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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

R A's Application [2010] NIQB 99

IN THE MATTER OF THE JUDICIAL REVIEW APPLICATION BY R A OF A DECISION TAKEN BY THE POLICE SERVICE OF NORTHERN IRELAND

Morgan LCJ Girvan LJ and Coghlin LJ

GIRVAN LJ

Introduction

[1]

"Under our tents I'll play the eavesdropper
To hear if any mean to shrink from me"
Shakespeare: Richard III v. 3

It is unsurprising that amongst the malign characteristics Shakespeare attributes to Richard III in his entirely negative portrayal were those of an eavesdropper. In Shakespeare's time and to this day eavesdropping was and is regarded as an essentially objectionable invasion of the privacy which citizens are entitled to expect and a trespass upon the personal space of individuals who are entitled to be free from prying ears and eyes. The dangers to the integrity of society and of citizens' lives from eavesdropping or in its more modern guise state surveillance were amply demonstrated in the Fascist and totalitarian regimes of Europe whose egregious abuses of human rights formed the backdrop to the European Convention on Human Rights which was designed to prevent the re-emergence of such abuses. The horrors of the snooping society in Nazi Germany portrayed in Brecht in *Fear and Misery in the Third Reich* were with the advances in surveillance equipment replicated in an even more sophisticated manner in East Germany, a society in which a culture of all pervasive surveillance destroyed human

relationships and degraded the lives of its citizens. The graphic portrayal of that system in the film *The Lives of Others* is a compelling argument, if one be needed, against unrestrained state surveillance.

[2] Although objectionable in principle it must be recognised that on occasion a substantial benefit to society may be achieved by properly regulated surveillance. It may, for example, prevent loss of life or assist in the detection of crime or conduct genuinely damaging to the public good. The price of invading the privacy of individuals may, on occasions, be a price worth paying. Convention case law recognises this but clearly shows that adequate safeguards must be in place and that surveillance must be subject to a clear and foreseeable legal regime.

The application

[3] The applicant in the present case sought an assurance that his consultations with his solicitor, his medical practitioner and a responsible adult during his period of detention by the police would not be the subject of surveillance. The police response was that it could neither confirm nor deny whether any form of covert surveillance had been conducted or would be conducted. It pointed out that covert surveillance was regulated by the Regulation of Investigatory Powers Act 2000 ("RIPA"), related statutory instruments and the revised Code. As Lord Hope pointed out in Re McE [2009] 2 WLR 782 at paragraph [58] a detained person has no right to object to covert surveillance which is authorised under RIPA. Nor, since this would be inconsistent with the covert nature of the conduct where it has been authorised, has he a right to be told whether or not surveillance is being undertaken in his case. The European Court of Human Rights in Kennedy v UK (see para 9 below) has confirmed this approach. If covert surveillance could have been legally authorised in the applicant's case the police response was a proper and inevitable one. The burden of the applicant's case is that covert surveillance could not be lawfully authorised in his case and that he is entitled in these proceedings to establish that that is the legal position. If he is right in his primary contention the applicant would be effectively entitled to similar relief to that granted in Re McE. The points raised in the case are of general importance and hence it is appropriate for the court to deal with the applicant's case notwithstanding that the questioning of the applicant has now been completed and notwithstanding that the police gave an undertaking that no surveillance would take place pending the determination of this application.

The decisions in Re C and Re McE

[4] At the outset it is necessary to establish what was decided by the combined effect of the decisions of the Divisional Court in Re C [2008] NI 287 and by the House of Lords on appeal in Re McE. The majority view in Re C,

which was upheld by a majority in the House, was that it was Parliament's intention that section 28 of RIPA could be applied to consultations between legal advisors and clients. The House of Lords rejected the minority view (which I espoused and which was accepted by Lord Phillips in the House) that RIPA could not be interpreted as permitting such surveillance. Although there was a division of views on that issue it was the unanimous view of the Divisional Court in Re C that the fundamental importance of the right of a detained person to consult a legal advisor privately necessitated an enhanced authorisation regime and that the protections afforded by the *directed* as opposed to *intrusive* surveillance schemes under RIPA were insufficient protections for a detained person. Having regard to Article 8(2) of the Convention any procedure for surveillance must be prescribed by law and must be necessary in a democratic society and proportionate. If surveillance of consultations between legal advisors and clients in police custody is to be lawfully carried out the protections to be satisfied for the carrying out of intrusive surveillance should at least apply. No appeal against that conclusion was brought by the Secretary of State which the House of Lords accepted as correct.

[5] The judgments in the Divisional Court identified a number of procedural inadequacies in the protections attaching to directed surveillance if it were to apply to the surveillance of legal consultations. Where surveillance involves surveillance of postal or telephone communications between a lawyer and a client it requires a determination by a person with proper independence and experience whether it is appropriate. No lesser protections should apply in the present situations. The law needed to be sufficiently clear, detailed and accessible to give citizens an adequate indication as to the circumstances in and conditions under which the authorities are empowered to permit such surveillance. The law must formulate appropriate threshold tests for the justification of such surveillance. The law must spell out the considerations for taking into account in determining what is proportionate. These matters were not adequately provided for under the law as it stood when Re C came before the court.

[6] Notwithstanding the unchallenged conclusions reached by the Divisional Court by the time Re C reached the House of Lords in Re McE the Secretary of State had still not given effect to the ruling. Until this was done, as Lord Phillips pointed out, the state authorities could not lawfully continue to carry out surveillance of legal consultations.

The 2010 Order and Revised Code

[7] Subsequently the Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010 was made under Section 47(1)(b) RIPA. It came into force on 25 February 2010. Article 3 provides:

> "(1) Directed surveillance that is carried out in relation to anything taking place on so much of any premises specified in paragraph (2) as is, at any time during the surveillance, used for the purpose of legal consultations shall be treated for the purposes of Part II of the Regulation of Investigatory Powers Act 2000 as intrusive surveillance.
>
> (2) The following premises are specified for the purposes of paragraph (1)
>
> ……..
>
> (d) police stations".

Article 2(d) of the Police Stations Order provides that legal consultation means a consultation between a professional legal advisor and his client or any person representing his client or a consultation between a professional legal advisor or his client or any such representative and a medical practitioner made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings. It thus does not apply to conversations between a detained persona and a responsible adult prior to a legal consultation.

[8] The 2010 Order gave effect to the Divisional Court judgment by subjecting surveillance of legal consultations in police stations to the requirements of the intrusive surveillance regime. The 2010 Order did not in itself address the other shortcomings in law identified by the Divisional Court judgments but the 2010 Order must be read with the contents of the Revised Code of Practice in relation to Covert Surveillance and Property Interference ("the Revised Code").

Kennedy v. UK

[9] Before considering the applicant's criticism of the current legal framework relating to covert surveillance in relation to consultations between the detained person, his lawyers, medical practitioner and an appropriate adult it is necessary to refer to the recent decision of the European Court of Human Rights in Kennedy v UK (Application 26839-05) given on 18 May 2010. The applicant in that case lodged two complaints with the Investigatory Powers Tribunal ("IPT"). He claimed that his mail, telephone and email communications were being continuously and unlawfully intercepted. He claimed that to the extent that any such conduct purported to have the authority of a warrant issued or renewed under RIPA Part I or the Interception of Communications Act 1985 the issue and renewal of that warrant lacked the necessary justification under Part I of RIPA, Article 8(2) or the general law. The IPT, following investigation, notified him that no

determination had been made in his favour. This meant either that there had been no investigation or that any interception which took place was lawful.

[10] The European Court in its judgment reviewed the relevant statutory provisions and examined the proportionality of the RIPA legislation and the safeguards built into the system. It addressed the question whether the state's powers of surveillance under Part I of RIPA were in accordance with law and necessary. It was not in dispute that the surveillance measures pursued the legitimate aims of protecting national security, the prevention of crime and the protection of the economic well-being of the country.

[11] Key conclusions reached by the court were as follows:

(a) The provisions of the relevant statutory codes made under RIPA could be taken into account in accessing the foreseeability of the RIPA requirements.

(b) Interceptions could only take place where the Secretary of State believed it was necessary for the purposes of preventing or detecting crime and for the purposes of safeguarding the economic well-being of the United Kingdom. This terminology was sufficiently clear. The State is not required to list or detail all conduct intended to be covered. "Serious crime" was adequately explained in the legislation.

(c) The Court concluded that the Code's advice that the duty on the Secretary of State to cancel warrants which were no longer necessary in practice meant that intercepting agencies must keep their warrants under review. It concluded that the provisions on duration, renewal and cancellation of warrants were sufficiently clear.

(d) In paragraph [162] of its judgment the Court noted that any captured data no longer required for the legitimate statutory purposes must be destroyed. Section 15 imposed a duty on the Secretary of State to ensure that arrangements were in place to secure any data obtained from interception. The Code strictly limited the number of people to whom intercept material could be disclosed imposing a requirement for the appropriate level of security clearance as well as a requirement to communicate data only where there was a "need to know". Where a summary of the material would suffice then only a summary should be disclosed. The data must only be accessible to those with the necessary security clearance. A strict procedure was in place for vetting.

(e) In paragraph [164] of its judgment the Court noted the requirement in Section 15 that intercept material and related communications as well as any copies made of the material or data had to be destroyed as soon as there were no longer any grounds for retaining them. The Interception of Communications Commissioner who was an independent person who held

or had held high judicial office had effective access to details of surveillance activities undertaken. The Commissioner's role in ensuring that the provisions of RIPA and the Code were observed and applied correctly was of particular value.

(f) The IPT provided adequate judicial protections for an individual who suspects that his communications had been intercepted.

[12] What emerges clearly from the decision in Kennedy v UK is that the surveillance regime under Part I of RIPA was compatible with Article 8. That decision is not determinative of the compatibility of the Part II regime in the context of the present case but the reasoning of the court in Kennedy is very relevant in view of the parallels between Part I and Part II of the surveillance legal regimes.

The applicant's challenge

[13] Miss Quinlivan on behalf of the applicant challenges the Convention compatibility of the legal regime relating to surveillance of relevant consultations on a number of grounds. Her submissions made two key points. Firstly, the "exceptional and compelling circumstances" making an authorisation appropriate under the Revised Code are not sufficiently clearly defined. The Revised Code merely gives examples of what can justify surveillance and a detained person cannot be confident that his legally privileged consultation is not being subject to surveillance. Secondly no adequate guidance was given in relation to securing legally privileged confidential information and how it should be secured and destroyed. There is no adequate guidance as to the circumstances in which it can be released. Less protection is afforded to legally privileged material than is available for material which has been obtained as a result of the interception of communications under Part 1.

Conclusions on the first issue

[14] The 2010 Order and the Revised Code make clear that in the case of surveillance of legal consultations such surveillance falls within the remit of the safeguards relating to intrusive surveillance (see the 2010 Order and paragraphs 2.12, 2.18 and 4.7 of the Revised Code.) Paragraph 4.12 of the Revised Code states:

> "Where covert surveillance or property interference is likely or intended to result in the acquisition of knowledge of matters subject to *legal privilege*, an *authorisation* shall only be granted or approved if the *authorising officer, Secretary of State or approving Surveillance Commissioner,* as appropriate is satisfied that

there are exceptional and compelling circumstances that make the authorisation necessary:

- Where the surveillance or property interference is not intended to result in the acquisition of knowledge of matters subject to legal privilege, such exceptional and compelling circumstances may arise in the interests of national security or the economic well-being of the UK or for the purpose of preventing or detecting serious crime.
- Where the surveillance or property interference is intended to result in the acquisition of knowledge of matters subject to legal privilege, such circumstances will arise only in a very restricted range of cases such as where there is a threat to life or limb, or to national security, and the surveillance or property interference is reasonably regarded as likely to yield intelligence necessary to counter the threat."

Paragraph 4.13 goes on to provide:

> "That in considering any *authorisation* for covert surveillance or property interference likely or intended to result in the acquisition of knowledge of matters subject to legal privilege the *authorising officer, Secretary of State or approving Surveillance Commissioner,* as appropriate, must be satisfied that the proposed covert surveillance or property interference is proportionate to what is sought to be achieved. In relation to intrusive surveillance, including surveillance to be treated as intrusive as a result of the 2010 Order, section 32(4) will apply."

Section 32(4) states that the matters to be taken into account in considering whether the requirements of sub-section (2) are satisfied in the case of any authorisation shall include whether the information which is thought necessary to obtain by the authorised conduct could reasonably be obtained by other means.

[15] In determining *necessity* and *proportionality* the person authorising the surveillance must have regard to Chapter 3 of the Revised Code. *Necessity* must be justified on one of the statutory grounds. The requirements of *proportionality* involve balancing the seriousness of the intrusion into the privacy of the subject of the operation against the need for the activity in

investigative and operational terms. Intrusion into private legal consultations and consultations between detained persons and an appropriate adult are clearly very serious so the countervailing view for the activity must indicate a marked need. Paragraph 3.5 and paragraph 3.6 of the Revised Code make clear the factors to be taken into account in determining proportionality.

[16] The statutory grounds relevant to the test of necessity in the case of intrusive surveillance are set out in section 32. These are legitimate purposes as the Court in Kennedy v UK accepted. The Surveillance Commissioner must satisfy himself that the test of necessity and proportionality is satisfied. Para 4.12 of the Revised Code in bullet point 2 sets out the circumstances in which surveillance can be appropriate. Surveillance of legal consultations as defined by the 2010 Order between legal advisers and detained persons will almost inevitably result in the acquisition of knowledge of matters falling within bullet point 2. Hence the heightened test specified in the second bullet point in paragraph 4.12 will apply.

[17] Miss Quinlivan's criticism that the wording of paragraph 4.12 is insufficiently prescriptive and merely gives examples of situations when surveillance may be authorised must be rejected. Reading RIPA, the 2010 Order and the Revised Code together it is clear that a Surveillance Commissioner could only properly authorise a surveillance operation in such circumstances where he is satisfied that

(a) there is a high degree of risk justifying the use of surveillance as a proportionate response to the risk posed by the individual to be the subject of the surveillance; and
(b) the potential usefulness of surveillance is demonstrably shown.

It is clear that the use of surveillance in cases where surveillance is likely to reveal matters covered by legal privilege is not to be authorised ill advisedly or lightly but only where it can be justified as a truly proportionate response to a real risk. In Kennedy the European Court noted that "the requirements of foreseeability of the law does not go so far as to compel states to enable legal provisions listing in detail all conduct" that may justify a decision on national security grounds. Similar reasoning applies in the present instance. The foreseeability of law does not require exhaustive definition in all instances. The wording of the Revised Code in this instance is sufficiently clear.

[18] Having regard to the reasoning in Kennedy, the wording of the Revised Code, the protection of the Surveillance Commissioner's involvement in the authorisation process, the general oversight provided by the Surveillance Commissioner and the ultimate protection provided by the IPT there are adequate safeguards in relation to the authorisation and review of surveillance of legal consultations falling within the 2010 Order.

Conclusions on the second issue

[19] In relation to the applicant's case that the Revised Code provides inadequate safeguards in relation to how collected material should be retained and destroyed, Mr Perry QC countered Miss Quinlivan's arguments by arguing that there were adequate safeguards under the Revised Code and the Data Protection Act 1998. He contended that the combined effect of those provisions was as follows:-

(i) the obtaining of information subject to legal professional privilege must be reported to the Commissioner;

(ii) arrangements had to be in place for the secure handling, storage and destruction of the material;

(iii) the material could not be stored for longer than was necessary for the purposes for which it was obtained;

(iv) material had to be destroyed when it was no longer necessary to preserve it for the purpose for which it was obtained; and

(v) unjustified disclosure of the material would be a criminal offence.

[20] It is clear from paragraph 4.23 of the Revised Code that public authorities deliberately acquiring knowledge of matters subject to legal privilege may use it to counter the threat which led to the authorisation for its acquisition. Under paragraph 4.24 the relevant Commissioner must be informed of the acquisition and retention of legally privileged material and he can demand to see it. In fulfilment of his obligation to ensure protection of the Article 8 rights of individuals the Commissioner must act conscientiously and properly in his oversight obligations and hence must carefully examine whether any disclosure of retained material has occurred and what is happening in relation to retained material. He provides an independent judicial oversight which includes a consideration of the circumstances of the disclosure of legally privileged material to an outside body (see paragraph 4.26).

[21] Paragraph 9.3 of the Revised Code requires each public authority to ensure that arrangements are in place for the secure handling and destruction of material obtained through the use of directed or intrusive surveillance. The PSNI's "Service Procedure 19/2010 on Covert Surveillance of Legal Consultations and the Handling of Legally Privileged Material" ("the Service Procedure")implemented on 22 June 2010 which remains in force until 23 June 2011 sets out details of arrangements made by the police for the handling, storage and destruction of material obtained through the use of the

surveillance of legal consultations. There is no reason to doubt that this Service Procedure satisfies what paragraph 9.3 of the Revised Code called for.

[22] Paragraph 6(4) of the Service Procedure provides –

> "(a) The PSNI will ensure that arrangements are in place for the secure handling, storage and destruction of material obtained through the use of directed or intrusive surveillance or property interference. The SAO will ensure compliance with the appropriate data protection requirements under DPA 1998 and any other relevant codes or practice relating to the handling and storage of material.
>
> (b) Particular attention is drawn to the requirements of the Code of Practice issued under the Criminal Procedure and Investigations Act 1996 ("CPIA").

Paragraph 6(5) provides:

> (5)(a) Material that is subject to legal privilege will be disseminated, stored and retained and disposed of in line with any specific conditions that are contained within the authorisation.
>
> (b) Legally privileged material will be clearly marked as being such and dissemination will be limited to only those persons who are authorised. The material will be handled in a manner that is consistent with the procedure set out for the storage and handling of classified material.
>
> (c) Legally privileged material that is deliberately acquired will only be disseminated for the purpose of countering the identified threat. Legally privileged material that is acquired and is not deemed relevant will not be copied or disseminated: the master and working copy will be sealed and securely stored. Material that is subject to legal privilege will not be used to further other investigations unless explicitly approved within the authorisation or any review. The dissemination strategy will

ensure that any subsequent investigation or prosecution is not compromised. The copying and handling of any material will be fully audited. Material that is subject to legal privilege will not be recorded on PSNI intelligence databases. Dissemination of material to an outside body will only be considered when it is necessary. Material that is disseminated to an outside body will retain any additional handling conditions. The additional handling conditions will be notified to that body as a condition of such dissemination.

(d) Any employee of the PSNI who is given access to the material will be required to sign to confirm that they will not disclose the material other than in accordance with the dissemination policy.

(e) Material that is subject to legal privilege will only be retained for as long as is necessary to –

(i) counter the threat in respect of which it was obtained;

(ii) comply with obligations with respect to CPIA 1996; and

(iii) comply with the Revised Code of Practice for Covert Surveillance and Property Interference.

(f) When the obligations with respect to (i) and (iii) above have been discharged the SAO will direct that the material be destroyed. Disposal will be witnessed and certified by the PSNI Human Rights legal adviser."

[23] The Service Procedure represents the current procedure now applicable and it is publicly available. It is a Code-compliant set of arrangements which makes clear the restraints on the use of the material and spells out an obligation to retain such material only so long as it is necessary to counter the relevant threat in order to comply with the obligations of RIPA and Revised Code. When the obligations are discharged the material must be destroyed.

[24] It is true that the statutory provisions under Part 1 of RIPA upheld in Kennedy v. UK relating to the retention and destruction of retained material under Part 1 are more detailed, prescriptive and precise. Taking together the 2010 Order, the Revised Code and the PSNI Service Procedure implementing Code compliant arrangements called for under paragraph 9.3 of the Revised Code the arrangements in place for the use, retention and destruction of retained material in the context of legal consultations subject to surveillance are compliant with the Article 8 rights of persons in custody in respect of their legal consultations. This conclusion can be reached without recourse to the Data Protection Act 1998 the application of which to material obtained from surveillance of legal consultations is at best questionable in view of that Act's definition of "data" and "personal data".

[25] The Revised Code makes clear that material subject to legal professional privilege is not admissible in court and demands that such material should be safeguarded by the taking of reasonable steps to ensure that there is no possibility of it becoming available or its contents becoming known to any person whose possession of it might prejudice any criminal or civil proceedings. A breach of Article 6 of the Convention will thus not occur. It is true that the existence of a power to carry out such surveillance without the detained person being aware of it creates a potential chill factor for the solicitor and client who cannot be quite sure that surveillance is not taking place. The House of Lords has concluded that RIPA permits such surveillance and that logically neither the solicitor or client can be informed whether or not it has occurred. The theoretical chill factor cannot be considered in undermining the right to a fair trial. The Code of Practice must be such as to reassure those in custody that save in exceptional circumstances their consultation with their lawyer will take place in private (per Lord Phillips in Re McE). The Revised Code in the present instance does set in place clear safeguards and protections which should realistically reduce the chill factor that inevitably flows from the mere existence of a power to carry out such surveillance.

[26] The special considerations which apply to legal consultations and between medical practitioners and detained persons does not apply to discussions between an accused person and an appropriate adult. The role of a responsible adult is to ensure that the detained person understands what is happening to him and why; to support, advise and assist him; to observe whether the police are acting properly and fairly and to intervene if they are not; to assist with communications between the detained person and the police and to ensure the detained person understands his rights and the appropriate adult's role in protecting those rights. The protections afforded by RIPA and the Revised Code are sufficient statutory protections.

[27] For the reasons given the application must be dismissed.

[28] No legal regime unless it is entirely inflexible and restrictive can avoid entirely the possibility of abuse of power by agents of the state. If the protections afforded by RIPA and the relevant codes made thereunder are to be properly safeguarded they require conscientious lawful application by state agents and by Surveillance Commissioners who are duty bound to ensure that the legislation is applied consistently with the human rights of individuals affected. On occasion errors will occur. In Re McE it emerged that there was no basis for the Prison Service to authorise surveillance but initially it asserted that it had such a right and presumably it had on occasion purported to exercise such a non-existent power (see Lord Carswell at paragraph [95]). Lord Neuberger indicated that the evidence suggested that Government had been knowingly sanctioning illegal surveillance of legal consultations at a time when the protections attaching to intrusive surveillance were not in place. It does not appear that these abuses of power were picked up or criticised. Those examples emphasise the importance of close and anxious scrutiny of the exercise of surveillance powers on the part of all those charged with the application or supervision of the surveillance legal regimes.