

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 27/07/2011

Before :

**LORD JUSTICE LAWS**

**MR JUSTICE KENNETH PARKER**

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Between :

ALEXANDER WINDSOR  
SUPERBREW (EUROPE) LIMITED  
KULWANT SINGH HARE (CO/3412/2011) **Claimants**

SARBJIT GILL  
SURAJ BRAR  
MICHAEL WELHAM (CO/3591/2011) **Claimants**

BRIJESH PATEL  
GARETH TURNER (CO/4113/2011) **Claimants**

BARRY CHAMBERS (CO/3695/2011) **Claimant**

SANJAY PANESAR T/A ANAMI LAW (CO/12754/2011) **Claimant**

ALEXANDER WINDSOR  
AVTAR SINGH HARE (CO/12833/2010) **Claimants**

LOREDAN ILLIES (CO/5375/2011) **Claimant**

- and -

BRISTOL CROWN COURT **First**  
COMMISSIONERS FOR HM REVENUE AND CUSTOMS **Defendant**  
**Second**  
**Defendant**

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Alun Jones QC and Mr R Bowers (instructed by Anami Law) for **Alexander Windsor and Sanjay Panesar T/A Anami Law**  
James Sturman QC, Mr R Bowers and Mr M Glover (instructed by Anami Law) for **Superbrew (Europe) Limited**  
James Pickup QC and Mr R Ashiq (instructed by Anami Law) for **Kulwant Singh Hare**

**Jonathan Caplan QC** (instructed by EBR Attridge Solicitors) for **Sarbjit Gil**  
**Richard Kovalevsky QC** (instructed by EBR Attridge Solicitors) for **Suraj Brar**  
**Orlando Pownall QC** (instructed by EBR Attridge Solicitors) for **Michael Welham**  
**Mr A Hucklesby** (instructed by Harringtons Solicitors) for **Brijesh Patel and Gareth Turner**  
**Mark Milliken-Smith QC** (instructed by Blackfords LLP) for **Barry Chambers**  
**Andrew Caldecott QC and Mr R Ashiq** (instructed by Anami Law) for **Avtar Singh Hare**  
**Mr R Bowers** (instructed by Kent Solicitors) for **Loredan Illies**  
**Mr A Bird** (instructed by the Solicitor's Office, HM Revenue & Customs) for **The Second Defendant**

Hearing date: 14 June 2011

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**Judgment**

**Mr Justice Kenneth Parker:**

**This is the judgment of the Court :**

**Introduction**

1. On 15 March 2011 there came before this Court three separate but factually related claims for judicial review. In the first two, Sanjay Panesar, a solicitor practising as Anami Law (CO/12754/2010) and Alexander Windsor and Avtar Singh Hare (CO/12833/2010) challenged the lawfulness of decisions made by HHJ Horton sitting in the Crown Court at Bristol on 2 December 2010 to issue a number of search warrants. Judgment was given on those claims on 5 April 2011 (President of the Queen's Bench Division, Kenneth Parker J). The history of the proceedings (and of related proceedings in respect of restraint orders), and the Court's reasons for allowing the claims, are fully set out in the judgment of the Court, and it is necessary only to refer to the relevant concluding paragraph:

“30. In our judgment, therefore, where the CACD and Mackay J both decided essentially the same issue in the restraint order proceedings as arises in these search order proceedings, where the evidence before them could have been and in fact was the same in each sets of proceedings to the point that procedurally the two matters should have been brought in the same Court before the same judge, it is not open to this court to decide the common issue differently. It follows that we are bound to decide that HHJ Horton could not properly have reached the conclusion that he did and should not have issued the search warrants, which this court will quash.”

2. Immediately following the handing down of the judgment on 5 April 2011, there took place before the Court quite extensive discussion about, and consideration of, the precise terms of the appropriate final order. It appears that a draft of a proposed final order had been put by the Second Defendant (HMRC) to the Claimants. By the time of the hearing on 5 April 2011 there was substantial agreement between the parties as to the appropriate terms, and brief submissions were made on outstanding points (mainly relating to the conditions upon which the substantive heads of relief would take effect). A final order was then drawn up and made. That final order was detailed, precise and comprehensive.

3. Following the final order of 5 April 2011 in the above claims, five further claims for judicial review were filed applying for the quashing of further warrants issued on 2 December 2010 by HHJ Horton, and seeking relief in very similar terms to those granted on the first two claims: namely, by Alexander Windsor, Superbrew (Europe) Limited, Kulwant Singh Hare (CO/3412/2011) (in relation to 5 premises from which items had been seized pursuant to the warrants); Sarbjit Gill, Suraj Brar and Michael Welham (CO/3591/2011) (in relation to 4 premises); Brijesh Patel and Gareth Turner (CO/4113/2011) (in relation to 3 premises); Barry Chambers (CO/3695/2011) (in relation to 2 premises); and Loredan Illies (CO/5375/2011) (in relation to a single property).
4. At a hearing on 13 May 2011 Kenneth Parker J extended time and granted permission in the first four new claims, and also made or continued certain interim injunctions restraining HMRC from examining, copying or using the material seized under the challenged warrants pending determination of the claims. On 10 June 2011 Mr CMG Ockleton, sitting as a deputy Judge of the High Court, made similar orders in respect of the fifth claim.
5. The written information sworn in support of the applications for the search warrants in the five new claims, now before the Court, was the same information as was sworn in support of the applications for the search warrants that were the subject of CO/12833/2010 (Windsor and Hare).
6. HMRC accept that in the five new claims this Court would be bound to follow its earlier judgment that there was not sufficient material before HHJ Horton to establish reasonable grounds to believe that an indictable offence had been committed. HMRC, therefore, concede that these five new claims must be allowed and that the relevant search warrants should be quashed.
7. It might then be thought that these protracted proceedings would be at an end. However, HMRC now apply, first, for a substantial variation of the final order made on 5 April 2011 in the original two claims for judicial review, and, secondly, resist the imposition of relief in the present five new claims in the same terms as were imposed on 5 April 2011 in respect of the original two claims.

### **The Procedural History**

8. In order fairly to address HMRC's contentions it is necessary to say a little about the procedural history of the claims.
9. On 15 December 2010, pending an application for permission to bring judicial review proceedings to challenge the lawfulness of the search warrants, Mr CMG Ockleton, sitting as a Deputy Judge of the High Court, granted injunctions, without notice, restraining -

“any examination or copying of any material taken from the Claimants’ premises on 7 December [2010] under the purported authority of warrants issued by the first defendant [the Crown Court at Bristol] on 2 December 2010, save by agreement with the Claimants.”

The interim order also provided that no use was to be made by HMRC of the relevant material or any knowledge obtained from it or otherwise in the course of the search pending the determination of the application.

10. In February 2011 there came before the Divisional Court (Toulson LJ and Edwards-Stuart J) cross-applications relating, among other things, to the interim injunctions granted in December 2010. In effect the restraining orders were maintained in respect of materials taken from the professional law offices of Mr Panesar, but, as regards other seized material, HMRC were permitted to inspect the material but were permitted to copy only if –

“The copy taken is numbered so that the provenance is apparent, and so that if in due course a Court orders the delivery up of all copies then it would be easy to comply with that order.” (See paragraph 3.3 of the Order of 3 February 2011, drawn up on 18 February 2011)

Toulson LJ explained in his judgment the rationale of the relevant variation, as follows:

“6..... The purpose of that condition is that if the Court were ultimately to set aside the search warrant in respect of the other five premises and the part of Griffins Wood House not occupied by Mr Panesar, and if the Court were to consider it right to order that any copies of that material should be delivered up, it would be easy to discharge that order.

7. I would express no view, because it would be premature to do so, whether it would be right for the court so to order. We have been referred to the recent decision of this court in *Cook v Serious Organised Crime Agency* [2010] EWHC 2119 (Admin). On that particular case the court thought that the appropriate remedy in relation to use of copies and unlawfully seized material lay in the use of section 78 of PACE. I do not read the judgments as laying down any general principle that that would always be so. My concern at this stage is simply to make an order which does not preclude the court from making whatever order it thinks meets the justice of the case once it has fully considered the judicial review applications”

11. In February 2011 the Court of Appeal gave judgment in the restraint proceedings, and MacKay J, following a further lengthy hearing, discharged the restraint orders. On 2 March 2011 a directions hearing in respect of the judicial review claims was held in the Divisional Court (Pill LJ and Rafferty J). In the light of the judgments of the Court of Appeal and of MacKay J, the Claimants asked the Court, in effect, to restore the original interim injunctions made in December 2010. On that occasion the Court was naturally concerned to ascertain whether HMRC had exercised the liberty granted on 3 February 2011 to take copies of any seized material, for a question might then arise as to how any such copies should be dealt with in any further order. Ms Kamm, then appearing for HMRC, said unequivocally:

“If I can assist the Court on the question of the current position, I am instructed that HMRC have begun inspecting the documents but have not, as yet, taken any copies, so, insofar as there have been any changes in status quo, it is that HMRC has seen some of these documents now.”

12. In other words, the Divisional Court was being told that, save for inspecting some material, HMRC had in fact behaved as if the December 2010 injunctions had not been varied on 3 February 2011. The Court, therefore, did not need to address the question of how any copies of seized material should be dealt with. On 5 April 2011 the Court allowed the claims, quashed the warrants and granted consequential relief, including an order for the return of the seized material and continuation of the injunctions made in December 2010. Paragraph 7 specifically ordered that:

“The interim injunctions made by Mr CMG Ockleton on 15 December 2010 (as varied by the Court on 3 February 2011 and 3 March 2011) will continue in force until either (a) the material seized by HMRC pursuant to the quashed search warrants is returned in accordance with paragraphs 5 and 6 above; or (b) the Second Defendants’ application under section 59 of the 2011 Act is granted; or (c) the Second Defendants’ appeal against the judgment of this Court is allowed, whichever occurs soonest.”

**The Application to Vary the Order of 5 April 2011 in CO/12754/2010 and CO/1233/2010**

13. On 14 April 2011 HMRC issued an application under section 59 of the Criminal Justice and Police Act 2001. According to its terms, paragraph 5 of the Order of 5 April 2011 would preclude HMRC from examining, using or copying the seized material for the purposes of the section 59 application. HMRC state that there is –

“in fact very limited material from these searches that HMRC would like .... to use in support of its case on the current section 59 application, only the data from mobile phone Ruskin 0003, seized from a bedroom at Oak Lodge, 59 Alderton Hill – this material was included within Annex 9 ... of the application, but has been redacted.”

14. HMRC, therefore, applies to vary the order of 5 April 2011 so that it may examine, use or copy the material seized for the purposes of furthering the application under section 59 of the 2001 Act. CPR 3.1(7) allows the Court to vary or revoke any order, even a final order.
15. The most valuable guidance appears in the judgment of Hughes LJ (with whom Carnwath and Smith LJJ agreed) in *Roult v North West Strategic Health Authority* [2009] EWCA Civ 444 [2010] 1 WLR 487. In particular:

“There is scant authority upon Rule 3.1(7) but such as exists is unanimous in holding that it cannot constitute a power in a judge to hear an appeal from himself in respect of a final order. Neuberger J said as much in *Customs & Excise v Anchor Foods*

(No 3) [1999] EWHC 834 (Ch). So did Patten J in *Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen* [2003] EWHC 1740 (Ch). His general approach was approved by this court, in the context of case management decisions, in *Collier v Williams* [2006] EWCA Civ 20. I agree that in its terms the rule is not expressly confined to procedural orders. Like Patten J in *Ager-Hanssen* I would not attempt any exhaustive classification of the circumstances in which it may be proper to invoke it. I am however in no doubt that CPR 3.1(7) cannot bear the weight which Mr Grime's argument seeks to place upon it. If it could, it would come close to permitting any party to ask any judge to review his own decision and, in effect, to hear an appeal from himself, on the basis of some subsequent event. It would certainly permit any party to ask the judge to review his own decision when it is not suggested that he made any error. It may well be that, in the context of essentially case management decisions, the grounds for invoking the rule will generally fall into one or other of the two categories of (i) erroneous information at the time of the original order or (ii) subsequent event destroying the basis on which it was made. The exigencies of case management may well call for a variation in planning from time to time in the light of developments. There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue – an interlocutory injunction may be one. But it does not follow that wherever one or other of the two assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to re-open any decision. In particular, it does not follow, I have no doubt, where the judge's order is a final one disposing of the case, whether in whole or in part....”

16. The application to vary the order of 5 April 2011 must be rejected, for the following reasons. First, the order was made after an extensive hearing at which the parties fully ventilated their views as to the appropriate terms of the order. HMRC did not then contend that paragraph 7 of the proposed order was in any way inapposite: the principal focus was on the conditions that would govern the order becoming effective. Furthermore, this was not a case in which HMRC had had little previous opportunity to consider how it would be affected by an order restraining the use of seized material: as the history shows, the potential general impact of any such restraint, albeit in the context of interim relief, had been explored at some length on two earlier occasions in the Divisional Court. In particular, Toulson LJ had flagged up, in the clearest terms, the countervailing considerations that could be relevant to the form of any final relief following a successful claim.
17. Secondly, the order was without question a final one, where, on authority, the grounds for variation must be compelling. Mr Bird suggested that paragraph 7 of the order could be regarded as “interlocutory”, and a more relaxed approach to variation be justified. However, the plain intention of paragraph 7 was definitively to resolve the parties' rights and obligations in relation to the use of seized material. It was not

intended to be an interim order pending the resolution of any further claim. The effectiveness of the order was made contingent on certain events, but there is an obvious difference between a final order, expressed in conditional terms, that is designed to conclude the contest between the parties, and an interlocutory order, whether conditional or contingent, that does no more than hold the position until the dispute has been determined. There is no doubt that the order of 5 April was in substance a final one, and Mr Bird's suggestion simply confuses a conditional with an interim order.

18. Thirdly, there has been no material change of circumstance since 5 April 2011. At that time HMRC already had well in mind the making of a section 59 application, and knew, or ought to have known, in particular that copies of some of the seized material might potentially be relevant in such an application. However, counsel then appearing for HMRC (Mr Jonathan Swift QC, one of the two Senior Crown Counsel in public law matters) did not suggest that HMRC might wish to deploy copies of any part of the seized material in a section 59 application. On the contrary, the whole basis of Mr Swift's submission was that HMRC now had at its disposal entirely new material (originating in Germany and Australia) which, taken with the information upon which the quashed warrants were grounded, would strongly support the section 59 application and make it just and expedient to suspend the operation of the order on the conditions proposed.
19. It is difficult to avoid the inference, particularly in the absence of any evidence from HMRC touching upon its change of position, that after 5 April 2011 HMRC came to appreciate that, without their being able to use the copies of seized material, the prospects of success of the section 59 application might be diminished, and so HMRC came to regret the way in which they had deployed their case on 5 April. However, changed appreciation is not a change of circumstances. In *WL Gore & Associates GmbH v Geox SPA* [2008] EWHC 462 (Pat), Lewison J rejected an application to vary under CPR 3.1(7) in not dissimilar circumstances:

“14. Has there, then, been a significant change of circumstances and, if so, when did that change take place? The factual circumstances surrounding the proposed entry of Gore into the market for licensing its technology for the manufacture of footwear has not, in my judgment, changed at all. What has changed is Gore's appreciation of the effect of what it agreed on the attitude of its licensees towards committing themselves to take up the licences. That, to my mind, is not a change of circumstances at all. It is simply a change of perception of the significance of those circumstances. As Mr. Price himself says, Gore was aware of the general commercial situation but unaware of the true seriousness of the situation until after the agreement was made. That is simply, to my mind, a change in the appreciation of the significance of what was agreed rather than a subsequent change of circumstance in itself.”
20. Fourthly, there must for reasons of public interest be finality in litigation: see *Johnson v Gore Wood & Co* [2002] 2 AC 1 at p31, by Lord Bingham. HMRC had every opportunity on 5 April 2011 to put forward the points upon which they now rely, and failed to do so. It would be wrong in principle to allow HMRC to seek to

argue points that could have been made before the final order was made, and there are no good grounds for, exceptionally, allowing such a course under the guise of an application to vary the final order in these claims.

21. There is one further point in the present context. As noted above, the purpose of the application to vary the final order is specifically to allow HMRC to use data from mobile phone Ruskin 0003, seized from a bedroom at Oak Lodge, 59 Alderton Hill, Loughton, the property of Mr Hare. It appears that on 18 February 2011 HMRC sent that mobile phone for analysis but did not copy the results at any time before 2 March 2011 (see second witness statement in the present claims of Douglas McGill, investigator attached to the HMRC Criminal Investigation Directorate at Bristol, at paragraph 7). If that is correct, the statement of position made to the Divisional Court on 2 March 2011 (see paragraph 11 above) was strictly correct, although it would have been more candid and helpful, both to the Court and the Claimants, if Ms Kamm had been able to disclose the complete picture, namely, that the phone had been sent for analysis, the results had been, or would shortly be, received, and could, if permitted, be copied. In any event, the order made by the Divisional Court on 2 March 2011 in unambiguous terms prohibited HMRC from any act, or further act, of copying seized material, or of using such material, including the results of the analysis of the relevant mobile phone. However, in breach of that order, the results of the analysis were copied, and then used by HMRC on or about 14 April 2011, to create a document headed "Telephone Analysis". (See paragraph 7 of the second witness statement of Douglas McGill). It still remains unclear to this Court how that breach came about. Furthermore, the said "Telephone Analysis" was then used, in plain violation of the final order of 5 April 2011, to support HMRC's application under section 59. Notwithstanding requests from the Claimants, HMRC was not forthcoming about these breaches of court orders and the picture did not become tolerably clear until 14 June 2011. No steps have so far been taken to remedy the breach by withdrawing the relevant material from the section 59 evidence.
22. The purpose of the application to vary the final order is, therefore, retrospectively to validate conduct that at the time represented breaches of court orders and constituted contempts of court. Reasons have already been given why, even putting that aspect aside, the application must be rejected, but the Court does observe that this final unhappy dimension serves to fortify the conclusion that the rejection of the application is neither unjust to HMRC nor detrimental to the public interest.

### **The Terms of the Final Orders in the Present Claims**

23. HMRC accepts that all original material seized should be returned to the respective Claimants. However, HMRC invites the Court to suspend the operation of that obligation pending the outcome of an application under section 59 of the 2001 Act. The Claimants contend that section 59 has no application to the present circumstances and no suspension of the obligation to return is justified. HMRC also invites the Court, in the exercise of its discretion, to permit HMRC to take copies of, and generally make use of such copies, both to support any section 59 application and in furtherance of the (continuing) criminal investigation. The Court, therefore, heard argument in respect of the Crown Court's jurisdiction under section 59 and in relation to the appropriate form of discretionary relief in these claims.

24. In our judgment, the final order on the present claims should, in principle, follow as closely as possible the terms of the final order of 5 April 2011 on the claims determined at that time. The fact that the present claims were not brought at the same time as the original claims was somewhat fortuitous. It was open to the present Claimants to bring such claims, for the grounds were precisely the same, and, if the original Claimants were successful, it would necessarily follow that all the warrants that have now been made the subject of challenge would be invalid, as HMRC has specifically acknowledged in response to the claims. The bringing of further claims would simply have led to a multiplicity of proceedings. HMRC knew, or ought to have known, that if the original Claimants were successful, it was almost inevitable that those affected by other warrants issued on 2 December 2010 would seek, as they have now sought, relief in the same terms as those obtained by the original Claimants. As already observed, HMRC had every opportunity on 5 April 2011 to make representations about the proposed terms of the final order on the original claims but did not advance any argument, of the nature now advanced, why paragraph 7 of the order, restraining HMRC from making use of the seized material for any purpose (including the making of applications under section 59 of the 2011 Act and/or the pursuit of criminal investigations) was in any way inappropriate. In those circumstances, it would be unfair to the present Claimants, and contrary to the principle requiring finality in legal proceedings, for the Court to make an order in the present claims in substantially different terms from the final order of 5 April 2011.
25. It appears, therefore, that the present claims genuinely raise only two issues. First, the present Claimants contend that section 59 has no application and the final order should not suspend the operation of HMRC's obligations under the order. Secondly, HMRC states that copies of seized material have already been made (not in breach of any interlocutory order) and that HMRC should be permitted to retain such copies and to use such copies for the purpose of any section 59 application and/or of the (continuing) criminal investigation.
26. As to section 59, on 5 April 2011 this Court, with the assistance of counsel, considered, albeit relatively shortly, the applicability of that section of the 2001 Act in the circumstances that had arisen, and decided to suspend the operation of HMRC's obligations under the order, so as to allow HMRC the opportunity to make an application under section 59, without prejudice to the right of the original Claimants to contend in the Crown Court as they have now in fact contended, that section 59 has no application. HMRC should have a similar opportunity in respect of the present claims, and the final order in the present claims should be in similar appropriate terms, unless it is plain that the Crown Court has no jurisdiction and any such application would be obviously futile.
27. The Claimants do argue that the matter is plain and obvious. It is convenient to set out the relevant part of Section 59, which appears under the heading "Remedies and safeguards":
- "59 Application to the appropriate judicial authority.
- (1) This section applies where anything has been seized in exercise or purported exercise, of a relevant power of seizure.

.....

....

- (6) On any application under this section, the appropriate judicial authority may authorise the retention of any property which –
- (a) has been seized in exercise, or purported exercise, of a relevant power of seizure, and
  - (b) would otherwise fall to be returned, if that authority is satisfied that the retention of the property is justified on grounds falling within subsection (7).
- (7) Those grounds are that (if the property were returned) it would immediately become appropriate –
- (a) to issue, on the application of the person who is in possession of the property at the time of the application under this section, a warrant in pursuance of which, or of the exercise of which, it would be lawful to seize the property;...

....

- (10) The relevant powers of seizure for the purposes of this section are –
- (a) the powers of seizure conferred by sections 50 and 51;
  - (b) each of the powers of seizure specified in Parts 1 and 2 of Schedule 1; and
  - (c) any power of seizure (not falling within paragraph (a) or (b)) conferred on a constable by or under any enactment, including an enactment passed after this Act.”

28. The Claimants point out that Part 2 of the 2001 Act (“Powers of Seizure”), containing section 59, followed, and was a legislative response to, *R v Chesterfield Justices, ex parte Bramley* (DC) [2000] QB 576. In that case a question arose whether under section 8(1) of PACE a constable, relying upon a lawful search warrant, could seize material which might not be, and in the event turned out not to be, within the specific scope of the warrant, on the basis that it was not practicable to seek to sift material on the premises, and the constable had removed material from the premises with a view to making a practicable and efficient sift off the premises for the purposes of retaining only material that was within the scope of the warrant. Section 16(8) of PACE provided that a search under a warrant “may only be a search to the extent required for the purpose for which the warrant was issued”. Kennedy LJ, who gave the leading judgment, addressed that relevant question as follows:

“But if there is a lot of material, and it is not possible to sort reasonably quickly and easily the material that is relevant (i.e.

within the scope of the warrant) from that which is not, what is to be done? Can the constable who is executing the warrant do a preliminary sift at the premises where the documents are stored, and then take all or a large part of the material away to sort it out properly elsewhere? Common sense suggests that the answer to that question should be in the affirmative ... but that is not what the statute says ... If a constable executing a warrant seizes items which when examined are found to be outside the scope of the warrant, and not covered by section 19, even if he acts in good faith I find in the statute no defence to an action for trespass to goods based on that unjustified seizure, and in some cases the award of damages could be significant ...”

29. A little later Kennedy LJ added:

“To put the matter in terms which would meet the requirements of the Convention it seems to me that if in a democratic society it is necessary for the prevention of crime to invade privacy to a greater extent than is spelt out in the 1984 Act, then the limits of the invasion must be spelt out in the statute or in some regulations or code made thereunder, and there must be a convenient forum available for dealing with disputes: cf *Niemietz v Germany* (1992) 16 EHRR 97. Meanwhile, in order to defend the right to privacy, I see no escape from the proposition that the words of the statute should be strictly applied.” (at 587 E-F)

30. Parliament then responded by conferring additional powers of seizure from premises in sections 50 and 51 of the 2001 Act, and by providing for remedies and safeguards in sections 59-62. Given, in particular, the background, the Claimants submit that only a narrow interpretation of section 59 is feasible. Section 59 refers to a “relevant power of seizure”, which must be a power falling within section 59(10). Parliament must have contemplated a lawful power of seizure: section 59(6) speaks of a “purported exercise” of a (putatively lawful) relevant power, not of an exercise of a purported power, which is something different. In *ex parte Bramley* itself the scenario under consideration was a lawful warrant that had been exercised in an unlawful manner, and Parliament could not have intended any remedies to extend to a situation in which the warrant itself was unlawful. The Court was taken to a report of legislative proceedings in the House of Lords, where the relevant minister, Lord Bassam of Brighton, stated that the new powers in Part 2 “are not free-standing and can be exercised only in support of an existing power of seizure”. The only remedy, it is submitted, if the warrant is itself unlawful, is to start the process afresh with a further application to a Magistrate or to the Crown Court.
31. We see force in these points. However, section 59, as distinct from sections 50 and 51, is essentially a remedial section; and there is no compelling reason to restrict the scope of the new remedies created by Part 2 of the 2001 Act to the specific factual scenario in *ex parte Bramley*. Although the Minister stated that the new powers were not free standing, he may well have had in mind the substantive powers of seizure in sections 50 and 51, and have been saying no more than that no new grounds for

issuing warrants were being enacted, rather than commenting on the scope of any new remedies. The statement, therefore, does not appear to give unambiguous support to a narrow construction of section 59. Looked at simply in terms of policy, it is well arguable that section 59 should extend even to a situation where the original warrant was unlawful. Ex hypothesi, the retained material could be seized on the immediate issue of a new warrant, and the procedure under section 59 would provide both a speedy and efficient means of achieving an outcome that tended to promote the detection and prevention of crime, while at the same time eliminating any risks associated with the return of the seized material. It is true that the actual language of section 59(6) is rather infelicitous if it were intended to capture not only a purported exercise of a lawful power but also the exercise of a purported power of seizure. However, if the policy grounds for adopting a wider interpretation are sufficiently strong, the language of “relevant power” could be read to include a purported relevant power of seizure in circumstances where it transpired that a warrant could be immediately issued to justify the seizure. Such an interpretation, it might well be said, would promote the objectives identified by Kennedy LJ in *ex parte Bramley*; and the owner of the seized material would appear to have little justifiable grievance if indeed there was later shown to be lawful grounds for seizing the material, even if the original warrant had been unlawful. A counter policy argument might be that a wide reading of section 59 could encourage those seeking warrants to be less industrious if they thought basic errors could easily be corrected. However, any such laxity would be likely to lead to judicial review of the warrant, and the Crown Court, on an application under section 59, would be likely to look critically at the material relied on where an earlier warrant had been quashed.

32. For these reasons, the interpretation of section 59 put forward by the Claimants is far from obvious, and the terms of the final order in the present claims, as in the original claims, should allow HMRC to make an appropriate application under section 59 of the 2001 Act.
33. That then leaves only the question of the retention of the copies that have already been made of seized material, and the use of such copies. It is common ground that, as was foreshadowed by Toulson LJ (see paragraph 10 above), the Court has a discretion to require HMRC to destroy, and not to use any information gleaned from, this material, and that there are competing considerations in the exercise of that discretion. On the one hand, the material was seized following an unlawful search, and the Claimants argue that, adequately to protect their rights under Article 8 and also Article 1 Protocol 1 of the ECHR, and their right to confidentiality at common law, it is necessary to order both that the property seized should be returned and also that any copies made thereof should be destroyed and any knowledge gained therefrom should not be used by HMRC. On the other hand, HMRC argues that there is a powerful interest in the detection and prevention of crime, the copies made may be relevant, both to support applications under section 59 and generally in the criminal investigation, and that it would be proportionate to allow HMRC to retain, and use such copies.
34. Mr Bird relied on *R (Cook) v Serious Organised Crime Agency* [2010] EWHC 2119 (Admin) [2011] 1 WLR 144 where the Divisional Court (Leveson LJ and Ouseley J) refused to order destruction of copies of material that had been unlawfully seized or to prohibit the use of knowledge or information contained in them. (See also *R (on the*

*application of Cummins) v Manchester Crown Court* [2010] EWHC 2111 (Admin)).  
At paragraphs 21 and 22 Leveson LJ said:

“21. It is clear from the fact that there is no freestanding application for the return of documents on the grounds that they are not said to be relevant to a criminal investigation that, prima facie, we could conclude that all are. Without a detailed examination it would obviously not be appropriate for this court to consider any type of balancing exercise. Equally, is it not appropriate to do so without a detailed analysis of the extent to which the confidentiality of the documents is also protected. Neither is the claimant left without a remedy in these circumstances, as Mr Bowers submitted. I have no doubt that section 78 of PACE controls the use to which any copies of documents can be put, bearing in mind that the deployment of unlawfully obtained evidence is not necessarily and inevitably prohibited irrespective of the circumstances: see *R v Sang* [1980] AC 402 and the many cases that develop the exclusionary principles which follow both from that decision and section 78 .

22. As to the derivative use of knowledge, if I understand the meaning of the phrase, there is a real risk of allowing the subject of an unlawful search a protection from an investigation which is not warranted. For my part, I would not be prepared to make an order that would encourage satellite litigation either in a civil or criminal context as to the origin of other, lawfully obtained, evidence. Thus, assume a prosecution is mounted using a witness who can lawfully prove a material fact. I would reject the proposition that the court should inquire whether the train of inquiry to that witness started as a result of what was learnt from the unlawful seizure or in some other way and doubt the utility of an investigation of the many steps in what are sometimes complex criminal inquiries.”

35. At paragraphs 27 and 28 Ouseley J said this:

“27. Although we have not seen the documents, as I have said, it has not been suggested that they fall outside the scope of section 19(2) of PACE . It is not suggested that they were legally professionally privileged, which might override any disclosure provisions. It is not suggested that they contain purely private information or have a confidential quality that might override what would otherwise be the plain inference that they are relevant to a criminal investigation falling within section 19(2). It is well recognized at common law that material that has been unlawfully obtained may be admitted in evidence and subject to control by section 78 of PACE. Where the common law permits evidence to be admitted in those circumstances, it is plain that the common law does not require the material to be destroyed beforehand and the information

contained within it not to be used. Quite the contrary. The common law contemplates that the information will be available for use in order for it to be produced in evidence at all. For there to be a case that article required the court to order destruction, a great deal more would have to be shown in relation to what the documents were for such a balance to be struck by this court.

28. In any event, the proportionality remedy in relation to that aspect of the unlawful obtaining and retention of documents lies in the use of section 78 of PACE in relation to admissibility in a criminal trial. For these reasons I agree with the order proposed by Leveson LJ.

36. The Claimants seek to distinguish *Cook* on the ground that in that case not only had SOCA commenced an investigation into the alleged criminal conduct of those affected by the unlawful warrants but also, by the time that the hearing took place in the Divisional Court, those persons were on trial in the Crown Court on charges of conspiracy to defraud. The copies were likely to contain relevant, and arguably admissible, evidence for the trial. In *Cook* also the flaw in the warrant was somewhat technical, and apparently easily remediable. In the present case the flaw goes to the core of the warrant, and it is far from obvious that the flaw can be remedied. Furthermore, none of the Claimants has been charged with any criminal offence, let alone put on trial.
37. We have concluded that it would not in this case be proportionate to order HMRC to destroy copies that it has already made of seized material, or to prohibit HMRC from using information derived from such copies, for the following reasons.
38. First, as in *Cook*, it is not claimed that the documents are covered by legal professional privilege, or contain purely private information or have a confidential quality. Second, the copies were not made in breach of any court order for, at the time that the copies were made, no proceedings for judicial review had been brought and no interlocutory injunctions had been sought or obtained. Third, there is nothing to suggest that the material copied would not be relevant to HMRC's continuing investigation into whether a serious fraud on the Revenue has been committed. With the greatest respect to the Court of Appeal, and to MacKay J, and without seeking to question the finding that, on the material considered, there were no reasonable grounds for concluding that an indictable offence had been committed, there are aspects of the information disclosed by HMRC that cause us some disquiet. In particular, we understand that much hinges on whether goods taken from bonded warehouses were the subject of genuine transactions in the French market. The evidence, in totality, may well show that that was the case. However, for all that is known at present, some of the material copied may well, among other things, shed further and significant light on that question, and it would not advance the public interest in the detection and prevention of crime for this Court to handicap HMRC in the way that the orders sought by the Claimants would risk doing. In this context, it should be remembered that the terms of the final order already place a substantial fetter on HMRC, and that, if the matter had been pursued differently on 5 April 2011, it is far from certain that HMRC would have been constrained as it is now constrained. Finally, it should be noted that, if criminal proceedings were at some

point brought against any of the Claimants, the admissibility of evidence arising from documents that had been unlawfully seized would be subject to the safeguards contained in section 78 PACE.

39. It is to be hoped that in the light of this judgment the parties can now agree the form of the final order in the five new claims. Any other consequential matters should be dealt with by written submissions.