Neutral Citation Number: [2019] EWHC 994 (Admin)

Case No: CO/115/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17th April 2019

Before :
MR JUSTICE MORRIS
- -
Between :

THE QUEEN (on the application of VIP COMMUNICATIONS LIMITED (IN LIQUIDATION))	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
THE OFFICE OF COMMUNICATIONS	**Interested Party**

- -
- -

James Segan (instructed by **Jury O'Shea LLP, Solicitors**) for the **Claimant**
Daniel Beard QC, Michael Armitage and **Imogen Proud**
(instructed by **Government Legal Department**) for the **Defendant**
The Interested Party did not appear

Hearing dates: 13 November 2018 and 1 February 2019
- -

Approved Judgment

Mr Justice Morris:

(1) Introduction

1. This is an application by VIP Communications Limited (in liquidation) ("the Claimant") for judicial review of a direction made by the Secretary of State for the Home Department ("the Secretary of State") to the Office of Communications ("Ofcom") under section 5(2) Communications Act 2003 ("CA 2003").

2. The application raises a point of construction of s.5(2) CA 2003, namely whether that subsection confers upon the Secretary of State the power to make a direction which overrides a statutory duty imposed upon Ofcom by other primary legislation; in this case, the duty upon Ofcom to make exemption regulations imposed by section 8(4) Wireless Telegraphy Act 2006 ("WTA 2006").

3. This point of construction was considered in earlier proceedings, *Recall Support Services Ltd v Secretary of State for Culture, Media and Sport* and was the subject of differing views expressed at first instance by Rose J [2013] EWHC 3091 (Ch) [2014] 2 CMLR 2 ("*Recall HC*") and then, on appeal, by Richards LJ [2014] EWCA Civ 1370 [2015] 1 CMLR 38 ("*Recall CA*").

4. On 6 July 2017 Ofcom issued a notice ("the COMUG Notice") stating its intention to make regulations under s.8(4) WTA 2006 exempting commercial multi-user gateway GSM apparatus ("COMUGs") from the individual licensing requirement in s.8(1) WTA 2006.

5. On 25 September 2017 the Minister of State for Security ("the Minister") gave a direction to Ofcom ("the Direction") under s.5(2) CA 2003 not to make such regulations. The Direction was given on the basis of serious national security and public safety concerns. Those concerns are not disputed by the Claimant.

6. The Claimant contends that the Direction was ultra vires the Secretary of State's powers to make a direction under s.5(2) and that the Direction is therefore unlawful and should be quashed. It contends, in summary, that s.5(2) CA 2003 does not confer any power upon the Minister to direct Ofcom *not* to comply with its duty under s.8(4) WTA 2006. If a statute is to confer upon a member of the Executive the power to override a duty in other primary legislation, then clear and specific words are required. Section 5 contains no such clear and specific words. That conclusion is supported by specific observations made by Richards LJ in *Recall CA*.

7. The Defendant contends in summary that, whilst s.8(4) WTA 2006 places a duty on Ofcom to introduce regulations, that is not the only relevant duty which Ofcom is under. It is also under a duty to act in accordance with directions given by the Secretary of State pursuant to s.5 CA 2003 on grounds such as national security and public safety. As a matter of pure construction of the power under s.5 CA 2003, the Direction was clearly not ultra vires. The Secretary of State's interpretation of the power was expressly approved by Rose J in *Recall HC* and this Court ought to follow that decision.

(2) The legislative provisions in issue

8. The legislative and regulatory framework is set out in detail in paragraphs 17 to 24 below. The two legislative provisions directly in issue are s.8(4) WTA 2006 and s.5(2) CA 2003.

9. Section 8 WTA 2006, in its amended form at the relevant time, provides as follows:

> *"(1) It is unlawful–*
>
> *(a) to establish or use a wireless telegraphy station, or*
>
> *(b) to install or use wireless telegraphy apparatus,*
>
> *except under and in accordance with a licence (a "wireless telegraphy licence") granted under this section by OFCOM.*
>
> *…*
>
> *(3) OFCOM **may** by regulations **exempt** from subsection (1) the establishment, installation or use of wireless telegraphy stations or wireless telegraphy apparatus of such classes or descriptions as may be specified in the regulations, either absolutely or **subject to such terms, provisions and limitations** as may be so specified.*
>
> *…*
>
> *(4) **If OFCOM are satisfied that the conditions in subsection (5) are satisfied as respects the use of stations or apparatus of a particular description, they must make regulations under subsection (3) exempting the establishment, installation and use of a station or apparatus of that description from subsection (1).***
>
> *(5) The conditions are that the use of stations or apparatus of that description is not likely to*
>
> *(a) involve undue interference with wireless telegraphy;*
>
> *(b) have an adverse effect on technical quality of service;*
>
> *(c) lead to inefficient use of the part of the electromagnetic spectrum available for wireless telegraphy;*
>
> *(d) endanger safety of life;*

> *(e) prejudice the promotion of social, regional or territorial cohesion; or*
>
> *(f) prejudice the promotion of cultural and linguistic diversity and media pluralism."*
>
> *(**emphasis** added)*

The legislative history leading to s.8 WTA in its present form is set out in paragraphs 18, 21, 23 and 24 below.

10. Section 5 CA 2003 provides as follows:

> ***"Directions in respect of networks and spectrum functions***
>
> *(1)* ***This section applies to the following functions of OFCOM**—*
>
> *(a) their functions under Part 2;*
>
> *(b)* ***their functions under the enactments relating to the management of the radio spectrum that are not contained in that Part**.*
>
> *(2)* ***It shall be the duty of OFCOM to carry out those functions in accordance with such general or specific directions as may be given to them by the Secretary of State.***
>
> *(3)* ***The Secretary of State's power to give directions under this section shall be confined to a power to give directions for one or more of the following purposes**—*
>
> *(a)* ***in the interests of national security**;*
>
> *(b) in the interests of relations with the government of a country or territory outside the United Kingdom;*
>
> *(c) for the purpose of securing compliance with international obligations of the United Kingdom;*
>
> *(d)* ***in the interests of the safety of the public or of public health.***
>
> *(3A) The Secretary of State may not give a direction under this section in respect of a function that Article 3(3a) of the Framework Directive requires OFCOM to exercise without seeking or taking instructions from any other body.*

> *(4) The Secretary of State is not entitled by virtue of any provision of this section to direct OFCOM to suspend or restrict—*
>
> *(a) a person's entitlement to provide an electronic communications network or electronic communications service; or*
>
> *(b) a person's entitlement to make available associated facilities.*
>
> *(4A) Before giving a direction under this section, the Secretary of State must take due account of the desirability of not favouring—*
>
> *(a) one form of electronic communications network, electronic communications service or associated facility, or*
>
> *(b) one means of providing or making available such a network, service or facility, over another…*
>
> *…*
>
> *(7) Subsection (4) does not affect the Secretary of State's powers under section 132"*
>
> ***(emphasis** added)*

Under s.405 CA 2003, as amended by Schedule 7 paragraph 34(2)(a) and (b) of the WTA 2006 itself, "*the enactments relating to the management of the radio spectrum*" referred to in s.5(1)(b) "*means (a) the Wireless Telegraphy Act 2006; and (g) the provisions of this Act so far as relating to that Act*". No "*enactments*" other than the WTA 2006 are mentioned in this definition and the definition does not distinguish between particular provisions of the WTA 2006.

(3) The factual background

GSM gateways

11. The Direction relates to telecommunications equipment known as a "GSM gateway". GSM gateways contain one or more of the same SIM cards as are placed into mobile telephones. They enable telephone calls and text messages from a landline to be routed directly on to mobile networks, with the invention of saving money on call charges. These devices are used by a wide range of businesses and public bodies, with the aim of reducing their telephone bills. Commercial deployment of a GSM gateway may be as a "commercial single user gateway" ("COSUG") or as a "commercial multi-user gateway" (COMUG). COSUGs are gateways which serve a single end-user. That single end-user may be an entire company or a large entity. By contrast, COMUGs involve the use of a GSM gateway to provide an electronic communication service by way of a business to multiple end-users. A COMUG is a

device that multiple users can connect to, and their calls to networks, other than that on which their phone operates, will all be converted such that they appear to be on network calls with other network operators. Further background in relation to GSM gateways is conveniently set out at paragraphs 4 to 9 in the judgment of Rose J in *Recall HC*.

National security issues

12. There are national security and public safety concerns surrounding the use of COMUGs. When a caller dials a number from a fixed line or a mobile phone, information identifying the number of the calling party is transmitted over the network, and in the case of a mobile phone, information as to the user's location is also transmitted. This is referred to as "caller line/location information" or "CLI". Such communications data has considerable utility for national security and public safety purposes as well as law enforcement purposes more generally. However where a call is routed through a GSM gateway, communications data concerning the caller is not conveyed to the network; instead that data is replaced by the number and location of the SIM card in the GSM gateway, making it almost impossible for communications data of the call or caller to be ascertained. This gives rise to serious national security and public safety concerns. These concerns have been explained in the witness statement of Thomas Rutherford, head of Interception and Equipment Interference Policy within the Office for Security and Counter-Terrorism at the Home Office.

13. As explained below, the use of COMUGs in the United Kingdom is currently unlawful, absent an individual licence from Ofcom. The restriction on the unlicensed use of COMUGs ("the Commercial Use Restriction") is based on these serious national security and public safety concerns surrounding their use. In the *Recall* litigation, the High Court and the Court of Appeal held that the public security concerns of this kind justified the imposition of the Commercial Use Restriction in relation to COMUGs, although not in relation to COSUGs.

The Parties

14. The Claimant is a company in liquidation. Prior to its liquidation, the Claimant's business involved the commercial exploitation of COMUGs. By 2002 it had established a business delivering services by way of GSM gateways. In 2003 mobile network operators ceased supply to GSM gateway operators and this brought about the collapse of the Claimant's business and that of others. In August 2005 the Claimant went into administration and in February 2010 it went into liquidation. Since 2003 it has brought a number of legal challenges with the aim of securing the liberalisation of GSM gateway use.

15. The Secretary of State is the cabinet minister whose remit includes the protection of national security. Acting through the Minister she made the Direction. Ofcom is the interested party. Its functions include being the national regulatory authority for the telecommunications sector in the United Kingdom.

Procedural history

16. On 26 April 2018 Walker J found that the Claimant has sufficient standing to bring this claim and went on to grant permission to apply for judicial review. On the other hand, he found that a second claimant did not have standing and, on that basis, refused permission. On 13 November 2018 I refused an application by Mr Tom McCabe, formerly a director and shareholder of the Claimant to intervene in these proceedings.

(4) The Legislative History and Framework

17. The regulatory framework in relation to telecommunications equipment both under EU and domestic legislation is set out in some detail by Rose J at §§10 to 30 in *Recall HC*. In the following paragraphs I summarise the position.

Wireless Telegraphy Act 1949 and Exemption Regulations

18. The relevant domestic regime was initially set out in s.1(1) WTA 1949, under which the use of any apparatus for wireless telegraphy was prohibited except under the authority of an individual licence granted by the Secretary of State. GSM gateways qualify as "wireless telegraphy apparatus" within the meaning s.1 WTA 1949, and now under s.8 WTA 2006. The requirement for an individual licence was subject to a power to make regulations providing for exemptions. Whilst under the Wireless Telegraphy (Exemption) Regulations 1999 a broad range of equipment was exempted from the licensing requirement, Regulation 4(2) of those Regulations had the effect that commercial use of GSM gateways remained subject to the individual licensing requirement. This is the Commercial Use Restriction. That was carried over to Regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 2003 ("the 2003 Exemption Regulations"). The decision to do so was based, substantially, upon security considerations: *Recall CA* §38. They were made in January 2003 under the WTA 1949 and came into force in February 2003.

The introduction of EU Regulation

19. Subsequently the use of telecommunications equipment became subject to EU regulation. The current EU regime is the Common Regulatory Framework ("CRF"), introduced in 2002 and which had to be implemented by 24 July 2003. The CRF includes Directive 2002/20/EC of 7 March 2002 of the European Parliament and of the Council on the authorisation of electronic communications networks and services (the "Authorisation Directive"). That Directive provides for two forms of authorisation, namely general authorisation (where no specific application for a licence is required) and individual rights of use subject to a licence (requiring application by a regulator). Article 5(1) of the Authorisation Directive (as subsequently amended) provides that Member States shall facilitate the use of radio frequencies under general authorisations, but that, where necessary, individual rights of use may be granted in order to avoid harmful interference, ensure technical quality of service, safeguard efficient use of spectrum, or fulfil other objectives of general interest as defined by Member States in conformity with Community law.

20. In July 2003 the Government decided that the Commercial Use Restriction should be retained. Security considerations were a prime reason for that decision.

Implementation of EU Regulation into UK law: the Communications Act 2003

21. The EU Common Regulatory Framework was principally implemented in the United Kingdom by CA 2003. The powers conferred on the Secretary of State by s.1 WTA 1949 to grant licences and to make exemption regulations were transferred to Ofcom. In particular, Article 5(1) of the Authorisation Directive was implemented by the introduction, into WTA 1949, of a proviso to s.1(1) for the discretionary making of regulations to exempt from individual licence and of a new s.1AA, imposing a duty on Ofcom to make regulations exempting the use of relevant apparatus from the licensing requirement in s.1(1) WTA 1949, when satisfied that the use of such operations was "not likely to involve any undue interference with wireless telegraphy".

22. At the same time, and from 25 July 2003, the 2003 Exemption Regulations, including Regulation 4(2) were maintained in force by transitional provisions in Schedule 18 CA 2003. That meant that the use of COMUGs continued to be subject to the Commercial Use Restriction, notwithstanding the addition of s.1AA to WTA 1949.

Wireless Telegraphy Act 2006

23. WTA 1949 as amended in that way was subsequently replaced by WTA 2006. Section 8 WTA 2006 contained provisions relating to licences and exemptions corresponding to those previously contained in section 1 and s.1AA WTA 1949. In particular s.8(3) WTA 2006 re-enacted the proviso to s.1(1) WTA 1949 and s.8(4) and (5) WTA 2006 re-enacted s.1AA(1) and (2) WTA 1949.

24. Subsequently the CRF and the Authorisation Directive were substantially amended by the "Better Regulation Directive", with a deadline for implementation of 25 May 2011. These were implemented by substantial amendments to both CA 2003 and WTA 2006. In particular s.8(5) WTA 2006 was subsequently further amended in 2011 to take account of these amendments by the addition in particular of the further conditions in s.8(5)(b) to (f).

The Recall litigation in summary

25. In the *Recall* case, the issue was whether the Commercial Use Restriction (imposed by domestic legislation at the time – namely the 2003 Exemption Regulations) infringed EU law (because that domestic legislation failed properly to implement the European Directives). Rose J held that the public security justification was available in law both as a matter of EU and domestic law. She further found that the public security justification was made out on the facts in respect of COMUGs, but not in respect of COSUGs. Thus, there was a breach of EU law in requiring individual licences for COSUGs, but not for COMUGs. However the claimants had no claim for damages because the infringement was not a manifest and grave disregard of UK obligations. The Court of Appeal upheld that outcome.

26. In the course of their judgments, both Rose J and Richards LJ in the Court of Appeal considered the relationship between s.5 CA 2003 and s.8(4) WTA 2006. Both held that the public security justification, which underpinned the Commercial Use Restriction, was available not only as a matter of EU law, but also as a matter of

domestic law – albeit for somewhat different reasons as I explain in paragraphs 69 to 75 below.

27. Following that decision, on 28 April 2016, Ofcom made the Wireless Telegraphy (Exemption) Regulations 2016 (amending the 2003 Exemption Regulations) the effect of which was to allow use of COSUGs without an individual licence from Ofcom. However COMUG use was not exempted and thus remained, pursuant to s.8(1) WTA 2006, subject to individual licensing. Regulation 4(2) of the 2003 Exemption Regulations has the effect of maintaining in force the Commercial Use Restriction in respect of COMUGs unless and until that aspect of the 2003 Exemption Regulations is revoked or amended.

28. As a result of s.8(1) WTA 2006, it is unlawful to install or use COMUGs in the absence of either an individual licence from Ofcom or regulations, made under s.8(3) WTA 2006 exempting COMUGs from the licensing requirement.

(5) The proposed exemption of COMUGs

29. On 16 December 2016 Ofcom published a consultation paper entitled "Commercial Multi User Gateway Review", the purpose of which was to seek views on the possible exemption from the licensing requirement in s.8(1) WTA 2006 of COMUGs, as well as COSUGs. The paper explained that the then current position was governed by the 2003 Exemption Regulations and summarised the background relating to the *Recall* case. To that end, Ofcom sought views from consultees "by reference to the conditions set out in section 8(5)" WTA 2006. If Ofcom was satisfied that those conditions were met, that would give rise to the statutory duty upon Ofcom to exempt COMUGs under s.8(4).

30. Following the consultation, Ofcom published the COMUG Notice. In that notice Ofcom addressed a number of the statutory conditions set out in s.8(5). It concluded that concerns raised by Vodafone and EE about adverse effect on technical quality of service were not sufficient to maintain the current restriction on the use of COMUGs. The Notice further recorded that the Home Office, amongst others, had raised concerns about the risk of endangering safety of life (s.8(5)(d)), but concluded that the evidence did not suggest a sufficiently direct and material risk to safety of life to justify maintaining the restriction. Ofcom concluded that the conditions in s.8(5) were met. In the course of that consultation national security issues were not considered. On that basis, it indicated that it would be making, as required by s.8(4) WTA 2006, regulations under s.8(3) exempting COMUGs from any individual licensing requirement. Ofcom attached to the Notice a draft of its proposed Wireless Telegraphy (Exemption) Amendment Regulations 2017.

The Secretary of State's response

31. Following publication of the COMUG Notice, the Home Office considered its response. As Mr Rutherford explains in paragraphs 44 and 45 of his witness statement, on 17 August 2017 Home Office Ministers were advised of concerns relating to national security and public safety and health if the licensing requirement was to be removed, as Ofcom proposed. He explains that:

> *"Ministers were advised of a range of options available to them in relation to COMUGs, including options for giving a direction under section 5 of the Communications Act 2003". One option was to give a direction which would require Ofcom to restrict the use of COMUGs by permitting them to operate only where the service provider could demonstrate that the caller identification would pass through the communications network and not impact on access communications data and content of the communications. Another was to direct Ofcom to maintain the status quo i.e. not to remove the licensing regime."* (emphasis added)

Mr Rutherford goes on to explain that the Security Minister preferred the latter option of maintaining the status quo, and that then on 1 September 2017, in response to a request from the Minister, officials gave further advice on two different options for the terms of a potential direction which would maintain the status quo by prohibiting the use of COMUGs without a licence. No further detail has been given of the "range of options" proposed on 17 August 2017, although it appears clear that a direction prohibiting use of COMUGs without a licence was not the only option considered. On one view of Mr Rutherford's evidence in paragraph 44, the first option there referred to might have been achieved by way of condition or limitation imposed within a s.8(3) exemption regulation.

The Direction

32. The Direction stated:

> *"I direct that the operation of a commercial multi-user gateway for the purpose of voice calls over a publicly available telephone service or SMS shall not be exempted by Ofcom from the requirement for a licence to be granted under section 8(1) of the Wireless Telegraphy Act 2006."* (emphasis added)

It is not disputed that the Direction by its terms instructed Ofcom not to comply with its statutory duty under section 8(4) WTA 2006.

33. The Direction went on to specify criteria for the grant, by Ofcom, of an individual licence for the commercial use of COMUGs. Those criteria were, first, that communications data can be obtained from the operator to the same level as can currently be obtained without the use of a COMUG; and, secondly, that the operator must be able to identify relevant communications without having to seek additional information from the COMUG provider so as to enable the operator to comply with an interception warrant.

34. The Secretary of State's case is that both the obligation to refrain from exempting COMUGs and the specific individual licensing criteria were based on the same national security and public safety considerations that were considered and upheld in the *Recall* litigation. The Secretary of State further maintains that the Direction does not constitute an absolute ban on the use of COMUGs. Rather someone wishing to operate a COMUG requires an individual licence, which will be granted where the two specified criteria are satisfied. Where those criteria are met the national security

and public safety issues would not arise since the calling line identity would be shown and the investigatory powers capabilities would not be impeded.

35. Subsequently, Ofcom responded by announcing on its website that, in the light of the Direction, it would not make the regulations contained in the COMUG Notice.

(6) The Parties' submissions

The Claimant's case

36. The Claimant submits that the Direction was not within the power conferred upon the Minister by s.5(2) CA 2003. It was unlawful and should be quashed:

(1) The central issue is what is the proper scope of the power to issue a direction under s.5(2). Section 5(2) does not confer any *power* upon the Minister to direct Ofcom not to comply with its duty under s.8(4) WTA 2006, as a matter of construction of the plain wording of the section and/or essential constitutional principle relating to the supremacy of Parliament.

(2) If a statute is to confer upon a member of the Executive the power to override or even modify a duty in other primary legislation, then clear and specific words are required. General words will not suffice. There are no such clear and specific words in s. 5 CA 2003. The Direction is a direction made by a minister to vary or modify primary legislation passed by Parliament.

(3) The mere existence of a power in s.5(2) CA 2003 to direct Ofcom in relation to its functions under WTA 2006 cannot include a power to direct Ofcom to ignore its WTA 2006 duties. First, the word "functions" in s.5(2) should not be interpreted as including "duties" under the WTA 2006, but instead only those things which Ofcom has "power" or "discretion" (rather than a duty) to do. Secondly, even if the word "functions" could be construed as including duties, the power to direct could only ever lawfully extend to directions *consistent with* the "carrying out" of such duties, and not directions which override those duties. A power to reverse a statutory duty would need to be contained in express words.

(4) Other statutory provisions support this construction: see s.94(3) Telecommunications Act 1984; s.3(5) WTA 2006 (formerly s.154(4) CA 2003). Moreover, s.4(2) CA 2003 does not assist the Secretary of State's case, because, unlike the position in relation to s.5(2), s.3(6) CA 2003 expressly gives priority to the duties in s.4 CA 2003.

(5) This analysis of principle is supported in particular by the decision of the Court of Appeal in the case of *EE Ltd v Office of Communications* [2018] 1 WLR 1858 CA and is provisionally endorsed by the observations of Richards LJ, for a unanimous Court of Appeal, in *Recall CA* as to the lawfulness of any direction of the very sort which the Minister has now made. This constitutes "powerful reason" for this Court to follow that judgment rather than the judgment of Rose J (as she then was) in *Recall HC*, even if, which is not accepted, her judgment on that issue was part of the ratio decidendi.

(6) This interpretation of s.5(2) CA 2003 is neither absurd nor unreasonable, nor would it leave a "gaping hole" in the legislation. The Secretary of State would not be left without power to act to prevent harm to national security or public safety in this case. There are other lawful means open to the Secretary of State to achieve the same result. In particular, the same conditions could be imposed upon the exemption of COMUGs under s.8(3) WTA 2006. The Secretary of State's own evidence does not suggest that there would be practical problems in alternative approaches.

(7) There is no evidence to support the Secretary of State's asserted position that the purpose of s.5 CA 2003 is to retain the ability to impose individual licensing on national security grounds.

The Secretary of State's case

37. The Secretary of State submits as follows:

(1) Section 5(2) not only confers a power on the Secretary of State but, more significantly, imposes a duty upon Ofcom to act in accordance with directions given by the Secretary of State which, more general, duty conditions the carrying out of Ofcom's duty under s.8(4) WTA 2006.

(2) As a matter of construction of the statutory power under which it was given, the Direction was evidently not ultra vires. Section 5 gives the Secretary of State the power to act to prevent harm to national security that would have arisen if Ofcom had introduced legislation to exempt COMUGs from the licensing requirement in s.8(1) WTA 2006. First, the term "functions" in s.5(2) includes "duties", and in particular, in this case, the s.8(4) duty upon Ofcom. Secondly, s.5(2) then imposes a duty on Ofcom to "carry out" its functions (including the s.8(4) duty) "in accordance with" a direction given under s.5(2). There is no limitation upon the words "carry out" (such as to preclude a direction *not* to carry out) and the words "in accordance with" are to be interpreted as "subject to". Thirdly, the position under s.5 CA 2003 is analogous to that in s. 4(2) CA 2003, where there is equally a duty, when "carrying out" functions listed in s.4(1) to act "in accordance" with the six specified Community Requirements. In s.4(2) CA 2003, "carrying out" must embrace "not carrying out" where that is what Community Requirements demand. It follows that Parliament should be taken to have intended the term "carry out" to have the same meaning in the very next section of the same Act, namely in s.5 CA 2003.

(3) Moreover that the scope of the power in subsection (2) of s.5 is, in general, unlimited as to the nature of the direction that may be given is supported by the specific limitations and qualifications on the power set out, in particular, in sub-sections (3A) and (4A) of s.5.

(4) As a matter of the history and development of the statutory regulatory scheme, the position now, and since 2003, is that Ofcom has responsibility for technical telecommunications and non-security issues, but the Secretary of State has retained powers in relation to national security and public safety. Section 5 is the mechanism to ensure that matters of national security can still be protected.

The Secretary of State's construction of s.5 means that the Secretary of State has the power to act - through the giving of directions - to ensure that serious national security and public safety risks (such as those presented through the unlicensed use of COMUGs) do not arise.

(5) The Secretary of State's interpretation of the power in s.5(2) was expressly approved by Rose J (as she then was) in *Recall HC*, a decision of a court of co-ordinate jurisdiction, which this Court should follow, unless convinced that she was wrong. The observations of Richards LJ in *Recall CA* did not express any concluded view and in any event were obiter. They provide no sound basis from departing from Rose J's decision on the point.

(6) As regards the Claimant's case:

(a) First, the doctrine of parliamentary supremacy does not assist – s.5(2) confers by primary legislation a power to direct Ofcom and imposes a duty upon Ofcom, not to comply with its duties under primary legislation.

(b) Secondly, s.3(5) WTA 2006 is consistent with the interpretation of s.5 CA 2003 as imposing a supervening duty on Ofcom.

(c) Thirdly, the Claimant's construction of s.5 CA 2003 produces absurd consequences which Parliament would not have intended.

(d) Fourthly, the judgment of the Court of Appeal in *EE Ltd v Ofcom*, concerning a different worded statutory power used in a distinct context, does not assist the Claimant. Section 5(1) WTA 2006 contain no equivalent provision imposing a duty upon Ofcom to follow a direction by the Secretary of State; moreover that case was concerned with the situation where the Secretary of State was seeking to "repatriate" Ofcom's duties and powers to himself.

(e) Finally if the same result could be achieved without the Direction, then under the provisions of s.31(2A) Senior Courts Act 1981 ("SCA 1981") this Court must refuse relief, because the outcome would not have been substantially different.

(7) Relevant Law

(a) Further statutory provisions

38. For convenience, I set out here further statutory provisions relevant to the issues in the case.

Telecommunications Act 1984

39. Section 94 Telecommunications Act 1984 provided, at material times, as follows:

> *"(1) The Secretary of State may, after consultation with a person to whom this section applies, give to that person such directions of a general character as appear to the Secretary of State to be necessary in the interests of national security or relations with the government of a country or territory outside the United Kingdom.*
>
> *…*
>
> *(3) A person to whom this section applies shall give effect to any direction given to him by the Secretary of State under this section notwithstanding any other duty imposed on him by or under Part 1 of Chapter 1 of Part 2 of the Communications Act 2003 …"*

Communications Act 2003

40. Section 3 CA 2003 provides as follows:

> *"General duties of OFCOM*
>
> *(1) It shall be the principal duty of OFCOM, in carrying out their functions—*
>
> *(a) to further the interests of citizens in relation to communications matters; and*
>
> *(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.*
>
> *…*
>
> *(6) Where it appears to OFCOM, in relation to the carrying out of any of the functions mentioned in section 4(1), that any of their general duties conflict with one or more of their duties under sections 4, 24 and 25, priority must be given to their duties under those sections.*
>
> *…"*

41. Section 4 provides as follows:

> *"Duties for the purpose of fulfilling EU obligations*
>
> *(1) This section applies to the following functions of OFCOM—*
>
> *(a) their functions under Chapter 1 of Part 2;*
>
> *(b) their functions under the enactments relating to the management of the radio spectrum;*

(c) their functions under Chapter 3 of Part 2 in relation to disputes referred to them under section 185;

(d) their functions under sections 24 and 25 so far as they relate to information required for purposes connected with matters in relation to which functions specified in this subsection are conferred on OFCOM; and

(e) their functions under section 26 so far as they are carried out for the purpose of making information available to persons mentioned in subsection (2)(a) to (c) of that section.

(2) It shall be the duty of OFCOM, in carrying out any of those functions, to act in accordance with the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive and are to be read accordingly).

…"

42. Section 132 provides as follows:

"Powers to require suspension or restriction of a provider's entitlement.

(1) If the Secretary of State has reasonable grounds for believing that it is necessary to do so—

(a) to protect the public from any threat to public safety or public health, or

(b) in the interests of national security,

he may, by a direction to OFCOM, require them to give a direction under subsection (3) to a person ("the relevant provider") who provides an electronic communications network or electronic communications service or who makes associated facilities available.

(2) OFCOM must comply with a requirement of the Secretary of State under subsection (1) by giving to the relevant provider such direction under subsection (3) as they consider necessary for the purpose of complying with the Secretary of State's direction.

(3) A direction under this section is—

> *(a) a direction that the entitlement of the relevant provider to provide electronic communications networks or electronic communications services, or to make associated facilities available, is suspended (either generally or in relation to particular networks, services or facilities); or*
>
> *(b) a direction that that entitlement is restricted in the respects set out in the direction."*

Wireless Telegraphy Act 2006

43. Section 3 WTA 2006 provides as follows:

> *"Duties of OFCOM when carrying out functions*
>
> *(1) In carrying out their radio spectrum functions, OFCOM must have regard, in particular, to —*
>
> *(a) the extent to which the electromagnetic spectrum is available for use, or further use, for wireless telegraphy;*
>
> *(b) the demand for use of the spectrum for wireless telegraphy; and*
>
> *(c) the demand that is likely to arise in future for the use of the spectrum for wireless telegraphy.*
>
> *(2) In carrying out those functions, they must also have regard, in particular, to the desirability of promoting—*
>
> *(a) the efficient management and use of the part of the electromagnetic spectrum available for wireless telegraphy;*
>
> *(b) the economic and other benefits that may arise from the use of wireless telegraphy;*
>
> *(c) the development of innovative services; and*
>
> *(d) competition in the provision of electronic communications services.*
>
> …
>
> *(5) Where it appears to OFCOM that a duty under this section conflicts with one or more of their duties under sections 3 to 6 of the Communications Act 2003 (c.*

21), priority must be given to their duties under those sections.

(6) Where it appears to OFCOM that a duty under this section conflicts with another in a particular case, they must secure that the conflict is resolved in the manner they think best in the circumstances."

44. Section 5 WTA 2006 provides as follows:

"Directions of Secretary of State

(1) The Secretary of State may by order give general or specific directions to OFCOM about the carrying out by them of their radio spectrum functions.

(2) An order under this section may require OFCOM to secure that such frequencies of the electromagnetic spectrum as may be specified in the order are kept available or become available—

(a) for such uses or descriptions of uses, or

(b) for such users or descriptions of users, as may be so specified.

(3) An order under this section may require OFCOM to exercise their powers under the provisions mentioned in subsection (4)—

(a) in such cases,

(b) in such manner,

(c) subject to such restrictions and constraints, and

(d) with a view to achieving such purposes, as may be specified in, or determined by the Secretary of State in accordance with, the order.

(4) The provisions are—

(a) section 8(3);

(b) sections 12 to 14; and

(c) sections 21 to 23.

(5) This section does not restrict the Secretary of State's power under section 5 of the Communications Act

> *2003 (c. 21) (directions in respect of networks and spectrum functions).”*

(b) EE Ltd v Office of Communications

45. In *EE Ltd v Office of Communications* [2017] EWCA Civ 1783 [2018] 1 WLR 1858 the issue was the ability of the Secretary of State to give a direction to Ofcom under s.5 WTA 2006 to override duties in s.4(2) CA 2003 and s.3(5) WTA 2006. (By contrast, in the present case, the issue is the ability to give a direction under s.5 CA 2003 to override a duty in s.8 WTA 2006). Those provisions are set out at paragraphs 41, 43 and 45 above. Ofcom had the function of setting fees for licences. Section 4(2) CA 2003 required Ofcom to act in accordance with Community requirements and s.3(5) WTA 2006 required Ofcom to give priority to its s.4(2) CA duty over other duties imposed upon it by s.3 WTA 2006. The Secretary of State however gave a direction to Ofcom under s.5(1) WTA 2006 to revise certain fees to reflect full market value. At first instance, Cranston J held that the direction was not ultra vires because s.5 WTA 2006 empowered the Secretary of State to give a direction which overrode Ofcom’s duty, under s.4(2) CA 2003 to set fees in accordance with Community requirements.

46. The Court of Appeal disagreed. S.5 WTA 2006 did not transfer to the Secretary of State Ofcom’s power to set fees nor did it authorise the Secretary of State to direct Ofcom, when exercising that power, to ignore the duties imposed upon it by s.4(2) CA 2003 and s.3(5) WTA 2006 to act in accordance with Community requirements.

47. One of the primary issues was whether a direction by the Secretary of State under s.5(1) WTA 2006 is capable of displacing statutory duties upon Ofcom under s.3 CA and s.4 CA 2003: §23. At §37, Patten LJ referred to Cranston J’s conclusion that a s.5 direction would have the effect of overriding Ofcom’s duties under s.4(2) and 3(5) WTA. At §51, Patten LJ recorded EE’s argument that the function of setting fees had been delegated to Ofcom by primary legislation and, absent clear words, that position could not be changed by subordinate legislation in the form of the Secretary of State’s direction. Further, so EE argued, the direction could not have been effective to remove from Ofcom the duty imposed upon it by s.4(2). Patten LJ addressed these contentions as follows:

> *“52. The general principle is not in dispute and the question of vires really turns on s.5 of WTA 2006. Does it empower the Secretary of State to repatriate to himself the function of setting licence fees in accordance with Article 8 and, if so, did the 2010 Direction have this effect?*
>
> *53. Section 5 of WTA 2006 allows the Secretary of State to give directions to Ofcom “<u>about the carrying out</u> by them of their radio spectrum functions”. These include the power to set licence fees which is contained in s.12 (see s.5(4)(b)). Although s.5(3) allows a direction to require Ofcom to exercise its powers “in such manner” as the Secretary of State specifies (s.5(3)(b)), what it does not do is to transfer*

> *to the Secretary of State the function of exercising the s.12 power. Lord Pannick submitted that had it purported to do so that would have been a breach of the provisions of the CRF and, in particular, Articles 3 and 3a of the Framework Directive which require member states to guarantee the impartiality of NRAs and requires them to act independently. But it is not necessary to resort to EU law. The power to give directions is in respect of the exercise by Ofcom of its radio spectrum functions. The Secretary of State was not thereby empowered to exercise those functions himself nor did he purport to give himself that power by the 2010 Direction. It is phrased in terms of requiring Ofcom to exercise its powers so as to implement the package of reforms including directing Ofcom to raise the licence fees.*
>
> *54. The question therefore arises whether s.5 authorises the Secretary of State to direct Ofcom in exercising its s.12 powers to ignore the duties imposed on it by s.4(2) of CA 2003 and s.3(5) of WTA 2006. In my view, it does not. Parliament has imposed those duties on Ofcom (compatibly with Article 8 of the Framework Directive) to be performed "in carrying out" its radio spectrum functions. It did not obviously contemplate or in my view authorise the performance of the Article 8 duty by someone who was not the regulator and who was not carrying out the relevant function to which the duty relates. In the absence of clear words, the s.4(2) duty is to be treated as non-delegable and there is nothing in s.5 of WTA 2006 which in terms allows the Secretary of State to relieve Ofcom of the statutory duties which Parliament has expressly imposed on it. The language of s.5 is entirely neutral." (emphasis added)*

48. The Court of Appeal concluded that a direction in relation to a *function* under the enactments relating to the management of the radio spectrum could not relieve Ofcom of a statutory *duty* placed upon it.

(c) Principles of statutory interpretation

49. I have been referred to a number of cases on the approach to statutory interpretation that should apply in the present case, and in particular the following: *R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants* "*JCWI"* [1997] 1 WLR 275 at 290-293; *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 [2016] AC 1531 at §§21-28; *R (Ingenious) v HMRC* [2016] UKSC 54 [2016] 1 WLR 4164 at §§19-20; *R (UNISON) v. Lord Chancellor* [2017] UKSC 51 [2017] 3 WLR 409 at §§65, 103; *R(A) v Secretary of State for Health* [2017] EWHC 2815 (Admin) [2018] 4 WLR 2; *J v Welsh Ministers* [2018] UKSC 66 [2019] 2 WLR 82: and, in addition, *Bennion on Statutory Interpretation* (7th edn) at pp 81-85.

50. From these authorities, the following principles can be stated:

(1) Subordinate legislation is invalid if it has an effect or is made for a purpose outside the scope of the statutory power pursuant to which it was made i.e ultra vires: *Public Law Project* §23.

(2) In considering whether subordinate legislation is ultra vires the court must determine the scope of the power conferred by statute to make that subordinate legislation: *Public Law Project* §23.

(3) The interpretation of any statutory provision conferring a power to make secondary legislation is to be effected in accordance with normal principles of construction: *Bennion* §§3.7(1)

(4) In determining the extent of the scope of the power conferred on the executive by primary legislation, the Court must consider not only the text of that provision, but also the constitutional principles which underlie the text and the principles of statutory interpretation which give effect to those principles. One such principle is the rule that, "specific statutory rights are not to be cut down by subordinate legislation passed under the vires of a different act" in the absence of clear words: *UNISON* §§65 (citing *JCWI* at 290), 87 and 103. In the light of the following principles, I consider that this principle must give way in the face of "clear words".

(5) If the legislature intends to confer a power (a) to amend the enabling Act or other legislation (i.e. Henry VIII powers) or (b) to interfere with fundamental rights, it will usually do so expressly. In the absence of express provision, a court may be reluctant to find that the legislature intended to confer such powers: *Bennion* §3.7

(6) In the case of fundamental rights, these cannot be overridden by general or ambiguous words. In the absence of express language or necessary implication to the contrary, the court presumes that even the most general words were intended to be subject to the basic rights of an individual. The more general the words, the harder it is likely to be to rebut the presumption: *Ingenious* §§19-20.

(7) A similar principle applies in the case of a so-called Henry VIII clause: *Ingenious* §21. A "Henry VIII" power describes a delegated power under which subordinate legislation is enabled to <u>amend</u> primary legislation. The court will scrutinise with care a statutory instrument made under such a Henry VIII power. In such a case, if the words used to delegate a power are general, the more likely it is that an exercise within the literal meaning will be outside the legislature's contemplation: *Public Law Project* §§25-26.

(8) The court can take into account the fact that delegation to the executive of a power to modify primary legislation is an exceptional course and if there is any doubt about the scope of the power conferred upon the executive, it should be resolved by a restrictive approach: *Public Law Project* §27 and *Bennion* at p 84 §3.8(1).

(9) In the case of a power by way of subordinate legislation to modify or to override the effect of primary legislation, the Courts may be inclined to adopt a similar approach to that adopted in the case of a Henry VIII power properly so-called: *Bennion* at §3.8(2) and pp 84-85.

As regards this final proposition I accept that *Public Law Project* does not expressly address the power to override a duty in other primary legislation; it was concerned with Henry VIII powers. Nonetheless in the light of the principles summarised in (1) to (8) above, as well as the observations in *EE* and in Richards LJ in *Recall CA* (below), I am satisfied that the tentative conclusion drawn in *Bennion* in fact represents the correct approach in the case of a power, by way of subordinate legislation, to modify or override the effect of an Act. That must include modifying or amending the effect of "rights and duties" established in other primary legislation.

(8) Discussion and Analysis

51. The question is whether s.5(2) CA 2003 confers upon the Secretary of State a power to make a direction to Ofcom not to make an exemption regulation which it is otherwise under a duty to make, pursuant to s.8(4) WTA 2006.

52. I start by addressing the construction of the words in s.5(2) CA 2003 themselves. Secondly, I consider other relevant provisions in legislation in the communications sector. Thirdly, I address the issue of national security more widely. Fourthly, I look in more detail at the judgments in the *Recall* case. Fifthly, I address the question of "absurdity". Finally, I consider s.31(2A) SCA 1981.

Construction

53. In his submission, the Secretary of State concentrates upon the *duty* upon *Ofcom* contained within s.5(2) CA 2003 to follow a direction given by the Secretary of State. However that ignores the issue as to the permissible content of such a direction as given by the Secretary of State. If there is a power to make such a direction under s.5(2), then clearly Ofcom is under a duty to comply with that direction. But the prior question here is whether *the Secretary of State* has the *power* to make a direction in the first place not to carry out its duty under s.8(4) or any other duty. I do not accept the Secretary of State's characterisation of the issue as being simply a tussle between conflicting duties.

54. The issue is one of statutory construction of s.5(2), applying the principles derived from the authorities as set out above. Whilst not strictly an issue of the parliamentary supremacy, that is a key principle underlying those principles of construction. In my judgment, the starting point is that a restrictive approach to construction is to be adopted and clear words are required to give a power, by way of secondary legislation, to override a statutory duty imposed by other primary legislation. Absent clear wording, or a provision to resolve a conflict between duties, the Court should presume that Parliament would not impose inconsistent duties or clashing duties.

55. First, as regards the word "functions" in s.5(2), I consider that, despite the generality of the term, it does include "duties", and thus includes the duty under s.8(4). In this regard, functions is apt to "embrace all the duties and powers" of Ofcom; i.e. "the sum total of the activities Parliament has entrusted to it": see *Hazell v Hammersmith LBC*

[1992] AC 1 at 29F. The Claimant submits that *Hazell* falls to be distinguished on the basis that, whereas in that case the relevant provision was an empowering provision "running with the grain" of the underlying duties, in order to assist in giving effect to them, the same cannot be said in the present case, where the power sought to be exercised *contradicts* the underlying duty. The word "functions" applies in general to any exercise of the power to make a direction. On its face s.5(2) is there to assist in giving effect to duties and powers. Where any particular direction might override or run counter to the function/duty, that raises the question of whether there is *power* to make such a direction, rather than the question of what the word "function" means in that sub-section. In *Recall CA*, Richards LJ expressed a similar view at §56 (see paragraph 72 below).

56. Secondly, however, the words "carry out" in s.5(2) bear the connotation of "performing", "putting into effect" or "discharging" Ofcom's "functions". Moreover, I consider that the words "carry out" qualify the meaning of the word "directions". Whilst s.5(2) does not expressly specify the content of any "general or specific direction" which may be given, in my judgment any "direction" given must, at the very least, be "in relation to" the "carrying out" of Ofcom's functions. In answer to the question "a direction as to what?", s.5(2) gives power to give a direction "in relation to the carrying out" of Ofcom's functions. If the words "carry out" are then applied specifically to "the duty under s.8(4) WTA" encompassed within those functions (or indeed any other of Ofcom's statutory duties), as a matter of construction a direction *not* to carry out that duty, cannot be a direction to carry out that duty, or even a direction "in relation to" the carrying out of that duty.

57. Thirdly, I do not accept that the words "in accordance with" are synonymous with "subject to". The former phrase carries the meaning of "in line with" or "in the same direction as"; the latter phrase carries the connotation of something which has the potential to override or trump.

58. Fourthly, the decision of the Court of Appeal in *EE* (and in particular §54 of the judgment) provides some considerable support for the Claimant's case. There, the Court of Appeal held that "in the absence of clear words" a direction to Ofcom "*about the carrying out* … of their radio spectrum *functions"* could not relieve Ofcom of a statutory *duty* placed on Ofcom by primary legislation. I do not accept the Secretary of State's submission seeking to distinguish, or minimise the relevance of, the decision and analysis in that case. First the decision is based on the fact that there is nothing in s.5 WTA 2006 which expressly ("in terms") overrides other statutory duties which have been imposed upon Ofcom by Parliament and on the fact that the language in s.5(1) as to the content of any such "general or specific directions" was "entirely neutral". Secondly, whilst I accept that s.5(1) WTA 2006 does not expressly make reference to a "duty" upon Ofcom to act in accordance with directions given by the Secretary of State (unlike the position in s.5(2) CA 2003), it must be the case that Ofcom is under *a duty* to give effect to such directions, once made by the Secretary of State. In any event, it is clear from s.5(2) and (3) WTA 2006 (which specify in more detail the content of an order made under s.5(1)) that such an order may "require" Ofcom to act in a specific way. In my judgment the imposition of such a "requirement" upon Ofcom in those subsections necessarily carries with it a duty upon Ofcom to act in accordance with that order. Thirdly, I do not accept that the decision in *EE* is concerned only with the case where the Secretary of State was

seeking to "repatriate" a duty otherwise placed on Ofcom or that there is any relevant distinction between a direction "to repatriate" a duty and a direction to override a duty. The principle expressed by Patten LJ at §54 is stated more widely.

59. Fifthly, Ofcom's duty under s.4(2) CA 2003 to "act in accordance with" Community requirements, in "carrying out" its functions (including the radio spectrum functions) does not assist in construing the words "carry out in accordance with" in s.5(2). It is not clear that any particular Community requirement itself imposes a "duty" not to carry out other duties. In any event, unlike the position with s.5(2) CA 2003, s.3(6) CA 2003 makes express provision for any consequential conflict between the s.4(2) duty and other duties of Ofcom. Thus if Community requirements were to impose a duty which conflicts with a duty involved in radio spectrum functions, then the s.4(2) duty takes priority and the latter duty must give way. If the Secretary of State's construction of the words "carry out in accordance with" in s.4(2) CA 2003 and in s.5(2) were correct, s.3(6) CA 2003 would be surplusage. It is notable indeed that in the very same statute, there is no equivalent provision for resolving conflicts between competing duties in the case of a duty imposed under s.5(2) to apply a direction by the Secretary of State. This provides strong support for the conclusion that s.5(2) does not itself envisage a stark conflict which would arise from the giving of a direction specifically not to carry out another duty primary imposed upon Ofcom by legislation, whether in CA 2003 or otherwise.

60. As regards sub-section (3A) and (4A) of s.5 CA 2003, the Secretary of State contends that, since Parliament has, by these provisions, expressly placed limitations upon the power to give directions under s.5(2), applying the interpretive maxim *expressio unius est exclusio alterius*, s.5(2) should be interpreted as excluding the implication of an additional limitation upon that power. In other parts of s.5 there are restrictions and limitations on the power to make a direction, which absent such restrictions, would involve a direction overriding aim another duty or requirement. There is some force in this submission. However, it is not sufficient to displace the conclusion which flows from the reasoning in the foregoing paragraphs. First, the absence of power in s.5(2) to direct Ofcom not to carry out its statutory duty is not based on the "implication of a limitation". Rather it is based on the absence of clear words conferring such a power expressly, which, as a matter of construction the words do not otherwise bear. Secondly, an "interpretive maxim" is just that. It is or may be an aid to construction, but cannot displace a construction otherwise properly placed upon the words.

61. I conclude therefore, that as a matter of pure construction of the words, in their context, a direction by the Secretary of State "not to carry out a duty" cannot be a direction "as to" or "in relation to" the carrying out of that duty, and thus not a direction to carry out functions within s.5(2) CA 2003.

Other statutory provisions

62. The absence of clear words, or express provision resolving conflicts of duties in the present case is highlighted by other provisions in legislation in this field which do make such express provision. First, s.94(3) Telecommunications Act 1984 *expressly* provided that a duty to give effect to a "national security" direction given by the Secretary of State under s.94(1) overrides any other statutory duty, arising under part 1 or Chapter 1 of Part 2 of CA 2003**.**

63. Secondly, s.3(5) WTA 2006 expressly provides for what is to happen where Ofcom is placed under conflicting duties by, on the one hand, s.3(1) and (2) WTA 2006, and, on the other hand, by ss.3 to 6 CA 2003 (which includes its duty under s.5(2) CA 2003). Ofcom is required to give priority to those duties arising under CA 2003. Section 3(5) WTA thus gives express priority to the very duty in question in the present case, namely s.5(2) CA 2003. The absence of a similar provision in relation to s. 8WTA 2006 suggests that it was not contemplated that a s.5(2) direction would conflict with the s.8(4) duty.

64. Nor do I accept, as a ground for distinguishing the position under s.3(5) WTA 2006, that the duty upon Ofcom in s.5(2) will conflict with its duty under s.8(4) WTA only in the specific case of a direction not to carry out that duty and in most cases is unlikely to conflict with that duty. Such a contention militates towards the view that the legislature did not contemplate such a conflicting direction at all. Mr Beard QC himself suggested in argument, the reason there is no conflict-resolving provision in this case, is because it was not generally a question of a hierarchy of duties, but that it was envisaged generally that the s.5(2) duty might modify the s.8(4) duty, and not seek to override or conflict with it. But that does not explain why there is no such provision to deal with the case where there is such a conflict.

65. Thirdly, as explained in paragraph 59 above, s.3(6) CA 2003 expressly gives priority to Ofcom's duties under s.4 and other specified sections of CA 2003 over its general duties, in relation to the carrying out of its functions mentioned in s.4(1) CA 2003. By s.4(1)(b) those functions include its radio spectrum functions (and thus its duties under WTA 2006).

National security and division of functions

66. It is the case that under the regulatory framework put in place following the implementation of the EU directives, responsibility for technical functions was transferred to Ofcom, the national regulatory authority, whilst at the same time the Secretary of State (in the main) retained responsibility for matters of national security and other matters, such as public safety and public health. This is reflected in the terms of s.5 CA 2003.

67. However that consideration does not conclusively point towards the Secretary of State's construction of the power in s.5(2). As explained below, there are other mechanisms open to the Secretary of State to exercise his powers to safeguard national security and other public interests. Exemption granted by regulation under s.8(3) WTA 2006 can be made subject to conditions or limitations. Moreover there is the power, by ss.5(7) and 132 CA 2003 for the Secretary of State, on grounds of national security, to direct Ofcom to give a direction suspending or restricting a provider's entitlement to provide services.

The judgments of Rose J and Richards LJ in the *Recall* litigation

68. I consider first, the analysis of each of Rose J and Richards LJ relevant to the issue before the Court now, before addressing the status, as a matter of precedent, of the judgment of Rose J.

Recall HC

69. Having concluded that the public security justification for the Commercial Use Restriction was available to the United Kingdom under Article 5 of the Authorisation Directive, the next issue for Rose J was whether that justification was available as a matter of domestic UK law. The claimants argued that when Article 5 was implemented into UK law (ultimately to be found in s.8 WTA 2006) the UK did not expressly incorporate into those provisions a "public security" justification. In response DCMS relied, inter alia, on s.5 CA 2003: even if the public security justification was not included in s.8 WTA, in fact that aspect of Article 5 was transposed through the route of the power in s.5 CA 2003 (§82). Rose J addressed that argument as follows:

> *"85. However, I accept that section 5 of the CA 2003 does have the effect contended for by DCMS and does allow the UK to rely on a public security justification in relation to the making of exemptions under section 1AA/section 8. Indeed, it is also more likely, in my judgment, that the legislative intention was that decisions about the needs of national security would be placed in the hands of the Secretary of State rather than of OFCOM.*
>
> *86. The Claimants countered with three points on the potential application of section 5 of the CA 2003. They argue that a direction made under section 5 could not be used to override the duty imposed on OFCOM in primary legislation such as the duty to issue an exemption imposed in section 1AA/section 8. I do not see why this should be the case. Sections 5 and 405(1) of the CA 2003 (which defines which OFCOM functions the power relates to) contain no such limitation.*
>
> *…"*

She then addressed the third point in the following terms:

> *"88. The Claimants also submit that even if the Secretary of State could have given a direction under section 5 of the CA 2003 to OFCOM to exercise its power under section 1AA/section 8 to impose an individual licensing regime on GSM gateways, the Secretary of State did not in fact do so. DCMS accept that there is no evidence that the Secretary of State ever made a direction under section 5 to this effect.*
>
> *89. On this point I agree with the submissions of DCMS that such a direction would only have been necessary if and when the 2003 Exemption Regulations were re-made in exercise of the powers under section*

> *1AA/section 8. The 2003 Exemption Regulations were made on 20 January 2003 under the power in section 1(1) WTA 1949 before section 1AA was inserted into the WTA 1949 on 25 July 2003 (by section 166 of the CA 2003). It is not suggested that the Regulations were ultra vires that power (i.e. the power in section 1(1) WTA 1949) when they were made.*
>
> *90. The 2003 Exemption Regulations were then continued in force by the transitional provisions set out in Schedule 18 to the CA 2003 …*
>
> *91. The 2003 Exemption Regulations were validly made by the Secretary of State under the power in section 1(1) WTA 1949 and are treated by virtue of paragraph 1 of Schedule 18 to the CA 2003 as having been made under that power by OFCOM. In so far as the Commercial Use Restriction depended for its validity on a public security justification, it was capable of being made under section 1(1) WTA 1949 despite the insertion of section 1AA in 2003 <u>because the CA 2003 also conferred a power on the Secretary of State under section 5 to give a direction to OFCOM to make the exemption subject to that restriction</u>. The 2003 Exemption Regulations could therefore have been validly granted in their current form at any point in the relevant legislative history. There was no need to remake the 2003 Exemption Regulations after the coming into force of the CA 2003 and so no need for the Secretary of State actually to make a direction under section 5 of the CA 2003." (<u>emphasis</u> added)*

Finally she summarised her findings in §92, the relevant parts of which are as follows:

> *"92. I can therefore summarise my findings on the question of whether it is open to DCMS to justify the restriction on the use of GSM gateways in the 2003 Exemption on the grounds of public security as follows.*
>
> - *…*
> - *…*
> - *…*
> - *However, section 5 of the CA 2003 implements the public security aspect of Article 5(1) of the Authorisation Directive by empowering the Secretary of State by direction to override OFCOM's duties under section 1AA of the WTA 1949 on grounds of public security.*

> • *The fact that no direction has in fact been given by the Secretary of State under section 5 of the CA 2003 in respect of the 2003 Exemption Regulations does not preclude DCMS from arguing that the exemption is justified on the grounds of public security. The exemption was in fact made under section 1(1) WTA 1949 before the CA 2003 provisions were brought into force; it was intra vires that power when made and was maintained in force by the transitional provisions in Schedule 18 to the CA 2003."*

70. Thus in summary, Rose J first accepted that s.5 does allow the UK to rely on a public security justification in relation to the making of exemptions under s.1AA/s.8. She then addressed three points. First, and significantly, at §86, she rejected the argument, now made in this case, that s.5 could not be used to override the duty imposed upon OFCOM to issue an exemption under s.8. Secondly, she rejected an argument based on s.5(4). Thirdly, she rejected the claimants' argument that the Secretary of State had not in fact ever made a direction under s.5. There had never been a need to make such a direction, because the 2003 Exemption Regulations had continued in force and, because they could have been validly granted in their current form, <u>because of the 2003 power</u>, there had been no need for the Secretary of State actually to have made a s.5 direction. As appears from the emphasised words in §91 above, part of her reasoning on the third point appeared to be based on her earlier conclusion, under the first point, that s.5(2) does confer a power on the Secretary of State to override the duty upon Ofcom under s.8(4) WTA.

Recall CA

71. On appeal, the Court of Appeal dismissed the claimants' appeal. Ground 1B of the grounds of appeal was that even if Article 5 of the Authorisation Directive permitted a public security justification for withholding a general authorisation (i.e. for the Commercial Use Restriction), the UK had chosen to implement the directive in a way that provided no basis for reliance on the ground. On the contrary the implementing legislation required the regulator to lift the Commercial Use Restriction - thus the maintenance of the Commercial Use Restriction was in breach of EU law.

72. Richards LJ addressed the specific issue of the transposition into domestic law of a public security justification at §§34 to 59. He concluded that the Commercial Use Restriction was not in breach of the Authorisation Directive in so far as it was justified on grounds of public security. In particular he stated as follows:

> *"53. Whilst the appellants' arguments have served to highlight unsatisfactory features of the domestic legislation, they have not persuaded me that the resulting situation is one in which the commercial use restriction is in breach of the Authorisation Directive in so far as the judge found it to be justified on the ground of public security. <u>In my view the key lies in the 2003 Exemption Regulations which, by excluding the commercial use of GSM gateways from the scope</u>*

of the exemption otherwise conferred, kept in place the commercial use restriction. Those regulations were validly made prior to the date for implementation of the directive. A decision not to make any material amendment to them was made just before the implementation date and was based on considerations of public security as a prime reason. The regulations, together with the commercial use restriction inherent in them, were then maintained in force as from the implementation date by the transitional provisions of the 2003 Act. They have remained in force to this day. As a matter of domestic law, therefore, the commercial use restriction has been valid throughout. ...

...

55. The appellants' submissions focus understandably on the fact that the duty to make exempting regulations which was imposed on Ofcom by section 1AA of the 1949 Act (as inserted by section 166 of the 2003 Act) and then by section 8 of the 2006 Act was not expressed to be subject to any public security exception. I find the domestic legislation very puzzling in that respect. There is a real tension between a duty expressed in those terms and the maintenance in force of the 2003 Exemption Regulations, under which GSM gateways were excluded from the scope of the exemption for reasons that had been openly stated to include public security. It would be surprising in those circumstances if the legislative intention was for Ofcom to make new exempting regulations, revoking or amending the 2003 Exemption Regulations, without regard to public security. Moreover, section 5 of the 2003 Act shows the importance attached by Parliament to national security in this general context and gives the Secretary of State substantial powers to act to protect it.

56. The wording of s.5 is, however, problematic. Section 5(2) provides that if directions are given by the Secretary of State, it is the duty of Ofcom to carry out its relevant functions (which include its duty under s.1AA of the 1949 Act to make exempting regulations) "in accordance with those directions". That cannot readily be interpreted as requiring Ofcom, if so directed by the Secretary of State, not to carry out a statutory duty otherwise imposed on it. The wording may be contrasted with the terms of s.94(3) of the Telecommunications Act 1984, quoted above, which require a person to give effect to a direction

> *"notwithstanding any other duty imposed on him", and with the terms of s.3(5) of the 2006 Act, also quoted above, which make clear how a conflict between statutory duties is to be resolved. On this point, therefore, I have greater reservations than did Rose J, who said at [86] of her judgment that she did not see why a direction under s.5 could not be used to override Ofcom's duty to make exempting regulations. (I consider that the point is essentially one of construction of the 2003 Act and that the Joint Council for the Welfare of Immigrants [1997] 1 W.L.R. 275 case on which the appellants rely does not provide any real assistance.)*
>
> *57. On the other hand, I agree with the judge, albeit for a slightly different reason, in rejecting the appellants' argument based on section 5(4). ….*
>
> *58. No relevant direction has ever been issued under s.5. None has needed to be issued in the absence of any decision by Ofcom to make exempting regulations to remove the commercial use restriction. The relationship between s.5 and Ofcom's duty to make exempting regulations has therefore never been put to the test in practice. I have expressed my doubts about the effectiveness of s.5 for the purpose on which the Secretary of State relies on it in these proceedings (and, as explained below, has relied on it in dealings with the European Commission) but I do not think it necessary to reach any concluded view on the subject. That is because, in my judgment, the compatibility of the commercial use restriction with the directive* ***does not depend on whether the Secretary of State has the power under domestic law, by way of a direction under s.5, to prevent Ofcom from making exempting regulations to remove the restriction****. I come back to the point that the commercial use restriction, as a valid measure of domestic law which is justified by considerations of public security insofar as it relates to COMUGs, is compatible to that extent with art.5 of the Authorisation Directive." (****emphasis*** *added)*

73. The reasoning of Richards LJ was based squarely upon the prior 2003 Exemption Regulations made before the relevant EU law was to be implemented and thereafter maintained in place, by the transitional provisions, for a prime reason of public security. As a matter of domestic law the Commercial Use Restriction was valid throughout. Since public security was at all material times an available ground of justification, the restriction in respect of COMUGs was compatible at all material times. The domestic exemption regulations remained a valid piece of UK legislation which Ofcom had not – at that point – sought to revisit. At that time Ofcom had not

made any decision to make exempting regulations to remove the Commercial Use Restriction.

74. He then went on to address specifically the relationship between s.5 CA 2003 and s.8(4) WTA and in particular the three points addressed by Rose J at §§86 to 91 of her judgment. As regards the first point, namely whether a section 5 direction could override Ofcom's duty under section 8, he had "greater reservations" and "doubts": §§56 and 58. He declined to reach a concluded view, because he reached the same conclusion on an alternative basis (third point). As regards the second point concerning s.5(4), he agreed with Rose J's conclusion, albeit for slightly different reasons: §57. On the third point, he concluded that Rose J had reached the correct conclusion on the basis of, effectively, the third point, namely that there had been no need for there to have been in fact a direction under s.5 because of the continuing effect of the 2003 Exemption Regulations: §§58 and 53.

75. However, and significantly, this last conclusion was because, in his view, the compatibility of the Commercial Use restriction did *not* depend on whether the Secretary of State had power under domestic law by way of a direction under section 5 to prevent Ofcom from making exemption regulations. On the "third point", Richards LJ's conclusion expressly did not depend on s.5 giving a power to override; whilst it appears that Rose J's conclusion on this point did or might have so depended. In this way, in my judgment, there is a material difference in the reasoning of Rose J and Richards LJ, when reaching the same ultimate conclusions.

Precedent

76. The position as a matter of precedent is that a judge of the High Court is not technically bound by decisions of other High Court judges, but he or she should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so: see *Willers v Joyce* [2016] UKSC 44 [2018] AC 843 at §9. That which is binding in a previous decision is that part of it which is the *ratio decidendi*. Parts of the decision which are *obiter dicta* are not on any view binding.

77. I proceed on the basis that Rose J's conclusion in the last sentence of §86 is part of the *ratio* of her decision. Whilst it might be said that her reasoning on the "third point" at §§88-91 formed the ratio, as I point out in paragraph 70 above, her conclusion (at §91) in relation to the effect of the 2003 Exemption Regulations itself appears to have been predicated on her conclusion in relation to the power under s.5 CA 2003.

78. However I am satisfied that in this case there is powerful reason not to follow her decision on this point. This is based on a number of considerations, first and foremost of which is the fact that in the very same case, the Court of Appeal expressly did not accept Rose J's conclusion on this point. In this regard, I make a number of specific observations.

    (1) On analysis, I consider that Richards LJ decided the issue on a different basis. In particular, the *ratio* of his decision was the continuing effect of the 2003 Exemption Regulations, and on that point he went out of his way to say (unlike Rose J's view) that his conclusion did *not* depend upon the power under s.5(2) CA 2003. In these circumstances, whilst the Court of Appeal decision upheld

the decision of Rose J, it might be said that in so far as §86 was the *ratio* of her decision, subsequent different reasoning of the Court of Appeal means that there is no requirement of this Court to follow Rose J's reasoning.

(2) I accept that Richards LJ expressly refrained from reaching "a concluded view" on the issue now before this Court and indeed commented that he found the position "puzzling" and "surprising". Nevertheless his consideration of the arguments was detailed, both taking into account the wording of s.5(2), including "in accordance with" and characterising the Secretary of State's construction as being a direction "not to carry out a statutory duty otherwise imposed upon it". The view that the words could not "readily" be interpreted in that way supports the conclusion that the requirement for "clear words" is not met. Moreover he took account of the contrast with other provisions such as s.94(3) Telecommunications Act 1984 and s. 3(5) WTA 2006.

(3) By contrast, Rose J's analysis and conclusion on this issue is very shortly stated. The extent of the argument before her is not clear from her judgment. That judgment does not address the specific wording of s.5(2). Moreover, Rose J's conclusion that s.5 CA 2003 "contains no limitation" (such as to preclude use of the power to override a statutory duty imposed by primary legislation) suggests an approach to construction that the Secretary of State is empowered to do anything, unless the contrary is expressly stated. If that was the approach adopted, then in my judgment, it may be at odds with the principles of construction to be applied to a case such as the present (set out in paragraph 50 above).

79. In my judgment, Richards LJ's reservations and doubts about Rose J's conclusions were well founded and provide powerful reason for this Court not to follow them. I have concluded, on the basis of very detailed argument before this Court that the Claimant's construction of s.5(2) is the correct construction.

Does the Claimant's construction leave a lacuna?

80. It is the case that the Claimant's construction of s.5(2) CA 2003 means that the Secretary of State does not, under the existing legislation, have the power to impose, contrary to the views of Ofcom, a system of individual licensing in respect of COMUGs on grounds of national security or other related grounds. This is so even though as a matter of EU law such a system of individual licensing would be permitted.

81. However this is not an absurd construction nor does it lead to a lacuna. First, there are other ways for the Secretary of State to safeguard national security risk by preventing exemption of COMUGs. The Secretary of State could direct Ofcom, under s.5(2) CA 2003, to impose, in regulations made under s.8(3) WTA 2006, conditions or limitations upon the exemption from the requirement for a licence. Those conditions could be precisely the same as those set out in the second part of the Direction: see paragraph 33 above. There is no reason in principle why Parliament should not choose to address issues of national security in this way, rather than by way of an individual licensing system. Moreover if such conditions were not met in any case, then an individual licence would be required, and if not obtained, operating COMUGs would be a criminal offence. On the other hand, if those conditions were

met, there would be no requirement to obtain an individual licence. Further, if a subsequent national security issue is raised in any particular case, the Secretary of State can make a direction under s.132 to suspend a person's entitlement to deliver relevant services.

82. Such measures are not precisely the same as a system of full "ex ante" regulation of COMUGs. Nevertheless they do allow the Secretary of State to protect matters of national security and do not leave the Secretary of State unable to take measures to protect those interests. This does not create such a lacuna in the Secretary of State's powers as to render the Claimant's construction of s.5(2) "absurd".

83. That the Claimant's construction does not lead to absurdity is borne out by the fact that in the lead up to the making of the Direction, the Home Office (officials and ministers) considered "a range of options" to meet their concerns on the national security issues raised by COMUGs: see paragraph 31 above. Whilst the detail of the options considered is not before the Court, it is clear that the Home Office considered options other than the making of a direction prohibiting outright the removal of the individual licensing regime. It appears that Home Office officials considered that they could achieve their objective by means other than a direction of the kind that was in fact made.

84. Finally, as pointed out by the Claimant, it remains open to the Secretary of State to amend s. 8 WTA 2006, to expand the list of conditions in s.8(5) either by way of delegated legislation under s. 2 European Communities Act 1972 or by way of primary legislation.

85. In my judgment, this supports the Claimant's contention that the construction for which it contends does not lead an absurd result or a gaping hole, in which the Secretary of State is unable to safeguard national security and public safety issues.

Section 31(2A) Senior Courts Act 1981

86. Under s.31(2A) SCA 1981, this Court must refuse to grant relief if it "appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". S. 31(2B) provides that the Court may disregard the duty in s.31(2A) "if it considers that it is appropriate to do so for reasons of exceptional public interest".

87. In the present case, I conclude that the Court is not required to refuse relief by reason of s.31(2A). Here "the conduct complained of" is the making of the Direction. I do not find that it is highly likely that, had the Direction not been made, the outcome for the Claimant would not have been substantially different (or, put another way, would have been substantially the same). First, it is not possible to know or predict to a degree of high likelihood what the Secretary of State would have done, had she not given the Direction. The range of options being considered by the Secretary of State has not been disclosed. Secondly, even if the Secretary of State had adopted, instead, an option of attaching "CLI" conditions to the s.8(3) exemption regulations, whilst this may have safeguarded national security issues, the Claimant or any person wishing to offer COMUGs would not be required to go through the process of applying for an individual licence, as long as it complied with the conditions. Whilst

this difference is not such as to create a lacuna in the legislation, it is nevertheless a materially different outcome.

88. Moreover, even if the duty under s.31(2A) had otherwise arisen, I would have concluded that in the circumstances of this case it would have been appropriate to disregard that duty "for reasons of exceptional public interest". Here the relevant exceptional public interest is ensuring that subordinate legislation made by the Executive which is ultra vires the power conferred upon it by Parliament is identified and declared to be such.

Conclusion

89. For the reasons given in paragraphs 61, 79 and 81, I conclude that the Direction was ultra vires the Secretary of State's powers under s.5(2) Communications Act 2003 and is therefore unlawful. This application for judicial review is allowed.

90. I will hear submissions as to the appropriate form of relief and orders consequential upon this conclusion. Finally, I am grateful to all counsel for the assistance they have provided to the court in the presentation of oral and written argument.