



Legal safeguards regarding covert surveillance of a detainee's consultations with his lawyer were insufficient at the time of his custody

The applicant in the case of [R.E. v. the United Kingdom](#) (application no. 62498/11), who was arrested and detained in Northern Ireland on three occasions in connection with the murder of a police officer, complained in particular about the regime for covert surveillance of consultations between detainees and their lawyers and between vulnerable detainees¹ and “appropriate adults”².

In today's **Chamber** judgment³ in the case the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life, home and correspondence) of the European Convention on Human Rights as concerned the covert surveillance of legal consultations; and,

no violation of Article 8 of the European Convention as concerned the covert surveillance of consultations between detainees and their “appropriate adults”.

The case was considered from the standpoint of the principles developed by the Court in the area of interception of lawyer-client telephone calls, which call for stringent safeguards. The Court found that those principles should be applied to the covert surveillance of lawyer-client consultations in a police station. The Court noted that guidelines arranging for the secure handling, storage and destruction of material obtained through such covert surveillance have been implemented since 22 June 2010. However, at the time of Mr. R.E.'s detention in May 2010, those guidelines had not yet been in force. The Court was not therefore satisfied that the relevant domestic law provisions in place at the time had provided sufficient safeguards for the protection of Mr R.E.'s consultations with his lawyer obtained by covert surveillance.

As concerned consultations between a vulnerable detainee and an “appropriate adult”, the Court found that they were not subject to legal privilege and therefore a detainee would not have the same expectation of privacy as for a legal consultation. Furthermore, the Court was satisfied that 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.

Principal facts

The applicant, Mr R.E., is an Irish national who was born in 1989 and lives in Newtownabbey (Northern Ireland).

¹ A juvenile or person who is mentally disordered or otherwise mentally vulnerable

² An “appropriate adult” could be a relative or guardian, or a person experienced in dealing with mentally disordered or mentally vulnerable people.

³ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

The Regulation of Investigatory Powers Act 2000 (RIPA) and the Covert Surveillance Code of Practice permits, in certain circumstances, the covert surveillance between detainees and their legal advisor, their medical advisor and, in the case of vulnerable detainees, their “appropriate adult”.

Between 15 March 2009 and 8 May 2010 Mr R.E. was arrested and detained on three occasions in connection with the murder of a police officer believed to have been killed by dissident Republicans. During the first two detentions his solicitor received assurances from the Police Service of Northern Ireland (PSNI) that his consultations with Mr R.E. would not be subject to covert surveillance.

Mr R.E. was arrested for the third time on 4 May 2010. On this occasion, the PSNI refused to give an assurance to Mr R.E.’s solicitor that their consultations would not be subject to covert surveillance. Mr R.E. sought permission to apply for judicial review of this decision. In particular, he alleged that the grounds upon which the authorisation of such surveillance would be appropriate were not sufficiently clearly defined and that the guidance concerning the securing and destruction of legally privileged information was not sufficiently clear or precise. On 6 May 2010 he was granted permission to apply for judicial review and the court directed that any subsequent consultations with his solicitor and his medical advisor should not be subject to covert surveillance. Mr R.E. was released without charge on 8 May 2010.

Mr R.E.’s application for judicial review was dismissed in September 2010. The court held that RIPA and the Covert Surveillance Code of Conduct were clearly defined and sufficiently detailed and precise. The Supreme Court refused Mr. R.E.’s application for permission to appeal in April 2011.

Complaints, procedure and composition of the Court

Relying in particular on Article 8 (right to respect for private and family life, home and correspondence), Mr R.E. complained about the regime – under RIPA and the Covert Surveillance Code of Practice – for covert surveillance of consultations between detainees and their lawyers and between vulnerable detainees and “appropriate adults”.

The application was lodged with the European Court of Human Rights on 7 October 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
 Päivi **Hirvelä** (Finland),
 George **Nicolaou** (Cyprus),
 Nona **Tsotsoria** (Georgia),
 Paul **Mahoney** (the United Kingdom),
 Krzysztof **Wojtyczek** (Poland),
 Faris **Vehabović** (Bosnia and Herzegovina),

and also Fatoş **Aracı**, *Deputy Section Registrar*.

Decision of the Court

[Article 8 \(concerning legal consultations\)](#)

The Court reiterated the reasoning in its judgment in the case of [Kennedy v. the United Kingdom](#) (no. 26839/05 of 18 May 2010) concerning interception of communications. In that judgment the Court held that the domestic law provisions (part I of RIPA) covering the nature of the offences which could give rise to interception, the categories of persons liable to be the subject of interception and the provisions dealing with duration, renewal and cancellation of interception measures had been sufficiently clear.

The Government argued that Mr R.E.'s case should be distinguished from the *Kennedy* case on the ground that the covert surveillance had been less intrusive than the interception of communications and that therefore the required level of safeguards should be less strict.

However, the Court considered that the surveillance of a legal consultation constituted an extremely high degree of intrusion into a person's right to respect for his or her private life and correspondence and consequently the same stringent safeguards should be in place to protect individuals from arbitrary interference with their Article 8 rights as in the case of interception of communications, such as a telephone call between a lawyer and a client.

The Court noted that, as in the *Kennedy* case, the domestic provisions with regard to covert surveillance (Part II of RIPA) had been sufficiently clear in terms of the nature of the offences which could give rise to such measures, the categories of persons liable to be the subject of surveillance and the provisions dealing with duration, renewal and cancellation of surveillance measures. Furthermore, guidelines to ensure that arrangements were in place for the secure handling, storage and destruction of material obtained through covert surveillance had been implemented by the Northern Ireland Police Service on 22 June 2010.

However, at the time of Mr. R.E.'s detention in May 2010, those guidelines were not yet in force. The Court was not therefore satisfied that the relevant domestic law provisions in place at the time provided sufficient safeguards for the protection of material obtained by covert surveillance, notably as concerned the examination, use and storage of the material obtained, the precautions to be taken when communicating the material to other parties, and the circumstances in which recordings could or had to be erased or the material destroyed.

There had therefore been a violation of Article 8 of the Convention as concerned Mr R.E.'s complaint about the covert surveillance of his legal consultations.

Article 8 (concerning consultations between detainees and their "appropriate adults")

As concerned the surveillance of "appropriate adult"-detainee consultations, the Court held that, unlike legal consultations, they were not subject to legal privilege and therefore a detainee would not have the same expectation of privacy. The Court was satisfied that 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.

Accordingly, the Court held that there had been no violation of Article 8 with regard to this part of Mr R.E.'s complaint.

Article 41 (just satisfaction)

The Court held that the United Kingdom was to pay Mr R.E. EUR 1,500 in respect of non-pecuniary damage and EUR 15,000 in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.