

THE PROTECTION OF HUMAN RIGHTS
Abuse of legal professional privilege; secrecy of proceedings and lawyer/client confidentiality, right to respect for private life.

Professor Sara Chandler¹

Surveillance; telephone tapping;; covert listening devices; right to private life

The strongest elements of the rule of law involve access to justice, the independence of the legal professional, and the protection of human rights. Two particular rights enshrined in the European Convention on Human Rights and in the UK Human Rights Act 1998 are Article 6: Right to a Fair Trial and Article 8: the Right to Privacy.

Of particular concern to members of the FBE is the protection of legal professional privilege and the secrecy of proceedings. Legal professional privilege² is defined as the right of the legal advisor and their client to confidentiality of their interactions in respect of legal advice and representation. For there to be access to justice the client must be confident that their interactions with their lawyer are secret and protected. Technological advances of the modern state make it possible for these interactions to be intercepted, and for the state to violate the citizen's right to privacy and a fair trial.

The case of **PG and JF v United Kingdom**³ concerned covert surveillance, the right to respect for private and family life and the right to a fair trial. In this case the Police received information that an armed robbery was to take place and applied for authorisation to place a listening device in a suspect's flat. They received oral permission. A listening device was placed in a sofa in the suspect's flat. Retrospective written permission was given four days later. The suspect and his associates discovered the "bug" ten days after that and they abandoned the flat. No robbery took place. Subsequently the suspect and others were arrested in a stolen car with holdalls containing balaclavas, plastic cable ties, leather gloves and army kitbags. The police also requested itemised billing in relation to the telephone at the flat.

As they wished to compare speech samples with the recordings obtained from the flat the Police applied for permission to place devices in the applicants' cells and to the clothing of police officers who would be present when they were charged. Written authorisation was given and speech samples were obtained without the suspects' knowledge or permission. At trial the information gained from the bugs was deemed admissible. The suspects were found guilty of conspiracy to rob and sentenced to 15 years in prison.

The case went to Strasbourg European Court of Human Rights (ECHR) in 2001. It was held unanimously that there had been a violation of Article 8 in respect of a covert listening device at the flat; and in respect of covert listening devices at the police station. However, there had been no violation of Article 8 in respect of the obtaining of information about the use of the telephone at the flat. There had been a violation of Article

¹ Professor of Clinical Legal Education, The College of Law, London. President FBE Human Rights Commission. Past President City of Westminster & Holborn Law Society.

² Police and Criminal Evidence Act 1984. PACE defines material covered by legal privilege which protects communications between client and legal adviser. Category 1: Giving of legal advice by a professional legal adviser, and does not have to be in relation to any proposed legal proceedings. Category 2: purposes of actual or contemplated legal proceedings, and covers a wider range of people who may be involved (including prospective witnesses). Category 3: Items not in themselves communications but are enclosed or referred to in such communications in actual or contemplated legal proceedings.

³ ECHR 25 September 2001

13 in respect of the use of covert listening devices and the State was to compensate the applicants as there was no domestic remedy available at that time.

It was held by six votes to one that there had been no violation of Article 6 (1) in respect of the use at trial of the materials obtained by the covert listening devices.

In respect of the right to private life the covert listening surveillance in the suspect's home amounted to an interference with the applicants' right to respect for their private life. In the absence of domestic law regulating the use of covert listening devices at that time, the interference had not been in accordance with the law. Since the case of **Klass v Germany** the ECHR has viewed the interception of communications (mail and phone) as potentially an interference with family and private life. "Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only insofar as strictly necessary for safeguarding the democratic institutions....."⁴

With regard to the metering of the telephone, the Court held that if done by a telephone company for billing purposes, metering does not infringe Article 8. There is a difference between this and the interception of communications by the state. The test of whether the interference had been "in accordance with the law" depends on the nature and extent of the interference. The use to which the interception in the case of *PG v United Kingdom* could be put had been strictly limited and had been obtained and used solely in the investigation of the suspected conspiracy to commit armed robberies. The measure had been justified as "necessary in a democratic society"

Some activities might be recorded or reported in a public manner, such as walking down a street where there are CCTV cameras present, where a person can be seen by any member of the public present. Private life considerations might arise once any systematic or permanent record came into existence in the public domain. Although when answering questions put by the police officers in the police station the applicants in *PG v United Kingdom* knew that they were being listened to, it is a different matter that their voices had been recorded and analysed without their knowledge or permission. Since there was no statutory system to regulate the use of covert listening devices by the police on their premises at that time, the recording amounted to an interference with the applicants' right to respect for private life.

The dissenting Judge in *PG v United Kingdom* (Judge Tulkens) stated in respect of the Article 6 infringement that he could not consider the trial as "fair" if the evidence obtained violated Article 8, in breach of a fundamental right guaranteed by the Convention. In *Klass v Germany* the Court stressed that the Convention must be interpreted as a coherent whole. The dissenting Judge agreed with the dissenting Judge Loucaides in *Khan v United Kingdom*⁵ who wrote:

"fairness when examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of human rights set out in the Convention. I do not think one can speak of a 'fair' trial if it is conducted in breach of the law"

Judge Tulkens continued that in concluding that there had not been an Article 6 violation the Court renders Article 8 ineffective. The rights enshrined in the Convention cannot

⁴ (1980) 2 EHRR 214

⁵ (2001) 31 EHRR 45

remain purely theoretical or virtual because “the Convention must be applied in such a way as to guarantee rights that are practical and effective”⁶ He drew attention to a serious risk as identified by Judge Loucaides in Khan: “If violating Article 8 can be accepted as ‘fair’ then I cannot see how the police can be effectively deterred from repeating their impermissible conduct.”⁷

The difference between the majority and the minority views in *PG v United Kingdom* highlights the essential need for the Court to interpret the relationship between the protection given by Articles 8 and Articles 6 together. In interpreting whether the intrusive activities of the state have been carried out in accordance with the law there must be an examination of domestic law as well as compliance with the Convention.

Legal professional privilege and UK/EHRR caselaw

In *Malone v United Kingdom*⁸ the police tapped and metered the applicant’s phone. The ECHR established that metering carried out by a telephone company for billing purposes does not breach Article 8 and should be distinguished from the interception by the Police of communications. It was found that there had been a breach of Mr M’s Article 8 rights. In *Campbell v United Kingdom*⁹ it was a breach of Article 8 when the Prison Governor read letters between prisoner and legal adviser. In *Khan v United Kingdom*¹⁰ the ECHR found that the use of recordings of Mr K’s conversations breached Article 8 but did not breach Article 6 even though the surveillance had not been in accordance with the law.

It is recognised that the use of covert surveillance can be carried out with authorisation, however unless the evidence can be challenged in Court then there remains little protection of human rights under the Convention or even the protection of legal professional privilege. In 2008 the UK Government considered the need to review statutory protection. The President of the Law Society at that time, Andrew Holroyd, stated: “The law requires that conversations between a solicitor and their client are legally privileged. All monitoring should cease and if a conversation between a solicitor and a client is captured accidentally the tape should be destroyed.”

UK Domestic regulation:

UK domestic law provides for regulation of state investigatory activities **The Regulation of Investigatory Powers Act (RIPA) 2000** established that it is an offence for any person intentionally, and without lawful authority, to intercept any communication in the course of its transmission through a public telecommunication system, and –except in specified circumstances- through a private telecommunication system. This makes telephone tapping an offence. RIPA tests whether surveillance is legal or illegal.

There are 3 tests in ECHR jurisprudence on respect for private life: accordance with the law, necessary in a democratic society and proportionality. “In accordance with the law” has been interpreted by the ECHR as requiring that there be a clear legal framework, either under common law or statute. The 1984 Police & Criminal Evidence Act provides the basis of statutory protection of suspect’s rights and the exercise of legal

⁶ *Comingersoll SA v Portugal* (2001) 31 EHRR 31; *Beer v Germany* (2001) 33 EHRR 3

⁷ *Khan v United Kingdom* (2001) 31 EHRR 45

⁸ (1985) 7 EHRR 14

⁹ (1992) 15 EHRR 137

¹⁰ (2001) 31 EHRR 45

professional privilege. RIPA provides for authorisation by the issue of a warrant by the Home Secretary and can only be issued if the Home Secretary believes it is “necessary” for certain specified purposes and the conduct authorised is proportionate to what is achieved by that conduct. Specified purposes are “in the interests of national security, for the purpose of preventing or detecting serious crime or in the interests of the economic well-being of the United Kingdom, or giving effect to an international mutual assistance agreement in circumstances equivalent to those for preventing or detecting serious crime”¹¹

Under RIPA the **Office of Surveillance Commissioners** (OSC) monitors and reports on the use of surveillance. Commissioners review all surveillance authorisations and have the power to quash any authorisations found to be outside the powers. RIPA set up the **Investigatory Powers Tribunal** to deal with complaints from members of the public about the use of statutory powers and the conduct of public authorities.

In *PG v United Kingdom* ECHR found that the system of investigation of complaints at that time (before RIPA) did not meet the standards of independence required to constitute sufficient protection against abuse of authority and thus provide an effective remedy.

Photographic and film surveillance:

Two related cases highlight the continued need for protection of human rights in regard to state surveillance. In the case of **Peck v United Kingdom**¹² closed circuit television was used to film the applicant carrying a large knife around his local town centre while in the process of attempting suicide. This material was then publicised without the applicant’s knowledge or permission. At the ECHR it was held that there had been a violation of Article 8 and Article 13 and the UK was ordered to pay compensation and legal costs. No crime had been committed and therefore no Article 6 consideration. In the case of **Perry v United Kingdom**¹³ the applicant was arrested in connection with a series of armed robberies of mini cab drivers. The applicant refused to attend identity parades and so the Police applied for authorisation to video him in the Police Station without his knowledge. The video footage was shown subsequently to witnesses, he was identified, and at trial in he was convicted. Neither the applicant nor his solicitor was informed that the video had been made or used for identification purposes. It was held unanimously at the ECHR that there had been a violation of the applicant’s Article 8 right to respect for private life. The UK Government was ordered to pay compensation and legal costs. Article 8 and Article 6 need consideration in all cases of state surveillance.

Vigilance by defenders of human rights

It is the vital role of the legal profession to maintain a watch on the human rights of every member of society and in this instance we, as lawyers, are the defenders of human rights. The Convention should be integrated into our common thinking and daily practice as legal professionals. Our vigilance is the safeguard of the rule of law, access to justice, the protection of human rights and modern democratic society.

Ends

¹¹ RIPA 2000 Section 5 (3)

¹² (2003) 36 EHRR 41

¹³ (2004) 39 EHRR 3