

REGULATION OF INVESTIGATORY POWERS ACT 2000

Challenging the Surveillance Evidence - An Article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

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Since the Human Rights Act 1998 came in to force each one of us has certain rights guaranteed, for example the right to a fair trial - this is guaranteed under Article 6 of the European Convention. But you also have a right to privacy, this is guaranteed under Article 8. The State can only infringe this right - e.g. by listening to your conversations, following you etc, if it is for a reason proscribed in Article 8(2), e.g. "for the prevention of disorder or crime" and then only if the interference is 'proportionate' and "in accordance with the law". This last part (lawfulness) has landed the UK in trouble in Strasbourg especially in the 1980s and 1990s. The Government was forced to introduce legislation in an attempt to comply with the Convention. The latest legislation is the Regulation of Investigatory Powers Act 2000 (RIPA). Under RIPA the different types of surveillance are labelled as either 'directed', 'intrusive' or 'covert human intelligence source' (CHIS). There is a Covert Surveillance Code of Practice which sets out the rules and procedures for authorisation of covert surveillance.

For each type of surveillance it must be shown to be 'necessary' and that the invasion of privacy necessary will be the minimum possible - i.e. 'proportionate'. If properly authorised the fruits of this type of surveillance may become admissible in a criminal trial, except telephone interception material which generally cannot be used in evidence - the material is used for intelligence purposes only, as under s17 of RIPA there is a prohibition on asking questions at trial about the use of telephone intercepts.

TYPES OF SURVEILLANCE AUTHORITIES

Directed Surveillance: this is covert but not intrusive but is still 'likely to reveal private information about a person' (s26(2)(a)). This is the most basic type of surveillance under the Act, in reality it is 'tailing' someone, following them, photographing and videoing them. It requires only internal authorisation by a designated person who believes that it is proportionate to the aim sought to be achieved.

Intrusive Surveillance: is defined as covert surveillance carried out in relation to anything taking place on residential premises or in any private vehicle. Such surveillance must be authorised by an Officer of at least Superintend-

ent rank. However, according to the Code of Practice, para 5.19, a police authorisation will not take effect until it has been approved by a Surveillance Commissioner (except in urgent cases). Surveillance Commissioners are independent overseers of the operation of the Act. They are there to try to protect our society becoming a nation of suspects rather than citizens. The grounds required for the authorisation of intrusive surveillance are narrower than for directed surveillance.

Covert Human Intelligence Source: this is defined as a person who establishes or maintains a personal relationship with a person for the covert purpose of using the relationship with a person or covertly disclosing information obtained by the use of such a relationship or as a consequence of such a relationship. This clearly includes under-cover officers but may also include the use of informants. Again the authorisations may be made by a limited list of senior persons and the grounds are identical to those for directed surveillance.

Intercepts: Intercept warrants are now authorised under s1 of RIPA. Under the Code of Practice only a very small number of very senior officials are authorised to make applications. The warrants must be personally authorised by the Home Secretary. The level of intrusion is regarded as very high and so only the most serious cases attract this type of authorised intrusion. However, the material cannot be used in evidence; but see last month's article on foreign intercepts.

CHALLENGING ADMISSIBILITY

What clients want to know from us is 'can covertly obtained material be excluded?' The answer, in principle, is 'yes'. Of course it all depends on the circumstances of the case. What should first of all be considered is the reason for the application for covert surveillance in the first place and then consider whether there is any force in any argument that the material should be excluded. This will inevitably involve human rights arguments and, very likely, Public Interest Immunity applications too.

Article 8: As mentioned above it is important for the police to ensure that the intrusion is properly authorised and the proper procedures in the Codes of Practice have been adhered to. If not then it is arguable that the surveillance is not "in accordance with law" as required under Article 8(2) of the European Convention. If not properly author-

ised the intrusion will have been a breach to the right of privacy and thereby unlawful. This opens up the case for arguing that evidence should be excluded or even, if there is bad faith on the part of the officers for the prosecution to be stopped as an abuse of process, see *R v Grant* [2005] EWCA Crim 1089.

It used to be a fairly straightforward task of asking for copies of the written RIPA applications and authorisations which would then be sent to the defence team with the highly sensitive information blacked out - then at least the defence could start to consider whether the operation was 'proportionate' or not and prepare for a possible exclusion argument. However, following the cases of *R v G.S. and Ors* [2005] EWCA 887, unrep. 22/4/05, it will now be more difficult for the defence to demand the applications and authorisation forms. The Court of Appeal has made it clear that the Act provides all the relevant lawfulness safeguards and if there is a challenge all the Crown have to do is produce the relevant authorisations to the Judge only for his inspection. However, the case of *R v Allsopp* [2005] EWCA Crim 703, was decided just weeks earlier than the G.S. case and, arguably, actually makes it easier for the defence to demand that officers come to Court to be cross-examined on oath (in the absence of the jury) about the lawfulness of the police operation (para. 28).

Even if a certain police operation was found to be unlawful and violated the suspect's Article 8 rights, the next question is; 'so what?' What must be remembered is that a breach of Article 8 does not mean that the material must be excluded as a fair trial could take place under Article 6. It all depends on the circumstances but the case law tends to be leaning towards a requirement of bad faith before an Article 8 violation will have an impact on a criminal trial. Where, for example, police officers have deliberately placed someone in a police cell in order to record the comments made by the cell-mate then that may lead to a violation that is sufficient for the Court to intervene; see *R v Allan* [2005] Crim LR 716 or if communications between a lawyer and a prison are monitored, per *R v Grant* [2005] 2 Cr. App. R 29, CA.

R V MCE [2009] 2 WLR 782

On this last point about legally privileged communications, there has been a recent case from the House of Lords (which by the way no longer exists - replaced from October by the Supreme Court). The House of Lords considered that RIPA did permit the capturing of conversations between lawyer and client. The Lords also considered why the Act, appeared on its face not to classify such intrusion as 'intrusive surveillance' as opposed to simple 'directed surveillance' - the highest form of intrusion could it seemed be authorised by an officer of the same body carrying out the surveillance. In essence the Lords decided that though it is lawful for surveillance to include the bugging of conversations between detainees

and their lawyers this could only happen if the surveillance was authorised at the higher level -i.e. Commissioner level for 'intrusive surveillance', and that had been so since the Northern Ireland High Court had a declared as such a year earlier. As it stands this level of authorisation is still not formally necessary under the Act and until Parliament amends RIPA surveillance of legally privileged material by the State will be unlawful. This case underlines the paramount importance that legally privileged communications are held in.

RIPA has been with us for some time now. There are some 43 categories of public authority able to watch over us in some way or other under RIPA. Unarguably the Courts have given the police and the prosecution much leeway in the authorisation process but still we can rely on the authorities to go to excess and breach the rules in such a fundamental way that people can literally get off a murder charge; see *R v Sutherland & Ors* (2002) Jan 29, Nottingham Crown Court - when the police unlawfully recorded conversations between suspects and their legal advisors. The moral of the story is there is still scope for the defence to probe and test the lawfulness of surveillance evidence in the right circumstances.

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