Deutscher Bundestag
1. Untersuchungsausschuss

30. Nov. 2016

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der 18. Wahlperiode

MAT A SV-18

zu A-Drs.: 573

WRITTEN NOTE TO BUNDESTAG COMMITTEE OF INQUIRY

1. I am a barrister, practising at Blackstone Chambers in London. I have acted in numerous claims about surveillance.

2. Since the Snowden leaks, there has been extensive litigation in the UK about surveillance. Most of the litigation has taken place in the Investigatory Powers Tribunal (IPT), a specialist tribunal:

   a) The President and Vice-President of the IPT are High Court judges. The other members are judges, retired judges or senior lawyers.

   b) The IPT hears cases partially in public and partially in secret.

   c) During secret hearings, claimants and their lawyers are excluded. However, the IPT sometimes appoints a security-cleared counsel to the Tribunal, who seeks to ensure that secret evidence is tested.

   d) The IPT does not authorise surveillance. It only hears claims made after the event, challenging the lawfulness of surveillance.

3. Pre-Snowden, the IPT had never found against the UK Security and Intelligence Services.

4. The current UK legal regime is contained in several complex pieces of legislation (RIPA 2000, ISA 1994, SSA 1989, TA 1984 and numerous internal rules and arrangements). It permits surveillance for:

   a) the protection of national security;

   b) the prevention and detection of serious crime; and

   c) to promote the economic well-being of the United Kingdom.

5. The first post-Snowden decisions of the IPT were in the *Liberty/Privacy* cases about bulk interception and the bulk receipt of information from the US NSA:

a) In *Liberty/Privacy No. 1*[1], the IPT held that bulk interception of communications content and communications data by GCHQ was, in principle, lawful. There were adequate safeguards in place, even where UK residents' content or communications data was obtained.

b) In *Liberty/Privacy No. 2*[2], the IPT decided that the receipt of intercepted communications from the US NSA had been unlawful until December 2014 because the legal regime had been too secret and so insufficiently foreseeable to the public (as required by Article 8 of the European Convention on Human Rights).

c) In *Liberty/Privacy No. 3*[3], the IPT made determinations in favour of Amnesty International and the Legal Resources Centre (the leading South African legal NGO) against GCHQ:

i) GCHQ "*intercepted and accessed*" the communications of Amnesty International and retained them for "*materially longer*" than permitted under GCHQ's internal rules. The IPT did not explain why GCHQ was intercepting and accessing Amnesty International's communications.

ii) In addition, "*communications from an email address associated with the* [Legal Resources Centre] *were intercepted and selected for examination pursuant to s.8(4) of RIPA*" and "*the procedure laid down by GCHQ's internal policies for selection of the communications for examination was in error not followed*". The actual nature of the error was not disclosed.

6. These claims are currently pending before the European Court of Human Rights (*10 Human Rights NGOs v UK*[4]).

7. The second piece of post-Snowden litigation concerned legal privilege (*Belhaj & Al-Saadi*[5]). Two Libyan families (including a pregnant woman and several children) were subject to 'extraordinary rendition' to Gaddafi's Libya. The families alleged that the operation was

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[1] http://www.bailii.org/uk/cases/UKIPTrib/2014/13_77-H.html
[2] http://www.bailii.org/uk/cases/UKIPTrib/2015/13_77-H.html
[3] http://www.bailii.org/uk/cases/UKIPTrib/2015/13_77-H_2.html
[4] http://hudoc.echr.coe.int/eng?i=001-159526
[5] http://www.bailii.org/uk/cases/UKIPTrib/2015/13_132-H.html

jointly organised by the CIA and MI6. MI6 paid compensation to one family of £2.2 million to settle a tort claim. The other family continued the litigation, which is currently pending before the UK Supreme Court. Both families complained to the IPT that their right to legal privilege had not been respected by the UK Security and Intelligence Services:

a) The previously secret internal policies of the UK Security and Intelligence Services about legal privilege were disclosed. The polices permitted the interception and use of privileged material, even where the material was about a case against the security services. For example, MI5's allowed its lawyers to read privileged communications *even in a case against MI5*:

> **Should I decline to consider material for LPP and instead pass it to a colleague if I am advising on a matter to which the material relates?**
>
> 14. No. Lawyers advised in March 2011 that there is no requirement to erect internal 'Chinese walls' between the lawyers for this purpose. They gave two

b) After disclosure of these policies, MI5, MI6 and GCHQ all conceded that their policies were unlawful and in breach of Article 8 of the ECHR.

c) The IPT found in favour of one of the claimants, Mr al-Saadi. It said "*... there are only two documents containing material subject to the legal professional privilege of any of the claimants which have been held by any of the Agencies, namely by GCHQ. These two documents contain information which is subject to the privilege of* [Mr Al-Saadi]". The IPT ordered the destruction of the privileged material.

d) The case showed the dangers of secret legal guidance and interpretations. The internal arrangements had been approved by the Intelligence Services Commissioner (a retired judge) but he did not identify the unlawfulness of the arrangements. Publication and scrutiny of the rules is important.

8. The IPT next considered whether the interception of the communications of members of the UK Parliament was lawful. In *Caroline Lucas MP & Baroness Jones AM*[6], two Green party politicians alleged that the legal regime for interception of Parliamentary communications was unlawful. The IPT disagreed and decided that:

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[6] http://www.bailii.org/uk/cases/UKIPTrib/2015/14_79-CH.html

a) First, an assurance given to Parliament about the interception of MPs communications (known as the "Wilson doctrine") was of no legal effect.

b) Secondly, the Security and Intelligence Services have internal procedures that limit the interception of MPs communications. These arrangements were compliant with the ECHR.

9. The fourth case before the IPT concerned computer hacking. In *Greennet*[7], the Tribunal decided that the rules governing computer hacking by the UK security services were adequate when the hacking occurred inside the UK. The IPT held that a "*thematic warrant*" authorising hacking of a large number of computers would in principle be lawful, both inside and outside the UK. The IPT did not decide whether the special legal regime governing hacking outside the UK complied with the ECHR.

10. This decision is currently subject to judicial review in the English High Court. The Security and Intelligence Services have argued that there is no right to judicial review of the IPT's decisions. The High Court's judgment is awaited.

11. The fifth case, *Human Rights Watch*[8], is perhaps the most important for the Bundestag's inquiry:

a) The IPT dealt with complaints by ten claimants (including one German citizen) who alleged that they had been subject to unlawful interception. These ten claimants were representative of several hundred claims made to the IPT, including 94 claims made by German citizens.

b) The IPT decided that if a claimant was not present in the United Kingdom when the alleged surveillance was carried out, he or she had no right to privacy under the European Convention on Human Rights.

c) Therefore, all of the human rights complaints made by non-UK nationals were dismissed, even though the alleged interception had taken place in UK territory.

d) If this decision is correct, the European Convention on Human Rights imposes no limits on any foreign surveillance activities. For example, there would be no ECHR

[7] http://www.bailii.org/uk/cases/UKIPTrib/2016/14_85-CH.html
[8] http://www.bailii.org/uk/cases/UKIPTrib/2016/15_165-CH.html

limits on the surveillance that GCHQ (or any other intelligence agency) could carry out in Germany.

e) This case is also pending before the European Court of Human Rights (*Human Rights Watch and others v UK*).

12. The sixth case, and most recent, is *Privacy International BCD/BPD*[9]. The case raised two issues:

a) First, the collection of 'Bulk Communications Data'. The UK security and intelligence services collect domestic and foreign communications data in bulk, from the internet and fixed and mobile telephones. The data appears to include location information. The data are kept for 1 year in a database. The programme was kept secret for over 10 years, but eventually disclosed. The IPT held that there were (in the past) inadequate safeguards and excessive secrecy, so the regime was contrary to Article 8 ECHR. But future collection and of the data would be lawful (subject to the points below).

b) Secondly, the IPT considered the collection and use of 'Bulk Personal Datasets': large databases of information about people most of whom are of no intelligence interest. For example, the datasets held by the UK include "*bulk travel data*", "*bulk untargeted communications metadata*", databases obtained by computer hacking and internet network management data and logs. Again, the IPT held that in the past there were inadequate safeguards and excessive secrecy, and the regime was contrary to Article 8 ECHR, but the problems had now been resolved (subject to the points below).

c) Again, the unlawful internal rules had been approved by the Intelligence and Interception Commissioners (both retired judges), but they had not identified the defects found by the Tribunal. Without disclosure and public scrutiny, such problems cannot be detected.

d) The case is ongoing. The Tribunal has ordered a further hearing about:

[9] http://www.bailii.org/uk/cases/UKIPTrib/2016/15_110-CH.html

i) whether sharing or granting access to 'Bulk Communications Data' and 'Bulk Personal Datasets' with foreign intelligence agencies and UK law enforcement agencies is lawful; and

ii) whether the collection, retention and use of these datasets is lawful under EU law.

13. Finally, the Court of Justice of the European Union has heard a reference made by the English Court of Appeal in Case C-698/15 *Tom Watson MP v Secretary of State for the Home Department*. The case is about the UK Data Retention and Investigatory Powers Act 2014. The Act permits communications providers to be ordered to retain communications data for a year, so that it can be accessed by public bodies for a variety of purposes. The English High Court[10] decided that the Act was contrary to EU law because of the absence of safeguards over use of the retained material. The Court of Appeal[11] doubted whether the High Court was correct and referred questions to the CJEU. The case was heard by the Grand Chamber in April 2016. The issues include whether prior independent authorisation is required for access to data. Judgment is expected on 21 December 2016.

BEN JAFFEY

30 November 2016

[10] http://www.bailii.org/ew/cases/EWHC/Admin/2015/2092.html
[11] http://www.bailii.org/ew/cases/EWCA/Civ/2015/1185.html