the IPA (or the preceding legislation). So, in addition to prohibiting the asking of questions, or making assertions, about the content of any intercepted communication, a literal application of the statutory provision would prohibit *anything* to be done for the purposes of or in connection with the Inquiry proceedings which, *in any manner*, even tended to suggest that authorised interception may have taken place at any point in the past.
12. Before turning to the apparent effect of this very broadly framed prohibition, it is important to recognise that section 56 is not to be viewed in isolation. As noted above, the prohibition is subject to the exceptions found in Schedule 3 to the IPA. Paragraph 23 of that Schedule provides for a mechanism through which any evidence, questioning or other step which would be caught by section 56, may be explored in an Inquiry in what is defined as a ‘restricted proceedings’ hearing. The paragraph identifies who may attend such a hearing. As with other types of closed proceedings in which intercept evidence may be heard, the permitted attendees are strictly limited. Neither family CPs, nor their legal representatives, would be able to attend such a hearing. Nevertheless, with the benefit of my legal team’s assistance, I would be able to fully explore all relevant issues concerning whether intercept had, or had not taken place, and, if it had, what such exercises had revealed. The question of the compatibility of such restricted proceedings hearings with the rights of family CPs to participate in the Inquiry has been fully ventilated in other debates before me and in my ruling on Special Advocates.
13. Returning then to the terms of section 56 itself, a literal interpretation would place significant restrictions on an open legal debate concerning the import of the section and its practical application. Two examples may illustrate the extent of this difficulty. The first concerns the Terms of Reference for this Inquiry. These were set by the Secretary of State, in consultation with me and after he had conducted a substantial period of consultation across all relevant Government departments. As published on the Inquiry website, the scope of the Inquiry includes the following:

“2. To the extent necessary to investigate issues relating to whether the Omagh Bombing could have been prevented by UK state authorities, the Inquiry’s investigations will include consideration, individually and collectively, of the following matters:

...

f. The nature of the intelligence said to have been obtained by the UK Government's Communication Headquarters (GCHQ), including from alleged vehicle and telephone monitoring, of dissident republican terrorists involved in the planning, preparation and conduct of the Omagh Bombing and other earlier attacks.

g. The adequacy of the analysis and handling of and response by UK state authorities to any intelligence obtained by GCHQ, including from vehicle and telephone monitoring, of dissident republican terrorists involved in the planning, preparation and/or conduct of the Omagh Bombing and other earlier attacks.

.....”

14. Given the publicly declared function of GCHQ, it might be said that even the publishing of the Inquiry's Terms of Reference, which marked the setting up date of the Inquiry, constitutes something done in connection with the Inquiry proceedings which, in some manner, tends to suggest that interception may have occurred. It is though, difficult to conceive that the Secretary of State for Northern Ireland, having taken the advice of the United Kingdom Intelligence Community and the Government Legal Department, would have associated himself with a breach of the statutory provision in the first document published by the Inquiry and then allowed such a breach to continue throughout the two and a half years since the Terms of Reference were published.
15. The second example concerns The Gibson Report. A literal interpretation of section 56 might suggest that even in setting out Sir Peter's remit, as I have above, I am in breach of the provision, given that this ruling is for the purposes of the Inquiry proceedings.
16. However, I do not consider that an interpretation leading to the consequences just outlined needs to be applied. When engaging in legal analysis a court requires to explain and set out the issues and factual circumstances which it is dealing with. A good example for present purposes can be found in the decision of the Divisional Court in the case of *R (Schofield) v Secretary of State for the Home Department and Others* [2021] EWHC 902 (Admin). In that case the court deliberated upon a contention that section 56 of the IPA was incompatible with article 2 ECHR. The substantive decision of the court was delivered by Lord Justice Singh. At paragraph 12 of that decision, he noted that the Secretary of State was content for the court to proceed on the assumption that the sensitive material with which the argument was concerned was intercept material within the scope of section 56.

17. In the course of his decision, Lord Justice Singh set out the evidence given on behalf of the Secretary of State by the Head of The Investigatory Powers Unit at the Home Office. That evidence made it plain, in general terms, that interception of communications did take place, as can be seen, for example, at paragraph 35 where the evidence as to the purpose of interception under the IPA is set out. At paragraph 45 the evidence given as to a particular example of circumstances in which interception takes place was noted. At paragraph 50 Lord Justice Singh quoted from the 2014 Government Review of Intercept as Evidence. Certain of these quotes again related to circumstances in which interception of communications took place.
18. These passages go to show that despite the broad terms of section 56, the court was content to examine the meaning of that statutory provision. They also demonstrate that in order to do so, the court was content to take into account and canvass a general understanding of the purpose of intercept and of circumstances in which interception takes place. One of the factors which may have assisted in this regard was the concession as to the assumption which the court could proceed on, and the Secretary of State's reliance on the policy of neither confirming nor denying that the sensitive material in question was in fact intercept evidence. In the circumstances of this Inquiry, the Terms of Reference, as set by the Secretary of State, invite consideration of intercept material and, as shall become clear, the Government has, most unusually, been prepared to go even further than the concession made in *Schofield*. I am therefore satisfied that I am at least as entitled as the court was in that case to engage openly in a discussion of the application of the section.

The questions

19. Having set out that background the principal questions for resolution fall to be these:
 1. Can the ILT, or the legal representatives of the CPs, explore in open evidence the content of The Gibson Report, if the introduction into evidence of that report, or the asking of questions about it, elicits evidence which makes it plain that interception of the communications of dissident republicans had occurred in 1998?
 2. Can the content of either the Sunday Telegraph article or the BBC Panorama Programme be explored in evidence with Mr. John Ware, or any other witness, if doing so elicits evidence as to the purported content of any intercepted communication, or tends to suggest that interception of the communication of dissident republicans may have occurred in August 1998?

20. The second of the two ILT notes mentioned above posed two additional questions which would fall for consideration once the two principal questions were resolved. The additional questions were:

“Question 1: Does section 56 of the Investigatory Powers Act 2016 (“IPA”) prevent the Chairman of an Inquiry from confirming in OPEN that the Inquiry is conducting “restricted proceedings” pursuant to section 19 of the Inquiries Act 2005 and paragraph 23 of Schedule 3 to the IPA? In particular, would such confirmation itself amount to a disclosure that *“tends to suggest that interception-related conduct has or may have occurred”*, on the basis that the necessity for holding proceedings under paragraph 23 of Schedule 3 arises only in the context of disclosure of issues otherwise falling within the section 56 prohibition and following a direction pursuant to paragraph 22?”

and

Question 2: If the answer to *Question 1* is that the Chairman can confirm in OPEN that the Inquiry is conducting ‘restricted proceedings’ without infringing section 56 of the IPA, is there any procedural mechanism by which CPs who do not fall within the definition of a “relevant party” in paragraph 23(4) of Schedule 3 to the IPA (i.e. OPEN CPs) may submit proposed lines of questioning for CTI to ask for consideration in those restricted proceedings without infringing Section 56? In particular, should paragraph 23(1) of Schedule 3 to the IPA be interpreted as permitting OPEN CPs to propose lines of questioning to the ILT which, on their face, refer to matters that may *“tend to suggest that interception-related conduct has or may have occurred”* (and would therefore fall within the prohibition contained in section 56) where those questions are submitted solely for consideration in *“relation to any restricted proceedings”* (from which proceedings section 56 is disapplied by paragraph 23(1))? Put another way, could such proposals properly be viewed as forming part of the restricted proceedings?

The submissions on behalf of His Majesty’s Government

21. The submissions on behalf of the Government were presented in a concise and helpful fashion by Ms. Fee KC. She made it plain that the basic position adopted by the Government was that section 56 of the IPA provides for a broad prohibition which must be applied robustly. She noted that the circumstances provided for in Schedule 3 to the IPA, in which the prohibition is disapplied, do not allow for an exception to the prohibition where material is already in the public domain. Paragraphs 22 and 23 of Schedule 3 provide that all issues concerning intercept which relevantly arise in Inquiry proceedings can be dealt with in closed restricted proceedings.

22. Developing this theme, Ms. Fee stressed that media reporting, of any kind, cannot ever disclose information about intercept or

interception in a meaningful way. Any media reporting could only make suggestions about such evidence. Only a State body could bring about formal, authorised disclosures of such material. That led, she submitted, to a clear conclusion as to the effect of section 56 of the IPA. The Inquiry and CPs are prohibited from relying, in open proceedings, upon material that may be said to have entered the public domain through media reporting or broadcasting, where such reference would either disclose material in circumstances from which its origin in interception-related conduct could be inferred, or tend to suggest that interception-related conduct has occurred, may have occurred or may occur in the future.

23. That brought the content of The Gibson Report into sharp focus. Ms. Fee readily acknowledged that the publication of the report should be viewed as an authoritative and public avowal by the Government of the matters contained within it. As a consequence, the Government would have no objection to the published report being referred to in the open Inquiry proceedings, so long as a lawful route to doing so could be identified. Whilst emphasising that the Government did not claim to be the arbiter of the matter, she suggested that the principle of statutory interpretation which held that the court should seek to avoid a construction leading to an absurd result, might mean that it would be unreasonable to preclude reference to this report. On this basis, to hold that section 56 of the IPA prevented reference to The Gibson Report, might lead to an absurdity and therefore allow for a different interpretation. Whatever view was taken of this submission, Ms. Fee contended that the aspects of each of the Sunday Telegraph article and the Panorama Programme which concerned intercept could not lawfully be admitted into evidence.

24. Turning to the first of the additional questions posed by ILT, Ms. Fee's position was that in ordinary circumstances section 56 would prohibit the Chairman of an Inquiry from announcing in open proceedings that the Inquiry was to hold a restricted proceedings hearing in terms of paragraph 23 of Schedule 3 to the IPA. To do so would in itself tend to suggest that interception-related conduct has, or may have, occurred. However, this would be subject to an exception in the unusual circumstances of the avowal of The Gibson Report. Standing that matter, and if it were possible to introduce the published report into open evidence, there would be nothing to prevent me from stating in open proceedings that I intended to hold a restricted proceedings hearing in order to consider the closed aspects of Sir Peter's Report ("The Closed Report").

25. In seeking to answer the second additional question, the position advanced on behalf of the Government was a little more complicated. Ms. Fee saw no difficulty with the representatives of the family Core Participants suggesting questions or topics that they would wish the ILT or the Chairman to consider for exploration in any restricted proceedings hearing considering The Closed Report. However, the rationale for this in Ms Fee's submission was that since the family CPs had not seen any of the closed documents, any questions which they may suggest would, of necessity, be hypothetical or speculative in nature. It followed that such questions would not tend to suggest that interception-related conduct had taken place. The section 56 prohibition would therefore not be infringed. This submission led to the proposition that not only would the family CP representatives be able to suggest questions to the ILT but they would be able to ask such hypothetical or speculative questions in open proceedings without section 56 being engaged. In such circumstances, if there were available answers, they would have to be provided later in the restricted proceedings hearing. On this analysis the statutory prohibition against asking questions would only be engaged if the questioner could be deemed to be asking on the basis of knowledge.

The submissions on behalf of the PSNI

26. On behalf of the Police Service of Northern Ireland ("the PSNI"), Mr. Henry KC began by taking stock of the breadth and intent of the provision to be found in section 56 of the IPA. He submitted that what one found was a very clear statutory intent to impose what is a draconian prohibition encompassing a wide range of potential actions in connection with Inquiry proceedings. Essentially, what the statute was addressing was an attempt to hint that something relating to intercept may have occurred. As he saw it, the purpose behind asking a question would be to hint or suggest that something may have occurred, otherwise, he asked, what would the purpose of the question be?
27. Mr. Henry then developed a careful analysis of the principles of statutory interpretation. It could not be said that there was any ambiguity in the terms of the legislation but the principle against resulting in an absurd outcome may be applicable. He drew attention to a number of authorities in his written submissions but focused on what had been said by Lord Sales in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UJSC 28 at para 43. In that passage Lord Sales had approved of what was said in Bennion, Bailey and Norbury on Statutory Interpretation at sections 13.1(1) and 13.1(2) to the effect that:

“ ... the courts give a wide meaning to absurdity in this context, ‘using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief’.”

and

“[t]he strength of the presumption ... depends on the degree to which particular construction produces an unreasonable result...”

28. Mr. Henry submitted that it was appropriate in the present context to ask whether the literal application of the language to be found in section 56 of the IPA would give rise to an absurd result. He contended that an inability to refer to The Gibson Report would be seen as an absurdity and should cause the provision to be interpreted differently. Following on from this suggested approach, he agreed with Ms. Fee that the Inquiry ought to be able to announce that it intended to hold a restricted proceedings hearing to consider the content of the Closed Report without contravening section 56.

29. Turning to consider the second additional question posed by the ILT, Mr. Henry began by emphasising the plain fact that there was no exception within the relevant provisions for asking questions about, or making assertions in relation to, material which could be said to be in the public domain. He rejected the suggested analysis that would permit questions to be asked in open proceedings by a participant who had no knowledge of the material sought to be explored. He contended that it could make no difference for the purposes of the statutory provision whether the question was asked on a speculative basis or not. Furthermore, what, he asked, would the position be if a question was asked, not based on pure speculation, but on the basis of other material which was said to be in the public domain? I understood him to have in mind media reporting as an example. In such circumstances, if a question received the answer “that can only be addressed in closed” he suggested that would of itself tend to suggest that intercept may have occurred

30. In addressing the second additional question, Mr. Henry’s position was that if the Inquiry had determined that it would hold a restricted proceedings hearing, as defined by paragraph 23 of Schedule 3 to the IPA, it ought to be possible for the Inquiry to devise a framework which would permit the representatives of family CPs to submit written questions to the ILT in order that they could consider exploring such issue in that hearing. Any such framework would provide for written questions to be considered in relation to the restricted proceedings hearing. In such circumstances the procedure set out in the framework would not be in contravention of section 56.

The submissions for the Fox Law Core Participants

31. On behalf of the CPs whom he represents, Mr. Southey KC contended for a different and less broad interpretation of section 56 of the IPA. Although he took time to set out his submissions carefully, and at some length, the core of his principal argument can, I think, be set out concisely. Stated in a sentence, the submission was that where publicly available information, for example the content of a media report, suggested that intercept had occurred then that information could be “referenced” in the open Inquiry proceedings without contravening the terms of section 56.
32. The contention was introduced by the observation that the submissions on behalf of the Government and the PSNI both appeared to accept that at least some material which was in the public domain, and which if admitted as evidence would appear to breach the terms of the section, could be referred to in evidence. Both, he observed, appeared to accept that the presumption against absurdity could arise in relation to The Gibson Report.
33. However, Mr. Southey contended that the statutory provision did not require to be read in this fashion. Put more simply, if there was a media report which stated that intercept had occurred in a particular set of circumstances, then it was this report which disclosed that matter, or tended to suggest that interception-related conduct had taken place. Introducing that report into evidence in the Inquiry would not be an act of disclosing anything, the media report had already caused that to happen. Equally, Mr. Southey submitted, that were he to ask questions about the content of the media report, this would not be a step which tended to suggest that interception-related conduct had occurred, since his questions would be framed in the absence of any knowledge about the truth or otherwise of the matter.
34. Mr. Southey sought to add weight to this argument by drawing attention to what he said often took place in the High Court or, for example, in the Special Immigration Appeals Commission. In such proceedings he suggested that if secret evidence was being managed the open advocate could often ask questions which the witness would only be able to answer in a closed session. Despite this, there was value in the exercise of asking the question, as it put on record a concern which the open participant wished to have explored. Since the question was not answered, nothing was added to the extent of public knowledge, but participation was facilitated in a way which caused no harm.
35. On this argument, there would be two keys to the lawful admission of evidence concerning intercept evidence. The first would be

that nothing was added to the level of public knowledge or awareness about interception-related conduct. The second would be that the questions were not posed on the basis of some inside knowledge. Mr. Southey explained that the limits of this approach would be that while the factual content of any such media report could be explored, it would not be permissible to examine its cogency or reliability, by for example seeking to examine the circumstances in which the information came to the journalist's attention or precisely what they had been told. However, Mr. Southey did give examples of what he contended he would be entitled to do. This included asking a witness from the Security Service about a media report concerning suggested acts of intercept and asking him if the contents of the article were accurate. In such a situation it would be an answer to the question which would breach section 56. He also contended that he would be entitled to make submissions about the content of such media reports.

36. Mr. Southey also had supplementary submissions concerning the application of articles 10 and 2 ECHR. Based on the fact that article 10 includes the "*freedom to hold opinions and to receive and impart information*", it was contended that preventing open reference to material that the Inquiry is considering engages article 10. Mr. Southey's contention was that on the interpretation of Section 56 argued for by public authorities, material which was in the public domain could not be referenced in these proceedings. The effect of this, he argued, was that the public were prevented from being made aware that family Core Participants are specifically trying to raise concerns about a particular document or a particular report. This, on his submission would be incompatible with article 10.

37. In relation to article 2, Mr. Southey accepted that in Inquiry proceedings closed hearings can be consistent with article 2, subject to there being justification for excluding the family CPs. However, if this Inquiry was to be considering material already said to be in the public domain at a restricted proceedings hearing that would not be compatible with article 2. The necessary justification would be absent.

The submissions on behalf of the Rush family

38. In presenting submissions on behalf of the family which he represents, Mr. Mansfield KC adopted a different and more radical approach.

39. Mr. Mansfield recognised the blanket application of section 56. That, in his submission, led to a significant problem for the Inquiry since it was anticipated that whether intercept material played a pivotal

role at key times would be a central issue to be resolved in determining the underlying question of whether the bombing could have been prevented. This issue was brought into focus in the Inquiry's own Terms of Reference. Mr. Mansfield contended that it would be difficult to see how I would be able to grapple with this issue without being able to reference the information upon which my analysis was based.

40. This meant that the statutory provision could be seen to be incongruous, disproportionate and incompatible with the particular task which had been set for this Inquiry. It had the potential to completely undermine the work of the Inquiry in searching for truth and accountability and would lead to a situation where I would be hamstrung by the provisions in the IPA.

41. In these circumstances, in setting up a Public Inquiry with the Terms of Reference chosen, the Government should have realised that the current legislative provisions would prevent an effective inquiry being carried out in public which could address one of the key issues. It ought to have realised that the terms of the IPA would require to be amended to accommodate the task given to this Inquiry.

42. Accordingly, Mr. Mansfield invited me to request the Secretary of State to promote urgent legislative amendment of the IPA. What he envisaged as being necessary was that the current statutory scheme should have two further exceptions included within Schedule 3 to the Act. The first would be to permit disclosure to Core Participants of the material relating to intercept which I had ordered to be disclosed to myself and the ILT in terms of paragraph 22 of the Schedule. The second would be to permit open reference to this material in the Inquiry's proceedings. As I understood the submission, the effect of such changes would be that I would still be required to consider whether material relating to intercept needed to fall within a restriction order under section 19 of the 2005 Act, and therefore whether it could be disclosed or not, but the benefit would be that there was not an absolute bar to disclosure.

The remaining family CP Submissions

43. The remaining submissions on behalf of family CPs essentially adopted those presented by Mr. Southey. They emphasised the importance of openness to the family CPs and urged me to approach the interpretation of the statutory provision in as liberal a manner as was possible.

Discussion

44. I can begin by considering Mr. Southey's principal submission. On his interpretation of section 56, material that was publicly available could be "referenced" in the Inquiry proceedings without contravening the statutory provision. What he meant by this term was that such material could be introduced into evidence, regardless of what it said about acts of interception or the capabilities of intercepting agencies. With some limitations, he could then ask questions about the content and veracity of such publicly available material and make submissions about it.
45. The corollary of this submission would appear to be that the statutory provision only applied to questions, assertions or other things done, which tended to suggest that interception-related conduct may have occurred at any time, and which were based on information which was not publicly available. This would give the statutory provision a meaning which was very far indeed from that conveyed by the words chosen.
46. This was a submission about how section 56 fell to be interpreted; it would apply to any proceedings in which the provision was engaged. It is, in my view, impossible to give effect to such a submission.
47. The concept of publicly available information is difficult to define, and no attempt to do so was made. It would seem to have a very wide application. For example, different agencies of the Government have published information concerning the use of intercept. Books have been published about GCHQ and what it does, including the authorised history of GCHQ by John Ferris. Some of these are of an academic nature, others are of a different description. There are many articles concerning intercept available on the internet, some have been published in mainstream media, others are directed towards a more niche audience. All of this constitutes publicly available information. Mr. Southey's submission does not make any distinction between material which may occupy a place at any point on a spectrum spanning Government publications through to conspiracy theories.
48. An understanding of the rationale behind the terms of the statutory prohibition seems to me to explain why it has such an all-encompassing application. The submission advanced presupposes that the purpose of the statutory provision is to stop the body of publicly available knowledge concerning intercept being added to. It does not seem to me that this is correct. Nor is it as simple as categorising publication of information about intercept as a loss of confidentiality which then deprives the statutory provision of its effect.

49. The starting point is to recognise that the statutory provision is not designed to keep the fact that the government has an intercept facility secret from the public. On the contrary, that fact is publicly known and acknowledged. There can be few informed members of the public who are not aware of the existence of GCHQ and its general functions. Those who wish to educate themselves can do so easily by looking to either GCHQ's own website or the BBC website. On the former they will find statements such as:

“we use a range of methods to gather communications and data that we believe has intelligence value”

“we focus on communications: how to access, analyse and – occasionally – disrupt the communications of the UK's adversaries”

On the BBC site they will find a statement to the effect that:

“GCHQ was formed on 1 November 1919 under the original name of the Government Code and Cypher School. Since then it has intercepted and analysed the communications of those who seek to do the UK harm.”

The circumstances in which lawful interception can be carried out and by which agencies are set out openly and for anyone to see in the Intelligence Services Act 1994 and in the Investigatory Powers Act 2016.

50. There is therefore nothing secret about the Government's ability to intercept communications in appropriate and lawful circumstances. Despite this, the terms of section 56 have been drawn in strict and broad terms. The reasons for such comprehensive restrictions being imposed include legitimate national security concerns relating to the need to keep the extent of the capabilities available and the techniques used secret. Other reasons relate to the practical difficulties of creating a disclosure scheme which could be operated within the context of litigation, and which would comply with the European Convention on Human Rights, and yet not impose overwhelming duties and responsibilities on the intercepting agencies. The difficulties in achieving such a scheme are canvassed in detail in the comprehensive *Privy Council Review of Intercept as Evidence*, published in January 2008 and in the Government review: *Intercept as Evidence*, published in December 2014. A summary of the findings of the 2014 review can be found at paragraph 50 of the decision in the *Schofield* case. In the absence of a practical method of resolving all of the difficulties associated with leading intercept as evidence in litigation, through various reviews, the Government has repeatedly concluded that a blanket prohibition should apply in legal proceedings, despite what may be known publicly or available to be read publicly.

51. This underlying rational for the provision found in section 56 of the IPA serves to distinguish proceedings in which the section is engaged from those in which other types of national security concerns lead to closed hearings being necessary. In the examples which Mr. Southey gave of questions being asked which were not capable of being answered in the open proceedings, no statutory bar on asking such questions exists.
52. What this means, is that for good and sound reasons, whilst articles in the media or books may openly discuss the fact and extent of intercept, either on an informed or speculative basis, questioning and anything else done in legal proceedings, which tends to suggest that interception may have occurred at any time, is very closely circumscribed. That same blanket prohibition applies in Inquiries Act proceedings, although some of the underlying reasoning concerning article 6 rights may not have the same impact.
53. It is therefore clear, in my view, that the prohibition to be found in section 56 cannot be interpreted as applying in the manner contended for by Mr. Southey. The submission flies in the face of the statutory provision and is inconsistent with the underlying purpose of the prohibition.
54. Before leaving Mr. Southey's principal submission, it is necessary to note that one aspect of the argument advanced resonated to some extent with a proposition advanced on behalf of the Government. Mr. Southey's contention had been that questions which were asked on the basis of information, such as provided by a whistle-blower from within a relevant agency would be impermissible, as they would be based on actual knowledge. Any questions framed without this type of actual knowledge underpinning them would not tend to suggest that interception-related conduct had taken place. As part of her submissions Ms. Fee had contended that the representatives of the family CPs might be able to ask hypothetical or speculative questions in open proceedings about intercept without section 56 being engaged, since such questions would not tend to suggest that interception-related conduct may have occurred.
55. Again, as a matter of general principle, I cannot give effect to these submissions. The distinction argued for by Mr. Southey cannot be recognised. It would mean that information provided directly by a whistle-blower could not form the basis of permissible questions, but media reports based on "sources" or a whistle-blower could. Questions which are asked about intercept on a speculative basis seem to me to be questions which would almost inevitably tend to suggest that

intercept may have occurred. It is difficult to think that such questions would have any other purpose. Questions which are asked on a hypothetical basis are as likely to suggest that intercept may have occurred as any based on speculation. The bar is set very low. It is set at questions which may tend to suggest, *in any manner*, that interception may have occurred. This is clearly distinguishable from questions which might tend to establish or tend to confirm that such conduct had occurred. Furthermore, the prohibition is directed at the questions, not at the answers to any such questions. The effect of the provision cannot therefore be avoided by saying that the questions could be answered in closed proceedings.

56. Having reached these conclusions, it is possible to return to the two principal questions set out at paragraph 19 above. One would expect to discern the answer to these questions through a straightforward exercise of statutory interpretation. That exercise would begin by identifying the purpose of the relevant provision, so that Parliament's intention can be ascertained. I have touched upon the purpose behind the section 56 provision above. The words chosen to give effect to that purpose deliberately create a blanket prohibition. That is not necessarily the end of the matter however. As Lord Sales explained in delivering the judgment of the Supreme Court in *R (PACCAR Inc) v Competition Appeal Tribunal*:

“The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used...”

57. As Mr. Henry had pointed out, Lord Sales then went on to quote with approval from Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), to the effect that absurdity is given a wide meaning in this context and is used to include virtually any result which is impossible, unworkable or impractical, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief. He also adopted the statement that the strength of the presumption depended upon the degree to which a particular construction produces an unreasonable result.
58. With these observations in mind, it is appropriate to acknowledge that the circumstances which have arisen in this Inquiry are unique. As a direct consequence of media reports concerning claims about the interception of communications associated with the Omagh bombing, the Prime Minister of the day announced that a review would take place and an open summary of that review was authorised for publication. Without any objection being advanced, The Gibson Report has been disclosed to CPs as part of the Inquiry's open disclosure process. It follows, and is accepted, that the Government has made, through that

published review, an open avowal of certain facts which are relevant to this Inquiry's Terms of Reference but which, on a strict reading of section 56, cannot be canvassed in open evidence. The facts which have been openly avowed would permit the following conclusions to be drawn from the content of The Gibson Report:

- a) In 1998 GCHQ's functions included the interception of telephone communications,
- b) GCHQ's purpose in carrying out interception in 1998 included providing support to agencies in Northern Ireland including the RUC Special Branch,
- c) In 1998 GCHQ undertook live monitoring of telephone numbers designated by RUC Special Branch as having the highest priority,
- d) In 1998 GCHQ targets for interception included Dissident Republicans,
- e) The product of GCHQ interception was passed to the RUC Special Branch throughout 1998,
- f) Interception of communications took place on 15 August 1998.

59. This is the unique situation in which the terms of section 56 fall to be interpreted. To declare that the Inquiry cannot introduce the content of this published report into open evidence, or to permit questions to be asked about its contents, would indeed, to my mind, produce a result which would be illogical, futile, pointless and artificial. This view is reinforced when the effect of introducing the report into evidence is weighed against the underlying reasons for the statutory prohibition. The national security concerns mentioned are of less impact given the facts which have been stated about intercept having taken place. Equally, the practical aspects relating to article 6 rights going to inform a need for a blanket prohibition do not apply in the Inquiry's inquisitorial proceedings where article 6 is not engaged. These factors go to fortify the view that the application of section 56 in the present circumstances will produce an outcome which is absurd. In other words, the presumption against an absurd outcome comes to be strengthened by taking account of all of the factors which arise in the present situation.

60. In debating and passing the IPA, Parliament cannot have anticipated that a statutory inquiry would be convened to investigate issues of preventability surrounding an atrocity such as this, in which the issue of interception of communications was recognised as potentially having a relevant part to play, and where the Government

had already published a report avowing important aspects of the very matters of intercept which form part of the investigation. I therefore agree with the submissions on behalf of the Government and the PSNI that to interpret section 56 as forbidding reference to The Gibson Report in open evidence would be to produce an absurd result. It follows that I will be content for the content of this report to be introduced into evidence and to permit questions directed towards its contents, subject to my own assessment of the relevance and value of any such questions.

61. I can now turn to address the second of the two principal questions. If either the Sunday Telegraph article or the Panorama programme were to be considered in isolation, then the straightforward answer to the second question would be that section 56 was engaged and the evidence sought to be elicited would be prohibited, although it could be fully ventilated in a restricted proceedings hearing. The fact that the family CPs could watch a copy of the broadcast both before and after the open hearing, or that they could hold a press conference outside the hearing centre about the content of both the article and the broadcast, would be neither here nor there. Such observations simply fail to engage with the statutory provision.
62. However, it does not seem to me that either the article or the broadcast can be considered in isolation. They are each inextricably linked to The Gibson Report. It is unrealistic and unnecessarily artificial to introduce this Report with an explanation that it was instructed following on from the allegations made in these sources but not to allow evidence of any of what was said to prompt the review. To the extent that leading evidence of The Gibson Report would constitute an avowal of the facts in the sub-section of paragraph 58 above, it is difficult to see why the sections of either the article or the broadcast which make the same claims should be excluded from evidence. This is simply a consequence of what is, I think, the unprecedented situation which will be before the Inquiry when the Government is seen to openly acknowledge in evidence facts directly relevant to the Terms of Reference which concern the circumstances in which interception of communications took place.
63. This conclusion does not mean that every aspect of either the article or the broadcast may legitimately be explored in open evidence. The effect of rejecting Mr. Southey's submission that section 56 is not engaged by questions concerning intercept based on material which is publicly available, is to recognise that meaning has to be given to the terms of the section. The claims made by Mr. Ware, in both his article and in the broadcast, were based on what he referred to as confidential sources. The first point to note about this is that a police officer, or a

member of the intelligence community, who provides information to a journalist about the fact of interception, or about the content of any particular intercepted communication, likely commits an offence in terms of section 4(3)(a) of the Official Secrets 1989. There is no public interest defence available in relation to such acts – *R v Shaylor* [2002] UKHL 11. Information of this sort, said to come from leaks or from sources claiming to have access to the underlying sensitive material, seems to me to be pre-eminently the type of information which the statutory provision is designed to prevent being explored in public.

64. So, to the extent that within the article or the broadcast there may be statements about matters relating to capabilities or techniques which have not been avowed in The Gibson Report, or claims made about the actual content of intercepted communications, an exploration of any such matters would be prohibited. Put straightforwardly, the content of The Gibson Report sets the boundaries of what may be explored in open evidence.

The additional questions

65. Turning now to the additional questions posed by the ILT, I agree with the submissions which addressed the first of these. Those submissions acknowledged that if The Gibson Report was introduced into evidence it would be permissible for me to confirm in open proceedings that I intended to hold a restricted proceedings hearing in order to explore The Closed Report. The very act of leading The Gibson Report would make it plain that Sir Peter also submitted The Closed Report. It would cause no offence to the terms of section 56 for me to acknowledge that I intended to consider that document as well. It ought equally to be possible to craft a form of words which will alert CPs to the fact that the Inquiry may hear other restricted proceedings without causing offence to the terms of the provision.
66. That brings me to the second of the additional questions. To acknowledge an intention to consider The Closed Report raises the matter of how those CPs excluded from the restricted proceedings hearing can communicate suggestions as to issues which ought to be explored at such a hearing. This question will become less acute in light of my view as to the extent to which the Sunday Telegraph article and the Panorama Programme may be led in evidence. To this extent Family CPs will have an opportunity to put on record relevant issues they may be concerned about during this open evidence. In addition, it seems to me that the terms of paragraph 23(1) of Schedule 3 to the IPA may itself provide the answer. That paragraph provides that:

“Section 56 does not apply in relation to any restricted proceedings of an Inquiry held under the Inquiries Act”

67. Section 17 of the 2005 Act permits the Chairman to direct the procedure of an inquiry, subject to any other provisions of the Act or rules and subject to the need to act with fairness. I see no objection to permitting family CPs to provide to the ILT written suggestions as to questions or issues they would wish to be explored during a restricted proceedings hearing. These written suggestions would be in relation to the restricted proceedings and therefore not caught by the application of section 56.

68. I do not consider that there is anything of any merit in Mr. Southey’s submissions concerning articles 10 and 2 ECHR. It does not seem to me that article 10 has any application in the manner contended for. To the extent that article 2 may be engaged, then the justification for holding a restricted proceedings hearing lies in the terms of section 56.

The invitation to make a request of the Secretary of State

69. In setting out these various conclusions I have not lost sight of the more radical suggestion made by Mr. Mansfield. The contentions which he advanced have to be seen in the light of the decision by Mr. Justice Horner (as he then was) in the Judicial Review proceedings which preceded this Inquiry. As his judgment recognised, there were different options open to the Secretary of State in determining how to comply with his ruling. What was necessary though was that there should be an investigation that was article 2 compliant and which could receive both open and closed materials.

70. Mr. Justice Horner considered that the arguable grounds of preventability which were made out were those identified as Grounds 2, 6, 7 and 9 at paragraph 144 of his decision. Ground 6 was in the following terms:

“6. Surveillance operations relating to events surrounding the Omagh bomb that were reported on in the BBC television programme, Panorama; in particular, telephone and vehicle monitoring carried out by the Government’s Communication Headquarters. [“Ground 6”]”

In specifying the need to be able to hear closed evidence, Mr. Justice Horner must have had this Ground at the forefront of his mind. He would have known that a statutory inquiry could only explore the extent to which there was, or was not, intercept available, along with the content of any such communications, through the procedure to be

found in Schedule 3 to the IPA. Equally, when deciding what type of inquiry to order in light of the ruling, the Secretary of State and his advisers must be taken to have understood the import of the IPA. After all, the statutory prohibition now found in section 56 has been in force since 1985 and has been re-instated in almost identical terms in the various legislative developments since then.

71. What was selected was a statutory inquiry. Although not the only option open to the Secretary of State, it may be thought to have been an option with a two-fold benefit. First, such an inquiry has the power to require the attendance of witnesses and production of documents. Second, it has the power to hear evidence which would ordinarily be excluded because of national security concerns. National security concerns may have less or greater weight and may fall to be given effect to or not depending on the balancing exercise which may be necessary. However, intercept evidence is, and always has been, in a separate category. Like the Secretary of State, everyone else must have known since the announcement of the present Inquiry that section 56 of the IPA would prevent it from disclosing material concerning intercept or hearing evidence about intercept in its open proceedings.
72. I therefore do not agree with Mr. Mansfield that the Government was under any form of misapprehension about the way in which this Inquiry would address aspects of its Terms of Reference. It must always have appreciated that disclosure would be prevented by the terms of paragraph 22 of Schedule 3 to the IPA. Similarly, it must always have appreciated that restricted proceedings hearings under the authority of paragraph 23 would be necessary to explore the issue of intercept evidence. The fact that proceedings under the 2005 Act are often called Public Inquiries can, as I have mentioned before, sometimes give a misleading impression as to what will be involved. It is the very opportunity to hear evidence in closed sessions which is seen as part of the value of the statutory process.
73. As it happens, in the present Inquiry in light of the unique circumstances which I have outlined, some evidence which would ordinarily be prohibited by section 56 will be capable of being led in an open session. But I do not agree that the prohibition found in section 56 of the IPA has the potential to undermine the work of this Inquiry. The ILT acting on my behalf will be able to explore all remaining and relevant issue in a restricted proceedings hearings. Accordingly, I do not feel hamstrung by the terms of section 56.

74. It follows that for the reasons set out I shall decline to make a request of the Secretary of State.

Rt. Hon. Lord Turnbull

Inquiry Chairman

29 September 2026