Privacy under The European Convention of Human Rights & The European Charter

- *Archit Gaur*[1]

The European Convention of Human Rights ('Convention') states as follows:

*"**Article 8***
Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In **Aycaguer v. France (2017)**[2]**,** The European Court of Human Rights decided on an application which claimed a breach of the applicant's right to respect for his private life on account of the order to provide a biological sample for inclusion in the national computerised DNA database (FNAEG) and the fact that his refusal to comply with that order had resulted in a criminal offence. The court observed that:

"The mere fact of storing data on a person's private life amounted to an interference within the meaning of Article 8. DNA profiles contained a huge amount of unique personal data…"

"… The respondent State overstepped its margin of appreciation in this sphere. Mr Aycaguer's conviction for having refused to undergo biological testing the result of which was to be included in the FNAEG amounted to a disproportionate infringement of his right to respect for private life, and therefore could not be deemed necessary in a democratic society."

In **Figueiredo Teixeira v. Andorra** [3] **(2016),** The European Court of Human Rights examined the application claiming violation of Article 8 when the applicant's telephone call details were stored and communicated to the judicial authority, suspecting him to be involved in the serious offence of drug trafficking. The court observed that:

"Article 87 of the Code of Criminal Procedure in force at the relevant time had detailed the conditions under which interference with the right to respect for private life was authorised."

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[2] Application no. 8806/12
[3] Application No. 72384/14

"The impugned interference, which had been geared to combating drug trafficking, had pursued one of the legitimate aims listed in the second paragraph of Article 8 of the Convention, that is to say the prevention of crime. As regards the proportionality of the measure, impugned interference had been authorised for a shorter period than that originally requested by the police. Moreover, the offences charged had been committed at most six months before the period covered by the impugned measure… The Andorran authorities had thus respected 'proportionality between the effects of the use of special investigation techniques and the objective that has been identified", and that they had used an unintrusive method to "enable the offence to be detected, prevented or prosecuted with adequate effectiveness'.

The Court therefore found that there had been no violation of Article 8.

In **R.E. v. The United Kingdom[4] (2015),** the applicant was arrested and detained on three occasions in relation to the murder of a police officer. He claimed violation of Article 8 under the regime of covert surveillance of consultations between detainees and their lawyers, medical advisors and appropriate adults sanctioned by *The Regulation of Investigatory Powers Act 2000* and *The Covert Surveillance Code of Practice* before The European Court of Human Rights. The court observed that:

Background

In 2006 a solicitor in Northern Ireland was arrested and charged with a number of offences, including inciting paramilitaries to murder and perverting the course of justice. The case arose out of the covert recording of his consultations with clients at Antrim police station. As a direct consequence of the criminal proceedings, solicitors in Northern Ireland became aware that their private consultations with detainees in police tations and prisons could be the subject of covert surveillance. Thereafter, solicitors attending detainees in police stations and prisons began to seek assurances from the police that their consultations would not be the subject of such surveillance.

When the police refused to give assurances, judicial review proceedings were initiated on the basis that there had been a breach of the common law right to legal and professional privilege, the statutory right to a private consultation with a lawyer, and Articles 6 and 8 of the Convention.

In the case of Re C & Others [2007] NIQB 101A the Divisional Court of the High Court of Justice in Northern Ireland found that, despite the express statutory right to private consultations, the covert surveillance of lawyer-client consultations was permitted by the Regulation of

Investigatory Powers Act 2000 ("RIPA"). However, RIPA provided for two principal surveillance schemes: intrusive surveillance and directed surveillance.

[4] Application No. 62498/11

The applicants in these judicial review proceedings appealed against the court's ruling that the surveillance was permitted by the domestic legislation. The appeal went to the House of Lords, where it was referred to as Re McE (Northern Ireland) [2009] UKHL 15. The House of Lords agreed with the Divisional Court that although the provisions of RIPA could override, inter alia, legal professional privilege, the higher level of authority necessary for an intrusive surveillance warrant was required rather than the directed surveillance warrants that had, until then, been issued.

Facts of the present case:

On 15 March 2009 the applicant was arrested in connection with the murder of a Police Constable believed to have been killed by dissident Republicans. When first arrested the applicant was assessed by the Forensic Medical Officer as a "vulnerable person" within the meaning of the Terrorism Act Code of Practice. Pursuant to paragraph 11.9 of that Code of Practice, he could not be interviewed, save in exceptional circumstances, in the absence of an "appropriate adult". In the case of a person who was mentally vulnerable, an appropriate adult could be a relative or guardian, or a person experienced in dealing with mentally disordered or mentally vulnerable people.

"The provisions of domestic law which govern the interception, acquisition and disclosure of communication data (including Part I of the Regulation of Investigatory Powers Act 2000 ("RIPA") together with the relevant sections of the Code) are set out in Kennedy v. the United Kingdom, no. 26839/05, §§ 25 – 61, 18 May 2010."

"The applicant complained that the regime for covert surveillance of consultations between detainees and their lawyers, medical personnel, and appropriate adults was in breach of Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

"The Government accepted that the applicant could claim to be a victim of an alleged violation of Article 8 in relation to his legal consultations with his solicitor between 4 May 2010 and 6

May 2010. It also noted that it did not appear to be in dispute that the surveillance pursued a legitimate aim for the purposes of Article 8 § 2 of the Convention."

"The Government argued that any interference was "in accordance with the law": it had its basis in domestic law; the law in question was accessible as it took the form of primary and secondary legislation and a published Revised Code (the Government accepted that it could not rely on the PSNI Service Procedure in the present case as it was not issued until 22 June 2010); and finally, the law was sufficiently foreseeable."

"Insofar as the applicant's complaints concern the regime for conducting covert surveillance of consultations between detainees and their legal advisors, the Government have accepted that he can claim to be a victim of the alleged violation."

"In this regard, it is now well-established that an individual may under certain conditions claim to be the victim of a violation occasioned by the mere existence of legislation permitting secret measures without having to demonstrate that such measures were in fact applied to him (Klass and Others v. Germany, 6 September 1978 § 34, Series A no. 28)."

"Consequently, the Court will proceed on the basis that there has been an "interference", within the meaning of Article 8 § 2 of the Convention, with the applicant's right to respect for his private life."

"In order to be justified under Article 8 § 2 of the Convention, the interference must be "in accordance with the law", in pursuit of a legitimate aim, and "necessary in a democratic society"… In respect of Part I of RIPA the Court considered that the interception regime pursued the legitimate aims of the protection of national security and the prevention of disorder and crime."

"The Court considers that the surveillance regime under Part II of RIPA pursues the same legitimate aims and this has not been disputed by the parties. It therefore falls to the Court to consider the remaining two questions: was the regime "in accordance with the law", and was it "necessary" to achieve the legitimate aim pursued?"

"The requirement that any interference must be "in accordance with the law" under Article 8 § 2 will only be met when three conditions are satisfied: the impugned measure must have some basis in domestic law; the domestic law must be compatible with the rule of law and accessible to the person concerned; and the person concerned must be able to foresee the consequences of the domestic law for him."

"The present case concerns the surveillance of legal consultations taking place in a police station, which the Court considers to be analogous to the interception of a telephone call between a lawyer and client. The Court has recognised that, while Article 8 protects the confidentiality of

all correspondence between individuals, it will afford "strengthened protection" to exchanges between lawyers and their clients, as lawyers would be unable to defend their clients if they were unable to guarantee that their exchanges would remain confidential. The Court therefore considers that the surveillance of a legal consultation constitutes an extremely high degree of

intrusion into a person's right to respect for his or her private life and correspondence; higher than the degree of intrusion in Uzun and even in Bykov. Consequently, in such cases it will expect the same safeguards to be in place to protect individuals from arbitrary interference with their Article 8 rights as it has required in cases concerning the interception of communications, at least insofar as those principles can be applied to the form of surveillance in question."

"Bearing in mind the fact that intrusive surveillance under Part II of RIPA concerns the covert surveillance of anything taking place on residential premises or in private vehicles by a person or listening device, the Court accepts that it will not necessarily be possible to know in advance either on what premises the surveillance will take place or what individuals will be affected by it."

"Insofar as the applicant complains about the regime for conducting covert surveillance of consultations between detainees and their appropriate adults, the Government have accepted that he can claim to be a victim of the alleged violation."

"The Court has already noted that in order to be justified under Article 8 § 2 of the Convention the interference must be 'in accordance with the law'."

"As with the regime for surveillance of lawyer/client consultations, the Court considers that the regime in question pursues the legitimate aims of protection of national security and the prevention of disorder and crime"

"That being said, the surveillance was not taking place in a private place, such as a private residence or vehicle. Rather, it was being conducted in a police station. Moreover, unlike legal consultations, consultations with an appropriate adult are not subject to legal privilege and do not attract the "strengthened protection" accorded to consultations with lawyers or medical personnel. The detainee would not, therefore, have the same expectation of privacy that he or she would have during a legal consultation. Consequently, the Court does not consider it appropriate to apply the strict standard set down in Valenzuela-Contreras and will instead focus on the more general question of whether the legislation adequately protected detainees against arbitrary interference with their Article 8 rights, and whether it was sufficiently clear in its terms to give individuals adequate indication as to the circumstances in which and the conditions on which public authorities were entitled to resort to such covert measures"

"…Surveillance of "appropriate adult"-detainee consultations were not subject to legal privilege and therefore a detainee would not have the same expectation of privacy.…The relevant

domestic provisions, insofar as they related to the possible surveillance of consultations between detainees and "appropriate adults", were accompanied by "adequate safeguards against abuse", notably as concerned the authorisation, review and record keeping. Hence, there is no violation of Article 8."

In **Sõro v. Estonia**[5] **(2015),** a seven-judge bench at the European Court of Huan Rights examined the application claiming violation of Article 8 (Right to Respect for Private Life) when the information about his employment during the Soviet era as a driver of the Committee of State Security of the USSR (the KGB) was printed in the Estonian State Gazette in 2004. The court in majority observed that:

"The publication of information about the applicant's employment as a driver of the KGB had affected his reputation and therefore constituted an interference with his right to respect for his private life. The lawfulness of that interference – which had been based on the Disclosure Act – was not in dispute between the parties. The Court also considered that the interference had pursued a legitimate aim for the purpose of Article 8, namely the protection of national security and public safety, the prevention of disorder and the protection of the rights and freedoms of others."

[5] Application No. 22588/08