2007

(Hamed v R SC, 2011, at [8])

ORDER RESCINDING EXISTING SUPPRESSION ORDERS IN RESPECT OF THE JUDGMENT OF 2 SEPTEMBER 2011, MADE BY THE HIGH COURT ON 15 SEPTEMBER 2011. IN PLACE OF THOSE ORDERS, ORDERS PROHIBITING PUBLICATION IN NEWS MEDIA, ON THE INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASES OR PUBLICATION BY ANY OTHER MEANS UNTIL FINAL DISPOSITION OF THE TRIAL ORIGINAL JUDGMENT.
REDACTED VERSION MAY BE PUBLISHED.

IN THE SUPREME COURT OF NEW ZEALAND

SC 125/2010
SC 128/2010
SC 129/2010
SC 130/2010
SC 131/2010
SC 132/2010
SC 133/2010
SC 135/2010
SC 138/2010
SC 139/2010
SC 2/2011
[2011] NZSC 101

OMAR HAMED
TAME WAIRERE ITI
PHILLIP PUREWA
MARAKI TEEPA
EMILY FELICITY BAILEY
TRUDI PARAHA
TE RANGIWHIRIA KEMARA
RAWIRI KIYOMI ITI
URS PETER SIGNER
RUANATIRI HUNT
VALERIE MORSE

v

THE QUEEN

3rd

Hearing: 3 and 4 May 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and Gault JJ

Counsel: A T I Sykes and T M Wara for Appellant Teepa
R E Harrison QC, T B Afeaki and G M Fairbrother for all other Appellants
J C Pike and R J Collins for Crown

Judgment: 2 September 2011

JUDGMENT OF THE COURT

A **The appeals of Mr Tame Iti, Mr Te Rangiwhiria Kemara, Mr Urs Signer and Ms Emily Bailey are dismissed.**

B **The appeals of the other appellants are allowed in part. The video surveillance evidence (other than footage of vehicles on Reid Road) is inadmissible against those appellants. All the other disputed evidence is admissible against them.**

REASONS

	Para No
Elias CJ	[1]
Blanchard J	[90]
Tipping J	[209]
McGrath J	[255]
Gault J	[281]

ELIAS CJ

[1] The appeal concerns the powers of search of the police, raising points of constitutional principle and Bill of Rights protections. It can readily be accepted that the police need legal powers to investigate apparently serious criminal offending and that such powers may include powers of surveillance. Parliament has not however provided legislative authority for covert filmed surveillance, despite recommendations that it should do so. The courts cannot remedy the deficiency through approval of police action taken in the absence of lawful authority without

destruction of important values in the legal system, to the detriment of the freedoms guaranteed to all.

The appeal

[2] In bush, on Tuhoe-owned lands in the Urewera Ranges, it is alleged that the appellants participated between November 2006 and October 2007 in military-style exercises using firearms, live ammunition, and Molotov cocktails. The appellants have connections with the privately-owned lands (those who are of Tuhoe descent either as beneficiaries of the owner incorporations or through whakapapa, and the other appellants as their invitees). All appellants are charged with offences contrary to the Arms Act 1983 arising out of the possession and use of the firearms and Molotov cocktails.[1] For such offences the maximum penalty is imprisonment for four years.[2] Four of the appellants (Te Rangiwhiria Kemara, Tame Iti, Urs Signer and Emily Bailey) are also charged under s 98A of the Crimes Act 1961 with participation in an organised criminal group. The indictment simply recites the terms of s 98A(1) in describing those participating as "knowing that their participation contributed to the occurrence of criminal activity, or [being] reckless as to whether their participation may have contributed to the occurrence of criminal activity". Although the objective of the criminal group (a necessary element of the definition of an "organised criminal group" under s 98A(2)) is not specified in the indictment, it has been treated in the lower Courts as being the objective of seizing by force an area of land, believed to be within the tribal lands of Tuhoe, through serious acts of violence.[3] Section 98A is an offence which, at the relevant time, carried a maximum penalty of imprisonment for five years.[4]

[3] The appeal concerns pre-trial rulings to admit prosecution evidence challenged as having been improperly obtained both through trespass and in breach

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1 Arms Act 1983, s 45(1)(b).

2 Section 45(1).

3 See *R v Bailey* HC Auckland CRI-2007-085-7842, 15 December 2009 [*Bailey – Admissibility*] at [82] and *Hunt v R* [2010] NZCA 528, [2011] 2 NZLR 499 at [91]. A letter from the Crown Solicitor at Auckland in respect of one of the appellants recites 11 offences of serious violence alleged to be within the objectives of the group, including murder, arson, kidnapping, and using a firearm against a law enforcement officer.

4 Crimes Act 1961, s 98A(1). The maximum penalty was raised to 10 years by s 5(1) of the Crimes Amendment Act 2009.

of the protection against unreasonable search and seizure contained in s 21 of the New Zealand Bill of Rights Act 1990. The evidence includes physical items left on the land after the exercises and photographs of such items on site. It also includes film obtained from motion-activated hidden cameras placed by the police over a number of months on the Tuhoe-owned land in the areas where the exercises were expected to be held. The prosecution relies on these films for identification of the accused and as a record of what they were doing.

[4] The facts are fully covered in the reasons given by Blanchard J and need not be repeated. Much of the investigation carried out by the police between November 2006 and October 2007 did not yield anything of evidential value (principally because exercises occurred in different locations than had been anticipated by the police or because expected exercises were cancelled).[5] The admissibility of evidence obtained from police investigations on the land in November 2006 was not in dispute on the appeal. In the result, the evidence in issue concerned police investigations undertaken in January 2007 on Paekoa Track, in June 2007 at Rangitihi, in August 2007 near Whetu Road and of vehicle movements along Reid Road, and in September and October 2007 near Whetu Road.

[5] In the High Court, most of the disputed evidence (including all the filmed surveillance) was found by Winkelmann J to have been improperly obtained[6] but was admitted under s 30 of the Evidence Act 2006 on the basis that its exclusion would be disproportionate to the impropriety.[7] On appeal, the Court of Appeal, disagreeing with the High Court, held that the police entries, physical searches and surveillance filming on the lands was authorised by warrants issued under s 198 of the Summary Proceedings Act 1957.[8] While no s 198 warrant had been obtained for the August entry on to private land at Whetu Road, the Court of Appeal held that the entry was lawful pursuant to an implied licence, since the area was used for recreation by the public without apparent objection from the owners.[9] With respect

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5 The police knew of the planning for the exercises through their monitoring of telephone conversations between the accused under interception warrants the validity of which is not in issue on the appeal.

6 *R v Bailey* HC Auckland CRI-2007-085-7842, 7 October 2009 [*Bailey – Propriety*] at [256].

7 *Bailey – Admissibility* at [108].

8 *Hunt v R* [2010] NZCA 528, [2011] 2 NZLR 499.

9 At [70]–[74].

to the film of vehicle movements along Reid Road, the Court accepted that the placement of the camera had entailed trespass but held that there was no breach of s 21 of the New Zealand Bill of Rights Act and that the evidence should be admitted under s 30 of the Evidence Act.[10] The Court of Appeal indicated that, even if it had been of the view that the evidence obtained pursuant to the s 198 warrants had been improperly obtained (contrary to its view that the warrants were valid), it would have admitted the evidence under s 30 for reasons similar to those given by Winkelmann J.[11]

[6] On further appeal to this Court, I agree with the reasons given by Blanchard J for holding, contrary to the view taken in the Court of Appeal, that the warrants under s 198 of the Summary Proceedings Act (with the exception of the warrant of June 2007 and possibly that of September 2007)[12] did not authorise the police entry on to the Tuhoe lands either for the purposes of the physical searches undertaken or for the purpose of setting up the hidden cameras and later retrieving the film taken by them. Section 198 authorises a warrant to be issued for search for "things" believed, on reasonable grounds, to be on the land at the time the warrant is issued. That follows from the language employed in the section and is also the interpretation to be preferred in application of s 6 of the New Zealand Bill of Rights Act. (I do not share the doubts expressed by Tipping J as to the application of s 6 because the powers conferred by s 198 are limits on fundamental rights and freedoms.) The authorisation of search under s 198 for physical things believed to be on the land includes observation and recording which is incidental to the search and any seizure but could not authorise the surveillance of people undertaken through the covert filming. No statutory authority other than s 198 of the Summary Proceedings Act was suggested to authorise entry. And, as the Law Commission report on *Search and Surveillance Powers* concluded, no statutory authority has been provided for surveillance of the kind undertaken through the hidden cameras.[13] That was also the conclusion of the Court of Appeal in *R v Gardiner*.[14]

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10 At [75] and [89].
11 At [90].
12 See Blanchard J at [153]–[154].
13 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [1.14] and [11.38]–[11.40].
14 *R v Gardiner* (1997) 15 CRNZ 131 (CA) at 136.

[7] I agree also with the reasons given by Blanchard J for rejecting the suggestion that the police had implied licence to enter for investigative purposes.[15] The limited licence accepted by this Court in *Tararo v R*[16] (which excuses from trespass someone who approaches a dwelling house to speak to the occupier) has no application to the present case. Nor does any licence to enter arise out of the circumstance that part of the land (particularly that adjacent to Whetu Road) was accessible and used by members of the public for recreational purposes. In the absence of lawful authority, the police trespass in entering the land meant that all evidence resulting from such entry (derived both from the physical scene examination and the covert filming) was "improperly obtained", requiring consideration of its exclusion under s 30 of the Evidence Act.

[8] I agree also that the evidence was improperly obtained not only by reason of the trespass but because it constituted unreasonable search and seizure, contrary to s 21 of the New Zealand Bill of Rights Act. To his conclusion of unreasonable search, Blanchard J would make an exception for the filming of vehicle movements along Reid Road in August, on the basis that such filmed observation was not a search within the meaning of s 21.[17] I differ with respect to the reasoning relating to the Reid Road filming. I consider it to have been unreasonable search, although I would admit it in application of s 30 of the Evidence Act.[18]

[9] In addition, I would go further than Blanchard J in respect of the filmed surveillance. I consider that the impropriety in relation to such surveillance arose not only because the police were acting unlawfully in trespassing on the land (the warrants obtained under s 198 of the Summary Proceedings Act being invalid), but because it is unlawful to undertake secret filming of people in the absence of any authority prescribed by law. No such authority was available here.

[10] I agree with the application in New Zealand of the purposive approach to what constitutes unreasonable search adopted by the Supreme Court of Canada in

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15 At [157]–[159].
16 *Tararo v R* [2010] NZSC 157.
17 At [171].
18 See below at [78]–[81].

Hunter v Southam Inc.[19] By it, both what constitutes "search and seizure" and what is "unreasonable" must be assessed in the context of the values underlying s 21. Section 21 protects personal freedom and dignity from unreasonable and arbitrary State intrusion. Whether such intrusion is unreasonable or arbitrary is objectively assessed according to the standard of what limitation on personal freedom can be "demonstrably justified in a free and democratic society".[20] The right protects privacy but, more fundamentally, it holds a constitutional balance between the State and citizen by preserving space for individual freedom and protection against unlawful and arbitrary intrusion by State agents.[21] It describes a "right to be let alone".[22] Police investigation which invades such private space constitutes search within the meaning of s 21. It may be undertaken through remote technology or through in person observation. I therefore take the view, differing from that expressed by Blanchard J,[23] that s 21 guarantees reasonable expectations of privacy from State intrusion.

[11] Whether surveillance amounts to a State intrusion upon reasonable expectations of privacy depends on wider context than property ownership. The values protected by s 21 are not simply property-based, as were the common law protections which preceded it. Rather, they provide security against unreasonable intrusion by State agencies into the personal space within which freedom to be private is recognised as an aspect of human dignity. Such privacy interest has been treated in the Supreme Court of Canada as "the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself".[24] The privacy protected by s 21 may be invaded as much through secret filming of individuals as through recording private communications, as the Canadian

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19 *Hunter v Southam Inc* [1984] 2 SCR 145 at 156–160 per Dickson J.

20 New Zealand Bill of Rights Act 1990, s 5.

21 It is not necessary for the purpose of the present case to consider the extent to which s 21 protects values other than a reasonable expectation of privacy (a matter left open in *Katz v United States* 389 US 347 (1967), and in New Zealand in *R v Jefferies* [1994] 1 NZLR 290 (CA) at 302–303 and *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA)).

22 Described as "the most comprehensive of rights and the right most valued by civilized men" in *Olmstead v United States* 277 US 438 (1928) at 478 per Brandeis J. See also the discussion in *Katz v United States* 389 US 347 (1967) at 350 per Stewart J.

23 Compare Blanchard J at [161].

24 *R v Duarte* [1990] 1 SCR 30 at 46 per La Forest J. See also *R v Jefferies* [1994] 1 NZLR 290 (CA) at 319 per Thomas J who referred to "the right of self-determination and control over knowledge about oneself and when, how and to what extent it will be imparted" as one of the "variety of related values" making up the concept of privacy protected by s 21.

Supreme Court has recognised.[25] In New Zealand, Parliament has provided authority for the interception of communications[26] but has not provided equivalent authority with respect to secret filming.

[12] In principle, there is no reason why activity in public space should, by virtue of that circumstance alone, be outside the protection of s 21.[27] It is consistent with the values in the New Zealand Bill of Rights Act that people may have reasonable expectations that they will be let alone by State agencies even in public spaces in their private conversations and conduct.[28] There is public interest in maintaining as a human right space for privacy in such settings. And in an age when technology makes surveillance impossible to resist, anywhere, the human right described in s 21 would be substantially obliterated if its scope is limited to what cannot be seen or heard by State agencies from public space. It follows that I am also unable to agree with the suggestion made by Blanchard J at [167] that police surveillance in a public place which is not technologically enhanced does not generally amount to a search. If those observed or overheard reasonably consider themselves out of sight or earshot, secret observation of them or secret listening to their conversations may well intrude upon personal freedom.

[13] I do not regard the fact that surveillance is undertaken covertly as a neutral factor.[29] Covert surveillance by the police of people who do not know that they are being observed collides with values of freedom and dignity in the same way as search of their correspondence or interception of their conversations.[30] The right to

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25 See *R v Wong* [1990] 3 SCR 36 at 46–47 and 53, referring to *R v Duarte* [1990] 1 SCR 30. In *Wong* at 43–44 the Supreme Court of Canada declined to limit the application of the Charter protection in s 8 against unreasonable search to the particular unauthorised audio surveillance in *Duarte*. Rather, La Forest J acknowledged wide protection embracing "all existing means by which the agencies of the state can electronically intrude on the privacy of the individual, and any means which technology places at the disposal of law enforcement authorities in the future".

26 See, for example, Crimes Act 1961, Part 11A.

27 A reasonable expectation of privacy in public spaces was accepted by the European Court of Human Rights in *Von Hannover v Germany* (2005) 40 EHRR 1 (ECHR) at [77]–[78].

28 In *R v Wong* [1990] 3 SCR 36, the Supreme Court of Canada accepted that s 8 protected individuals from unauthorised film surveillance of gambling in a hotel room to which strangers were admitted. La Forest J rejected at 47 "[t]he notion that the agencies of the state should be at liberty to train hidden cameras on members of society wherever and whenever they wish".

29 Compare Blanchard J at [168].

30 As La Forest J concluded in *R v Wong* [1990] 3 SCR 36 at 47, surreptitious video surveillance by State agents without judicial authorisation was, like audio recording of conversations, a notion "fundamentally irreconcilable" with expectations of acceptable government behaviour in "a free and open society".

be "*secure* against unreasonable search"[31] underscores a purpose in allowing citizens to relax vigilance and live their lives with freedom.

[14] The reasonableness of the searches in issue on the appeal does not in my view turn on details of ownership or qualities of the land or the connections of the appellants with it. In the present case I take the view that the more critical feature is the absence of lawful authority for police secret surveillance.

[15] Although my views as to the basis for impropriety in the obtaining of the evidence differ only in part from those expressed by Blanchard J, in the end the difference leads me to conclude, in application of s 30 of the Evidence Act, that the filmed surveillance evidence, with the exception of that recording vehicle movements along Reid Road, must be excluded against all appellants. I would however admit under s 30 both the physical evidence discovered on inspection of the sites (including the photographs of the sites as inspected) and the film of vehicle movements along Reid Road, for the reasons given below at [78]–[81].

[16] Before dealing with the application of s 30, it is necessary for me to explain first why I consider that police search which is not authorised by law is unlawful and that unlawful police search is itself unreasonable search, contrary to s 21 of the New Zealand Bill of Rights Act. Both considerations affect the balancing of interests I undertake in application of s 30.

Authority of law is required for State intrusion on personal freedom by search

[17] The New Zealand Bill of Rights Act provides protection for human rights and fundamental freedoms against unreasonable State intrusion. Under s 21 of the Act, everyone has "the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise". As the White Paper which preceded enactment of the legislation stressed, citing the Canadian Supreme Court case of *Hunter*, the list of interests protected is not exhaustive: s 21

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31 New Zealand Bill of Rights Act 1990, s 21 (emphasis added).

"guarantees a broad and general right".[32] While freedom from unauthorised search on private property has long been protected at common law,[33] the former property-based protection expands with human rights values to protect the public interest in "personal freedom, privacy and dignity".[34] Section 21 protects "people, not places".[35] Moreover, security from unreasonable State intrusion will often be a necessary condition of other freedoms, such as freedom of conscience, freedom of expression, freedom of movement, and freedom of association.[36]

[18] Section 21 gives effect to art 17 of the International Covenant on Civil and Political Rights. Article 17 provides that no one is to be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence". The United Nations Human Rights Committee, in General Comment on Article 17, has said that art 17 applies to "[s]urveillance, whether electronic or otherwise", as well as "interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations".[37] All such are treated as prohibited except to the extent authorised by "relevant legislation", complying with the obligations under art 17.[38] The term "unlawful" is interpreted to mean that "no interference can take place except in cases envisaged by the law":[39]

> Interference authorised by States can only take place on the basis of law, which must itself comply with the provisions, aims and objectives of the Covenant.

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32 "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.154], citing *Hunter* at 158.

33 "A Bill of Rights for New Zealand: A White Paper" at [10.145], citing *Entick v Carrington* (1765) 19 St Tr 1029.

34 See Richardson J in *R v Jefferies* [1994] 1 NZLR 290 (CA) at 302 where he stressed that a search of the person or premises not only invaded property rights, but also constituted "a restraint on individual liberty, an intrusion on privacy and an affront to dignity". See also Thomas J at 319.

35 See *Katz v United States* 389 US 347 (1967) at 351 per Stewart J. Although this was said of the Fourth Amendment, it has been equally applied to s 8 of the Canadian Charter of Rights and Freedoms RSC 1985 App II, No 44: *Hunter* at 158–159 per Dickson J.

36 See *R v Jefferies* [1994] 1 NZLR 290 (CA) at 319 per Thomas J (mentioning the impact of surveillance on freedom of conscience) and *R v A* [1994] 1 NZLR 429 (CA) at 437 per Richardson J (referring to free speech).

37 United Nations Human Rights Committee *CCPR General Comment No 16: Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) at [8].

38 Ibid.

39 Ibid, at [3].

[19] Section 21, like s 8 of the Canadian Charter of Rights and Freedoms, is a constraint on State activity.[40] It does not in itself provide any authority for "reasonable" State intrusion.[41] The right to be secure against unreasonable search does not turn on the reasonableness of police conduct, viewed as a stand-alone inquiry and assessed after the event.[42] In *Hunter*, the Supreme Court of Canada emphasised that the concern of s 8 was with "impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective".[43] In *R v Collins*, it held that the Crown must first establish that search is authorised by law before it can be considered reasonable in other respects.[44] In New Zealand, Cooke P pointed out in *R v Jefferies* that a suggestion in the context of the Bill of Rights that police officers may act reasonably outside the law "is to sow dangerous seeds".[45] Implication of powers to search was described by Sopinka J in the Supreme Court of Canada as an "Orwellian vision of police authority".[46] Rather, authority of law for the search must be found elsewhere.

[20] Because of the principle of legality, intrusive search is not properly to be treated as implicit in general statutory policing powers. As Hardie Boys J explained in relation to the police in *Jefferies*, "in our constitutional model police powers are conferred expressly and specifically":[47]

> There is no conferment of general authority. A police officer stands in no different position from any other citizen, save in so far as powers or authorities are conferred on him by particular enactment. There is no power of entry onto property, of search or seizure, except as conferred by statute.

Casey J in the same case expressed himself as being "unwilling to see the extension of implied police power into this area unless it is done by the legislature after due consideration".[48]

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40 *Hunter* at 156.
41 Ibid, at 156–157.
42 As Dickson J highlighted in *Hunter* at 160, post facto approval of searches by retroactive inquiry would be "seriously at odds with the purpose of s 8. That purpose is ... to protect individuals from unjustified state intrusions upon their privacy [and] requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place".
43 Ibid, at 157.
44 *R v Collins* [1987] 1 SCR 265 at 278.
45 *R v Jefferies* [1994] 1 NZLR 290 (CA) at 296.
46 *R v Evans* [1996] 1 SCR 8 at [20].
47 *R v Jefferies* at 313.
48 Ibid.

[21] *Jefferies* was concerned with whether the police had lawful authority to stop and search a vehicle. Private citizens have no such authority and the interference would be an actionable wrong. The finding in *Jefferies* that the police had no implied authority[49] meant that they, too, were subject to the general prohibition. Similarly, in the present case, the invalidity of the warrants and the absence of any other lawful authority for the police to be on the land made them trespassers. The evidence collected through the trespass was "improperly obtained" and subject to the requirements for admission contained in s 30. On this point all members of the Court are in agreement.

[22] In *Jefferies* it was unnecessary for the Court to consider whether specific authority is required of police conduct which would not constitute an actionable wrong if undertaken by a private citizen. In the present case, I do not think it can properly be assumed that covert surveillance, if it intrudes on personal freedom, is not an actionable wrong if undertaken by a private citizen. In *Hosking v Runting* a majority of the Court of Appeal was prepared to recognise that invasion of privacy is a tort.[50] Such protection is consistent with the protection of the human right of privacy required by the European Court of Human Rights in *Von Hannover v Germany*.[51] The matter has not been argued here and it would be wrong to express even a provisional view. If the assumption of lawfulness if surveillance is undertaken by a private citizen is incorrect, the principle referred to by Hardie Boys J in *Jefferies* would be of direct application because the police can have no implied authority to act inconsistently with the law that attaches to everyone else.

[23] Whether or not the assumption that individuals are not prohibited by law from undertaking covert surveillance of others is correct, however, I consider that the police cannot undertake such surveillance lawfully in the absence of specific authority of law. The statements in *Jefferies* are in my view ultimately derived from a wider principle of the common law which withholds from State agents the liberties preserved for individual citizens.

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49 The majority judges in *Jefferies* in that respect were right in my view to reject the suggestion of the President at 298 that the police officer's appointment under the Police Act 1958 provided the necessary authority for the police intervention in that case.

50 *Hosking v Runting* [2005] 1 NZLR 1 (CA) per Gault P, Blanchard and Tipping JJ (Keith and Anderson JJ dissenting).

51 *Von Hannover v Germany* (2005) 40 EHRR 1 (ECHR).

The common law does not permit officials the freedom of action of individual citizens

[24] Public officials do not have freedom to act in any way they choose unless prohibited by law, as individual citizens do. The common law position in New Zealand and in the United Kingdom is that, except in matters within the prerogative or as is purely incidental to the exercise of statutory or prerogative powers, the executive and its servants must point to lawful authority for all actions undertaken. That constitutional principle of legality applies to the police surveillance undertaken here.

[25] The general common law principles applicable are those described in *De Smith's Judicial Review*:[52]

> While government must be able to carry out incidental functions that are not in conflict with its statutory powers, it is wrong to equate the principle pertaining to private individuals – that they may do everything which is not specifically forbidden – with the powers of public officials, where the opposite is true. Any action they take must be justified by a law which "defines its purpose and justifies its existence".

[26] The final quote is taken from *R v Somerset City Council, ex parte Fewings*.[53] There, Laws J held that the principles which govern the relationship between public bodies and private persons are "wholly different":[54]

> For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that action to be taken must be justified by positive law.

The statement of principle in *Fewings* was expressly affirmed on appeal by Sir Thomas Bingham MR.[55]

[27] In New Zealand the general principle that public authorities, unlike citizens (who may do whatever is not prohibited), may do only what they are authorised to

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52 Harry Woolf, Jeffrey Jowell and Andrew Le Sueur (eds) *De Smith's Judicial Review* (6th ed, Sweet & Maxwell, London, 2007) at [5-025].

53 *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (QB) at 524 per Laws J.

54 Ibid.

55 *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037 (CA) at 1042.

do by some rule of law or statute was applied by Smith J in *Herbert v Allsopp*[56] and Woodhouse J in *Transport Ministry v Payn*.[57] The principle they applied is not of recent origin. It may be traced to the *Proclamations' Case*.[58] It is part of the rule of law expounded by Dicey.[59] The principle is, as successive editions of *Halsbury's Laws of England* recognised, a necessary condition for the liberties of the subject. Thus, the third and fourth editions of *Halsbury* referred to the liberties of the subject being derived from two principles: that the subject is free to do anything not prohibited by law or which infringes the legal rights of others; "whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law (including the royal prerogative) or statute."[60]

[28] The lack of equivalence between the subject and public authorities is a necessary condition of the liberties of the subject: "[w]here public authorities are not authorised to interfere with the subject, he has liberties".[61] Equivalent liberty for public authorities would destroy individual liberty.

[29] There is New Zealand authority to contrary effect. In *R v Fraser*[62] and *R v Gardiner* the Court of Appeal took the view that unless police actions in undertaking video surveillance are prohibited by statute or otherwise constitute an actionable wrong such as trespass, they are lawful at common law.

[30] In *Fraser* the point was barely discussed, the Court simply saying:[63]

> Nor do we accept [that] proceeding without such a warrant was unlawful. Other than s 21 of the Bill of Rights Act, counsel were not able to point to any statutory or common law prohibition against observing or recording on videotape the open area surrounding a residential property and plainly there is none.

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56 *Herbert v Allsopp* [1941] NZLR 370 (SC) at 374.

57 *Transport Ministry v Payn* [1977] 2 NZLR 50 (CA) at 62, citing RFV Heuston *Essays in Constitutional Law* (2nd ed, Stevens & Sons, London, 1964) at 34.

58 *Proclamations' Case* (1611) 12 Co Rep 74, 77 ER 1352. See also *Entick v Carrington* (1765) 19 St Tr 1029.

59 AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, MacMillan & Co Ltd, London, 1959) at 202.

60 *Halsbury's Laws of England* (4th ed, 1974) vol 8 Constitutional Law at [828]; (3rd ed, 1954) vol 7 Constitutional Law at [416].

61 Ibid.

62 *R v Fraser* [1997] 2 NZLR 442 (CA).

63 Ibid, at 452.

[31] In *Gardiner*, the search was more intrusive than in *Fraser* because it entailed telescopic capacity and captured some activity through the window of a dwelling.[64] The Court of Appeal was referred to the Canadian Supreme Court decision in *Hunter* and a decision of the European Court of Human Rights, *Malone v United Kingdom*,[65] in support of the argument that filmed surveillance was unlawful without legislative authority. The Court did not refer to *Hunter* in its reasons. Nor was there reference to *Herbert v Allsopp* or *Transport Ministry v Payn* or other authority. The Court considered that the decision of the European Court of Human Rights was not on point because of differences in the expression of the international law obligations under both art 8 of the European Convention on Human Rights and art 17 of the International Covenant on Civil and Political Rights, and the wording of s 21 of the New Zealand Bill of Rights Act. It preferred to apply the United Kingdom High Court decision of Sir Robert Megarry V-C in *Malone v Metropolitan Police Commissioner*.[66] Although the Court allowed "[t]hat does not mean *Malone*[67] and the International Covenant have no influence on the question of the reasonableness of conduct falling within s 21 of the Bill of Rights", it considered it "a much longer step to argue that either this country's ratification of the Covenant or the enactment of a Bill of Rights which does not adopt the same relevant language has rendered video surveillance (otherwise ungoverned by domestic law) unlawful":[68]

> Such a radical change to the common law is not to have been taken to have occurred except by direct expression. It is to be noted that, at an earlier stage of the *Malone* litigation, *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] 2 All ER 620, Megarry J, speaking of telephone tapping in the UK, said that it could lawfully be done in terms of domestic law because, at that time there was nothing to make it unlawful. This is the position for video surveillance (without sound recording) in New Zealand. If New Zealand's domestic law does not represent an adequate response to the International Covenant, that is a matter for legislative attention.

[32] I am unable to agree with the reasoning of the Court of Appeal in *Gardiner* and would not apply it or *Fraser*. I consider that *Malone v Metropolitan Police Commissioner,* the United Kingdom decision with which the European Court of Human Rights disagreed, should not have been followed in New Zealand. The

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64 In *Fraser*, the filming was into a garden space able to be seen from off the property without enhancement.

65 *Malone* v *United Kingdom* (1984) 7 EHRR 14 (ECHR).

66 *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (Ch).

67 Referring to the decision of the European Court of Human Rights.

68 *R v Gardiner* at 134.

general proposition there expressed by Megarry V-C,[69] although cited with apparent approval by the 1996 reissue of the fourth edition of *Halsbury*'s *Laws of England*,[70] has been much criticised.[71] More importantly, I consider that it is contrary to the common law principle essential to individual freedom, already discussed.

Authority of law for State powers of search is required by the New Zealand Bill of Rights Act

[33] Quite apart from the position at common law before enactment of the New Zealand Bill of Rights Act, I do not think the approach in *Malone v Metropolitan Police Commissioner* (a case which preceded enactment of the Human Rights Act 1998 (UK)) can survive enactment of the New Zealand Bill of Rights Act.

[34] The wording of s 21 does not bear the distinction drawn in *Gardiner* between it and art 17 of the International Covenant on Civil and Political Rights and art 8 of the European Convention on Human Rights.[72] There is no material difference on the point in issue – the need for authority of enacted law – between s 21 and the international obligations. Article 8 of the European Convention permits "no interference [with the right to respect for private and family life] except such as is in accordance with the law and is necessary in a democratic society" and for identified purposes which include "the prevention of disorder or crime". Article 17 protects against "arbitrary or unlawful interference with ... privacy" and provides that "[e]veryone has the right to the protection of the law against such interference or attacks". The obligation of protection of law and the requirement of lawful authority for interference are equivalent to the protection in the European Convention against interference except in accordance with the law. And the General Comment of the

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69 *Malone v Metropolitan Police Commissioner* at 367. Megarry V-C held that telephone tapping could be carried out by police because "it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful".

70 *Halsbury's Laws of England* (4th ed, reissue, 1996) vol 8(2) Constitutional Law and Human Rights at [6] in fn 3, with the caveat that some actions of the executive not prohibited in England may nonetheless be contrary to the European Convention on Human Rights.

71 See Anthony Lester and Matthew Weait "The Use of Ministerial Powers Without Parliamentary Authority: The Ram Doctrine" [2003] PL 415 at 421–422; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 627; John Lambert "Notes of Cases" [1980] MLR 59 at 65 and Vaughan Bevan "Is Anybody There?" [1980] PL 431 at 436–444.

72 *R v Gardiner* at 134.

United Nations Human Rights Committee so treats it in making it clear that it regards statutory authority necessary before interference could comply with art 17.[73]

[35] Section 21 does not in its terms contain the reference to "unlawful" interference. The rights are expressed to be without limitation. But, like s 8 of the Canadian Charter on which it was based, s 21 must be read together with the general limitation provision contained in s 5 of the New Zealand Bill of Rights Act. By it, "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[74] The reference to "prescribed by law" is equivalent to the requirements of protection against "unlawful" interference under art 17 of the International Covenant on Civil and Political Rights (as is explained by the General Comment) and the protection against "interference ... except such as is in accordance with the law and is necessary in a democratic society" under art 8 of the European Convention. This equivalence in language means that the reasoning of the European Court of Human Rights in *Malone* could not be brushed aside, as it was in *Gardiner.*

[36] Section 21 is properly interpreted to require authority of law for State intrusion upon personal freedom. Such interpretation is necessary to give effect to New Zealand's international obligations under art 17,[75] and is therefore to be preferred, especially when the legislation in question is enacted to implement those obligations.[76]

[37] Contrary to the view expressed in *Gardiner,* I consider that the enactment of the New Zealand Bill of Rights Act did indeed effect radical change to New Zealand law. That is as the White Paper that preceded it envisaged.[77] And New Zealand case

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73 United Nations Human Rights Committee *CCPR General Comment No 16* at [8].

74 Compare Canadian Charter of Rights and Freedoms RSC 1985 App II, No 44, s 1.

75 In a similar vein see Hardie Boys J in *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*] at 699.

76 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) at 57, citing *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289. More recently, see *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104. As Cooke P observed in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266, the argument that international instruments may be ignored is "unattractive" as it implies that New Zealand's adherence to those instruments is "at least partly window-dressing".

77 "A Bill of Rights for New Zealand: A White Paper" at 5.

law has recognised its transformative effect.[78] Indeed, the New Zealand courts would fail in their obligations under ss 3 and 6 of the New Zealand Bill of Rights Act if they do not ensure that the common law is consistent with the Bill of Rights Act. I consider that the policies and principles of the Bill of Rights Act compel the courts to insist on lawful authority for interference with personal freedom through police surveillance.

Legislative authority is necessary for surveillance

[38] Parliament has provided many statutory powers of entry, search, and seizure, including for the interception of conversations. It has not however provided any authority for secret surveillance of the type undertaken here, despite having had the absence of such powers drawn to its attention by the Court of Appeal[79] and the Law Commission.[80] I consider that the police act unlawfully if they do not have specific statutory authority for intruding upon personal freedom. That conclusion is compelled in my view both by the common law and by the terms of the New Zealand Bill of Rights Act. It also meets rule of law values of certainty and predictability.[81]

[39] Citing the United Nations General Comment, the Law Commission in its report *Search and Surveillance Powers* acknowledged that it is an aspect of the rule of law that "search and seizure should only take place if a law provides a basis for it".[82] It proposed objectively based legislative powers, "clearly expressed" (so that citizen and law enforcement officers understand the extent of the authority to search), judicial authorisation ("preferably in advance of the powers being exercised"), and reasonable exercise of the authority conferred.[83] Echoing the language of the Supreme Court of Canada in *Hunter*, the Law Commission considered that such measures aimed "to prevent unreasonable searches and seizures occurring in the first place and ensuring that both before and after intrusive search

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78 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156 per Cooke P.
79 *R v Gardiner* at 134 and 136.
80 Law Commission *Search and Surveillance Powers* at [11.9].
81 See further my reasons in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [38]–[39].
82 Law Commission *Search and Surveillance Powers* at [2.22].
83 Ibid, at [2.23].