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WHY INTERCEPT EVIDENCE SHOULD BE ADMISSIBLE IN CRIMINAL PROCEEDINGS

Evidence obtained from covert interception of telephone calls is not, generally, admissible in evidence criminal proceedings.

In this paper, the first in a new series of articles and papers published by the Society of Conservative Lawyers, Jonathan Fisher QC explains why the law on admissibility of intercept evidence needs to be changed.

In the last Parliament, the Conservative Party proposed an amendment to the Serious Organised Crime and Police Bill to permit intercept material to be admissible in evidence. The amendment was supported by the Liberal Democrats. The Government opposed the amendment and it was defeated by a majority of 113 [Hansard, 7th February 2005, Vol 430, No 35, cols 1231 to 124].

The arguments in favour of repealing the general prohibition on the use of intercept evidence in terrorist and serious criminal cases are overwhelming. The present prohibition is anachronistic and illogical, and its abolition has been repeatedly recommended to Government in recent years. It is extraordinary that the Government continues to resist this change, preferring instead to enact draconian legislation which infringes human rights legislation and significantly erodes traditional liberties.

Almost every other country, including the US and European countries, permits intercept evidence to be given in evidence, and intercept evidence is deployed

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in these countries with significant success in terrorist and organised crime cases. Use of intercept evidence is consistent with human rights legislation. The law already permits use of intercept evidence in certain cases. Yet the circumstances in which this is allowed are arbitrary and illogical. The operational ability of the UK intelligence and police services are not damaged by use of intercept evidence in these cases, and the US and European intelligence and police services are not damaged by use of intercept evidence in their own countries.

In 1996 Lord Lloyd recommended lifting the ban on the use of intercept evidence in his review of terrorist legislation. On 28th September 1999 a consultation paper entitled 'Interception of Communications in the UK' was published. This recommended a lift on the ban on the use telephone intercepts. The recommendation was again made during the debate on the Regulation of Investigatory Powers Act (RIPA) 2000, but section 17 continued the ban on the use of intercept evidence in court, that had previously been contained within the Interception of Communications Act 1985. Most recently the Newton Committee, headed by Privy Councillor Lord Newton, published a report into the Anti-Terrorism, Crime and Security Act 2001, on 18th December 2003. This report recommended that the blanket ban on the use of intercepted communications in court should be relaxed. Yet the Labour Government has, to date, resisted any change to the law.

As Lord Lloyd of Berwick explained in his inquiry into anti-terrorist legislation, published in 1996:

"The first and most obvious argument is that evidence of intercepted material is admissible to prove guilt in each of the countries which I have visited, and in every other country of which I have knowledge. The United Kingdom stands

alone in excluding such material. Thus in the United States the use of intercept material in evidence is regarded as essential. In many instances, including high-profile cases involving the New York Mafia, convictions otherwise unobtainable have been secured by the use of intercept material. I put to officers of the FBI the suggestion that they were having second thoughts about the use of intercept material. I could find no support for this suggestion. In France I was told that intercept material has proved very valuable in terrorist cases. Thus, some 80 per cent. of the evidence against those suspected of involvement in the 1995 bombings is derived from intercept. Similarly, in Australia interception is regarded as an 'extremely valuable aid to criminal prosecution' . . . 664 prosecutions for offences ranging from murder to serious fraud were based on intercepted material, nearly 500 of those prosecutions being for drug offences. Convictions were obtained in 87 per cent of the cases. Often, when presented with the evidence of an intercept, the defendant pleads guilty."

Use of intercept evidence does not infringe human rights under the European convention, providing that it is used proportionately, by serving a pressing need. The case of Khan v United Kingdom[1] clarified the legitimacy of using intercept type surveillance evidence, with respect to Article 6 at the European Court of Human Rights. The case concerned a police recording, of an incriminating conversation, relating to the importation of heroin by means of a secret electronic surveillance device. The European Court of Human Rights in Strasbourg held that its use at the trial did not violate the right to a fair hearing under Article 6. The court, repeating what it had said in previous ECHR judgments, held that the central question was whether the proceedings as a whole were fair. Noting that the accused had been afforded an opportunity to challenge the admissibility of the evidence under section 78 of Police and Criminal Evidence Act 1984, as well as its authenticity, the court

found that the use of the evidence did not conflict with the requirements of fairness guaranteed by Article 6(1).

In the case of P.G and J.H v UK[2] the complaint concerned the monitoring and recording of conversations by means of a covert listening device which was placed in the home of one of the applicants, the monitoring of calls made on the applicant's telephone and the use of listening devices to obtain voice samples while the applicants were at a police station. The European Court of Human Rights was asked to consider whether these activities amounted to an interference with the applicants' right to their private life and their right to a fair trial. Acknowledging that this case was similar to that of Khan, the majority of the Court was satisfied that the use of evidence of material obtained in this manner did not violate the right to a fair trial.

The fundamental point is clear. The proportionate use of intercept evidence in a criminal trial is compatible with the European Convention of Human Rights. This can be contrasted with the administrative detention at the Home Secretary's fiat which offends both the ECHR and the rule of law. One only needs to refer to their Lordships decisions in the Belmarsh judgment[3] to establish this point. Whilst the House of Lords judges were concerned with the discriminatory effect of the Government's legislation on foreigners, the judges made a point of expressing wider concerns about the impact of this type of legislation on the Rule of Law. Lord Nicholls condemned the Government's actions, saying that "indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law". As Liberty has pointed out:

"We have been saying for years that intercept evidence should be admissible in Court .... If it will help bring those detained without trial in Belmarsh to be put on trial and given due process then it is long overdue".

The Government's arguments for non-disclosure of intercept evidence have been based on the arguments that technology is changing so fast, any regime put in place would soon be outdated, the fear that allowing intercept evidence heard in a court could compromise national security, damage relationships with foreign powers or the intelligence services, or threaten the lives of sources. The final argument is that once intercept evidence has been disclosed there may be a requirement to disclose the whole of the tapped conversation. This could be a 10 minute passage, but one which has been tapped for a number of years.

These arguments have not persuaded security analyst and former anti-terrorist intelligence officer Charles Shoebridge. Speaking to the BBC he said:
"Phone taps, could have provided "compelling evidence" in recent terrorist cases, had they been admissible. Similarly, advancing technology cannot be a good reason to delay legislation. Otherwise new legislation would never be introduced at all. Technology is continually advancing.[4]"

Justice, the all-party law reform group, has also addressed the arguments put forward by the Government:
'If the intelligence services of the United States, France, Israel, Canada and Australia can survive the use of such evidence in their courts, then British spies are surely equal to the challenge.[5]'

The Director of Public Prosecutions, Ken Macdonald QC, has made it clear that he backed the idea and anti-terrorist sources stated:
'MI5 and MI6 have no objection in principle to such a move but the time and resources required to allow the product of telephone taps to be used as evidence in court far outweighed the potential disadvantages.[6]

So what is the problem? Telephone tapping evidence is already used in certain cases. There is no prohibition on the use of interceptions which have occurred within an internal network, whether that is a place of work, at home, or in prison. If an office manager is making a telephone call to a colleague, within the same telephone network system, and that call is tapped, there is no difficulty presented with that tapped evidence being used in a court of law. Equally, if a listening device is placed in a person's house and a conversation is tape recorded or transmitted by a wireless device somewhere else and recorded at that location, that intercepted conversation provides admissible evidence in a court of law. Individuals can be wired up with recording devices attached to their body, and again, the conversations that they have with other people are admissible. Taps from conventional bugs, not attached to phones, can be used in court. The case of Ian Huntley demonstrates how intercept evidence can be used in court[7]. Whilst Ian Huntley was held in custody in relation to his suspected involvement with the murder of Holly Wells and Jessica Chapman, two phone calls that he had made were intercepted, without the participants' knowledge at the time, and the detail of what was said was presented in evidence in court.

It is no surprise that intercept evidence can be given as evidence in a criminal court without damaging police and intelligence capability and methodology because a well refined system for non-disclosure of unused material already exists in the criminal courts. As a general rule, the prosecution has to disclose

all material it has for and against its case. However, under the Criminal Procedure and Investigations Act 1996 (CPIA) there are provisions for applications to be made to the court in circumstances where there is a dispute about whether the prosecution should disclose certain material in the public interest. When the prosecution is preparing its list of materials to hand over to the defence it is able to indicate which material it considers it does not need to disclose because of public interest immunity. It must also consider the relevance of the material. If there are vast quantities of intercepts not relevant to any issue in the case, the disclosure rules do not require this material to be disclosed, irrespective of any question of public interest immunity.

To protect against any compromise in national security or the lives of sources, the prosecution duty of disclosure of evidence is limited so the prosecution need not disclose material where the public interest so dictates. There will be some cases where the prosecution take the view that the material should be withheld, for example, where it is so sensitive that it is subject to public interest immunity. The prosecution must have genuine arguments for not disclosing material on public interest immunity grounds which provides added protection for the defendant. Public interest immunity also helps in the UK's co-operation with other countries because it allows the police and other prosecuting bodies to keep out of court sensitive material that other countries do not want published. Therefore, contrary to the Government's claims, the use of intercept material will not have a negative affect on the relationship between the British and foreign security agencies. One of the greatest concerns the Government has expressed about the use of intercept material in evidence is that it will release information that will compromise national security. However, material compromising national security is already strongly protected. Interests of the State may justify a claim to immunity on

the grounds that disclosure of the contents of a particular material would be prejudicial to national security.

The rules regarding public interest immunity do not just apply to national security. They also protect those other subjects which might be affected by the use of intercept material, such as informers. Withholding of sensitive information is an uncontroversial and unexceptional daily occurrence in the criminal courts. There is a clear public interest in preserving the anonymity of informers, the identity of a person who has allowed his premises to be used for surveillance, and anything which would reveal his identity or the location of his premises, other police observation techniques, police and intelligence service reports, manuals and methods. The Police Order Manual, for example, is protected from disclosure. Techniques relating to systems, procedures, technology and methodology of intercepts fall into the same category. The difficult balance between both the interests of national security and the defendant's right to a fair trial is effectively managed by the recently introduced special counsel procedure, and the Government's fears are ill-founded.

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THE SOCIETY OF CONSERVATIVE LAWYERS was founded in 1947 and has provided a regular input to Conservative thinking. Its aims and objectives are to:

- Support the Conservative and Unionist Party

- Uphold the principle of justice and democracy
- Consider and promote reforms in the law
- Act as a centre for discussion of Conservative ideas
- Provide speakers and assist in finding candidates
- Promote and assist in the publication of literature

Behind these objectives lies a vibrant organisation, which has provided generations of parliamentary candidates and thinking to Conservative Party manifestos. The Society holds meetings and dinners with a strong political theme.

The research committee, chaired by Nicholas Vineall, regularly publishes commentary and research. Such papers set out the views of their authors, not a collective view held by the Society.

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[1] (2001) 31 EHRR 1016
[2] Application No. 44787/98, Judgment of 25 September 2001
[3] A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2004] UKHL 56
[4] BBC News: 'What's bugging ministers about phone taps? By Alexis Akwagyiram & Tom Geoghegan - 28th January 2005 - www.bbc.co.uk
[5] The Guardian, ' Ban stays on court use of phone tapping' - Alan Travis and Richard Norton-Taylor – January 27, 2005
[6] The Guardian – as above (5)
[7] (Case unreported) Details obtained from the BBC: www.bbc.co.uk