COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 8691/79

James MALONE
against
UNITED KINGDOM

Report of the Commission

(Adopted on 17 December 1981)

STRASBOURG
1983

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I INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The substance of the application

2. The applicant, Mr James Malone, is a United Kingdom citizen, born in 1937 and resident in Dorking, Surrey. In 1977 he was an antique dealer. It appears that he has since ceased business as such. He is represented by MM. Davis Hanson, solicitors, of London.

3. In March 1977 the applicant was charged with offences relating to the handling of stolen goods. At his trial, between 5 June and 16 August 1978 it emerged that a telephone conversation to which he had been a party had been intercepted on behalf of the police. In his application to the Commission the applicant states that he has been subject to police surveillance since about 1971. He believes that, at the behest of the police, his correspondence and that of his wife has been intercepted, that his telephone lines have been "tapped" and that his telephone has also been "metered" by a device recording all the numbers dialled. He complains of these matters, and of relevant United Kingdom law and practice, and alleges that he is the victim of breaches of Arts 8 and 13 of the Convention.

B. Proceedings before the Commission

4. The application was introduced on 19 July 1979 and registered on 23 July 1979. On 12 May 1980 the Commission decided, in accordance with Rule 42 (2) (b) of its Rules of Procedure, to bring it to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits. The Government's observations were submitted on 21 October 1980 and the applicant's observations in reply on 3 February 1981. On 17 March 1981 the Commission decided to invite the parties to appear before it at a hearing on the admissibility and merits of the case. The hearing was held on 13 July 1981. The applicant was represented by Mr Colin Ross Munro Q.C. and Mr Daniel Serota, counsel, Mrs Jane Galloghy, solicitor and Mr Lawrence Gallogly, counsel's clerk. The respondent Government were represented by Sir Michael Havers, Attorney General; Mr David Edwards, Agent; MM. David Vaughan and Nicolas Bratza, counsel; Mr Henry Steel of the Law Officers' Department and Mr John Semken, Mrs Sally Evans, Miss Philippa Drew and Miss Amy Edwards of the Home Office.

5. Following the hearing the Commission declared the application admissible (1). Further observations on the merits of the case were submitted by the respondent Government on 27 April 1982 and by the applicant on 24 September 1982.

6. After declaring the case admissible the Commission, acting in accordance with Art. 28 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In light of the parties' reaction the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

7. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. C.A. NØRGAARD, President
G. SPERDUTI, First Vice-President
J.A. FROWEIN, Second Vice-President
J.E.S. FAWCETT
E. BUSUTTIL
T. OPSAHL
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
M. MELCHIOR
J. SAMPAIO
A. WEITZEL

(1) See Decision on Admissibility, Appendix II.

8. The text of the Report was adopted by the Commission on 17 December 1982 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

9. A friendly settlement of the case not having been reached, the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly:

(1) to establish the facts; and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

10. A schedule setting out the history of proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application forms Appendix II.

11. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

II ESTABLISHMENT OF THE FACTS

A. Introduction

12. The facts, as they appear from the parties' submissions, are outlined in the following paragraphs. The respondent Government accept that a single telephone conversation to which the applicant was a party was intercepted on behalf of the police pursuant to a warrant issued by the Home Secretary for the prevention and detection of crime. Beyond admitting that fact, the Government neither admit nor deny the applicant's suggestion that his telephone lines have been "tapped" and that his correspondence has been intercepted. They deny that his telephone was "metered" on behalf of the police. The particular facts of the case are not otherwise generally in dispute between the parties. However as noted below there is some dispute between them on questions of domestic law, and in relation to domestic practice.

B. The particular facts of the case

13. On 22 March 1977 the applicant's home was searched by the police and he and his wife were charged with offences relating to the allegedly dishonest handling of stolen goods. The applicant had been under police observation for some time previously, being suspected of involvement in such offences. A large number of items was removed by the police from his premises. According to police evidence these included items from thirty three separate burglaries.

14. The applicant was tried on these charges between 5 June and 16 August 1978. He was then acquitted on some of the charges. The jury failed to agree on the other charges and he was re-tried on those charges between 23 April and 16 May 1979. Following a further failure by the jury to agree, the prosecution offered no further evidence and the applicant was acquitted.

15. During the first trial it emerged that details of a telephone conversation which the applicant had had prior to 22 March 1977 were contained in the note book of the police officer in charge of the investigations. Counsel for the Crown then accepted that the conversation had been intercepted on the authority of a warrant granted by the Secretary of State.

16. After the first trial the applicant instituted civil proceedings in the Chancery Division of the High Court against the Metropolitan Police Commissioner, seeking inter alia declarations to the effect that interception, monitoring or recording of conversations on his telephone lines without his consent was unlawful, even if done pursuant to a warrant of the Secretary of State. On 28 February 1979 the Vice-Chancellor, Sir Robert Megarry, dismissed the applicant's claim (1).Details of his judgment, in which he explored in detail the legal basis for the interception of telephone communications are set out below (paras. 35 - 42).

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(1) See Malone v. Commissioner of Police of the Metropolis, /1979/ All ER 620.

17. In his application to the Commission the applicant stated that he believed that both his correspondence and his telephone communications had been intercepted for a number of years. He based this belief, so far as concerns correspondence, on delay to and signs of interference with his correspondence. As to his telephone communcications, he stated that he had heard unusual noises on his telephone and alleged that the police had at times been in possession of information which they could only have obtained by telephone tapping. He also referred to the evidence which emerged at his trial and to the response of the police and Post Office to representations he had made about the matter. He believes that such measures have continued since his acquittal on the charges against him. The respondent Government admit that the single conversation about which evidence emerged at the applicant's trial was intercepted. They do not otherwise disclose whether any interceptions have been made or not, stating that to do so might frustrate the purpose of such interceptions and jeopardise police sources of information. However, the Government accept that, as a person suspected of receiving stolen property, the applicant was one of a class of persons against whom measures of interception were liable to be employed.

18. The applicant has also stated that he believes that his telephone has been "metered" on behalf of the police by a device which automatically records all numbers dialled. He bases this belief on the fact that when he was arrested in March 1977, about twenty people he had recently telephoned were searched. The Government state that a metering system is operated by the Post Office under which a record can be made of all numbers obtained on a particular telephone in order to ensure that the subscriber is being correctly charged. This system involves only the use of signals sent to the Post Office, and does not involve interception of the conversation. No Post Office records relevant to metering of the applicant's phone were obtained or used by the police in the present case.

C. Relevant Domestic Law and Practice

1. Introduction

19. There is no statutory code governing the interception of postal and telephone communications in the United Kingdom, although it has for long been the practice for such interceptions to be carried out on the authority of a warrant issued by a Secretary of State (in practice now the Home Secretary). The practice followed has been examined in a number of official reports. The first was the Report of a Committee of Privy Councillors who were appointed, under the chairmanship of Lord Birkett, to consider and report on "the exercise

by the Secretary of State of the executive power to intercept communications and, in particular, under what authority, to what extent and for what purposes this power has been exercised and to what use information so obtained has been put; and to recommend whether, how and subject to what safeguards; this power should be exercised ...". Their Report (here referred to as "the Birkett Report") was published in October 1957. The Committee examined the legal basis for interceptions and the practice followed, and made a number of recommendations. The Government announced that they accepted these recommendations and Government spokesmen have subsequently affirmed that the practice followed remains essentially as described and recommended by the Birkett Committee.

20. In April 1980 a Command Paper entitled "The Interception of Communications in Great Britain" (Cmnd. 7873, referred to as "the White Paper") was published. This brought up to date the description of the relevant practices given in the Birkett Report. Finally in March 1981 a Report by the Rt. Hon. Lord Diplock, who had been appointed to monitor the relevant procedures on a continuing basis, was published outlining the results of the monitoring he had carried out to date.

21. These Reports contain considerable information on such matters as the conditions which must be fulfilled before a warrant is issued, the purposes for which they are issued, the procedures which are followed and the safeguards against abuse which are applied. The legal basis of the practice of intercepting telephone communications was also examined by the Vice Chancellor in his judgment in the action which the applicant brought agains the Metropolitan Police Commissioner.

22. Despite the absence of any overall code, a number of statutory provisions are nonetheless relevant. There are several provisions under which it is an offence for a Post Office employee to interfere with or divulge the contents of communications passing through the postal or telecommunication systems. It is a defence for the person concerned to show that he was acting under a warrant. There is also a provision under which the Post Office can be required to inform the Crown about matters which it transmits.

23. Both the procedures and practices referred to in the various Reports and the relevant statutory provisions are described hereafter. The parties are, however, in dispute as to the effect of the statutory provisions. Essentially the Government maintain that because of the existence of the various offences and of a statutory limitation on the means whereby and the purposes for which a requirement to provide information may be laid on the Post Office, it is in practice not possible lawfully to intercept a postal or telephone communication except under a warrant granted in accordance with the practices and procedures described in the Birkett Report and White Paper. The applicant does not accept this and maintains, in substance, that the system for the issue of warrants exists purely as a matter of administrative practice and that there is no effective legal restriction on the interception of communications.

24. This section of the Report outlines the information as to the relevant law and practice which can be drawn from the above-mentioned sources, together with certain background matters. The parties' submissions in relation to the disputed matters are set out in the following section of the Report and the Commission will consider in its opinion what conclusions should be drawn.

25. As a final introductory matter it is convenient to note certain changes which have occurred in the organisation of the postal and telephone services since 1957, when the Birkett Committee made its Report. The Post Office, which ran both services, was then a Department of State under the direct control of a Minister (the Postmaster General). By virtue of the Post Office Act 1969 it became a public corporation with a certain independence of the Crown, though subject to various ministerial powers of supervision and control exercised at the material time by the Home Secretary. It has since been split by virtue of the British Telecommunications Act 1981 into two separate corporations, namely the Post Office and British Telecommunications, which have responsibility respectively for mail and telephones. The 1981 Act repealed and amended various provisions of the previous Post Office legislation but made no change of substance in the law relating to interception of communications. For the sake of convenience the present Report generally refers to the position as it was when the present application arose, before the 1981 Act came into force.

2. The relevant law

(a) Statutory offences

26. It is convenient first to outline the relevant statutory prohibitions on interferences with postal and telegraphic communications.

27. As to postal communications, Section 58 (1) of the Post Office Act 1953 provides as follows:

> "If any officer of the Post Office, contrary to his duty, opens ..... any postal packet in course of transmission by post, or wilfully detains or delays .... any such postal packet, he shall be guilty of a misdemeanour .....
>
> Provided that nothing in this section shall extend to the opening, detaining or delaying of a postal packet returned for want of a true direction, or returned by reason that the person to whom it is directed has refused it, or has refused or neglected to pay the postage thereof, or that the packet cannot for any other reason be delivered, or to the opening, detaining or delaying of a postal packet under the authority of this Act or in obedience to an express warrant in writing under the hand of a Secretary of State."

A broadly similar provision has been in force since 1710.

28. Section 45 of the Telegraph Act 1863 provides inter alia that it is an offence if an employee of a telegraph company "improperly divulges to any person the purport of any message". Section 20 of the Telegraph Act 1868 provides that:

> "Any person having official duties connected with the Post Office, or acting on behalf of the Postmaster General, who shall, contrary to his duty, disclose or in any way make known or intercept the contents or any part of the contents of any telegraphic messages or any message entrusted to the Postmaster General for the purposeof transmission, shall ... be guilty of a misdemeanour ... "

These provisions are still in force. At the time when the present case arose references in them to a (telegraph) company, the Post Office and the Postmaster General, fell to be construed as references to the Post Office, (1). The provisions thus applied to employees of the Post Office (S. 45 of the 1863 Act) and to "any person having official duties connected with .... or acting on behalf of" the Post Office, (S. 20 of the 1868 Act).

29. It has been held that telephone communications are a form of telegraphic communication within the scope of the Telegraph Acts (2), and it is not in dispute that the offences referred to in the preceding paragraph apply to telephone conversations. Section 11 of the Post Office (Protection) Act 1884 creates a similar offence in relation to telegrams.

(b) The Birkett Report

30. In Part I of their Report the Birkett Committee examined the legal basis for the Secretary of State's authority to intercept communications. They observed that the origin of the power was obscure. However the power to intercept mail had been used for many centuries and had been publicly known and recognised as a lawful power in various statutes. The Committee referred to the provisions of various Post Office statutes in force since 1710, including in particular Section 58 (1) of the 1953 Act, (see para. 27 above).

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(1) See Post office Act 1969, Schedule 4, para 4.

(2) Attorney General v. Edison Telephone Company, (1880) 6 Q.B.D. 244, referred to in the Birkett Report at para. 46.

31. The Committee also discussed the power to intercept telephone messages. This had been exercised from time to time since the introduction of the telephone. Until 1937 the Post Office had acted on the view that it was a power possessed by any operator of telephones and not contrary to law. No warrants were therefore issued. In 1937 it was decided as a matter of policy that it was undesirable that records of telephone conversations be made without the authority of the Secretary of State. The Home Office also considered that the power under which mail had been intercepted on the authority of a warrant of the Secretary of State was wide enough to include the interception of telephone messages. It had since been the practice of the Post Office to intercept telephone conversations only on the express warrant of the Secretary of State.

32. The Committee discussed various possible legal bases for the exercise of this power. These were that it was based on the Royal prerogative, or on provisions of the Telegraph Act 1868 or that the view acted on by the Post Office prior to 1937 was correct. The Committee stated (para. 50) that it formed the view "that it rests upon the power plainly recognised by the Post Office statutes as existing before the enactment of the statutes, by whatever name the power is described". The Committee continued as follows:

> "51. We are therefore of the opinion that the state of the law might fairly be expressed in this way.
>
> (a) The power to intercept letters has been exercised from the earliest times, and has been recognised in successive Acts of Parliament.
>
> (b) This power extends to telegrams.
>
> (c) It is difficult to resist the view that if there is a lawful power to intercept communications in the form of letters and telegrams, then it is wide enough to cover telephone communications as well.
>
> 52. If, however, it should be thought that the power to intercept telephone messages was left in an uncertain state that was undesirable, it would be for Parliament to consider what steps ought to be taken to remove all uncertainty if the practice is to continue. So far as letters and telegrams are concerned, the provisions of the Post Office Act of 1953 appear to have worked in practice without any difficulty. If it were thought necessary, a suitable amendment to that section of the Act of 1953 would remove doubts whether telephonic communications were in the same position as letters and telegrams."

(c) The Post office Act 1969

33. Since the Post Office ceased, by virtue of the 1969 Act, to be under the direct control of a Minister, a provision (Section 80) was included in the Act whereby the new corporation could be required to inform "designated persons holding office under the Crown" of matters which were transmitted through its services. Previously, it appears, the Postmaster General would have been under a ministerial duty to provide such information in appropriate circumstances. Section 80 was in the following terms:

> "Provision of information to persons holding office under the Crown
>
> 80. A requirement to do what is necessary to inform designated persons holding office under the Crown conerning matters and things transmitted or in course of transmission by means of postal or telecommunication services provided by the Post Office may be laid on the Post Office for the like purposes and in the like manner as, at the passing of this Act, a requirement may be laid on the Postmaster General to do what is necessary to inform such persons concerning matters and things transmitted or in course of transmission by means of such services provided by him."

34. The 1969 Act also introduced, for the first time, an express statutory defence based on possession of a warrant, to the offences under the Telegraph Acts mentioned above (para. 28), similar to that which existed under Section 58 (1) of the Post Office Act 1953. This was effected by para. 1 (1) of Schedule 5 to the Act, which was in the following terms:

> "I. -(1) In any proceedings against a person in respect of an offence under section 45 of the Telegraph Act 1863 or section 11 of the Post Office (Protection) Act 1884 consisting in the improper divulging of the purport of a message or communication or an offence under section 20 of the Telegraph Act 1868 it shall be defence for him to prove that the act constituting the offence was done in obedience to a warrant under the hand of a Secretary of State."

(d) The Vice-Chancellor's Judgment

35. In the civil action which the applicant brought against the Metropolitan Police Commissioner, the applicant sought various relief including declarations to the following effect:

- a. that interception, monitoring or recording of conversations on his telephone lines without his consent, or disclosing the contents thereof, was unlawful even if done pursuant to a warrant of the Home Secretary;

- b. that he had a right of property, privacy and confidentiality in respect of conversations on his telephone lines and that interception, monitoring, recording and disclosure of conversations were in breach thereof;

- c. that the interception and monitoring of his telephone lines violated Art. 8 of the Convention;

36. In his judgment, delivered on 28 February 1979, the Vice-Chancellor held that he had no jurisdiction to make a declaration based on Art. 8 of the Convention. He made a detailed examination of the domestic law relating to telephone "tapping", held in substance that the practice of tapping on behalf of the police as described in the Birkett Report was legal, and dismissed the action.

37. The Vice-Chancellor described the question before him as being, in simple form, "Is telephone tapping in aid of the police in their functions relating to crime illegal?" He further delimited the issue as follows:

> "..... the only form of telephone tapping that has been debated is tapping which consists of the making of recordings by Post Office officials in some part of the existing telephone system, and the making of those recordings available to police officers for the purposes of transcription and use. I am not concerned with any form of tapping that involved electronic devices which make wireless transmissions, nor with any process whereby anyone trespasses onto the premises of the subscriber or anyone else to affix tapping devices or the like. All that I am concerned with is the legality of tapping effected by means of recording telephone conversations from wires which, though conncected to the premises of the subscriber, are not on them." (1)

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(1) /1979/ 2 All ER 620 at P. 629.

38. He described the parties' respective submissions on the matter. For the applicant it had been contended that it was unlawful for anyone to intercept or monitor the telephone conversations of another without his consent. This contention was based on rights of property, privacy and confidentiality. The applicant had also relied on Art. 8 of the Convention, both as conferring a direct right and as an aid in the interpretation and application of English law. Thirdly he had relied on the absence of any grant of powers to tap telephones, either by statute or the common law, (1). The "basic thesis" of the contentions put forward on behalf of the Police Commissioner and the Solicitor General (who had intervened in the case) had been that apart from certain limited statutory exceptions, there was nothing to make governmental telephone tapping illegal, (2).

39. The Vice-Chancellor held that there was no right of property in the words contained in a telephone conversation, (3). As to the applicant's remaining contentions he observed firstly that no assistance could be derived from cases dealing with other kinds of warrant. Unlike a search of premises, the process of telephone tapping on Post Office premises did not involve the tort of trespass, (4). Secondly, referring to the warrant of the Home Secretary, the Vice-Chancellor observed that such warrant did not "purport to be issued under the authority of any statute or of the common law". The decision to introduce such warrants in 1937 seemed "plainly to have been an administrative decision not dictated or required by statute." He referred however to Section 80 of the Post Act 1969 and Schedule 5 to the Act and stated that by the Act "Parliament has provided a clear recognition of the warrant of the Home Secretary as having an effective function in law, both as providing a defence to certain criminal charges, and also as amounting to an effective requirement for the Post Office to do certain acts," (5). Thirdly the Vice-Chancellor held that there was no general right

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(1) ibid at p. 630

(2) ibid. at p. 630

(3) ibid. at p. 631

(4) ibid. at p. 640

(5) ibid, pp. 640-642.

of privacy in English law nor any particular right to privacy in respect of telephone conversations as the applicant had contended. It would be the function of the legislature, not the courts, to introduce any such right if it were thought desirable, (1). As to the right of confidentiality, no such right arose under contract since there was no contractual relationship between the Post Office and the telephone subscriber. Nor was there any other obligation of confidence on a person who overheard a telephone conversation, whether by means of tapping or otherwise. Even if a duty of confidentiality did arise, there might be "just cause or excuse for breaking confidence," In the case of telephone tapping on behalf of the police, there would be "just cause or excuse" if certain requirements were satisfied and, on the evidence, the process of tapping as carried out on behalf of the police did satisfy such requirements, (2).

40. Fifthly the Vice-Chancellor held that the Convention did not confer any rights on the applicant which he could enforce in the English courts, (3). He considered, sixthly, the argument that the Convention, as interpreted in the Klass Case (4), could provide assistance to the court in determining what the law was, where there was uncertainty. He observed that the court was not faced with the interpretation of legislation enacted with the purpose of giving effect to obligations imposed by the Convention. Where Parliament had refrained from legislating on a point that was plainly suitable for legislation, it was difficult for the court to lay down new rules that would carry out the Crown's treaty obligations, or to discover for the first time that such rules had always existed. He compared the system of safeguards considered in the Klass case with the English system, as described in the Birkett report and observed that none of the relevant safeguards was to be found "as a matter of established law" in England and only a few corresponding provisions existed as a matter of administrative procedure. He further commented on the English system as follows:

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(1) ibid pp. 642-644.

(2) ibid. pp. 645-647

(3) ibid. p. 647

(4) European Court of Human Rights, Judgment of 6 September 1978, Series A. No 28.

"Even if the system were to be considered adequate in its conditions, it is laid down merely as a matter of administrative procedure, so that it is unenforceable in law, and as a matter of law could at any time be altered without warning or subsequent notification. Certainly in law any adequate and effective safeguards against abuse are wanting. In this respect English law compares most unfavourably with West German law: this is not a subject on which it is possible to feel any pride in English law.

I therefore find it impossible to see how English law could be said to satisfy the requirements of the Convention as interpreted in the Klass case, unless that law not only prohibited all telephone tapping save in suitably limited classes of case, but also laid down detailed restrictions on the exercise of the power in those limited classes. It may perhaps be that the common law is sufficiently fertile to achieve what is required by the first limb of this: possible ways of expressing such a rule may be seen in what I have already said. But I see the greatest difficulty in the common law framing the safeguards required by the second limb. Various institutions or offices would have to be brought into being to exercise various defined functions. The more complex and indefinite the subject-matter the greater the difficulty in the court doing what it is really appropriate and only appropriate, for the legislature to do. Furthermore, I find it hard to see what there is in the present case to require the English courts to struggle with such a problem. Give full rein to the Convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision.

It appears to me that to decide this case in the way that counsel for the plaintiff seeks would carry me far beyond any possible function of the Convention as influencing English law that has ever been suggested; and it would be most undesirable. Any regulation of so complex a matter as telephone tapping is essentially a matter for Parliament, not the courts; and neither the Convention nor the Klass case can, I think, play any proper part in deciding the issue before me."

He suggested that the subject was one which "cries out for legislation," (1)

41. As a seventh and final point of substance, the Vice-Chancellor referred to the applicant's contention based on the absence of any grant of powers to the executive to tap telephones, and observed as follows:

> "I have already held that, if such tapping can be carried out without committing any breach of the law, it requires no authorisation by statute or common law; it can lawfully be done simply because there is nothing to make it unlawful. Now that I have held that such tapping can indeed by carried out without committing any breach of the law, the contention necessarily fails. I may also say that the statutory recognition given to the Home Secretary's warrant seems to me to point clearly to the same conclusion". (2)

42. The Vice-Chancellor therefore held that the applicant's claim failed in it entirety. He made the following concluding remarks as to the ambit of his decision:

> "Though of necessity I have discussed much, my actual decision is closely limited. It is confined to the tapping of the telephone lines of a particular person which is effected by the Post Office on Post Office premises in pursuance of a warrant of the Home Secretary in a case in which the police have just cause or excuse for requesting the tapping, in that it will assist them in performing their functions in relation to crime, whether in prevention, detection, discovering the criminal or otherwise, and in which the material obtained is used only by the police, and only for those purposes. In particular, I decide nothing on tapping effected for other purposes, or by other persons, or by other means; nothing on tapping when the information is supplied to persons other than the police; and nothing on tapping when the police use the material for purposes other than those I have mentioned. The principles involved in my decision may or may not be of some assistance in such other cases, whether by analogy or otherwise: but my actual decision is limited in the way that I have just stated." (3)

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(1) ibid. pp. 647-649

(2) ibid et p. 649.

(3) ibid at p. 651.

(e) Subsequent Developments

43. Since the Vice-Chancellor's judgement, the necessity for legislation concerning the interception of communications has been the subject of review by the Government, and of Parliamentary discussion. On 1 April 1980, on the publication of the White Paper, the Home Secretary announced in Parliament that the Government had decided not to introduce legislation. He explained the reasons for this decision in the following terms:

> "The interception of communications is, by definition, a practice that depends for its effectiveness and value upon being carried out in secret, and cannot therefore be subject to the normal processes of parliamentary control. Its acceptability in a democratic society depends on its being subject to ministerial control, and on the readiness of the public and their representatives in Parliament to repose their trust in the Ministers concerned to exercise that control responsibly and with a right sense of balance between the value of interception as a means of protecting order and security and the threat which it may present to the liberty of the subject.
>
> Within the necessary limits of secrecy, I and my right hon. Friends who are concerned are responsible to Parliament for our stewardship in this sphere. There would be no more sense in making such secret matters justiciable than there would be in my being obliged to reveal them in the House. If the power to intercept were to be regulated by statute, then the courts would have power to inquire into the matter and to do so, if not publicly, then at least in the presence of the complainant. This must surely limit the use of interception as a tool of investigation. The Government have come to the clear conclusion that the procedures, conditions and safeguards described in the Command Paper ensure strict control of interception by Ministers, are a good and sufficient protection for the liberty of the subject, and would not be made significantly more effective for that purpose by being embodied in legislation. The Government have accordingly decided not to introduce legislation on these matters."

44. In the course of the Parliamentary proceedings leading to the enactment of the British Telecommunications Act 1981, attempts were made to include in the Bill provisions which would have made it an offence to intercept mail or matters sent by public telecommunication

systems except under a warrant issued under conditions which corresponded essentially with those described in the White Paper. The Government successfully opposed these moves, essentially on the grounds that secrecy, which was essential if interception was to be effective, could not be maintained if the arrangements for interception were laid down by legislation, and thus became justiciable in the courts. The present arrangements and safeguards were adequate and the proposed new provisions were, in the Government view, unworkable and unnecessary, (1). The 1982 Act eventually contained a re-enactment of Section 80 of the Post Office Act 1969 applicable to the Telecommunications Corporation, (2). Section 80 of the 1969 Act itself continues to apply to the Post Office.

3. The practice followed in relation to interceptions

45. Details of the practices followed in relation to interceptions, as officially described, are set out in the White paper. The practices there described are essentially the same as those described in and recommended in the Birkett Report, and referred to in Parliamentary statements by successive Prime Ministers in 1957, 1966 and 1978. The police, H.M. Customs and Excise and the Security Service may request authority for the interception of communications for the purposes of "detection of serious crime and the safeguarding of the security of the State" (para. 2 of the White Paper). Interception may take place only with the authority of the Secretary of State. Such authority is contained in a warrant under the Secretary of State's own hand. In England and Wales the power to grant such warrants is exercised by the Home Secretary, or occasionally if he is ill or absent, by another Secretary of State on his behalf (ibid).

46. According to the White Paper current practice in England and Wales in the case of warrants applied for by the police to assist in the detection of crime, includes the following features:

- the offence must be "really serious" - i.e. an offence for which a first offender might expect to receive three years in prison or a lesser offence in which either a large number of people was involved or there was good reason to apprehend the use of violence. (paras. 3 and 4);

(1) See, e.g. Statement of the Home Secretary (Mr Whitelaw) in the House of Commons on 1 April 1981, Hansard cols. 334-338.

(2) 1981 Act, Schedule 3, para. 1

- normal methods of investigation must have been tried and failed, or be unlikely to succeed (para. 3);

- there must be good reason to think that an interception would be likely to lead to an arrest and a conviction (para. 3);

- applications for warrants are in writing and state the purpose of the interception requested and the facts and circumstances supporting the request; they are submitted to the Permanent Under-Secretary of State at the Home Office (the senior civil servant). If he is satisfied that the required criteria are met he submits it to the Home Secretary for approval and signature. In case of exceptional urgency the latter may give authority by telephone (para. 9);

- details of the relevant address/telephone number are included in the warrant. Changes require authority of the Secretary of State or (if he delegates authority) Permanent Under-Secretary. Separate warrants are needed for telephone and mail interception (para. 10);

- all warrants are time-limited; first warrants last up to two months; renewals, in the case of police warrants for up to a month at a time, may be granted by the Home Secretary, also after scrutiny of the application by the Permanent Under-Secretary, (para. 11).

47. The interception itself, whether of correspondence or telephone communications, is carried out by the Post Office. They send a copy of intercepted correspondence to the organisation concerned (e.g. the police) and the contents are then noted by that organisation insofar as relevant to their investigation. Recordings of telephone conversations are similarly transmitted to the relevant organisation who note (or have transcribed) the parts relevant to their investigations. Most recordings are erased within a week. Notes or transcriptions are retained for twelve months, or so long as required for the investigation, and are then destroyed (para. 15 of the White Paper). The product of interceptions is used only for investigative purposes and is not tendered in evidence (para. 16). There is no disclosure of information obtained to private individuals or bodies or domestic tribunals (para. 17).

48. For security reasons it is the normal practice not to disclose the numbers of interceptions made (Birkett Report paras. 119-121; White Paper paras. 24-25). However in order to allay public concern as to the extent of interception both the Birkett Report and White Paper gave figures for the number of warrants granted annually over the years preceding their publication. The figures in the White Paper cover the years from 1958-1979 and are set out in Appendix III to this Report. They indicate that between 1969 and 1979 generally something over 400 telephone warrants and something under 100 postal warrants were granted annually by the Home Secretary. Para. 27 of the White Paper also gave the total number of warrants in force on 31 December for the years 1958(237), 1968(273) and 1978(308). The total number of telephones at the end of 1975 was, according to the Government, 26,500,000, a fourfold increase over the number in 1937. The Government also state that over the period fromm 1958 to 1978, there was a fourfold increase in indictable crime, from 626,000 to 2,395,000.

49. When the White Paper was published, on 1 April 1980, the Home Secretary, in addition to announcing that the Government did not intend to introduce legislation (see para. 43 above), also announced that the Government had decided that it would be desirable if there were "a continuous independent check that interception was being carried out in accordance with the established purposes and procedures". A senior judge, Lord Diplock, was appointed to this function with the following terms of reference:

> "To review on a continuing basis the purposes, procedures, conditions and safeguards governing the interception of communications on behalf of the police, H.M. Customs and Excise and the security service as set out in Cmnd Paper 7873; and to report to the Prime Minister."

50. It was announced that this person would have right of access to papers and the right to request additional information from the Departments and organisations concerned. His first report would be published and for it he would examine all the arrangements set out in the White Paper. Subsequent reports on the detailed operation of the arrangements would not be published but Parliament would be informed of any findings of a general nature and of any changes in the arrangements.

51. In March 1981 the first Report by Lord Diplock was published. It stated that he had considered whether current practices were effective

to ensure that the following six conditions were observed:

> "(1) that the public interest which will be served by obtaining the information which it is hoped will result from the interception of communications is of sufficient importance to justify this step;
>
> (2) that the interception applied for offers a reasonable prospect of providing the information sought;
>
> (3) that other methods of obtaining it such as surveillance or the use of informants have been tried and failed or from the nature of the case are not feasible;
>
> (4) that the interception stops as soon as it has ceased to provide information of the kind sought or it has become apparent that it is unlikely to provide it;
>
> (5) that all products of interception not directly relevant to the purpose for which the warrant was granted are speedily destroyed; and
>
> (6) that such material as is directly relevant to that purpose is given no wider circulation than is essential for carrying it out."

For this purpose he had selected at random a number of apparently typical warrant applications and followed them back to their original sources. In each case he had had personal access to the files of the applicant authority and had been able to discuss with the officers concerned the detailed reasons why they considered that the three conditions justifying the issue of a warrant were fulfilled. On the basis of his investigations he was satisfied that the procedures were "working satisfactorily and with the minimum interference with the individual's rights of privacy in the interests of the public weal."

52. On 21 April 1982 the Home Secretary announced that Lord Diplock had submitted his second Report to the Prime Minister, reaching the general conclusion that the procedures continued to work satisfactorily. The concept of a serious offence mentioned in the White Paper was, however, to be extended on Lord Diplock's recommendation to cover offences which would not necessarily attract a penalty of three years' imprisonment on first conviction, but in which the financial rewards of success were very large. As announced, the second Report was not published.

III SUBMISSIONS OF THE PARTIES

A. The Applicant

1. Introduction

53. The applicant maintains that United Kingdom law relevant to the interception of telephone and postal communciations contravenes Art. 8 of the Convention. Furthermore there is no effective remedy for the breach of Art. 8 and the law also contravenes Art. 13 of the Convention. He submits that he is himself the victim of these breaches of the Convention since he has submitted evidence that his own postal and telephone communications have been intercepted, and that his telephone calls have also been "metered" and details supplied to the police. Furthermore since he is potentially effected by such secret surveillance in any event, he is entitled to claim to be a "victim" of the relevant law for the purposes of Art. 25 of the Convention, in accordance with the case-law of the Court in the Klass case (1).

2. Art. 8 of the Convention

(a) General submissions

54. The applicant submits that the relevant law and practice, and the measures which have been applied against him personally, involve an interference with this right to respect for correspondence, as guaranteed by Art. 8 (1), and that this interference is not justified under Art. 8 (2), having regard particularly to the Court's interpretation of that provision in the Klass case. In particular he submits that such interference was not "in accordance with the law" or "necessary in a democratic society" for any of the purposes mentioned in Art. 8 (2).

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(1) Judgment of 6 September 1978, Series A. Vol. 28, pp. 19-20, paras. 36-38.

(b) "in accordance with the law"

55. The applicant, referring to previous case law of the Court and the Commission (1), submits that the phrase "in accordance with the law" in Art. 8 (2) should be interpreted, having regard to the concept of the rule of law and the principle of legality or legal certainty, as requiring that any interference should be pre-determined by substantive law, so that its nature, extent and manner are reasonably foreseeable, and there are adequate safeguards against abuse. The law should set the conditions and procedures for an interference and provide safeguards against abuse. It is not enough that the interference is merely lawful in the sense that it is not forbidden.

56. The applicant does not accept that any express power to intercept telephone communications exists in English law. The true position is as set out in the judgment of the Vice-Chancellor, namely that apart from certain limited statutory exceptions, and in the absence of any trespass or other tort, there is nothing to make telephone tapping unlawful. It is lawful merely because there is nothing making it illegal. The Government themselves argued this in the proceedings before the Vice-Chancellor.

57. The provisions of Section 80 and para 1 (1) of Schedule 5 to the Post Office Act 1969 are of relatively little importance. In no way do they constitute a "legal basis for interception" as contended by the Government or confer a "power" to intercept.

58. Section 80 of the 1969 Act was introduced because once the Post Office ceased to be under direct ministerial control it could no longer be assumed that it would act on a warrant of the Home Secretary. A "requirement" therefore replaced the old administrative arrangement introduced in 1937. As held by the Vice-Chancellor it merely provides statutory recognition of the lawfulness of a telephone interception if the authorities choose to issue a warrant. Tapping without a warrant is lawful. Anyone in the United Kingdom may lawfully tap a telephone provided he does not commit trespass or, in case of a Post Office employee, act "improperly" or "contrary to ... duty".

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(1) Sunday Times Case, Judgment of 26 April 1979, Series A. Vol. 30, para. 48; Silver and others v. the United Kingdom, Report of the Commission adopted on 11 October 1980, para. 281.

59. Para. 1(1) of Schedule 5 to the 1969 Act merely gives a statutory defence to certain offences by Post Office employees. However there is in any event only an offence (and the question of the statutory defence only arises) if the employee acts "improperly" or "contrary to ... duty". He would not be so acting if he intercepted a suspect's conversation at the request of a senior police officer, unless he had been forbidden to do so by a superior. Nor would he be so acting if he acted on the instructions of a superior. In such circumstances a Post Office employee could lawfully tap a telephone without a warrant. It is also lawful for any person other than a Post Office employee to tap a telephone without a warrant and it would not be a criminal offence for an employee of the Post Office to assist or facilitate such tapping.

60. The applicant denies that the existence of the power to intercept and the conditions governing its exercise are accessible to the individual. He points out that in his own case requests to the police for information relating to telephone tapping practice were refused. A veil of secrecy surrounds the matter, he submits.

61. The whole approach in United Kingdom law is different to that under the Convention. Under Art. 8 telephone tapping is prima facie unlawful, unless shown to be justified under Art. 8(2). In United Kingdom law it is generally not unlawful and the conditions governing interception are mainly administrative.

62. There is no legal regulation of "metering", the results of which can be made available to the police without restriction.

63. As to the interception of mail, the applicant accepts that no lawful interception can take place without a warrant. However, no offence by a Post Office employee is committed under Section 58(1) of the Post Office Act 1953 unless he acts "contrary to his duty". Furthermore the statements merely assume the existence of a power to issue a warrant. Such power can neither be based on any prerogative right of the Crown, nor on common law. The fact that interception of mail has taken place proves only that the power has been exercised, not that its use has been lawful. There are no statutory restrictions as to how and why the Secretary of State may issue a warrant. Whereas telephone tapping involves no tort in the absence of trespass, interference with mail involves the tort of unlawful interference with chattels.

64. The applicant submits that in these circumstances the interception of postal and telephone communications in the United Kingdom is not carried out "in accordance with the law" for the purposes of Art. 8(2).

(c) "Necessary in a democratic society ..."

65. In accordance with the Klass judgment, Art. 8(2) is to be interpreted "narrowly". On its proper construction it requires that any interference with the right to respect for correspondence should be necessary "in the interests of national security, public safety or the economic well-being of the country" and additionally for one of the other purposes mentioned, for instance "for the prevention of crime". It is not enough that a measure should be necessary "for the prevention of crime" alone. Accordingly only the most serious crimes would justify an interference. However there is no legal restriction on the classes of crime covered by the United Kingdom system, and the definition of "serious crime" in the Birkett Report is in any event too wide. It covers matters such as obscene publications and receiving stolen property.

66. The applicant further suggests that the phrase "for the prevention of crime" may not cover the detection of crime which has already occurred, and that the tapping of telephones for the purpose of detecting such crime may not therefore be permissible.

67. On the basis of the Court's judgment in the Klass case he accepts that the existence of some legislation granting powers of secret surveillance of communications is, under exceptional conditions, necessary in a democratic society for the prevention of crime, (1). However in the United Kingdom there is no such legislation, only an administrative practice veiled in secrecy and unanswerable in practice to either the courts or Parliament. There are no adequate and effective safeguards against abuse, such as the Court held in the Klass case to be necessary, (2). In this context the applicant makes a number of criticisms of the relevant administrative system, which he compares unfavourably with the German system at issue in the Klass case.

68. In the first place there are no legal restrictions on telephone tapping and mail interception. Any restrictions are administrative and unenforceable in law. Interception cannot therefore be said to be legally permissible "under exceptional conditions only" (Klass judgment, para. 48). Legal safeguards comparable to those considered in the Klass case, which were laid down in the legislation itself (Judgment para. 43), do not exist. Furthermore there are no retrictions or safeguards of any kind in relation to "metering."

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(1) Klass Judgment, para. 48.

(2) ibid., para. 49.

69. Secondly the system is covered by a veil of secrecy. As a matter of policy the authorities refuse ever to admit or deny that an interception has taken place. The official secrets legislation makes it impossible for a person suspecting that he has been subject to interception measures to find out the true position. The safeguards which allegedly exist are thus incapable of verification and there is in practice no possibility of effective review either by the courts or Parliament.

70. Thirdly there is no judicial process for the issue of warrants, only an administrative one. As shown by a report by the Post Office Engineering Union, the Home Secretary's control over the issue of warrants is unlikely to be effective in practice. He has limited time and extensive responsibilities in other areas. His advice is limited and he is over dependent on professional security advisers. He does not have practical control over interceptions and is not accountable to Parliament, (1).

71. Fourthly there is no provision for a person to be notified of interception at any time and the invariable practice is not to notify. The applicant's own case is wholly exceptional in that he found out. There is no system comparable to the German one whereby a person is entitled to be notified of interception measures as soon as notification can be made without jeopardising the purpose of the investigation. The applicant concedes that a system which did not provide for notification in certain circumstances would not contravene Art. 8. However the complete absence of any right to be notified suggests that the system is contrary to Art. 8.

72. Fifthly there is no independent element to protect against abuse. There is no independent supervisory body equivalent to the G.10 Commission in Germany. There is no possibility of an independent enquiry or investigation at the instance of an alleged victim of interception. The courts are completely excluded from the system, as is shown by the Home Secretary's statement in Parliament on 1 April 1980 (see para. 43 above). The terms of reference of Lord Diplock for review of the practice of interception (see para. 49 above), are inadequate. In particular he does not have power to investigate the detailed circumstances of particular cases. It is unlikely that, as a full-time member of the judiciary, he has the time or facilities to monitor the system in detail. His terms of reference do not cover interceptions authorised by Secretaries of State other than the Home Secretary or interceptions without warrant. His reports, apart from the first one, are to be secret.

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(1) "Tapping the Telephone", published on 31 July 1980 by the Post Office Engineering Union (POEU), pp. 18-19.

73. The applicant submits that such controls as are alleged to have been developed are therefore not effective and do not satisfy Art. 8. No safeguards can be said to be effective unless capable of independent verification. There is no evidence, other than the number of warrants, to support the contention that the safeguards are effective. On the other hand there is evidence, the applicant submits, that interceptions take place ouside the official framework, more widely than officially admitted, without warrants and without the control of the Secretary of State. The applicant refers in this respect to the Post Office Engineering Union Report (sup. cit.) and various articles from the press produced by him (1).

74. The applicant therefore submits that the practices at issue cannot be justified as being "necessary in a democratic society" and for this reason also are in breach of Art. 8.

3. Art. 13 of the Convention

75. The applicant submits that there is no effective remedy for the breach of Art. 8 which he complains of, and there is therefore also a breach of Art. 13 of the Convention. Furthermore even if the United Kingdom system of interception does conform with Art. 8, there is no effective remedy against any particular breach because of the practical impossibility of discovering whether an interception has taken place, or whether the appropriate procedure has been complied with.

76. To be capable of providing an "effective remdy" a national authority must be able to satisfy certain minimum conditions of independence, impartiality and competence and certain minimum guarantees of procedure. The authority must be able to determine the claim to a remedy for a violation of the right in question and enforce such remedy when granted. Basic principles of natural justice must be observed and the authority must give adequate reasons for its determination.

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(1) e.g. articles in the "New Statesman" of 1 February 1980 and 18 July 1980.

77. The applicant refers to the various remedies relied on by the Government (see para. 109 below) and submits that as a matter of practice these remedies do not exist.

78. In particular he does not accept that interception or divulgence of material by a Post Office employee without a warrant would be an offence. This would only be so if the employee acted "improperly" or "contrary to duty". Further it is impossible for the police or an individual to prosecute in the absence of information. It is unreal to suppose that an injunction could be obtained, or that an application or judicial review could succeed, without evidence. An injunction is in any event a discretionary remedy. It is not, he submits, an offence for a police officer to be implicated in carrying out an interception without a warrant and the facts of his own case show that complaints against the police have not produced tangible results. Complaints to the Secretary of State are not an "effective remedy" in view of the lack of information on which to base a complaint and the fact that the Secretary of State would himself have granted any warrant. Even if a warrant could be quashed in court, there would be no remedy for the interception prior to the Court's ruling.

79. The applicant also points out that he himself was unable to see the warrant relating to the interception of his telephone and no information has been given as to the specific grounds on which it was allegedly issued. No information has been given either as to whether there has been any investigation of his complaints.

B. The respondent Government

1. Introduction

80. The Government accept that, under Art. 25 of the Convention, the applicant is entitled to claim to be a "victim" if and insofar as the interception of his telephone conversation or the law and practice in England and Wales on the interception of communications on behalf of the police for the prevention and detection of crime could be shown to be in breach of the Convention. However they deny that there is any breach of the applicant's rights under Art. 8 or Art. 13 of the Convention. Referring to the terms of the Commission's decision on admissibility, the Government state that their observations are confined to the law and practice in England and Wales relating to the interception of communications on behalf of the police for the detection and prevention of crime.

2. Art. 8 of the Convention

(a) General submissions

81. On the authority of the Court's judgment in the Klass Case the Government accept that the application on behalf of the police of measures of interception of correspondence and telephone conversations, and the authorisation of such measures by domestic law constitute an "interference" with the right to respect for correspondence. However, they maintain that such interference is justified under Art. 8 (2), being both "in accordance with the law" and "necessary in a democratic society .... for the prevention of disorder or crime ... " and "for the protection of the rights and freedoms of others".

(b) "in accordance with the law"

82. Referring to previous case-law of the Commission and Court, the Government submit that on their natural construction the words "in accordance with the law" require that any administrative action by a public authority which interferes with the exercise of a right protected by Art. 8 (1) should be lawful under domestic law, complying in all respects with its substantive and formal requirements. The "law" includes uncodified law, (1). The Court's observations in the Sunday Times Case (para. 49) concerning the accessibility and precision required of the relevant "law" are less appropriate to a case such as the present one, which does not concern a law restricting or penalising the exercise of the right (to which the individual must conform), but an interference by public authority in the exercise of lawful power. In such a case the paramount consideration is the legality of administrative action in domestic law.

83. In its judgment in the Klass case the Court fell short of endorsing the Commission's proposition (para. 63 of its Report) that the conditions and procedures for an interference must be laid down by the law itself. Para. 43 of the Court's judgment makes it clear, on the contrary, that the requirement of being "in accordance with the law" was fulfilled merely because the interference "results from Acts passed by Parliament" and that it was not a necessary additional requirement of Art. 8 (2) that the conditions and procedurres should be laid down in the legislation, although the Court observed that "in addition" that was the case.

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(1) Sunday Times Case, Judgment of the Court, lines A. vol. 30, p. 31, para. 49.

84. It is clear that the interception of communications on behalf of the police pursuant to a warrant granted for the purpose of detecting and preventing crime is lawful under domestic law, whatever the precise origins of the power. If any doubt existed, it was removed by the Vice-Chancellor's judgment.

85. In his judgment the Vice-Chancellor observed that telephone interception "can lawfully be done simply because there is nothing to make it unlawful" (1) and that the Post Office Act 1969 had provided statutory recognition of the warrant of the Secretary of State as having an effective function in law for certain purposes (2). These remarks, whilst accurate, do not in the Government's submission, fully reflect the significance of the Post Office Act 1969 in providing a statutory basis for the interception of communications pursuant to a warrant.

86. Despite statutory recognition, prior to 1969, of the power to intercept communications, the authority to issue warrants did not arise from statue and had no statutory basis. In 1969 for the first time the issue of a warrant by the Secretary of State authorising interception was given statutory force by Section 80 of the Post Office Act 1969, (see para. 33 above). The significance of Section 80 is threefold:

- i for the first time it conferred on the Secretary of State a Statutory power to issue warrants and gave statutory force to the warrants issued; after its enactment the power of the Secretary of State to issue warrants to the Post Office derived exclusively from the statute, no residual power remaining under common law.

- ii it expressly defined the purposes for which the Secretary of State was empowered to issue warrants, namely "for the like purposes" as a warrant could previously have been laid on the Postmaster General. In the context of interceptions on behalf of the police, these words confined the purpose for which a warrant might be issued to that of

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(1) /1979/ 2 All ER at p. 638

(2) ibid at p. 642, see para. 39 above.

the detection of crime, that being the only purpose for which the Secretary of State could in practice have laid such a requirement on the Postmaster General. In support of this contention the Government refer to para. 57 of the Birkett Report (1).

- iii Schedule 5 to the Act provides a statutory defence to any official of the Post office carrying out an interception in obedience to a warrant. Any relevant measure of interception by a Post office official otherwise than pursuant to a warrant is a criminal offence by virtue of the Telegraph Acts and Post Office legislation.

87. The requirements of foreseeability and accessibility identified by the Court in the Sunday Times Case are, so far as relevant, satisfied. The power to intercept and the purposes for which and manner in which such interception can be lawfully carried out, are governed by statute. The words "for the like purposes" and "in the like manner" define the power to intercept by reference to the practice prior to the passing of the Act, which was fully described in the Birkett Report and has been reaffirmed since in statements to Parliament in the White Paper.

88. If, contrary to the Government's contention, Art. 8(2) does require that the law should set up the conditions and procedures for an interference, this requirement is satisfied. The essential conditions governing the lawful interception of communications on behalf of the police are laid down in the 1969 Act, the detailed procedures bring fully described in the Birkett Report and White Paper. Interception may only take place pursuant to a requirement laid on the Post Office under Section 80. The words "for the like purposes" confine the purpose for which a warrant may be issued to that of the detection of crime. The words "in the like manner" confine the manner in which the statutory power can be exercised: interception may only take place pursuant to a warrant signed personally by the Secretary of State specifying the telephone number in question and the name and address of the subscriber, or the name and address of the addresses of mail, and the period during which it is to have effect.

(1) Para. 57 stated as follows:

"The Secretary of State has to satisfy himself on the facts of each case that it is proper to issue his warrant. In practice the principle on which the Secretary of State acts is that the purpose(s) for which communication may be intercepted must be ... for the detection of serious crime ..."

89. In addition Section 80 requires and empowers the Post Office to make information available only to "designated persons holding office under the Crown". In the case of interceptions for the detection of crime, this is invariably the Metropolitan Police Commissioner.

90. It is beyond argument that a Post Office employee intercepting a telephone conversation or mail for purposes unconnected with the functions of the Post office and without a warrant would be acting "improperly" and "contrary to his duty" and thus committing an offence. Further, although the statutes prohibit only Post Office employees from intercepting telephone conversations, any other person doing so through the exchange or with the use of Post Office equipment would, in practice, require the complicity of a Post Office employee or official. If he were party to the doing by someone else of an act he was himself prohibited from doing, he would commit an offence. the applicant's assertion to the contrary is not correct, according to the Government.

91. Summing up their position the Government submit that the relevant measures of interception are undertaken "in accordance with the law" for the purposes of Art. 8(2) for reasons which they state as follows in their final observations on the merits:

> Such interception is lawful under domestic law and since 1969 can be carried out only pursuant to statutory powers conferred on the Secretary of State and on the Post Office by the Post office Act 1969; the power and the purpose and manner of its exercise have been expressly limited by statute, the powers being exercisable only pursuant to a warrant signed personally by the Secretary of State, issued for the exclusive purpose of the detection of crime and complying in all respects with the formal requirements of Section 80; the interception or divulging of communications by the Post office otherwise than pursuant to such a warrant has been expressly made punishable by statute; and the existence of the power to intercept and the conditions of its exercise are, and have at all material times been, accessible to the individual concerned."

(c) "Necessary in a democratic society ..."

92. The Government submit that the interference with the Art 8(1) right is justified under Art. 8(2) as being "necessary in a democratic society ... for the prevention of disorder or crime" and "for the protection of the rights and freedoms of others."

93. It is beyond dispute that the aims of such interference are legitimate. The "prevention of crime" clearly embraces its detection. The applicant's contention that the interference must additionally be shown to be necessary in the interests of national or public safety or for the economic well-being of the country is contrary both to the natural construction of Art. 8(2) and to the case-law of the Commission and Court which have consistently interpreted the various purposes in paragraphs 2 of Arts. 8, 9, 10 and 11 disjunctively and not cumulatively. In particular the detection of serious crime as defined in the Birkett Report and White Paper is a legitimate aim, and the receiving of stolen property is rightly considered as a serious matter since the receiver lies at the root of much serious crime.

94. The applicant rightly concedes the necessity of some legislation granting powers of recent surveillance. The necessity for the measures in question here was considered in the Birkett Report and the White Paper, both of which found that it was necessary. In particular in the White Paper it was noted that the increase of crime, particularly organised crime, the increasing sophistication of criminals and the ease and speed of movement had made telephone interception an indispensable tool (White Paper, para. 21). There is also the same community of view in Europe as to the necessity of such measures in the field of crime prevention as their is in the security field (c.f. Report of the Commission in the Klass Case, para. 65).

95. However, a comparative examination of the different systems shows a substantial divergence of practice between European States. There are differences as to the circumstances in which interception may take place, as to the form and substance of the conditions which apply and as to the use to which information thus obtained may be put. For example in some States authority to intercept can apparently be given in any case of suspected crime, not just in cases of serious crime. In some States, such as France, the Netherlands and Luxembourg, authority is given by a juge d'instruction, in others, such as Ireland, Switzerland and the United Kingdom, by a minister. In most States, such as Austria, the Federal Republic of Germany and the Netherlands, the information obtained may be used in evidence. In the United Kingdom it is never used in evidence or revealed to anyone other than the police officers concerned with the investigation.

96. This variety of approaches underlines the need to afford States a margin of appreciation in this area, the existence of such a margin having been re-emphasised in the Klass case by both the Commission (Report para. 65) and the Court (Judgment para. 49). whilst the margin of appreciation is not unlimited, each system of surveillance must be

examined separately and the absence in one of a particular safeguard considered appropriate in another does not show that the safeguards in the former are inadequate. In particular the adverse comparison drawn by the applicant, and by the Vice-Chancellor in his judgment, between the system at issue here and the German system is misleading and misconceived. It is particularly misleading in that the majority of the safeguards on which the Court placed emphasis in the Klass case (in particular the supervisory role of the G.10 Commission and the Parliamentary Board) were applicable only in the security field, and did not apply to interceptions for the detection and preventon of crime.

97. The practice relating to the interception of communications in England and Wales for the prevention and detection of crime is fully and accurately set out in the Birkett Report as confirmed and modified by the White Paper. Under current law and practice a series of limitative conditions or safeguards must be satisfied before an interception can be effected. Further conditions apply to the implementation of the measures and the use of information obtained. The salient conditions and safeguards are:

- i. By virtue of Section 80 of the 1969 Act interception may only take place pursuant to a warrant signed personally by the Secretary of State. Each application for a warrant is considered personally by him. He signs and issues it if the required conditions are satisfied and he considers it right to do so. Except in cases of exceptional urgency a warrant is only issued on written application by an Assistant Commissioner of the Metropolitan Police and by the chief officer of any other police force concerned. Even in cases of exceptional urgency the personal authority of the Secretary of State must be obtained, and a warrant is ssigned and issued as soon as possible thereafter. An application must state the purpose for which interception is requested and the facts and circumstances supporting the request. It is submitted through the Permanent Under-Secretary of State at the Home Office who submits it to the Home Secretary only if satisfied that it meets the required criteria.

- ii. By virtue of Section 80 a warrant may only be issued for the detection or prevention of crime. Interception will only be authorised to assist in the detection of "serious crime". Normal methods of investigation must have been tried and have failed; or by the nature of things be unlikely to succeed. There must also be good reason to think that an interception is likely to lead to an arrest and conviction.

- iii. By virtue of Section 80 every warrant must set out the name and address of and (if relevant) telephone number of the person whose communications are to be intercepted. Exploratory or general surveillance is not permitted.

- iv. By virtue of Section 80 every warrant must be time limited. The initial limit does not exceed two months and renewals are for a maximum of one month at a time. For each renewal the Permanent Under-Secretary must be satisfied that the reasons for issue of the warrant are still valid and that there is good cause for renewal. When interception is no longer required it is discontinued. Warrants are regularly reviewed.

- v. Section 80 requires that every warrant issued under it is directed to the Post Office and all interceptions are carried out by the Post office officials, not the police. The product of interception is made available to a special unit of the Metropolitan Police who note or transcribe only what is relevant to the investigation. Recordings are thereafter erased, normally within a week. Notes or transcriptions are retained for twelve months or for as long as required for the investigation, then destroyed. Information obtained is used only for purposes of criminal investigation. It is not transmitted to anyone not directly concerned in the investigation and not used in evidence in any court or tribunal. The special position assigned by Section 80 to the Secretary of State, as the only person able to issue a warrant, enables him to enforce strict compliance with these restrictions.

98. Since April 1980 a continuous independent check of the interception system has been conducted by Lord Diplock. The Government refer to the findings in his first Report to the effect that the system is working satisfactorily. In particular this Report makes it clear that he can and does investigate individual cases in detail.

99. The applicant's suggestion that there is no legislation governing interception but only a secretive administrative practice is wholly misconceived. There is legislation controlling both the purpose and the manner of interception. Whilst it is not as detailed as the German legislation considered in the Klass case, the United Kingdom is not unique in this respect. As the Commission noted in its Report, the German legislation was "rather detailed ...

compared with other systems" (para. 65). So far as not contained in legislation, the conditions and procedures governing interception are set out in detail in the Birkett Report and White Paper. The applicant's contention that the practice is "veiled in secrecy" is thus wholly unsustainable. Although for obvious reasons the Secretary of State will not discuss individual cases, his accountability to parliament for the operation of the system as a whole is beyond dispute.

100. As to the applicant's criticism of the absence of an independent supervisory body comparable to the German G. 10 Commission and Parliamentary Board, the Government point out that the functions of these bodies are limited to security cases and that no comparable supervisory body exists for criminal cases. As to this criticism that warrants are not issued by a court, the product of interceptions, unlike the position in Germany, is not used in evidence. Whilst it is appropriate that a measure which might lead to a conviction on a serious charge should be orderd by a court (as in the case of a search warrant), the balance of advantage lies in vesting power to issue interception warrants exclusively in the Secretary of State. Transfer of responsibility to magistrates or judges could result in a more diffuse and weaker control, an increase in the number of warrants issued, and inconsistency of application of the principles governing their issue. It would also render very difficult or impossible the system of independent scrutiny established in April 1980. Similar considerations led the Birkett Committee to reject the suggestion that the Secretary of State should no longer have exclusive control, (Birkett Report, paras. 85 and 139).

101. Other criticisms made by the applicant concerning the control exercised by the Secretary of State on the system are also unfounded. as between the police and the suspect the Home Secretary is in an entirely independent position, having no responsibility for individual police operations and no power to give operations orders to the police. The criticism to the effect that there is an absence of proper personal consideration of warrant applications is wholly without substance, as shown by the Birkett Report (para. 90), and confirmed by the Home Secretary in the Parliamentary debate on the British Telecommunications Bill in April 1981. The allegation that interceptions can be authorised by persons other than the Secretary of State is also unfounded. An interception cannot be lawfully authorised by any Post Office official and no evidence has been adduced to show that any such purported authorisation has occurred. Any interception by the Post Office without a warrant personally signed by the Secretary of State would be a criminal offence.

102. Finally the Government refer to the applicant's criticism that there is no system for notifying the victim of interception. The reasons for non-notification before the surveillance has terminated are obvious, as the Court noted in the Klass Case, (Judgment, para. 55). It is unclear to what extent the position after termination differs in practice from that in the Federal Republic of Germany. The effect of the judgment of the Federal Constitutional Court of 15 December 1970 was only to require notification as soon as it could be made without jeopardising the purpose of the measures. It was unclear how often such notification was in fact made. The risks inherent in disclosing the fact of interception, even after it is complete, were recognised by the Court in the Klass case (para. 58). The Court also recognised that "the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with (Art. 8) since it is this very fact which ensures the efficacy of the 'interference'". Accordingly even if the practice is different to the German one, the absence of notification does not give rise to a breach of Art. 8.

103. In assessing the applicant's contention that the system is open to abuse, it is relevant to consider the likelihood of such action and the safeguards against it. In the absence of evidence or indication to the contrary, it must be assumed that the relevant authorities are applying the legislation properly (Klass Judgment, para. 59). The system at issue here contains the following features:

i. statutory provisions defining the purpose and manner in which interceptions may take place;

ii. detailed and published procedures and conditions governing the implementation of interception measures;

iii. close personal control of individual measures by the Secretary of State;

iv. overall scrutiny of the system as a whole and of individual measures by a senior member of the judiciary.

It fully satisfies the purpose of reducing the effect of interception measures to an absolute minimum and preventing, as far as possible, abuses of the system. No evidence has been adduced to show that there has not been strict compliance with the law and established procedure. The statistics show on the contrary that notwithstanding the dramatic increase in crime, there has been only a modest increase in the number of warrants.

104. As to the question of "metering" the Government observe that this does not involve the interception of telephone communications and is unconnected with any form of surveillance. The Post Office makes no use of communications sent to any person other than itself. There is accordingly no interference with the right to respect for correspondence, or any other right guaranteed by Art. 8. The police and Crown cannot compel the Post Office, any more than a banker or other person keeping records, to produce its records in the absence of a subpoena by a court. Here the police did not cause the applicant's telephone calls to be metered or undertake any search operations on the basis of any list of numbers supplied by the Post Office. There is accordingly no breach of Art. 8 in this respect.

3. Art. 13 of the Convention

105. On the authority of the Court's judgment in the Klass Case, the Government accept that Art. 13 guarantees a right to a remedy to everyone who claims that his rights under the Convention have been violated. However it does not follow that an issue arises under Art. 13 whenever such a claim is made, irrespective of whether the claim has any substance. Where it is claimed that domestic law and practice contravene the Convention, and such claim is held to be ill-founded, no additional issue arises under Art. 13. Since the applicant's claim concerning the law and practice relating to the interception of communications is ill-founded, no issue arises here under Art. 13.

106. The Government further point out that in the Klass Case the Court recognised that the effectiveness of any remedy is significantly reduced by the secrecy of the measures of interception and the absence of notification, if at all, until after its completion. It therefore found it necessary to interpret the concept of an "effective remedy" in a limited sense.

107. The Klass Judgment, they submit, establishes the following:

- the authority referred to in Art. 13 need not necessarily be judicial, (para. 67);

- Art. 13 cannot impart an unrestricted right to notification of surveillance measures; it cannot lead to a result tantamount to nullifying the conclusion that the absence of notification is compatible with Art. 8 in order to ensure the efficacy of surveillance measures, (para. 68);

- where secret surveillance measures have been found to be consistent with Art. 8 notwithstanding lack of notification, an "effective remedy" must mean a remedy as effective as can be having regard to the restricted scope for recourse inherent in such a system, (paras. 68-9).

108. the lack of notification does not and cannot entail a breach of Art. 13, notwithstanding the fact that it seriously restricts the effectiveness of any remedy. The inevitable inadequacy of domestic remedies in this field is compensated for by the system of controls and procedural safeguards.

109. Further, within the limitations set by the requirement of secrecy, effective remedies do exist. These are

i. In the event of interception, or disclosure of intercepted material, by a Post Office employee without a warrant, prosecution by the police (following a complaints to them), or a private prosecution;

ii. In addition, an application to the Courts for an injunction to restrain further unlawful interceptions;

iii. Application for an injunction to restrain the disclosure or publication of interceipted communications by employees of the Post Office, otherwise than under a warrant of the Secretary of State, or to any person other than the police;

iv. In the event that the police were implicated in an interception without a warrant, a complaint under Section 49 of the Police Act 1964;

v. In the event that a warrant was issued for purposes other than those permitted by the 1969 Act, or if the facts adduced by the police to support the application for a warrant were without foundation, application for judicial review to quash the warrant, or for a declaration as to its invalidity.

vi. If it were established that the police or Secretary of State had misappreciated the facts, or that there was not an adequate case for imposing an interception, a complaint to the Secretary of State, either directly or through a Member of Parliament; this would be investigated and if found justified, the warrant would be cancelled;

110. Remedies relating to interception are necessarily of limited effectiveness due to lack of knowledge of the interception and, even if notification is made, the difficulty of adducing evidence to challenge the grounds for the measures. In the particular circumstances, having regard to the inevitable limitations, the aggregate of remedies provided for in English law satisfies Art. 13.

IV. OPINION OF THE COMMISSION

A. Points at Issue

111. The principal points at issue under the Convention are as follows:

-i. Whether the applicant's rights under Art. 8 of the Convention have been breached by reason of interception of his postal or telephone communications by or on behalf of the police, or by reason of the law and practice relevant to such interceptions;

-ii. Whether his rights under Art. 8 have been breached by reason of "metering" of his telephone by or on behalf of the police, or by reason of relevant law or practice;

-iii. Whether an "effective remedy before a national authority" as referred to in Art. 13 of the Convention was available to the applicant in respect of the above-mentioned matters.

B. Article 8 of the Convention in relation to the interception of postal and telephone communications

1. General remarks

112. The applicant claims that his postal and telephone communications have been intercepted by or on behalf of the police and submits that the measures taken and relevant domestic law and practice involve breaches of his right to respect for his correspondence guaranteed by Art. 8 of the Convention. Art. 8 is in the following terms:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

113. As the Commission noted in the admissibility decision the respondent Government have accepted that one telephone conversation to which the applicant was party was intercepted at the request of the police under a warrant issued by the Home Secretary, the warrant being issued and the interception being made for the prevention and detection of crime. The applicant suggests that both his postal and telephone communications have been subject to further measures of interception. The respondent Government do not reveal whether or not that is the case, although they accept that being suspected of involvement in crime, the applicant was a person whose communications were liable to be intercepted.

114. Following the approach of the court in the Klass Case, the Commission finds that the applicant is "directly affected" by the law and practice in England and Wales under which the secret surveillance of postal and telephone communications on behalf of the police is permitted and takes place. His communications have at all relevant times been liable to such surveillance without his being able to obtain knowledge of it. Accordingly, as has not been disputed, he is entitled to claim, for the purposes of Art. 25 of the Convention, to be a "victim" of the relevant law and practice irrespective of whether or to what extent he is able to show that it has actually been applied to him, (1). In these circumstances the Commission does not find it necessary to consider to what extent, if at all, the applicant's communications have been intercepted, apart from the single admitted instance. It will confine itself to examining the admitted interception and the relevant law and practice to ascertain whether it is compatible with the Convention.

115. Following the Court's approach in the Klass Case (2), the Commission finds that the admitted interception of the applicant's telephone conversation was an interference by public authority with his right to respect for his private life and correspondence guaranteed by Art. 8 (1). In addition, the existence of the laws and practices which permit and establish a system for effecting secret surveillance of postal and telephone communications, in itself amounts to an interference with these rights under Art. 8(1) apart from any measures of surveillance actually undertaken (3). The existence of such interferences is not disputed and as the Commission indicated in the admissibility decision, the principal questions to be considered thus arise under Art. 8(2).

(1) Klass Case, Judgment of the court, Series A. N°. 28, pp. 16-20, paras; 30-38.

(2) Klass Judgment, para. 41

(3) ibid.

116. To be compatible with Art. 8 a given "interference" must, in the Commission's opinion, be both "in accordance with the law" and "necessary in a democratic society" for at least one of the purposes mentioned in Art. 8(2). It is not, however, required that the interference be necessary for more than one such purpose and the Commission does not accept the applicant's suggestion that necessity "in the interests of national security, public safety or the economic well-being of the country" is required in addition to necessity for one of the other purposes mentioned, such as the "prevention of crime". Neither the English nor the French text of Art. 8(2) justifies reading them as cumulative requirements and the Commission and Court have consistently held that necessity for one of the purposes mentioned is sufficient, (1).

117. In the present case there is dispute between the parties as to whether the relevant interferences were either "in accordance with the law" or "necessary in a democratic society" for any of the purposes mentioned in Art. 8(2).

2. "in accordance with the law"

118. The Commission has considered whether they were "in accordance with the law". The parties differ as to the interpretation of this phrase. The applicant maintains essentially that it implies that domestic law must specify the circumstances and conditions in which an interference may take place. The Government suggest that in the context of a case such as the present one, the main requirement is that the measure constituting the interference should be compatible with domestic law.

119. In the Commission's opinion the phrase "in accordance with the law" in Art. 8(2) falls to be given the same meaning as the phrase "prescribed by law" in Art. 10 (2), both phrases being the same ("prévue par la loi") in the French text, (2). In the Sunday Times Case the Court held that the following were "two of the requirements" that flow from the expression "prescribed by law" or "prévue par la loi":

(1) See e.g. Handyside Case, Judgment of 7 December 1976, Series A. No. 24, p. 21, paras. 43-46; Dudgeon Case, Judgment of 22 October 1981, Series A. No. 45, p. 19, para. 43

(2) See Sunday Times Case, Judgment of 27 October 1978, Series A No. 30, para. 48; Silver and others v. the United Kingdom, Report of the Commission adopted on 11 October 1980, para. 282

"Firstly the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

(Para. 49 of the Judgment).

120. The Government suggest that these requirements of accessibility and foreseeability are of limited importance in the circumstances of the present case, since it does not concern a situation where the exercise of a Convention right is actually restricted by penal or other law. The primary consideration, in their view, is whether the interference was lawful under domestic law.

121. The Commission, as it stated in its Report in the Silver Case, considers that the phrase "in accordance with the law" is not merely a reference back to domestic law but "also a reference to the rule of law, or the principle of legality, which is common to democratic societies and the heritage of Member States of the Council of Europe",(1). It implies in the Commission's opinion that there must be a measure of legal protection in domestic law against arbitrary interferences by public authority with the rights protected by Art. 8(1). Even in a case which does not involve any legal restriction or possible liability to penal sanctions, the requirements of accessibility and foreseeability referred to by the Court still apply, in the Commission's view. The individual must in principle be able to ascertain with reasonable certainty from the law in what circumstances a public authority may interfere with the protected rights.

122. The degree of certainty required of the law may vary in different circumstances, as the Court indicated in the above-quoted passage in the Sunday Times Case. However, in the field of secret surveillance, such as is at issue here, the Commission considers it particularly important that the law should specify clearly the circumstances in which measures interfering with the protected rights may lawfully take place since the opportunity for the courts to

(1) Silver Report, para. 281

determine obscure or disputed questions of law is obviously limited. Accordingly if the individual is to have an adequate indication of what the legal rules applicable in this area are, it is necesary that they should be reasonably clear and unambiguous. Furthermore the law should define the circumstances in which an interference may take place with reasonable precision. As the Commission indicated in its Report in the Klass Case, the "conditions and procedures" for an interference should be provided for by law, (1).

123. The relevant law must also, in the Commission's opinion, be in conformity with the purpose of the restrictions permitted by Art. 8(2) of the Convention. In this respect the Commission refers to the Court's case-law concerning the requirement of "lawfulness" in relation to deprivations of liberty permitted under Art. 5(1) of the Convention (2). This requirement, in conjunction with those of accessibility and foreseeability, means in the present context that to be compatible with Art. 8(2) the law should not permit secret interferences with the rights guaranteed by Art. 8(1) for purposes which are out of line with those mentioned in Art. 8(2).

124. It is not necessary that the "law" for the purposes of Art. 8(2) should be statute law, still less that it should comprise a comprehensive code. As the Government point out, the "law" includes uncodified law, (3). However it plainly does not include mere statements of administrative practice. Accordingly, for an "interference" to be "in accordance with the law" it should be carried out under a system of domestic law which, when looked at in all its relevant features, can be seen, with reasonable certainty, to permit interference only in circumstances which are limited or defined with reasonable precision and in principle compatible with the purposes mentioned in Art. 8(2). It is not sufficient merely that an interference should be lawful in the sense that it is not unlawful, or that it should be carried out under a publicly announced administrative practice without binding effect on the authorities.

125. In the present case the parties are agreed, and the Commission itself is satisfied, that the interception of postal and telephone communications carried out under a warrant issued on behalf of the police in accordance with the official practice for purposes of detection of crime is lawful. This was found to be so, in relation to telephone interceptions by the Vice-Chancellor in his judgment (see paras. 35 - 42 above) and is generally recognised to be the case in relation to postal interceptions also.

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(1) Klass Case, Report of the Commission, Series B. Vol. 26, p.37, para. 63

(2) See e.g. Winterwerp Case, Judgment of 24 October 1979, Series A. Vol. 33, p. 17, para. 39

(3) Sunday Times Case, Judgment, para. 47

126. The essential issue is therefore whether the law delimits the circumstances in which such interceptions may be carried out with sufficient certainty and precision, for the purposes of Art. 8(2). To determine this issue it is necessary to consider the legal limits of the power of interception, including the question whether interceptions may lawfully be carried out without a warrant, or in circumstances or for purposes other than those referred to in the Birkett Report and White Paper, as the applicant suggests.

127. The Commission first observes that in considering the parties' submissions on these matters it is faced with disputes on a number of questions of domestic law which have not been determined by the domestic courts. For instance the parties are in dispute as to the effect of Section 80 of the Post Office Act 1969, and as to the scope of the various statutory offences applicable to Post Office employees. The Commission is not itself in a position to make an authoritative statement of the applicable domestic law, but has generally confined itself to considering to what extent it can be said with reasonable certainty, that the law delimits the relevant practices.

128. The respondent Government maintain that Section 80 of the 1969 Act now provides a statutory power, and the sole legal basis, for the issue of interception warrants and, by its reference to the laying of a requirement "for the like purposes and in the like manner as, at the passing of this Act a requirement may be laid on the Postmaster General ..." restricts the purposes for which, and manner in which, a requirement may lawfully be laid to the purposes for which and manner in which requirements could previously be laid on the Postmaster General, namely those described in the Birkett Report. In their submissions (see paras. 86 - 89 and 97 above) they maintain that the effect of Section 80 is thus to provide a statutory basis for the following features of relevant practice:

- interception may take place only pursuant to a warrant signed personally by the Secretary of State; any other interception involving a Post Office employee is a criminal offence;

- a warrant (in the present context) may only be issued for the detection or prevention of crime;

- it must specify the relevant name, address and telephone number; it must be time-limited; it can only be addressed to the Post Office, not the police;

- the Post Office is only required and empowered to make information available to "designated persons holding office under the Crown";

The applicant, on the other hand, suggests that Section 80 does not confer or delimit a "power" to intercept communications, but has much more limited effect, (see para. 58 above).

129. The Commission has first considered whether the law is such that an interception may only take place pursuant to a warrant issued under Section 80 of the 1969 Act. It first notes that in its terms Section 80 only delimits the circumstances in which the Post Office may be required to take steps to provide information about matters which it transmits. Its purpose appears to have been, as the applicant submits, to place a legal duty on the new Post Office corporation to carry out interceptions, in place of the ministerial duty formerly incumbent on the Postmaster General, rather than to lay down conditions and procedures for carrying out such interceptions. It does not itself prevent the Post Office from carrying out interceptions when it is not under a legal obligation to do so. There is nothing in it, for instance, to prevent a Secretary of State from issuing a warrant authorising interception for any purpose whatever, or to prevent the Post Office acting on the basis of such a warrant or even on the basis of a request by the police, although they would not be under a legal obligation to do so.

130. It does not therefore appear to the Commission that Section 80 limits in any way the circumstances in which interceptions may be carried out. It only limits the circumstances in which the Post Office may be required to carry them out.

131. On the other hand it appears probable that a "warrant" could only afford a statutory defence to an offence under Section 58 (1) of the Post Office Act 1953 (see para. 27 above) or to any of the offences mentioned in para. 1(1) of Schedule 5 to the 1969 Act (see para. 34 above) if it imposed a duty to carry out the interception. Under both these provisions the relevant defence is to have acted "in obedience" to a warrant, implying performance of an obligation, and not mere compliance with a request or authority. Accordingly it appears that a "warrant" could only form the basis of a defence if it amounted to a valid "requirement" under Section 80. A request by the police plainly could not found the relevant defence. Thus although Section 80 does not of itself restrict the circumstances in which interception may lawfully take place, it appears to do so in conjunction with the statutory offences.

132. However an interception carried out by a Post Office employee without a warrant under Section 80 is still not necessarily an offence. As the applicant points out, an essential ingredient of an offence under the above-mentioned provisions is that the employee should have been acting "improperly" or "contrary to his duty". The applicant suggests that an employee would not be so acting if he acted on the orders of a superior or, unless forbidden by a superior, at the request of a senior police officer. The Government dispute this.

133. The Commission has not been referred to any interpretation of these phrases by the domestic courts and finds that their precise effect is uncertain. However, even if the orders of a superior might afford some protection to an individual Post Office employee of junior rank carrying out an interception in the absence of a warrant, it would appear that the superior himself would almost certainly be guilty of an offence. Furthermore, the Commission finds it difficult to conceive of circumstances in which a Post Office employee could carry out an interception for purposes unconnected with the operation of the postal or telecommunication systems, and without a warrant or verbal authority given in emergency, without being said to act improperly or contrary to his duty. Accordingly, although the matter is not altogether free from doubt, it appears to the Commission reasonably certain that an interception of either mail or a telephone conversation carried out by a Post Office employee at the request of the police would involve an offence unless carried out in obedience to a warrant or emergency verbal authority amounting to a valid "requirement" under Section 80 of the 1969 Act.

134. The applicant also points out that the relevant statutory offences apply only to employees of the Post Office and that other persons carrying out interceptions of telephone conversations at least, would not be guilty of an offence. In the Commission's view this limitation on the scope of the offences does not seem to be of great practical significance in the context of the present case. So far as concerns mail, the applicant himself points out that unauthorised interference with mail would normally constitute the tort of unlawful interference with chattels. The existence of this tort appears to provide a degree of legal protection against interference with mail by persons other than Post Office employees. Indeed the applicant accepts that mail cannot lawfully be intercepted without a warrant. So far as concerns telephone interceptions the Commission notes that the present case concerns only the interception of such conversations as they pass through the public telecommunication system operated by the Post Office. The applicant does not appear to dispute the Government's contention that as a practical matter such interceptions would normally require the co-operation of Post Office personnel. He submits that a Post office employee would not be guilty of an offence if he facilitated an interception by another person (such as a police officer). However Section 20 of the Telegraph Act 1868, under which a Post Office employee is guilty of an offence inter alia if he shall "... in any way make known" the contents of a message prima facie appears wide enough to cover the situation where the employee gave practical assistance necessary to enable an unauthorised person to gain knowledge of messages.

135. Taking these various matters into account the Commission considers it unlikely that the police could lawfully effect or obtain the interception of a postal or telephone communication passing through the services operated by the Post Office unless they were in possession of a warrant amounting to a valid "requirement" under Section 80 of the 1969 Act.

136. It remains to be considered to what extent the circumstances in which such a "requirement" may be issued are circumscribed by law. In this respect the Commission notes that the respondent Government's submissions as to the effect of Section 80 are based on the premise that it defines the power to intercept by reference to the practice which existed as at the passing of the Act. The Commission further notes that the Vice-Chancellor, in his judgment apparently accepted that Section 80 referred back to the previous administrative arrangements for the issue of the Home Secretary's warrant which were referred to in the Birkett Report, (1). On the other hand he was also plainly of the view that the system of safeguards described in the Birkett Report existed as a matter of administrative practice only and not as a matter of established law, (1). Indeed he expressed the view that it could, as a matter of law, "at any time be altered without warning or subsequent notification".

137. The Commission for its part cannot find in Section 80 any clear legal regulation of the conditions and procedures for the issue of "requirements" or "warrants". The section makes no express reference to previous practice. It appears merely to authorise the laying of a requirement on the Post Office for whatever purpose and in whatever manner a ministerial duty might previously have been lawfully placed on the Postmaster-General. Its intention appears to be only to place the Post Office, for the purpose of carrying out interceptions in an equivalent position vis-à-vis the Government to that of a Minister so that the Post Office can be required to provide information under Section 80 whenever the Postmaster General could lawfully have been required to provide it as a matter of ministerial duty.

138. However, it does not appear that, before the 1969 Act, there was any clear legal restriction either of the purposes for which, or the manner in which, a ministerial duty could be imposed on the Postmaster General. Part I of the Birkett Report suggests that, at most, any legal restriction on the purposes for which warrants could be issued was generally related to considerations of state security and public order, and in no way precise, (2). The system of issuing warrants for telephone interceptions in particular was established as an administrative measure only and it is very doubtful whether the purposes for which such warrants could be issued were subject to any legal limitation whatever. The Birkett Report also indicates clearly that it was only as a matter of practice that, in the criminal field, the issue of warrants was restricted to cases involving "serious" crime.

(1) [1979] 2 All ER at p.641

(2) See e.g. Birkett Report, paras. 25, 21 and 27

139. Furthermore, particularly as regards telephone interceptions, the Commission considers it by no means clear that the issue of a warrant by a Secretary of State was the only manner in which, as a matter of law, a duty to provide information could have been imposed on the Postmaster General. However the Birkett Report in any event indicates that the procedures for issuing a Secretary of State's warrant were governed by practice not law. Thus administrative practice alone governed such questions as which Secretary of State could issue a warrant. (Birkett Report, paras. 54 - 55); the content of the warrant and the number of persons a single warrant could cover, (para. 56); the persons or authorities at whose request warrants might be issued, (para. 62), and the question of time limits on warrants and their duration, (para. 75).

140. The Commission is unable to read Section 80 as altering the administrative practices which governed the issue of warrants to the Postmaster General into rules of law governing the issue of warrants to the Post Office. Indeed the Government themselves do not appear to suggest that the relevant practices are given statutory affect in their entirety. Thus they maintain that the "purpose" of a requirement under Section 80 is now limited to the "detection of crime", although the practice described in the Birkett Report was more restricted, namely the detection of "serious crime", a concept which was itself defined. However this definition has since been extended as a purely administrative matter, (see para. 52 above). The Commission has difficulty in seeing on what basis part only of the previous practice concerning the "purpose" for which warrants could be issued could be considered as incorporated into statute.

141. The Commission also finds it surprising, if Section 80 does regulate the purpose and manner of issuing interruption warrants in the manner contended by the Government, that this fact should not be mentioned in the White Paper. The White Paper itself, the Diplock Report and the Home Secretary's statement in Parliament on 1 April 1980 (see para. 43 above) all suggest, on the contrary, that the arrangements are laid down as an administrative matter only and are subject to change by Governmental decision of which Parliament will be informed.

142. It thus appears to the Commission that Section 80 of the 1969 Act does not regulate either the purpose for which warrants may be issued or their content or duration in the manner contended by the Government. In any event it fails to do so with any reasonable degree of clarity.

143. The position therefore appears to be as follows. Firstly it appears reasonably certain that a postal or telephone communication passing through the relevant public service could not lawfully be intercepted for police purposes save in obedience to a valid warrant under the hand of a Secretary of State. Secondly it does not appear that the purposes for which such warrants may be issued are subject to any, save possibly the very broadest, legal restriction. In any event it cannot be stated with any reasonable degree of certainty that such restrictions exist. Thirdly the scope, form, content and duration of such warrants similarly does not appear to be defined by law, or at any event it cannot be stated with reasonable certainty that they are so defined. Fourthly other matters such as the procedures whereby such warrants are applied for, the persons or authorities who may apply for them, and the handling of information obtained are regulated by administrative practice, not by rules of law.

144. Accordingly in the Commission's opinion it cannot be said, at least with any reasonable certainty, that domestic law lays down even the principal conditions or procedures for the issue of warrants authorising postal and telephone interceptions on behalf of the police. In the Commission's opinion such interceptions are not therefore carried out "in accordance with the law" for the purposes of Art. 8 (2).

145. Conclusion

The Commission concludes by 11 votes with 1 abstention that there has been a breach of the applicant's rights under Art. 8 of the Convention by reason of the admitted interception of his telephone conversation and the law and practice governing the interception of postal and telephone communications on behalf of the police.

C. Article 8 of the Convention in relation to the question of telephone "metering"

146. The applicant maintains that his telephone has been "metered" by the Post Office on behalf of the police, and that details of the numbers he has called have thus been recorded and communicated to the police. He observes that "metering" is not subject to any form of legal regulation and alleges the breach of Art. 8 of the Convention. The Government explain that "metering" takes place for reasons connected with the operation of the telephone system, such as the checking of accounts, and deny that the applicant's telephone has been metered at the request of the police, or that the police obtained any records of metering. They also maintain that metering does not involve any interference with the rights protected by Art. 8 (1) of the Convention.

147. The Commission first notes that the only evidence the applicant has produced to suggest that his telephone has been "metered" is a list of persons whose premises, according to him, were searched at the time of his arrest in March 1977, and who had allegedly telephoned shortly before. However even if the searches did take place in the circumstances alleged by the applicant, this does not show that they were effected on the basis of information obtained by "metering". If information about the persons the applicant had been telephoning did lead to the searches, it could equally well have been obtained by interception of his lines.

148. In the circumstances the Commission does not consider it established that information obtained by metering was communicated to the police in the present case.

149. It is true, as the applicant points out, that there appears to be nothing in United Kingdom law to prevent information so obtained from being passed by the Post Office to the police. In the Commission's view an issue would arise under Art. 8 if it were shown that this happened in practice. However no evidence has been produced to show that the Post Office does pass such information to the police in the absence of a court order compelling it to do so. The Commission does not consider it necessary to investigate that matter any further after the finding already made on the interception.

Conclusion

150. The Commission concludes by 7 votes against 3, with 2 abstentions, that it is unnecessary in the circumstances of the present case to investigate whether the applicant's rights were also interfered with by "metering".

D. Article 13 of the Convention

151. The applicant maintains that there is no effective remedy available to him before a national authority in respect of his complaints under Art. 8 of the Convention. He also maintains that even if the system of interception conforms with Art. 8, no effective remedy is available in respect of any particular breach which might occur, because of the impossibility of discovering whether an interception has taken place. He alleges the breach of Art. 13 of the Convention, which is in the following terms:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

152. In the Klass Case the Court held that "Art. 13 must be interpreted as guaranteeing 'an effective remedy before a national authority' to everyone who claims that his rights and freedoms under the Convention have been violated," (1). The Commission has itself since held that it does not go so far as to guarantee "a remedy by which legislation could be controlled as to its conformity with the Convention", (2).

153. In the present case there is accordingly no breach of Art. 13 in so far as the applicant has no remedy in respect of his complaint that United Kingdom law, as such, breaches his rights under the Convention by permitting measures of surveillance. The principal issue in the Commission's opinion is whether in the United Kingdom there is any "effective remedy" available in respect of specific interception measures which might be considered to breach Art. 8.

154. As to this question the Commission notes that the effectiveness of remedies in respect of measures of secret surveillance is inevitably limited by the fact of the secrecy. As the Court pointed out in the Klass Case an "effective remedy" in such a case must therefore mean "a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance," (Judgment, para. 69).

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(1) Klass Judgment, para. 64.

(2) Case of Young, James Webster, Report of the Commission adopted on 14 December 1979, para. 177.

155. The Commission accepts that in principle remedies are available in the United Kingdom, in both the civil and criminal courts, in respect of interceptions which are carried out unlawfully, for instance by a Post Office employee acting "improperly" and without a warrant. These include criminal prosecution and application to the civil courts to restrain unlawful interceptions or the disclosure of information unlawfully obtained, as the Government point out, (see para. 109 i - iii above). It also accepts that such remedies are effective, in respect of unlawful interceptions, within the limits inevitably set by the secrecy of the United Kingdom system.

156. However the position is otherwise as regards interceptions carried out under a warrant. The absence of legal effect to the rules governing such interceptions, to which the Commission has already referred, inevitably removes the possibility of any effective review by the courts. Furthermore there is no other independent authority with jurisdiction to afford a remedy to an individual claiming to have been the subject of a measure of interception involving a breach of the applicable administrative rules. The Secretary of State who has himself issued the relevant warrant does not, in the Commission's opinion, possess the necessary independence to provide an "effective remedy" under Art. 13, (c.f. Klass Judgment para. 67). The Commission notes furthermore that the function of the judge appointed to review the operation of the system (see para.49 above), is to carry out a continuing review of the system as a whole. His function does not coincide with that of the "national authority" referred to in Art. 13, namely to decide on individual claims and, if appropriate, afford redress, (see Klass Judgment, para. 64).

157. Accordingly where an individual claims that an interception lawfully carried out under a warrant nonetheless infringes Art. 8, no effective remedy is available to him in the Commission's opinion. In so far as the law thus in principle denies the applicant an "effective remedy", there is therefore a breach of his rights under Art. 13 in the Commission's view.

Conclusion

158. The Commission concludes by 10 votes against 1 with 1 abstention that there has been a breach of the applicant's rights under Art. 13 of the Convention in that United Kingdom law does not provide an "effective remedy before a national authority" in respect of interceptions carried out under a warrant.

Secretary to the Commission

(H. C. KRUGER)

President of the Commission

(C. A. NØRGAARD)

Separate opinion by Mr Opsahl under
Article 8 of the Convention
in relation to the question of telephone "metering"

I abstained on the vote recorded in para. 150 of the Report because I was not quite sure of its implications. True, in view of the finding on interception further investigation of the facts about telephone "metering" might be considered less necessary in the present case, and in any event would probably be very difficult. Unfortunately, however, such difficulty is likely to arise in every case on this point, and this in itself might have called for an examination of the legal aspects of such a situation. When it has to be concluded that there is nothing in law to prevent an interference with privacy as protected by Article 8 and it is not known, perhaps impossible to show, what happened, one cannot in practice establish the possible breach of that Article by abuse of the data obtained by telephone "metering".

In my opinion this legal and factual vacuum raises another issue under the Convention. The lack of safeguards against abuse of data obtained by the Post Office by telephone "metering" could be examined in the light of Article 1 as a possible failure to secure the right guaranteed in Article 8. In the absence of such an examination I do not propose any conclusion on this point in the present case. But I would point out that the finding of such a failure to secure the right, or to protect against possible violations of it, would not depend on evidence that the right itself had actually been violated. It could represent a violation of the obligations of the State under the Convention without amounting to a breach of the right of the particular individual who has made the application. I would therefore prefer to call it a case of non-implementation, rather than violation, of his right.

The questions of interpretation and terminology arising here do not seem to fall outside the competence of the Commission in a case brought under Article 25: Exactly where a violation in the ordinary sense is very difficult to establish, the finding of a failure to protect against violations would be of interest to the individual who has made the allegations without being able to prove them. For the reasons given, these observations regarding the issue under Article 1 seem sufficient to me in the present case.

Dissenting opinion of MM Melchior and Weitzel
under Article 8 of the Convention
in relation to the question of telephone "metering"

The position which we adopted in relation to the vote on "metering" (para. 150) was that it was appropriate to examine the merits of the applicant's allegations.

On the one hand we agree with the separate opinion of Mr Opsahl which approaches the matter at issue by reference to Arts 1 and 8 of the Convention in combination with one another.

On the other hand it does not appear to us to be in contradiction with that point of view to express an opinion on the question under Art 8 itself.

In light of the Klass Case it does not appear to us to be satisfactory to refuse to examine the complaint on the ground that no evidence has been produced that the Post Office did communicate to the police, at their request, a list of the telephone numbers contacted by the applicant. In any case he has produced some evidence to this effect (para. 147 supra). That, however, is not the decisive element. It is in the very nature of such a procedure that it will not be brought to the knowledge of the person under surveillance, and that he cannot himself, except by indirect presumptions, establish that he has been subjected to it. Furthermore the file shows that the applicant was a person plainly liable to be subjected to such a measure.

Such a procedure allows the persons with whom a subject has had a telephone contact to be identified and will thus tend to assist the investigations of the police and prosecuting authorities. It is moreover an easier and less complicated procedure than telephone interception in the true sense.

No doubt the use of this technique can be justified by one or more of the general interest objectives referred to in Art. 8 (2). Apart from this it must be "in accordance with the law" and accompanied by guarantees to ensure that it is not used excessively, to the detriment of private life.

In fact the state of United Kingdom law does not appear to satisfy these requirements. The only applicable rule is that the Post Office is not under any obligation and only has a duty to communicate such information if an order to this effect is addressed to it by a court. But no legal provision prevents the Post Office from voluntarily communicating such information to the police authorities at their request. Furthermore there are no rules defining the circumstances in which this procedure can be used, the procedure to be followed in resorting to it, the controls to be exercised when it is used etc. Consequently it appears to us that there was a violation of Art. 8 in this respect.

APPENDIX I

HISTORY OF PROCEEDINGS

Item	Date	Note
Introduction of application	19 July 1979	
Registration of application	23 July 1979	
Commission's deliberations and decision to invite the respondent Government to submit written observations on admissibility and merits of the application	12 May 1980	MM G. Sperduti, Acting President J.E.S. Fawcett C.A. Nørgaard E. Busuttil B. Daver T. Opsahl C.H.F. Polak J.A. Frowein G. Jörundsson R.J. Dupuy G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior J. Sampaio J.A. Carrillo
Receipt of Government's observations	24 October 1980	
Receipt of applicant's observations	30 January 1981	
Commission's deliberations and decision to invite the parties to appear at a hearing on admissibility and merits of the case	17 March 1981	MM G. Sperduti, Acting President J.E.S. Fawcett C.A. Nørgaard E. Busuttil L. Kellberg B. Daver J.A. Frowein G. Jörundsson G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior J.A. Carrillo

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Item	Date	Note
Hearing on admissibility and merits; Commission's deliberations and decision on admissibility	13 July 1981	MM C.A. Nørgaard, President G. Sperduti J.A. Frowein F. Ermacora J.E.S. Fawcett M.A. Triantafyllides E. Busuttil B. Daver T. Opsahl G. Tenekides S. Trechsel B. Kiernan M. Melchior J. Sampaio A. Weitzel For the applicant Mr Colin Ross Munro QC Mr Daniel Serota Mrs Jane Gallogly Mr Lawrence Gallogly For the Government Sir Michael Havers QC, Attorney General Mr David Edwards Mr David Vaughan Mr Nicolas Bratza Mr Henry Steel Mr John Semken Mrs Sally Evans Miss Philippa Drew Miss Amy Edwards
Commission's decision to grant the applicant free legal aid	15 October 1981	MM J.A. Frowein, Acting President G. Jörundsson G. Tenekides B. Kiernan J. Sampaio A.S. Gözübüyük A. Weitzel

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Item	Date	Note
Communication of text of admissibility decision and invitation to parties to submit further observations on merits	23 October 1981	
Government's letter concerning procedure and friendly settlement	25 November 1981	
Applicant's letter concerning procedure and friendly settlement	8 February 1982	
Commission's deliberations and consideration of state of proceedings	9 March 1982	MM C.A. Nørgaard, President J.A. Frowein J.E.S. Fawcett M.A. Triantafyllides E. Busuttil L. Kellberg T. Opsahl G. Jörundsson G. Tenekides S. Trechsel B. Kiernan M. Melchior J. Sampaio J.A. Carrillo A.S. Gözübüyük A. Weitzel J.C. Soyer H.G. Schermers
Receipt of Government's further observations on merits	27 April 1982	

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Item	Date	Note
Receipt of applicant's further observations on merits and friendly settlement proposals	28 September 1982	
Government's letter on friendly settlement	27 October 1982	
Commission's deliberations and final votes on merits of the case	13 December 1982	MM C.A. Nørgaard, President G. Sperduti J.A. Frowein J.E.S. Fawcett E. Busuttil T. Opsahl G. Tenekides S. Trechsel B. Kiernan M. Melchior J. Sampaio A. Weitzel
Adoption of the Report	17 December 1982	MM C.A. Nørgaard, President G. Sperduti J.A. Frowein J.E.S. Fawcett G. Tenekides S. Trechsel B. Kiernan M. Melchior J.A. Carrillo A.S. Gözübüyük A. Weitzel J.C. Soyer