JUDICIARY OF
ENGLAND AND WALES

Summary of the Judgment in the case of:

The Queen on the application of The National Council for Civil Liberties (Liberty)

and

(1) Secretary of State for the Home Department and
(2) Secretary of State for Foreign and Commonwealth Affairs

27 April 2018

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

1. The High Court has today given judgment in this case. The Court consisted of a panel of two Judges known as a Divisional Court: Lord Justice Singh (who is a Judge of the Court of Appeal) and Mr Justice Holgate (who is a High Court Judge).

2. This claim for judicial review concerns the compatibility of the Investigatory Powers Act 2016 ("IPA") with European Union law, in particular the EU Charter of Fundamental Rights. For present purposes the Court was only concerned with part of the claim, a challenge to the compatibility of Part 4 of the IPA with EU law. Part 4

was brought into force (although not in its entirety) on 30 December 2016 and substantially re-enacts the Data Retention and Investigatory Powers Act 2014 ("DRIPA").

3. In particular this case concerns the power given to the Secretary of State by section 87(1) of the IPA to issue "retention notices" to telecommunications operators requiring the retention of data. It is important to note that this power relates to *retention* and not *access* to such data. It is also important to note that, although the power affects a wide range of private information to do with communications, it does not concern the *content* of such communications, such as emails or text messages.

4. It is accepted by the Defendants that Part 4 is incompatible with EU law in two respects, just as the DRIPA had been declared to be incompatible by the Court of Appeal in January 2018. One of the issues in the present case was what remedy, if any, should be granted by the Court to reflect that incompatibility.

5. Having set out the factual and legal background, the Court considered the question of the appropriate remedy at paras. 88-101 of its judgment. At para. 100 of its judgment the Court stated:

> "In all the circumstances of this case, therefore, we have come to the conclusion that the appropriate remedy to make in respect of what are acknowledged by the Defendants to be inconsistencies with EU law is to grant a declaration (i) specifying the two respects in which there is an incompatibility; and (ii) stating that those must be remedied within a reasonable time. Further, we propose to state in the declaration (iii) that a reasonable time would be 1 November 2018. We also propose to give the

> parties liberty to apply to vary the order or the terms of the declaration we grant if subsequent events (which must be supported by evidence) require any change to the timetable. If necessary this Court will hold a further hearing to consider any application if it is made."

6. The Court also considered nine specific issues, at paras. 102-185 of its judgment. It decided either that those grounds of challenge did not arise in the circumstances of this case; or that they should be rejected; or that the claim should be stayed in respect of certain grounds pending the decision of the Court of Justice of the European Union in a reference which has already been made to it by the Investigatory Powers Tribunal for a preliminary ruling in a case brought by Privacy International.

7. The Court concluded, at paras. 186-187, as follows:

> "186. For the reasons we have given this claim for judicial review succeeds in part, because Part 4 of the Investigatory Powers Act 2016 is incompatible with fundamental rights in EU law in that in the area of criminal justice:
>
> (1) access to retained data is not limited to the purpose of combating 'serious crime'; and
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> (2) access to retained data is not subject to prior review by a court or an independent administrative body.
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> 187. We have concluded that the legislation must be amended within a reasonable time and that a reasonable time would be 1 November 2018, which is just over 6 months from the date of this judgment. We have also concluded that the appropriate remedy is a declaration to reflect our judgment."

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