Case No: IPT/A1/2013

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 24 July 2013

Before:

THE PRESIDENT
THE VICE-PRESIDENT
MR ROBERT SEABROOK QC
MS SUSAN O'BRIEN QC
and
MR CHARLES FLINT QC

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RE: A COMPLAINT OF SURVEILLANCE

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MR JONATHAN CROW QC and MR OLIVER SANDERS (instructed by the Home Office)

MR MARTIN CHAMBERLAIN QC (instructed by the Treasury Solicitor) as counsel to the Tribunal

Hearing date: 14 January 2013
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JUDGMENT ON PRELIMINARY POINT OF LAW

A preliminary legal point

1. A preliminary point of law arises in connection with a complaint to this Tribunal under the Regulation of Investigatory Powers Act 2000 (RIPA). The complaint is of unlawful surveillance. In order to determine the complaint, it is necessary for the Tribunal to decide whether the covert recording of a "voluntary declared interview" of the complainant, as described in paragraph 22 of this judgment, amounts to "surveillance" for the purposes of part II of RIPA.

2. The relevant official publications of the Office of the Surveillance Commissioners and of the Home Office differ in their interpretation of what constitutes "surveillance" for the purposes of Part II of RIPA ("Surveillance and Covert Human Intelligence Sources"). See paragraphs 24 and 25 of this judgment. A ruling by this Tribunal is necessary both to decide the general point of interpretation and to determine the particular complaint.

3. The point turns on whether, in all the relevant circumstances, the conduct described in the complaint is "surveillance" within the meaning of Part II of RIPA. Those provisions relate to prior authorisation of "directed surveillance" and "intrusive surveillance." Although they are defined terms in s.26 of RIPA, the core activity of "surveillance" itself is not defined in s.26, nor is it defined in s.48, which is the general interpretation section for Part II. s.48(2) refers to "surveillance", but does not define it. Instead, the subsection provides that it is "to be construed" as including certain matters specified in three paragraphs-(a), (b) and (c). See paragraph 10 of this judgment.

4. The question is this: is the covert making of a recording of a "voluntary declared interview" of the complainant in the course of an investigation or operation "surveillance" within the meaning of Part II? The practical significance of the question is that, if no "surveillance" would take place, then it would not be necessary to consider whether it would be of the "directed" or the "intrusive" kind: if there is no "surveillance", there would be no need for an authorisation under Part II.

The legislation

General

5. The Tribunal recognises at the outset that the wording in Part II presents some difficulties for the reasonable reader. It is easy to see how different interpretations in the official publications could be reached. The investigation which has prompted the question combines both the overt and the covert in the process of intelligence gathering at the core of all surveillance activities.

6. On the one hand, in a voluntary declared interview the process of intelligence gathering is open: the person from whom intelligence is being gathered is aware that intelligence is being gathered from and about him and that that is happening in the course of a process in which he is engaged. Openness, awareness and participation in the process of intelligence gathering from and about a person are not features of subjecting that person to surveillance: for obvious reasons surveillance is intended to remain hidden from the subject of it.

7. On the other hand, the critical question refers to an undercover aspect of intelligence gathering, which involves the secret use of a technological device (the covert recording). Intelligence gathering of which the subject remains unaware and in which he is not engaged is a distinctive feature of surveillance.

8. As a matter of ordinary English usage and of first impression a voluntary declared interview does not appear to the Tribunal to involve surveillance by the interviewer of the interviewee, whereas the making of a secret recording does appear to involve surveillance by the person making the recording. It will, however, be necessary in due course to consider the purpose and impact of s.48(2) of RIPA in the light of the submissions to the Tribunal.

9. Whatever the explanation for the conflict of official interpretations they cannot both be correct. The function of the Tribunal is to decide which of the possible interpretations is more consistent with the language and scheme of the legislation and with its overall purpose.

The provisions

10. S.48 (2) of RIPA, which applies for the interpretation of Part II of RIPA, uses expressions such as "in the course of surveillance" in (b) and "surveillance by a surveillance device" in (c), but without providing any statutory definition of surveillance itself. Instead of enacting a definition of "surveillance" Parliament has chosen to use a familiar legislative technique of deeming. In this instance it consists of providing that "surveillance" for the purposes of Part II shall be construed so as to include:-

> "(a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;
>
> (b) recording anything monitored, observed or listened to in the course of surveillance; and
>
> (c) surveillance by or with the assistance of a surveillance device."

11. At this stage the Tribunal notes three points about s.48(2).

12. First, the subsection refers to "surveillance" in (b) and (c), as well as in the opening words, in a manner that assumes that it has an accepted meaning. It was not considered necessary either to define or to describe it as such. Surveillance is essentially an intelligence gathering activity. It involves the use of various means. The person who is subject to surveillance is intended to remain unaware of those means and does not engage with the person secretly gathering the intelligence.

13. Secondly, the purpose and effect of the deeming technique in the drafting of s.48(2) is to provide that in Part II surveillance includes methods of intelligence gathering activities that might not be covered by surveillance in ordinary English usage. It may operate to amplify the ordinary meaning.

14. Thirdly, the common features of (a) (b) and (c) are that (i) none of them refers to the *purpose* of the activities described and (ii) all the activities described are different ways in which, for the purposes of Part II, intelligence about a person may be gathered without that person ever being aware of the means used: by monitoring, observing or listening to that person, or by recording those things in the course of surveillance, or by using a surveillance device. In brief, s.48(2) identifies particular aspects of the manner in which intelligence

gathering may take place, without expressly defining surveillance itself, or providing when or where it takes place, or who is conducting it.

15. Fourthly, by s.48(2)(b) "recording anything monitored, observed or listened to" is surveillance, if such recording is of monitoring etc "in the course of surveillance." Thus, if the recording is not "in the course of surveillance", it is not itself rendered surveillance by the subsection.

16. Part II applies to certain kinds of surveillance described as "directed surveillance" and "intrusive surveillance." Those expressions are themselves defined, though with no attempt to define "surveillance" itself.

17. Thus, s.26 (2) provides that surveillance is "directed" for the purposes of Part II if it is "covert but not intrusive" and "is undertaken:-

> (a) for the purposes of a specific investigation or a specific operation;
>
> (b) in such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); and
>
> (c) otherwise than by way of an immediate response to events or circumstances the nature of which are such that it would not be reasonably practicable for an authorisation under this Part to be sought for the carrying out of the surveillance."

18. S.26(3) provides that surveillance is "intrusive" for the purposes of this Part if, and only if, it is covert surveillance that:-

> "(a) is carried out in relation to anything taking place on any residential premises or in any private vehicle; and
>
> (b) involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device."

19. Other subsections in s.26 specify that certain kinds of surveillance are not intrusive, or are neither directed nor intrusive.

20. It is also provided in s.26 that "for the purposes of this section:-

> (a) surveillance is covert if, and only if, it is carried out in a manner that is calculated to ensure that persons who are subject to the surveillance are unaware that it is or may be taking place.."

21. In s.26 "private information," in relation to a person, includes any information relating to his private or family life. See subsection (10).

The background

22. The specific circumstances giving rise to the problem of interpretation are that:-

> (1) An individual holding an office or position with a public authority (the interviewer) conducts an interview with a member of the public (the interviewee).
>
> (2) It has been made clear to the interviewee that the interviewer holds an office or position of that kind and that the interview is voluntary.
>
> (3) Without the knowledge or consent of the interviewee a device is used to record the voluntary declared interview.

23. The uncertainty surrounding the issue of interpretation is highlighted by comparing the official publications which express differing views about it.

24. In the Guidance published by the Office of the Surveillance Commissioners (OSC) on "use by officers of covert surveillance devices to confirm at a later date what has been said or done by another person" it is stated that that would be surveillance under s.48(2)(b) and (c), and covert "since the person is unaware that it is taking place.." In Note 171 that Guidance expresses the doubts of the Surveillance Commissioners whether the Home Office statement "in s.2.29 of its Code is an accurate statement of the law." The Guidance comments that :-

> "…the individual may well know that what they say has been passed to a public authority but they may not volunteer some information if it were known that what was said was being recorded. If there is no reason to suspect that the individual would object to a recording it should be made with their knowledge. Otherwise a recording is capable of being construed as covert and should be authorised."

25. The Code on Surveillance issued by the Home Office (the HO Code) refers to specific situations "not requiring directed surveillance authorisation."

> " 2.29 The following specific situations also constitute neither directed not intrusive surveillance:
>
> - the recording whether overt or covert, of an interview with a member of the public where it is made clear that the interview is entirely voluntary and that the interviewer is a member of a public authority. In such circumstances whether the recording equipment is overt or covert, the member of the public knows that they are being interviewed by a member of a public authority and that information gleaned through the interview has passed into the possession of the public authority in question."

Submissions

26. The Tribunal has received valuable assistance from the written and oral submission made during the course of a hearing in open court by Mr Jonathan

Crow QC appearing for the Home Office and Mr Martin Chamberlain QC as counsel to the Tribunal. Supplementary written submissions followed and were completed on 22 February 2013.

A. Home Office submissions

27. The Home Office defends its published view with various arguments which may be summarised as follows.

28. First, in ordinary English usage, the essence of "surveillance" is observation for the purpose of obtaining information without directly interacting or engaging with the subject of the surveillance.

29. Secondly, although "voluntary declared interviews" necessarily involve the interviewer in "observing or listening to" (following the wording of s.48(2)(a)) the interviewee, there is direct interaction or engagement by the interviewer with the interviewee. So the voluntary declared interview does not in itself entail "surveillance" of the interviewee any more than this Tribunal would be engaged in surveillance of counsel when observing or listening to his oral submissions. The question of meeting authorisation requirements for directed surveillance or intrusive surveillance would simply not arise.

30. Thirdly, creating a record of the details of such an interview (e.g. by making full shorthand notes of it) would not involve a separate or free standing surveillance of the interviewee. What is being recorded by or for the interviewer during the interview is the interview: the recording of the information obtained is not itself surveillance nor is it done "in the course of surveillance."

31. Fourthly, it makes no difference that the record is created by use of a device, rather than manually. The use of a device would not convert into surveillance "observing or listening to" that did not itself take place "in the course of surveillance."

32. Fifthly, it makes no difference that a record of the interview is made covertly. The covert nature of the recording would not convert into surveillance "observing or listening to" a person that did not take place "in the course of surveillance" within the meaning of s.48(2)(b).

33. Although originally submitting that even if the making of a covert record of a voluntary declared interview involves surveillance, it is not "directed" surveillance, as it is not the undertaking of surveillance that results in obtaining private information, but the interview itself which has that result, Mr Crow accepted that if (contrary to his submissions) s.48(2) were engaged, the satisfaction of s.26(2)(b) and (c) would depend upon the facts of any particular case.

B. Submissions of Counsel to the Tribunal

34. Counsel to the Tribunal made submissions as to why the covert recording of a voluntary declared interview is surveillance and would require authorisation, if it is also directed or intrusive. His submissions may be summarised as follows.

35. First, the essence of surveillance, as specifically construed for the purposes of Part II of RIPA in accordance with s.48(2)(a), is "observing or listening to" persons or "their conversations." In view of that provision surveillance in Part

II is not limited, as it would be in ordinary English usage, to the connotation of covert "spying on" someone.

36. Secondly, the interpretation of the statutory definition of "surveillance" in RIPA is prior to and distinct from the statutory authorisation requirements in RIPA, which are triggered if the surveillance is covert and is directed or intrusive.

37. Thirdly, during the course of a voluntary declared interview, the interviewer will be both "observing" and "listening to" the interviewee and "their conversation", so that it is surveillance within Part II.

38. Fourthly, recording such an interview is of something "observed or listened to in the course of surveillance" so that is also surveillance under s.48(2)(b). That does not mean that a RIPA authorisation would be required for, for instance, taking notes of the interview overtly or recording it overtly.

39. Fifthly, a covert recording of a voluntary declared interview would require RIPA authorisation, if it constituted directed surveillance within s.26(2) or intrusive surveillance within s.26(3), on the basis that the conditions therein set out are present.

40. Finally, Mr Chamberlain submitted on the authority of *PG v United Kingdom* (2008) 46 EHRR 51, paragraphs 54-59, that the making of a permanent recording of a conversation could constitute the processing of personal data and an interference with Article 8 even where the conversation was a formal one between a police or other public officer and an individual and not in any sense private. If RIPA were read in the way contended for by the Home

Office, then (since there was no other statutory mechanism by which the making of a recording could be authorised (a proposition which the Home Office did not accept) there would be no lawful mechanism by which public authorities could obtain authorisation for conduct which constituted an interference with Article 8 ECHR. This would make the statutory scheme incompatible with Article 8 (as the UK legislation then in force had been found to be in *Malone v United Kingdom* (1984) 7 EHRR 14 and *Halford v United Kingdom* (1997) 24 EHRR 523). It follows that – provided only that such a reading is "possible" (and the Home Office agrees that it is) – the Tribunal is obliged, pursuant to s.3 of the Human Rights Act 1998, to read RIPA in such a way as to enable such conduct to be lawfully authorised; and the only way of doing that is to treat the recording of a voluntary declared interview as constituting "surveillance".

Discussion and conclusions

41. In the process of oral and written submissions and in the deliberations of the Tribunal a number of other detailed points were discussed. At the end of the day, however, the Tribunal returns to concentrate on the impact of the few critical words in s.48(2) of RIPA.

42. First, as already indicated above, the Tribunal agrees with Mr Crow QC that it is not correct to read s.48(2) as providing a comprehensive definition or description of surveillance itself, as distinct from the various ways in which it may be conducted. On a linguistic approach s.48(2) cannot possibly be a comprehensive definition, if only because (i) it uses the non-exhaustive word "includes" and (ii) within its very terms, it refers to "surveillance" as if it had a

meaning independently of the provisions of paragraphs (a), (b) and (c) to which it is made subject. Those provisions make no reference to the purpose of the various activities specified.

43. Secondly, in the absence of a statutory definition, the correct approach must be to regard surveillance as bearing the meaning that it has in ordinary English usage. The specific adjustments directed by s.48(2)(a) (b) and (c) are to that core meaning. Those adjustments neither define surveillance itself, nor do they change its essential meaning as a covert intelligence gathering activity. The adjustments are made to amplify its scope to ensure that it includes within the process the various different ways in which the intelligence gathering may be conducted. Various ways of conducting surveillance are expressly specified in case they might not be covered by "surveillance" methods in ordinary English usage.

44. Thirdly, the Tribunal accordingly rejects the contention based on s.48(2)(a) that, regardless of the purpose, nature or circumstances of the intelligence gathering activities in question, every act of "observing or listening to persons", their conversations or communications is automatically treated as surveillance. The counter-intuitive outcome of that approach is that a person would be the subject of surveillance in a voluntary declared interview, even though he is aware of and indeed collaborating with the interviewer in the process of gathering of intelligence from or about the interviewee.

45. As a matter of ordinary English usage, the awareness and participation of the interviewee in the process of the voluntary declared interview means that no surveillance of the interviewee by the interviewer is involved. As indicated

earlier the essence of surveillance viewed as a whole is that it consists of a number of different means used for the purpose of intelligence gathering activity without awareness or participation on the part of the person subject to it. A person is not being subject to an intelligence gathering activity if he knows what is going on and voluntarily engages in that process.

46. Fourthly, that conclusion is consistent with the purpose and context of Part II. It involved setting up a statutory system of authorisations of specified kinds of conduct as part of the regulation of investigatory powers, such as interception or surveillance to which objection might be taken on account of the covert nature of the means employed to obtain private information. The purpose of Part II of RIPA was to afford protection for the private lives of citizens from unjustified intrusion by the State within the framework established by Article 8 of the European Convention on Human Rights and incorporated into English law by the Human Rights Act 1998, which came into force on the same day as RIPA.

47. In that context, it is the view of the Tribunal that the awareness and participation of the interviewee in the voluntary declared interview does not bring the activity within the scope of Article 8. The interviewer is simply asking questions, listening to the answers given by the interviewee and observing the interviewee. A record of the questions and answers made by the interviewer, either manually or by a device, in the course of the voluntary interview could not, for the same reason, reasonably be regarded as an infringement of Article 8 rights. Mr Chamberlain's submissions set out in paragraph 40 do not arise.

48. It is true that in, a very general way, a voluntary declared interview involves the use of investigatory powers by asking questions, listening to the answers and observing the person interviewed. But investigation at a voluntary interview would not fall within the scope of the particular regime devised for the regulation of investigatory powers or the wider framework of Article 8. The regulatory scheme was established to regulate covert use of investigatory powers in cases where the person under surveillance is unaware of their use and therefore not in a position to know whether there may be an abuse of those powers. "Surveillance" in that context carries with it the connotation of a covert act as in ordinary usage.

49. The notion of a "covert interview" requiring RIPA authorisation is one that is difficult to grasp. An interview is by its very nature an overt intelligence gathering operation in which the interviewee actively participates, even if only to the extent of refusing to answer questions. There would be no sensible purpose in Parliament enacting legislation to require prior authorisation of an overt operation, such as a voluntary declared interview, and therefore no good reason for interpreting "surveillance" as extending to overt intelligence gathering operations.

50. Finally, as the interviewer in a voluntary declared interview is not engaged in surveillance of the interviewee, the recording of the interview is not observing or listening to "in the course of surveillance" within the meaning of s.48(2)(b). Paragraphs (b) and (c) only apply if there is surveillance. If paragraph (a) is not a comprehensive definition of surveillance (and it is not), then (b) and (c) do not apply. The making of the recording only involves the recording process

itself. It does not involve a separate act of "observing or listening to" the person being interviewed.

THE TRIBUNAL MAKES THE FOLLOWING DECLARATION

51. The tribunal declares that the covert making of a recording of a "voluntary declared interview" of the complainant in the course of an investigation or operation is not "surveillance" within the meaning of Part II of the Regulation of Investigatory Powers Act 2000.