Neutral Citation Number: [2020] EWCA Civ 1564

Case No: C1/2019/1285

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MORRIS J
[2019] EWHC 994 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2020

Before :

LORD JUSTICE UNDERHILL
(VICE-PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION))
LADY JUSTICE MACUR
and
LORD JUSTICE FLAUX

- -

Between :

THE QUEEN (on the application of VIP COMMUNICATIONS LIMITED (In Liquidation))	**Claimant/ Respondent**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Appellant**
OFFICE OF COMMUNICATIONS	**Interested Party**

- -
- -

Daniel Beard QC, Michael Armitage and Imogen Proud (instructed by **The Treasury Solicitor**) for the **Appellant**
James Segan QC (instructed by **Maddox Legal Ltd**) for the **Respondent**

Hearing date : 15 October 2020

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Approved Judgment

Lord Justice Flaux:

Introduction

1. The Secretary of State appeals, with permission granted by Leggatt LJ (as he then was) against the Order dated 17 April 2019 of Morris J, that the Direction given by the Secretary of State on 25 September 2017 to the Office of Communications ("Ofcom") under section 5(2) of the Communications Act 2003 ("CA 2003") be quashed. The Direction sought to prevent Ofcom from introducing regulations which would have the effect of making it lawful to operate a species of GSM gateway known as a commercial multi-user gateway ("COMUG") without a licence. GSM gateways are telecommunications equipment which contain one or more SIM cards such as are placed in mobile phones. They enable phone calls and text messages from landlines to be routed directly on to mobile networks with the intention of saving money on call charges. Commercial deployment of a GSM gateway may be as a commercial single user gateway ("COSUG") or as a COMUG. COSUGs are gateways serving a single end-user, such as a large commercial entity. In contrast, COMUGs involve the use of a GSM gateway to provide an electronic communications service to multiple end users.

2. The Direction was given because of national security and public safety concerns about the use of COMUGs. When a call is made from a land line or a mobile phone, information identifying the calling party is transmitted over the network as is information as to the user's location in the case of a mobile phone. However, where a call is routed through a GSM gateway, communications data about the caller is not conveyed to the network. Instead that data is replaced only by the number and location of the SIM card in the GSM gateway, making it almost impossible for communications data about the call or the caller to be ascertained in the case of COMUGs. This gives rise to serious national security and public safety concerns, not challenged before the judge or before this Court.

Factual and legislative background

3. Before the respondent company went into liquidation, its business was the commercial exploitation of COMUGs. In 2003, mobile network operators ceased supplying SIM cards to GSM gateway operators which led to the collapse of the respondent's business. It went into administration in 2005 and into liquidation in February 2010. Since 2003, it has been involved in a number of legal challenges, with the aim of securing the liberalisation of COMUG use.

4. One such challenge was in *Recall Support Services v Secretary of State of Culture, Media and Sport.* The issue there was whether the so-called "Commercial Use Restriction" on the unlicensed use of GSM gateways, contained at the time in Regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 2003 ("the 2003 Exemption Regulations"), infringed EU law because that domestic legislation failed properly to implement EU Directives. At first instance, Rose J (as she then was) held that the public security justification was available in law as a matter of both EU and domestic law and that on the facts it was made out in respect of COMUGs but not COSUGs: [2013] EWHC 3091 (Ch); [2014] 2 CMLR 2 ("*Recall HC*"). Her decision was upheld by this Court where the lead judgment was given by Stephen Richards LJ: [2014] EWCA Civ 1370; [2015] 1 CMLR 38 ("*Recall CA*").

5. The relevant regulatory framework under EU and domestic legislation was set out in detail by Rose J in her judgment in *Recall HC*. It was summarised by Morris J in [18] to [24] of his judgment which I gratefully adopt:

> "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
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> 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).”

6. As the judge noted at [8] of his judgment, the two legislative provisions directly in issue in the present case are section 8(4) of the Wireless Telegraphy Act 2006 (“WTA 2006”) and section 5(2) of CA 2003.

7. Section 8 of WTA 2006, as amended with effect from 26 May 2011, 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."

8. Section 5 of 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".

9. Other statutory provisions which are of relevance to the issues before this Court are as follows. At the material time, section 94 of the Telecommunications Act 1984 provided:

> "(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 …"

10. Sections 3 and 4 of CA 2003 provide as follows:

> "3 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.
>
> 4 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)."

11. Section 132 of CA 2003 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."

12. Sections 3 and 5 of WTA 2006 provide as follows:

> "3 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.

5 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)."

13. Following the *Recall* litigation, there was a process of consultation by Ofcom and, on 6 July 2017, it issued a notice ("the COMUG Notice") stating its intention to make regulations under section 8(4) WTA 2006 exempting COMUGs from the individual licensing requirement in section 8(1) WTA 2006.

14. On 25 September 2017, the Minister of State for Security gave the Direction to Ofcom under section 5(2) CA 2003 not to make such regulations. 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. Ofcom shall not issue a licence for such purposes unless the provider of the [COMUG] can demonstrate that the calling line identification will pass through the telecommunications network such that:
>
> a) It is possible to obtain from the telecommunications operator with whom a device or account is registered, accurate telecommunications data to the same level as can currently be obtained without the use of a [COMUG]. This includes data that identifies the sender and end-recipient of communication, or the time or duration of a communication, in the same timescales. This data must be provided to the same level of integrity and in the same format as if the communications had been made without the use of a [COMUG] and without the need to approach the [COMUG] provider to gain this information;

> b) The relevant telecommunications operator with whom a device or account is registered is able to uniquely identify relevant communications, without having to seek additional information from the provider of the [COMUG], such that the telecommunications operator can comply with an interception warrant issued by the Secretary of State."

15. The respondent contends that the Direction was ultra vires the powers of the Secretary of State under section 5(2) of CA 2003 which does not confer any power on the Secretary of State to direct Ofcom not to comply with its duty under section 8(4) WTA 2006. If a statute is to confer a power on the executive to override a duty under other primary legislation, clear and specific words are required, which are absent from section 5(2).

16. The Secretary of State contends that the duty under section 8(4) is not the only duty that Ofcom is under. It is also under a duty to act in accordance with directions given by the Secretary of State pursuant to section 5 CA 2003 on grounds such as national security and public safety. As a matter of construction of section 5, the Direction was clearly not ultra vires.

The judgment below

17. Having set out in detail the legislative and factual background and the rival submissions of the parties, the judge set out at [49]-[50] the principles of statutory interpretation which he derived from the cases to which he had been referred:

> "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 amend 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."

18. The judge then turned to his analysis and discussion. At [53] he said that the prior question to whether as the Secretary of State contended Ofcom was under a duty to follow a direction given under section 5(2) was whether the Secretary of State had a power to make a direction in the first place to Ofcom not to carry out its duty under section 8(4) or any other duty. The judge's starting point was that a restrictive approach to construction was required as clear words were required to give a power by way of secondary legislation to override a statutory duty imposed by other primary legislation. He concluded for a number of reasons that as a matter of construction a direction "not to carry out a duty cannot be a direction to carry out that duty and thus cannot be a direction to Ofcom to carry out its functions within section 5(2) of CA 2003."

19. First, at [55] he noted that "functions" in section 5(2) of CA 2003 embraced all the duties and powers of Ofcom, referring to *Hazell v Hammersmith LBC* [1992] AC1 at 29F. He said that the respondent submitted that *Hazell* could be distinguished on the grounds that the relevant provision was an empowering provision "running with the grain" of the underlying duties, rather than the present case where the power sought to be exercised contradicts the underlying duty. That raised the question whether there is power to make the Direction rather than the question of what "function" means in the sub-section. The judge noted that Richards LJ expressed a similar view in *Recall CA* at [56].

20. Second, at [56] the judge concluded that "carry out" in section 5(2) of CA 2003 connoted performing or discharging Ofcom's functions. He considered that if the words "carry out" were applied specifically to the duty under section 8(4) of WTA 2006, as a matter of construction a direction *not* to carry out a duty cannot be a direction to carry out that duty or even a direction "in relation to" the carrying out of that duty.

21. Third, he said that he did not accept that "in accordance with" in section 5(2) was synonymous with "subject to" as submitted on behalf of the Secretary of State. "In accordance with" carried the meaning of "in line with" or "in the same direction as" whereas "subject to" connoted something which has the potential to override or trump.

22. Fourth, he said at [58] that the decision of this Court in *EE Ltd v Office of Communications* [2017] EWCA Civ 1783; [2018] 1 WLR 1858 provided considerable support for the respondent's case. The judge had referred to that case in detail earlier in

his judgment at [45] to [48]. As he said, one of the principal issues was whether a direction by the Secretary of State under section 5(1) of the WTA 2006 was capable of displacing statutory duties upon Ofcom under sections 3 and 4 CA 2003. The Court of Appeal held that a direction in relation to a function of Ofcom (to which section 5(1) of WTA 2006 is addressed) could not relieve Ofcom of a statutory duty placed upon it. The judge rejected the various arguments of the Secretary of State seeking to distinguish *EE* and he considered that [54] of Patten LJ's lead judgment was particularly supportive of the respondent's case:

> "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."

23. Fifth, the judge said at [59] that Ofcom's duty under section 4(2) CA 2003 to "act in accordance with" Community requirements in "carrying out" its functions does not assist in construing the words "carry out in accordance with" in section 5(2) CA 2003. He said it is not clear that any Community requirement imposed a "duty" not to carry out other duties and in any event, unlike section 5(2), section 3(6) CA 2003 makes express provision for any consequential conflict between the section 4(2) duty and other duties of Ofcom, as a consequence of which if any Community requirements imposed a duty which conflicted with a duty involved in radio spectrum functions, then the section 4(2) duty takes priority. On the Secretary of State's construction of section 5(2), section 3(6) would be surplusage. It was notable that there was no equivalent provision to resolve conflicts between competing duties in the case of a duty imposed under section 5(2) CA 2003, which the judge considered gave strong support to the conclusion that section 5(2) does not envisage a stark conflict which would arise from the giving of a direction specifically not to carry out another duty imposed upon Ofcom by the legislation.

24. At [60] the judge noted that the Secretary of State relied upon the fact that sub-sections (3A) and (4A) of section 5 CA 2003 expressly placed limitations on the power to give directions under section 5(2) to contend that, applying the maxim *expressio unius est exclusio alterius,* section 5(2) should be interpreted as excluding the implication of any additional limitation on that power. The judge considered that there was some force in that submission but not sufficient to displace the reasoning in the five points he had made. He considered the absence of power under section 5(2) to direct Ofcom not to carry out its statutory duty was not based upon the implication of a limitation but on the absence of clear words conferring the power expressly.

25. At [62] to [65] the judge referred to other statutory provisions making express provision for resolving a conflict of duties as highlighting the absence of clear words here. First, section 94(3) of the Telecommunications Act 1984 expressly provided that a duty to give effect to a "national security" direction by the Secretary of State under section 94(1) overrides any other statutory duty arising under CA 2003. Second, section 3(5) WTA 2006 expressly provides for what is to happen if Ofcom is placed under conflicting duties by sections 3(1) and (2) WTA 2006 on the one hand and sections 3 to 6 CA 2003 (including its duty under section 5(2)) on the other. Section 3(5) WTA 2006 thus gives express priority to the very duty in question under section 5(2). The judge considered that the absence of a similar provision in relation to section 8 WTA 2006 suggests that it was not contemplated that a section 5(2) direction would conflict with the section 8(4) duty. The judge rejected the attempt on behalf of the Secretary of State to distinguish the position under section 3(5) WTA 2006, specifically the suggestion that there was no conflict-resolving provision in this case because it was envisaged generally that the section 5(2) duty might modify the section 8(4) duty and not seek to override or conflict with it. The judge said that did not explain why there was no such provision to deal with the case where there was such a conflict. Third, the judge referred back to his fifth point about section 3(6) CA 2003 expressly giving priority to Ofcom's duties under section 4.

26. The judge then dealt in detail with how the point he had to decide had been dealt with in *Recall HC* and *Recall CA*. He cited extensively from the judgment of Rose J who, having decided that the public security justification for the Commercial Use Restriction was available under Article 5 of the Authorisation Directive, went on to consider whether it was available as a matter of domestic law. It was argued on behalf of the Secretary of State that even if the public security justification was not included in section 8 of WTA 2006, that aspect of Article 5 was transposed through the route of the power in section 5 CA 2003. Rose J accepted that argument. She went on to address three points raised by the claimants in response, one of which was that a direction under section 5 CA 2003 could not be used to override the duty imposed on Ofcom under section 8 WTA 2006. At [86] she dealt with this point:

> "[The claimants] 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."

27. Rose J went on to accept the case for the Secretary of State on the other two points. It is not necessary for the purposes of this appeal to set out the analysis by Morris J of the detail of those parts of the judgment of Rose J, save to note that the third point was the argument that the Secretary of State had never in fact made a direction under section 5 CA 2003, which Rose J rejected on the basis that there was no need for any such direction because the 2003 Exemption Regulations had continued in force.

28. On appeal in that case one of the grounds of appeal was that, even if the public security justification for the Commercial Use Restriction was permitted by Article 5 of the Authorisation Directive, the UK had chosen to implement the Directive in a way that provided no basis for reliance on that ground. The Court of Appeal rejected that

argument and dismissed the appeal, on the basis that the 2003 Exemption Regulations made before the Directive was implemented and maintained in place by the transitional provisions meant that public security was at all material times an available ground of justification for the Commercial Use Restriction. In other words, like Rose J, this Court rejected the claimant's third point on section 5 CA 2003. Again the detail of the reasoning of Richards LJ as set out by Morris J does not matter for present purposes. All that is of significance is how he dealt with the claimant's first point under section 5, which reflects the issue in the present case. At [56] and [58] of his judgment he said:

> "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 WLR 275 case on which the appellants rely does not provide any real assistance.)
>
> 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."

29. In a section headed "Precedent" Morris J dealt with the question whether [86] was part of the *ratio* of Rose J's decision and concluded it was. However he concluded for reasons set out at [78] that there was powerful reason not to follow her decision. Since this Court is not bound by her decision, it is not necessary to set out the detail of those reasons.

30. The judge then went on to consider whether the claimant's construction leaves a lacuna in the legislative scheme. He concluded that it did not. At [81] he noted that there were other ways for the Secretary of State to safeguard national security by preventing exemption of COMUGs. The Secretary of State could direct Ofcom under section 5(2) of CA 2003 to impose, under section 8(3) of WTA 2006, conditions or limitations upon the exemption from the requirement for a licence which could be in the same terms as the second and third paragraphs of the Direction. If those conditions were not met, an individual licence would be required and operating without it would be a criminal offence. The judge also said that, if a subsequent national security issue arose in any particular case, the Secretary of State could make a direction under section 132 to suspend entitlement to deliver relevant services.

31. At [82] the judge said that whilst that would not be the same as a full "ex ante" regulation of COMUGs, it would allow the Secretary of State to protect matters of national security so that there was not a lacuna rendering the respondent's construction of section 5(2) absurd. As he said at [83], that the respondent's construction did not lead to absurdity was borne out by the fact that the Home Office had considered a "range of options" other than making the Direction. He also pointed out at [84] that the Secretary of State could always amend section 8 WTA 2006 to expand the list of conditions in section 8(5).

32. Finally, the judge rejected the argument on behalf of the Secretary of State that relief should be refused under section 31(2A) of the Senior Courts Act 1981. He concluded that the Direction was ultra vires the Secretary of State's powers and hence unlawful.

Grounds of appeal

33. The Secretary of State's ground of appeal is that the judge erred in concluding that the Direction was ultra vires the Secretary of State's powers under section 5(2) CA 2003. There are then a number of sub-grounds:

    (1) That the judge found without any evidential basis that the national security concerns could be addressed by alternative mechanisms and failed to identify any good reason why Parliament would have prevented the Secretary of State from preserving a licensing regime where national security considerations justified such a regime;

    (2) That the judge failed to appreciate the significance of Parliament's inclusion of specific restrictions on the scope of the power under section 5(2);

    (3) That he erred in taking as the starting point that a power to override primary legislation by way of secondary legislation should by construed narrowly;

    (4) That the judge gave an unduly restrictive interpretation to the words "carry out" and "in accordance with" in section 5(2); and

(5) That he erred in holding that the decision of this Court in *EE* provided considerable support for the respondent's case.

Summary of parties' submissions

34. On behalf of the Secretary of State, Mr Daniel Beard QC emphasised that, although section 5(2) CA 2003 gave the Secretary of State broad powers to give directions, because section 5(4) precluded the Secretary of State from directing Ofcom to suspend or restrict someone's entitlement to provide a telecommunications service, the section could only be used to give directions before the event, not after the event. The problem with a general exemption for COMUGs such as Ofcom was proposing was that you would not know who was using the gateways, whereas with a licensing regime you would have prior scrutiny. He submitted that the power to give a direction under section 5(2) such as was given in the first paragraph of the Direction in the present case was essential to maintaining such prior scrutiny.

35. He submitted that there was no reason to suppose that Parliament had intended that the power be limited in the way the judge had found. Before the enactment of CA 2003, the Secretary of State was clearly entitled to maintain a licensing regime for COMUGs which gave rise to national security concerns. That was the whole purpose of the Commercial Use Restriction. The effect of CA 2003 was to establish a dedicated regulator, Ofcom, responsible for the technical aspects of telecommunications regulation, with the Secretary of State remaining responsible for taking any action on national security grounds. Hence section 5(2) CA 2003 and section 1AA WTA 1949 (the predecessor of section 8 WTA 2006) both came into force on 25 July 2003. Section 1AA provided that Ofcom could take account only of the technical issue whether the use of stations or apparatus would be likely to involve any undue interference with wireless telegraphy before deciding whether to exempt such equipment from the default requirement of a licence. If Morris J's construction of section 5(2) were correct, following this legislative division of responsibility, the Secretary of State suddenly became powerless to insist on a licensing requirement for equipment whose unlicensed use gave rise to national security concerns, however serious, provided only that Ofcom considered that the use of such equipment was not likely to cause any undue interference with wireless telegraphy. Mr Beard QC submitted that there was no good reason why Parliament would have removed such important pre-existing powers of the Secretary of State in that way.

36. Section 8 WTA 2006 as amended was the successor of section 1AA of WTA 1949. It now provided six factors of which Ofcom must be satisfied (the first of which was the single condition in section 1AA(2)) before its exempting duty was triggered, none of which concerned national security or public safety. Mr Beard QC focused on factor (f), that the use of the stations or apparatus was not likely to prejudice cultural diversity. He submitted that if Morris J's construction were correct, Ofcom could stop a COMUG on grounds of cultural diversity, but the Secretary of State was powerless to stop it on grounds of national security, which cannot have been what Parliament intended.

37. He challenged the judge's conclusion that there was no lacuna in the legislative scheme on his construction of section 5(2) CA 2003. There was no basis upon which the judge could have made the finding at [81] that there were other ways in which the Secretary of State could protect national security concerns when he did not know what the alternative measures were or whether they would have been effective. The imposition

of some condition after a general exemption had been granted would not be as effective as the Direction and there was no reason to assume that Parliament would have intended a sub-optimal system of addressing national security concerns.

38. In answer to questions from the Court as to what objection there could be to a Direction that directed Ofcom, before it granted an exemption, to impose conditions under section 8(3) WTA 2006 for the grant of any exemption in the terms of a) and b) in the second and third paragraphs of the Direction, Mr Beard QC submitted that that would be licensing by another name, not consistent with a generalised exemption.

39. Mr Beard QC submitted that, given that Parliament had turned its mind to and expressly provided in section 5(3) (3A) and (4) CA 2003 for limits on the otherwise widely drafted power of the Secretary of State under section 5(2) there was no basis for imposing further limitations on that power, which was the effect of the judge's construction. Whilst the judge had said there was some force in this submission, he had then wrongly discounted it.

40. The judge had placed too much weight on the words "carry out" in section 5(2). Ofcom would still be carrying out its licensing functions if it followed the Direction. Section 3(6) of CA 2003 also referred to carrying out functions and made it clear that in carrying out its functions, Ofcom had to give priority to its duty to act in accordance with Community law. To the extent that how it proposed to carry out a function conflicted with Community law, it would not be entitled to carry out that function. Mr Beard QC submitted that this demonstrated that "carrying out" could include not carrying out a function.

41. He submitted that the judge had adopted an unduly restrictive approach to construction from [54] of the judgment onwards because he assumed that the power being used by the Secretary of State was using secondary legislation to amend or override primary legislation in the form of section 8 WTA 2006. However, this was not the exercise of Henry VIII-style powers, the use of delegated powers to use secondary delegated legislation as a means of amending primary legislation, where it was well-established that such powers could not be conferred in the absence of clear words. The power to give a direction under section 5(2) was conferred by the section itself, a piece of primary legislation. Mr Beard QC submitted that if there were a conflict between a direction under section 5(2) and the statutory duty of Ofcom under section 8 WTA 2006, it was a conflict between two duties arising under primary legislation. Accordingly, it was not appropriate to adopt the restrictive approach to construction which the judge had adopted. The question for the Court was simply one of construction of CA 2003. This was the approach of Richards LJ in the last sentence of [56] of his judgment in *Recall CA* (which I quoted above).

42. Mr Beard QC submitted that the judge had been wrong to conclude that the decision of this Court in *EE* provided considerable support for the respondent's case. That case addressed a different issue under different provisions, specifically section 5(1) WTA 2006, which gave the Secretary of State the power to: "give general or specific directions to Ofcom about the carrying out by them of their radio spectrum functions". He submitted that the scope of the directions which the Secretary of State could give was thus restricted to directions "about the carrying out" of Ofcom's functions. There is no reference in section 5(1) to a concomitant duty on Ofcom to act "in accordance with" the directions of the Secretary of State. Furthermore, that case was one where the

Secretary of State required Ofcom to take certain matters into account when setting licence fees in circumstances where EU law as transposed in section 4(2) CA 2003 and section 3(5) WTA 2006 specifically required Ofcom as regulator to act in accordance with the objectives set out in Article 8 of the Framework Directive. Mr Beard QC submitted that in those circumstances, it was scarcely surprising that this Court was not prepared to interpret section 5(1) of WTA 2006 as giving the Secretary of State power to direct Ofcom to wholly disregard objectives to which it was required to have regard under EU law. This approach could not be "read across" to the interpretation of section 5(2) CA 2003.

43. At the outset of his submissions for the respondent Mr James Segan QC emphasised that the only issue on the appeal was the question of law as to whether the Secretary of State had acted ultra vires in directing Ofcom not to comply with its duty under section 8(4) WTA 2006. There was no issue that the Secretary of State was the right person to make national security decisions. The only question was whether she had acted within the law. The judge had been entirely right to conclude that the Secretary of State had exceeded the four corners of her powers. It was common ground that the first sentence of the Direction sought to direct Ofcom to act contrary to its section 8(4) duty. He submitted that the Secretary of State had no power to give such a direction. If the executive were to have power to override a statutory duty of Ofcom, there would have to be clear words conferring that power, which there were not.

44. Mr Segan QC referred the Court to the Authorisation Directive and specifically Article 5.1 which provides:

> "Member States shall, where possible, in particular where the risk of harmful interference is negligible, not make the use of radio frequencies subject to the grant of individual rights of use but shall include the conditions for usage of such radio frequencies in the general authorisation".

45. Section 166 CA 2003 inserted section 1AA in WTA 1949 and thus implemented Article 5.1 into domestic law. Mr Segan QC referred to [369] of the Explanatory Notes to CA 2003 dealing with section 366 which states:

> "This section amends the Wireless Telegraphy Act 1949 to require OFCOM to exempt certain stations or apparatus from the requirement to be licensed under that Act where their use would not cause undue interference (as redefined in section 183). This implements Article 5(1) of the Authorisation Directive."

46. He submitted that there was no indication that the duty on Ofcom under the section was capable of being overridden by an executive direction under section 5(2). On the contrary, when CA 2003 intended that a duty of Ofcom could be overridden by another duty, it expressly said so, as in the case of section 154 (one of the provisions repealed by WTA 2006) which set out the duties of Ofcom when carrying out spectrum functions. Section 154(4) provided:

> "Where it appears to OFCOM that any of their duties under this section conflict with one or more of their duties under sections 3 to 6, priority must be given to their duties under those sections."

Thus, that section made express provision that, in effect, the duty under section 5(2) had priority over the duties under that section. There was no equivalent qualification in section 1AA WTA 1949 as inserted by section 166 CA 2003. WTA 2006 was a consolidating statute. Parliament again considered the various duties of OFCOM and re-enacted the same scheme without qualifying section 8 WTA 2006 with a provision like section 154(4) CA 2003, which now became section 3(5) WTA 2006.

47. Mr Segan QC submitted that clear words were needed to confer power on the executive to override a duty under primary legislation. He accepted that this was not a case of Henry VIII-style powers, because it was not secondary legislation seeking to amend primary legislation, but he submitted that it engages the same underlying principles. The Direction is a type of delegated legislation: see *Bennion on Statutory Interpretation* Section 3.2. The general approach emerged from a number of the cases cited to the judge and referred to by him in [49]-[50] of his judgment. Mr Segan QC relied in particular upon the statement of principle by Lord Neuberger PSC in *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39; [2016] AC 1531 at [21] to [28], to the effect that if there is any doubt about the scope of a power conferred on the executive to modify primary legislation, it should be resolved by a restrictive approach. Mr Segan QC also relied upon *R (Ingenious Media plc) v HMRC* [2016] UKSC 54; [2016] 1 WLR 4164 at [19]-[20] per Lord Toulson JSC and *J v Welsh Ministers* [2018] UKSC 66; [2019] 2 WLR 82 at [24] per Baroness Hale of Richmond PSC.

48. Mr Segan QC pointed out that the functions of Ofcom to which section 5(2) CA 2003 was referring were all their functions under Part 2, as well as under other legislation (such as WTA 2006) and Part 2 ran from sections 32 to 197, covering a wide range of functions. If the case for the Secretary of State were correct all those other duties would be susceptible to being overriden by a section 5(2) direction.

49. He submitted that it simply could not be said that either section 5(2) CA 2003 or section 8 WTA 2006 contained clear words to the effect that the duty under section 8 was subject to a direction to the contrary being given by the Secretary of State under section 5(2). Where Parliament intended that one duty or function would trump another in this legislation, it said so expressly, as in the case of sections 3(6) and 4(2) of CA 2003. This was also the case with the express provision in section 94(3) of the Telecommunications Act 1984 (set out at [9] above) which was amended by Schedule 17 para 70(5) of CA 2003, so that the draftsman had in mind an express provision in the context of national security that a direction given by the Secretary of State should be followed, notwithstanding any other duty. Had Parliament intended that section 1AA WTA 1949 as inserted by section 166 CA 2003 (which upon consolidation became section 8 WTA 2006) should likewise be subject to a direction from the Secretary of State, it could and would have said so expressly.

50. In relation to the decision of this Court in *EE*, Mr Segan QC accepted that it was concerned with different provisions in this legislation, but the same principle was in play as in the present case. The Court decided that clear words were necessary for the power of the Secretary of State to give a direction to Ofcom there under section 5 of WTA 2006 to ignore the duties imposed on it by section 4(2) CA 2003 and section 3(5) WTA 2006. There were no such clear words. Of particular relevance was [54] of Patten LJ's judgment (which I have quoted at [22] above). Mr Segan QC also relied upon what Richards LJ said in *Recall CA*, albeit as he accepted it was a tentative view expressed obiter.

51. As for Mr Beard QC's argument that the judge's construction caused there to be a lacuna in the legislative scheme, Mr Segan QC submitted that this was not the correct way to approach the issue. It was, in Baroness Hale's words in [24] of *J v Welsh Ministers*, to put the cart before the horse, to take the assumed purpose of section 5 CA 2003 i.e. the preservation of individual licensing regimes and then work back to imply powers which were simply not there. The Secretary of State was, in effect, asking the Court to take a strained approach to statutory construction because of national security considerations which was not something the Courts had done historically.

52. Mr Segan QC submitted that, in any event, there was no lacuna. The statutory scheme would preserve the ability of the Secretary of State to protect national security by permitting Ofcom to comply with its statutory duty under section 8 WTA 2006 whilst giving a direction under section 5 CA 2003 that Ofcom should impose conditions upon exemption along the lines of the second and third paragraph of the Direction.

53. In relation to the Secretary of State's reliance on the maxim *expressio unius est exclusio alterius*, Mr Segan QC relied upon the recent approval by the Supreme Court in *Connect Shipping Inc v The Swedish Club* [2019] UKSC 29; [2019] 4 All ER 885 (per Lord Sumption JSC at [8]) of Lord Hoffmann's observation in *National Grid Co plc v Mayes* [2001] UKHL 20; [2001] 1 WLR 864 at [55] that the maxim is "often perilous". The judge had been right not to give the maxim undue weight. The logic of the argument based on the maxim was that, in the absence of an express limit such as in sub-sections (3) to (4A), section 5 would confer unlimited power to override statutory duties and that the only source of possible restriction upon any such power is the section itself. Mr Segan QC submitted that this was the wrong approach. Section 5 CA 2003 was not to be taken as conferring the power to override statutes unless such a power was expressly carved out, rather no such power is taken to exist unless it is specifically provided for by clear words.

Discussion

54. The Court is concerned with an issue of statutory construction, as Richards LJ noted in *Recall CA*, but in my judgment Mr Segan QC is correct that the Court will not construe a statutory power to give a direction as extending to giving a direction not to comply with statutory duties under that or another statute, in the absence of clear words to that effect. Mr Beard QC sought to argue that the authorities upon which Mr Segan QC relied were all about overriding fundamental public law rights. However, in my judgment, whilst that may have been the context in which the issue arose in those cases, the underlying principle is of broader application. The principle is stated in Section 3.7(2) of *Bennion* in these terms:

> "If the legislature intends to confer certain powers - such as the ability to create offences, to impose taxes, to amend the enabling Act or other legislation, to make retrospective provision, to interfere with fundamental rights, or to permit sub-delegation – 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."

Furthermore, although it is concerned with different provisions in the current legislation, the decision of this Court in *EE* is a recent example of the application of the

principle that clear words will be required before the powers conferred on the Secretary of State will be interpreted as extending to directing Ofcom not to comply with its statutory duties: see [54] of the judgment of Patten LJ cited at [22] above.

55. In my judgment there are no such clear words in the present case and, for a number of reasons, section 5(2) CA 2003 cannot be construed as conferring on the Secretary of State the power to give a direction to Ofcom not to comply with one or other of its statutory duties.

56. First, it is quite clear from the statutory scheme that (in accordance with the principle stated in *Bennion*), when Parliament intends that one duty owed by Ofcom should, in the case of conflict, be subordinate to another, it says so expressly. The clearest and most relevant example is what was section 154(4) CA 2003 cited at [46] above. That stated in terms that where Ofcom's duties in carrying out its functions under that section conflicted with one or more of their duties under sections 3 to 6 of the Act (thus including the very duty under section 5(2) with which the present case is concerned) priority was to be given to the latter duties. Thus, Parliament was well able, when it chose to do so, to make express provision for the section 5(2) duty to take priority over other Ofcom duties. However, it did not make any equivalent express qualification of the obligation to make exemption regulations in section 1AA in WTA 1949 inserted by section 166 CA 2003, nor did it do so when the consolidating statute WTA 2006 was passed a few years later. Section 3(5) of that Act contained the same express qualification as its predecessor, section 154(4) CA 2003, but there was no such express qualification of the obligation to make exemption regulations under section 8(4) of WTA 2006, which replaced section 1AA WTA 1949, either as originally enacted or as amended in 2011. In my judgment, the absence of an express provision that section 5(2) CA 2003 should have priority over section 8(4) WTA 2006 is a very strong pointer to it not having been the intention of Parliament that the Secretary of State should have the power to direct Ofcom not to comply with its duties under section 8(4) WTA 2006.

57. Furthermore, in the specific context of directions from the Secretary of State in the interests of national security, what was section 94 of the Telecommunications Act 1984 as amended (replaced by more detailed powers of the Secretary of State under the Investigatory Powers Act 2016) expressly provided in section 94(3) that a person to whom a direction was given by the Secretary of State should give effect to it, notwithstanding any duty imposed on him by Part 1 of Chapter 1 of Part 2 of CA 2003. Again, this method of drafting an express qualification (as amended by CA 2003 itself) demonstrates that if Parliament had intended that section 5(2) should have priority over section 1AA WTA 1949/section 8(4) WTA 2006, it would have enacted an express provision to that effect. It is to be noted in this context that although Richards LJ did not express a concluded view in *Recall CA* on this issue, the doubts he had as to whether section 5(2) CA 2003 conferred a power on the Secretary of State to direct Ofcom not to comply with a statutory duty imposed upon it, were based upon the fact that the other statutory provisions to which I have referred made clear expressly how conflicts between statutory duties were to be resolved.

58. Second, in the absence of an express provision to that effect, the words actually used in section 5(2) CA 2003 do not clearly give the Secretary of State the power alleged. I consider that the sub-section is imposing a duty on Ofcom in relation to functions it actually carries out and "carry out" cannot be extended to include "not carry out". The first paragraph of the Direction directs Ofcom not to grant exemptions from the

requirement for a licence, when section 8(4) WTA 2006 requires it to do so if the conditions in (5) are satisfied, in other words it directs Ofcom not to carry out specific functions when it has a statutory duty to do so. Furthermore, as Mr Segan QC pointed out, the logical consequence of the Secretary of State's construction of section 5(2) would be that if the Secretary of State considered that it was in the interests of national security to do so, he could direct Ofcom not to carry out any of its functions under Part 2 CA 2003 or WTA 2006, in which case Ofcom would not be "carrying out" any functions at all.

59. Third, like the judge, I do not consider that the maxim *expressio unius est exclusio alterius* and the contention based upon it that the existence of express limitations in sub-section (3) to (4A) on the power in section 5(2) CA 2003 means that the implication of any further limitation on the power is excluded assist the Secretary of State. Both Lord Hoffmann and Lord Sumption have described the maxim as "perilous". Further, as Stanley Burnton LJ said of the maxim in *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630; [2010] QB 633 at [79]: "[it] is not a particularly strong rule, and itself depends on the assumption that what is expressly stated impliedly excludes what is not mentioned."

60. The fact that there are express limitations on the power in sub-sections (3) to (4A) tells one nothing about whether as a matter of construction sub-section (2) contains clear words having the effect for which the Secretary of State contends. The fallacy in reliance on the maxim is that the respondent's case that the power under section 5(2) CA does not extend to directing Ofcom not to carry out its statutory duty is not based upon there being some further implied limitation on the power beyond those contained in (3) to (4A), but upon the absence of clear words conferring such a power as a matter of statutory construction.

61. Fourth, there is nothing in the contention of Mr Beard QC that Parliament cannot have intended that the Secretary of State should not be entitled to give a direction to Ofcom not to carry out its statutory duty under section 8(4) WTA 2006, where the interests of national security and public safety are engaged, because the construction adopted by the judge would leave a lacuna in the legislative scheme. I consider that Mr Segan QC is right that this is the wrong approach. As Baroness Hale of Richmond PSC put it in *J v Welsh Ministers* at [24]:

> "With the greatest of respect to the Court of Appeal, this approach puts the cart before the horse. It takes the assumed purpose of a CTO [community treatment order] - the gradual reintegration of the patient into the community - and works back from that to imply powers into the MHA [Mental Health Act 1983] which are simply not there."

I agree with Mr Segan QC that it would be quite wrong to place a strained construction on section 5(2) CA 2003 to give the Secretary of State extensive powers when there are not clear words justifying such powers, merely to fill a perceived lacuna in the legislation. The remedy for any lacuna would be an amendment to the statute by Parliament to confer the power contended for.

62. In any event, in my judgment there is no lacuna in the legislative scheme. The Secretary of State can legitimately exercise the powers under section 5(2) to give a Direction to

Ofcom to impose conditions in relation to national security as a term of the grant of an exemption under section 8(4) WTA 2006. Under section 8(3), Ofcom is entitled to make any grant of exemption "subject to such terms, provisions and limitations as may be so specified". I consider that the Secretary of State would be entitled to give a Direction to Ofcom that any grant of exemption should be subject to the conditions that any telecommunications operator satisfy a) and b) in the second and third paragraphs of the existing Direction. It is only the first paragraph that seeks to go beyond the power given to the Secretary of State under section 5 CA 2003.

63. It is no answer to the effectiveness of such a Direction for Mr Beard QC to categorise it as licensing by another name. The imposition of such conditions would be within the discretion given to Ofcom under section 8(3) WTA 2006 to impose terms or limitation on any grant of exemption. Further, this approach would enable the Secretary of State to ensure that conditions were imposed on the grant of exemption by Ofcom which would address any national security concerns without acting ultra vires.

64. Contrary to Mr Beard QC's submission, this is not a sub-optimal system of addressing national security concerns. It is difficult to see why the imposition of conditions on the grant of exemption should not be as effective as only granting a licence where such conditions are met. However, if that proves wrong and there are problems, as I have said the remedy is not for the Court to give the words of the relevant statutes a meaning they will not bear, but for Parliament to legislate an appropriate amendment.

65. Accordingly, I have reached the firm conclusion that there is a complete absence of clear words in either section 5(2) CA 2003 or section 8(4) WTA 2006 which would entitle the Secretary of State to give a direction to Ofcom not to carry out its statutory duty under section 8(4) WTA 2006. The Direction was ultra vires the powers of the Secretary of State. I am conscious that a contrary conclusion was reached by Rose J in *Recall HC*, but as the judge pointed out at [78(3)] of his judgment in the present case, it is not clear what was the extent of the argument before Rose J and her conclusion was shortly stated without reference to the principles of construction and, in particular, the need for clear words in the absence of an express provision. I consider her conclusion was incorrect.

Conclusion

66. In my judgment, the judge correctly concluded that the Direction was ultra vires the powers of the Secretary of State under section 5(2) CA 2003. This appeal must be dismissed.

Lady Justice Macur

67. I agree.

Lord Justice Underhill

68. I also agree.