

Re McE, M & C [2009] UKHL 15

McE, M & C were arrested and detained on unrelated matters. The police had been asked for assurances that their consultations with legal or medical professionals would not be subjected to covert surveillance. The police neither confirmed nor denied that this would occur.

All three then asked the court whether they were entitled to undertake such consultations without being monitored and submitted that it was unlawful for the police to neither confirm nor deny whether they would take such action. The court ruled that monitoring such conversations was unlawful and the police had been in violation of Article 8 of the European Convention on Human Rights (ECHR) by their refusal to answer clearly the enquiries made. The court also ruled that the Regulation of Investigatory Powers Act 2000 (RIPA) was designed to cover consultations with legal advisers but in this instance the circumstances were not proportionate.

The case subsequently came before the House of Lords concerning questions over the impact of RIPA on the common law right of legal privilege and its significance for statutory based rights given to detained persons in respect of the right to consult a lawyer privately.

In addition there were questions raised concerning the application of the Code of practice on Covert Surveillance and whether such surveillance undertaken in accordance with section 28 of RIPA breached articles 6 and 8 of the ECHR.

McE, M and C argued that RIPA could not have been intended to override fundamental Human Rights and that the general provisions of RIPA could not have been intended to affect legal privilege afforded to detained persons under more specific statutory provisions.

Held - Appeals dismissed.

Parliament had intended that the provisions of RIPA covering covert surveillance should extend to those that were usually protected by legal privilege. The reasons are complex, but a brief general summary is:

- Giving it its ordinary and natural interpretation, RIPA applied to privileged consultations and there was nothing in its wording that suggested that these should be excluded.
- There is a need for some exceptions to the principle of confidentiality relating to privileged consultations otherwise that privilege could be abused. Situations where lawful monitoring of consultations were limited but had not been defined. They could not exist if the rule against such monitoring were absolute.
- The Code of Conduct accompanying the legislation makes detailed provision regarding obtaining appropriate authorisation to undertake such monitoring. Parliament had at no point intended for RIPA not to cover confidential consultations.

- The exception covering legal privilege in section 97 of the Police Act 1997 was intended to limit the general powers conferred by part III of that Act and it did not follow that it would not have applied to privileged communications without it.

Section 28 of RIPA overrules or qualifies the right of a person to consult in private with a legal adviser at common law. It also overruled or qualified those rights under the provisions relied upon by Mc, M or C in this instance. There is no absolute prohibition on the surveillance in instances such as in this case for the purpose of human rights, but the court recognised there is requirement for proportionality.

Notes *The House of Lords strongly endorsed the comments of the Divisional Court in respect of proportionality and steps should be taken to characterise surveillance of legally-privileged matters as intrusive surveillance. The House did dismiss the appeals but made it very clear that proportionality requires this to be considered as intrusive surveillance.*

*The interpretation and comments made within this document are not to be considered as legal advice.
Reference should always be made to the original case.*