

## **EUROPEAN PARLIAMENT LIBE ENQUIRY**

### **Judicial Scrutiny of Intelligence Agencies**

David Bickford CB

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The public's dissatisfaction with the covert, intrusive powers of the UK intelligence and law enforcement agencies is higher than at any other time.

Whether this is based on perception or reality doesn't really matter.

One reality is that these powers are regulated by legislation, namely the Regulation of Investigatory Powers Act 2000 and its Code of Conduct, which provide for executive non-judicial authorisation for covert surveillance of the most intrusive kind.

Another reality is that in 2010 the European Commission on Human Rights found that the provisions of that legislation complied with the Convention in the case of *Kennedy v UK* on the basis of the extensive jurisdiction of the Investigatory Powers Tribunal to hear complaints of unlawful interception.

The *Kennedy* decision is linked to the seminal ECHR case of *Klass v Germany* in 1978 where independent non-judicial oversight of covert surveillance was also found to be the basis for ECHR compliance, save in that case the oversight exercised effective and continuous control.

It can be argued, therefore, that the public's dissatisfaction is based on perception.

But this ignores the public's understanding of the basic tenets of the balance of rights between them and the state as expressed in *Klass*, namely that 'Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions.'

In the current climate of increasingly extensive covert surveillance to combat terrorism and organised crime, as long as government Ministers continue to authorise the agencies' eavesdropping, telephone and electronic surveillance, and informant approval, the public believe that there is an unhealthy seamless relationship between them and, as a result, serious questions are being asked whether this regime is tolerable in a democracy.

And that scepticism is made worse by the UK Government's proposal in their draft Communications Data Bill that the intelligence agencies themselves control their mining of communications data; the who, when and where of electronic communications.

That is on one level. On another, counter terrorism operations are not solely within the remit of the intelligence agencies. Law enforcement, customs,

immigration, and other agencies are involved and may authorise covert surveillance themselves and without judicial authority.

All these agencies are under pressure to keep the public safe and Ministers are aware of this and under pressure themselves.

It is within this pressure that Ministers not only make the policy for the extent of covert surveillance but also make the decisions on day to day intrusive surveillance for each target.

An application for covert surveillance is limited to that sole purpose. Yet covert surveillance is only part of operations conducted against suspected terrorists and organised criminals. Other information is being gathered by other means and some of it is so sensitive it is very tightly held, creating the dilemma of who can be told.

These accumulated pressures bear on the balances of necessity and proportionality made by the agencies when applying for authority and also on Ministers when they consider giving authority.

At the time of the *Klass* case, 1978, the number of cases of covert surveillance was not high. Moreover, the *Kennedy* case considered one allegation of telephone tapping by an individual convicted of murder. The Court's acceptance of executive authority for covert surveillance in these cases is not relevant today, when intelligence agency covert surveillance, including data mining and profiling, takes place on a far, far larger scale in those circumstances of combatting international terrorism and organised crime I have outlined.

The Court in the *Klass* decision stated unequivocally that in a field where abuse is so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.

In particular the Court said 'The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.'

In my view, and I have expressed this on a number of occasions, the extent of covert surveillance today and the pressures involved in its authorisation, particularly on the balances of necessity and proportionality, instruct us that the principle in *Klass* of judicial authorisation must now be applied.

The government or, if you like, the executive, must step out of the equation and leave the authorisation of these highly intrusive methods to the judiciary.

That means that application must be made by the agencies direct to the judiciary for authority to eavesdrop, intercept telephone and electronic communications, mine communications data and employ informants.

Not only does this procedure reduce the risk or perception of collusion but, by removing the executive from these decisions, limits the room for accusations of political interference, and properly complies with the obligations of the state under ECHR.

Government may argue that all this is unnecessary as there is adequate oversight of the intelligence agencies. There is independent oversight for the UK intelligence agencies now that Parliament itself is in charge of overseeing them.

However, both that oversight and the oversight of the Investigatory Powers Tribunal is ex post facto and, on any argument, can not substitute for independent judicial authority at the coal face.

Government may also point to the United States where the judges of FISA Courts approve covert surveillance, yet the same public unease about the extent of covert surveillance has manifested itself. This ignores the fact that President Bush by-passed the FISA Courts in the war on terrorism and the FISA Amendment Act 2008 greatly reduced the powers of the FISA Courts by giving authority back to the executive. Prior to that FISA operated successfully.

There is also the important point that if judicial authority were given for telephone and electronic intercept in the UK, the current refusal of the British Government to use this intercept as evidence would look even more unwise.

This concept of judicial authority for intrusive covert surveillance is not new. Many jurisdictions adhere to it.

In the French legal system, an examining judge supervises the French agencies' covert targeted operations and determines the day to day legal and civil rights balances involved. This includes covert surveillance and, in this regard, Decision No 2005-532 DC of 19 January 2006 is instructive.

The pressures that apply to Ministers do not exist for the examining judge. He or she holds the balance of necessity and proportionality without the political responsibility of protecting the public. Moreover, the examining judge sees the whole operation and makes decisions with the complete background in mind.

I have worked under this system in France and I was relieved to have those balances ascertained judicially as operations proceeded.

Another extremely important asset attaching to the examining judge system is that, unlike the UK, the evidential uncertainties are dealt with as the operation proceeds. This reduces the risk of mistakes being exposed at trial resulting in unnecessary acquittals.

It is a system I would wish to see in all the UK agencies' covert targeted operations, both intelligence and law enforcement.

I have no doubt that the examining judge system offers the best assurance to the public that their privacy is safeguarded by independent, non-political, coal-face supervision.

David Bickford CB

