

FOREIGN INTERCEPTS

Challenging Admissibility - An Article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

It is well known that material gathered from intercepted phone calls cannot be evidence in a criminal trial in this country. It is s17 of the Regulation of Investigatory Powers Act 2000 (RIPA) that provides that prohibition. In fact s17 provides that it is unlawful even to ask questions in Court about the existence of intercept material. The reason is to avoid the general public learning of the authorities abilities and, more to the point, what the authorities cannot do. This prohibition must surely end one of these days - many prosecutors feel frustrated that they cannot use such material; equally many defendants feel that the Crown have in their possession material that may assist their defence.

THE STARTING POINT - RIPA

In fact RIPA does not prohibit all intercept material from disclosure and use. In 2006 a Turkish national was convicted in as a ringleader in a huge people smuggling operation. The police had intercept material from Belgium and the CPS made it known that the material could only have been admissible because it was obtained by overseas law enforcement agencies. What is the law in this situation?

INTERCEPTION WARRANTS

It is impossible to explain in a short article the complexities of this area - which many criminal lawyers don't properly understand. The starting point is that under s1(1) of RIPA it is an offence to intercept any telecommunications or postal communications in the UK unless it is done with "lawful authority". "Lawful authority" requires (in most cases) that an interception warrant is issued by the Home Secretary under s5 of the Act. Warrants however are not granted easily; the suspect's right to privacy under Art 8 has to be considered and the interference must be 'proportionate' and 'necessary'. This is a recognition of how serious the breach of privacy is - listening to phone calls is clearly extremely intrusive and should never become a matter of routine.

In *R v P* [2001] 2 WLR 463, the House of Lords considered the predecessor to s17 of RIPA, s9 of the Interception of Communications Act 1985 (IOCA). It found that the 1985 Act applied only to intercepts in the UK. The Court followed the earlier case of *R v Aujla*, Times Law Reps, 24/11/97. In that case the Dutch authorities intercepted calls between a person in this country and a

person in Holland, without the knowledge of the British police. The Court found that the interception of calls by tapping a line in Holland was not a breach of IOCA (all UK phone tapping is illegal unless properly authorised by IOCA, or now RIPA) - the issue for the Court then was should the evidence be admitted, not can the evidence be admitted. The Court held that the trial Judge had to take into account the circumstances in which the material was obtained. That discretion included considerable weight to be attached to the suspect's right to privacy as guaranteed by Art 8 of the European Convention on Human Rights. All these cases of course are pre-RIPA. Today the European Convention has fuller effect since full implementation, in October 2000, of the Human Rights Act 1998.

MUTUAL ASSISTANCE

The UK, has been since May 2000, a party to the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU. This requires E.U. States to co-operate with each other and provide assistance in respect of criminal investigations. Section 1(4) of RIPA applies to 'international agreements' - e.g. the EU convention. It provides that where such an agreement is in place the Home Secretary must not issue any request for assistance to another country without "lawful authority". Lawful authority here means the Home Secretary must issue an interception warrant under s5(1), prior to any request for mutual assistance. So if you are now awaiting trial in this country and the evidence is based upon material intercepted overseas in an E.U. country (and you were in that country at the time) the first question must be 'who ordered the interception?' The British or the other other State?

Interceptions Abroad - initiated by the British Authorities Say, for example the UK police are investigating a suspect who is a British national but based overseas in an E.U. country. The police want to listen to his phone calls but need the assistance of that country's authorities. Then, in that case s1(4) applies and the first step is for the police to get the Home Secretary to issue a warrant and then ask the Member State for assistance, as RIPA now specifically recognises the E.U. wide Convention on Mutual Assistance. It should be borne in mind that RIPA only 'designated' that Convention on 1st April 2004 - RIPA (Designation of an International Agreement) Order 2004. It may therefore be arguable that any requests made prior to this date are simply unlawful as the mutual assistance

Convention had not yet been recognised and the proper safeguards put in place.

Assuming though that RIPA is properly engaged, because the British police had asked the overseas E.U. State for help (after 1st April 2004), and did use the s5 warrant procedure, then s17 is firmly engaged as well - in fact s17(2)(b) specifically relates to international mutual assistance requests. Thus, it would be unlawful for that intercepted material to go before the jury.

INTERCEPTIONS ABROAD - INITIATED BY AN E.U. AUTHORITY

If, on the other hand, the British police have not instigated the interception then RIPA might not be relevant and s17 would not bite. This though does not mean that the material is automatically admissible as evidence; as some may think. There should at that stage be consideration given to legal argument for the exclusion of that material. This would be an enhanced version of the Aujila arguments mentioned above. For example, just because RIPA does not apply, does not mean the Human Rights Act does not apply - questions would arise such as why was the intercept authorised, is the procedure in the authorising country compliant with the Convention on Human Rights, and so on. However, just because material is gained unlawfully does not mean it is inadmissible. Unlawfully obtained material may be kept from the jury depending on the type of breach of the rules and the unfairness caused - only where s17 is involved is there a definitive stay on the use of intercept material.

Furthermore, there are additional arguments about voice attribution; voices are not like fingerprints or DNA - it is an inexact science. In *R v O'Doherty* [2203] 1 Cr. App. R 5 it was held that, in the present state of scientific knowledge, no prosecution should be brought where the identification evidence relied solely on what is called the 'auditory method' of voice attribution (with one important exception); see now *R v Flynn & St. John* [2008] 2 Cr. App. R (20) CA.

RIPA S17 - THE PROHIBITION & ASKING QUESTIONS

Section 17 prevents any questions being asked about the lawfulness of an intercept operation. It is possible to challenge whether the conditions are in place for a non-RIPA intercept to become evidence i.e. an overseas intercept - is it really non-RIPA, if it is is the interception lawful in human rights terms; was the foreign interception properly authorised, are their systems human rights compliant etc etc? This was established in *Att.-Gen.'s Reference* (No. 5 of 2002), 4 ALL ER 901.

R v Herbert Austin & Ors [2009] EWCA Crim 1527, 23/7/09 is a very recent case which is of interest. It was an appeal from Winchester Crown Court of defendants charged with drug trafficking offences. The British authorities had been conducting surveillance on a suspect and were aware that he was flying to Columbia. They

informed the Columbian authorities who also placed him under surveillance. This surveillance included phone intercepts. That material was provided to the British authorities following a letter of request. The Crown then applied to adduce the material before the jury at the subsequent trial. The defence resisted and relied on expert evidence to suggest that the calls were actually intercepted in this country and not in Columbia (in which case s17 would apply). The Judge heard evidence on this topic and also heard from the Crown in a Public Interest Immunity application - i.e. where the defence were excluded from Court. This procedure formed part of the challenge in the Court of Appeal. The trial Judge found that the recordings were made in Columbia not the UK and ruled the material admissible.

The Appeal Court, having considered the PII material, found that it would have made no difference had the defence had sight of that material and therefore it would not have assisted in any s17 arguments. However, the Court found that the defence were not in possession of certain facts and materials which may have assisted them in an application to exclude the material - i.e. even though it was admissible, to exclude it anyway on grounds of fairness. This is often the base for any evidential applications - first submission: the material cannot be admitted, second; if it can it shouldn't applying s78 of the Police & Criminal Evidence Act 1984. That second limb persuaded the appeal Court that had the proper PII and disclosure provisions been applied as set out in *R v H & C* [2004] 2 AC 134 things may have been different. Therefore the Court decided that the material ought to be evaluated with that question in mind and that evaluation would have to be carried out by a Special Counsel instructed to review the material and decide how much could be disclosed to the defence so that they could ably put forward their exclusion argument.

THE FUTURE - SOCA & CROSS-BORDER CO-OPERATION

The E.U. States are fast moving together in the field of international cross co-operation in criminal investigations. In this age of global mass-communication, internet crime and the European Arrest Warrant one thing is for sure; we are to see a lot more of the authorities attempting to introduce foreign intercept material before the Courts; whether they are successful or not is another question.

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