

STOP BUGGING US!

An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

THE BUGGING OF CONVERSATIONS BETWEEN LAWYERS & THEIR CLIENTS IN PRISON

The recent news that Sadiq Khan MP was bugged whilst visiting one of his constituents at HMP Woodhill was shocking enough. Even more shocking is the allegation that Special Branch telephoned the prison before the MP had even booked his visit and asked a DS Mark Kearney to “keep an eye out for” Khan who was to visit a Mr. Babar Ahmad, who had been arrested on a U.S. extradition warrant and held at Woodhill. Kearney is now facing trial for allegedly tipping off a local newspaper about other stories. This news about an MP being bugged led to further stories about lawyers being bugged, and even our possessions being looked through when they are left at the gate-house during legal visits. One solicitor was even accidentally sent a transcript of a telephone conversation he had with his client.

Sadly all of this comes as no surprise to us. The fact that the authorities will circumvent the law in investigating some suspects is something that we take for granted. We have long had suspicions that certain types of clients; i.e. those who face terrorist, trafficking conspiracy, murder or corruption charges may, in some cases, attract a degree of post-charge interest that requires us, as lawyers, to be careful. It would be unfortunate if, for example, a solicitor discussed with his client a potentially helpful witness, only to discover that that witness is suddenly arrested by officers in the very same case.

With one client of ours, who was certain that his meetings with solicitor and counsel were bugged, the conversations would start with a cheery ‘good morning’ followed by an invite to anyone not in the room to go forth and multiply. Parts of those meetings were conducted by writing to each other across the desk. Such bugging operations cannot be taken lightly; they are a serious infringement on all of our civil liberties and is a step way too far. The latest news stories have caused great consternation among criminal lawyers and rightly so. For our part we have at least one client whose suspicions that they are being bugged appear to us to being possibly well-founded. Unfortunately, we certainly do not believe that the recent news stories will stop these abuses from taking place.

WHAT IS THE LAW?

The starting point is the Regulation of Investigatory Powers Act 2000 (RIPA). RIPA provides a statutory backcloth to all covert police operations so that all such operations must be properly authorised. This requirement for proper authority emanated not from a Government desire for its citizens to know and understand the power of the authorities; but because it had to under human rights law. Article 8 of the European Convention of Human Rights established, even before the Human Rights Act 1998 came into force, the right to privacy. Any surveillance is a breach of privacy. Of course, surveillance is also a necessary and legitimate tool in the fight against crime. The problem is getting the balance right between allowing the State to watch us and preventing law enforcement authorities from becoming oppressive ‘Stasi’ type agencies paying no regard to our rights. The Human Rights Act is the protection from State abuse.

RIPA classified surveillance into 3 different types. First of all there is Directed Surveillance. This is typically the authorisation for a subject to be watched and followed - it requires no trespass onto property. Then there is Intrusive Surveillance; this will involve the placing of bugs in cars etc and any interference with property. Then there is the use of Covert Human Intelligence Sources (CHISs) - i.e. informants and undercover officers.

INTRUSIVE SURVEILLANCE

The activity of bugging meetings in prison is ‘intrusive surveillance’. Authority for such an operation is required first from a senior officer and then by an independent Surveillance Commissioner, sections 32-40 RIPA.

The 2000 Act does not provide any special protection to legally privileged communications but then it does not have to - such communications have always been regarded as sacrosanct. The RIPA Code of Practice deals with the subject. It points out that if there are in fact reasonable grounds to suspect that the lawyer is actually engaged in furthering crime when he is meeting his client then the special protection does not apply. However, any application which is likely to result in legally privileged material being acquired should only be made “in exceptional and compelling circumstances” (code of Practice, para. 3.6).

ABUSE OF PROCESS

In a murder case at Nottingham Crown Court, *R v Sutherland* 29/1/02 (unrep), the Judge heard how police, acting in bad faith, had intercepted legally privileged conversations, between lawyers and clients in the police station exercise yard. Even though those conversations were not relied on at trial, this was still an abuse of the process of the court and the case was thrown out of court. The Judge, Newman J., pointed out that it is wrong to treat the breach of a fundamental principle as if the principle were no more than a rule of evidence. If the court relieves a party to the proceedings from the consequences of a flagrant breach of a fundamental right against the opposing party, then the court will have acted unlawfully. Newman J.'s approach was approved by the Court of Appeal in *R v Wood and others* [2002] 3 Archbold News 3.

I THINK I AM BEING BUGGED, WHAT CAN I DO?

First of all be honest and objective - is your case really the sort that deserves that type of risk by police officers? If so, then why do you think you are being bugged? Prison does engender a kind of paranoia in some - then again sometimes people are right to be paranoid, as we now all know 'they' really are prepared to listen into conversations between lawyers and clients.

If you honestly and reasonably suspect that you are being bugged then you must tell your legal team. You can take sensible precautions like writing your concerns down at meetings or getting word out through relatives etc. Practically speaking there is little your lawyers can do. The police will hardly admit that they unlawfully bugging you. However, one simple step can be taken in appropriate cases. The lawyers can ask the prosecution to confirm that there is no surveillance taking place of discussions between lawyer and client. If the answer comes back 'no there is not' then if, at a later stage, suspicions become more concrete, or further evidence of bugging comes to light, and the Court becomes involved then the improperly authorised bugging operation, plus the lie to the defence is almost bound to spell the end of the case as an abuse of the court's process.

There is a right way and a wrong way to ask the authorities about whether you are being bugged. It will all be dependent on the facts of the case - what is actually required is an answer rather than just the request being ignored which will be the first instinct of the prosecution in many cases. In some cases it may be as blatant as defence counsel standing up in court and asking the prosecution to confirm that there is no unlawful bugging taking place - in other cases it may form a request within the Defence Statement. If done properly it will be difficult for the Crown to simply refuse the request for information because para 10(b) of the Attorney General's Guidelines on Disclosure 2005 provides that material

will be disclosable if it has "capacity to support submissions that could lead to (i) the exclusion of evidence (ii) a stay of proceedings; or (iii) a court or tribunal finding that any public authority had acted incompatibly with the Defendant's rights under the ECHR." As we have seen any evidence of recording conversations between client and lawyer certainly does have the capacity to lead to a submission to stay the proceedings.

CATEGORY A

The recent stories in the press include an allegation that some prisoners were made Category A prisoners (or in the case of remand prisoners, 'provisional Category A') in order that they may be transferred to a prison where they could be more easily monitored; whether by visits with lawyers or family. If there is a suspicion that that is the case then there may be a pressure point for the defence. Decisions regarding Category A status must be made by Prison Service HQ; para. 8.1 of Prison Service Order 0900. Convicted Category A prisoners have the right to full disclosure of reports on them, the right to make written representations prior to any review of their security category and a full reasoned decision - furthermore, the decision cannot be based on a wish by the police to listen into his conversations. The relevant Prison Service Order on the procedures which Prison Service HQ must adopt when making these decisions is PSO1010. There is then scope to issue Judicial Review proceedings challenging any Category A decision and demanding full disclosure of the reasons for re-categorisation; see e.g. *R (Alan Lord) v Home Secretary* [2002] EWHC 2073, Admin - 1st September 2003. That way the High Court process will place the authorities under pressure to re-categorise the prisoner back to what he was. In such a case speed is of the essence given the tight time limits for issuing Judicial Review proceedings.

We look forward with great interest to the report of Sir Christopher Rose, the Chief Surveillance Commissioner, who has been tasked with unravelling what happened in the Sadiq Khan case, though how much of it will be made public is not clear.

AUTHORS

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