

## The Human Rights Act, European Convention on Human Rights and phone hacking convictions

Interception of mobile phones and voicemail is regulated by law under the Regulation of Investigatory Powers Act (RIPA), passed in 2000. That Act was introduced in direct response to both the 1998 Human Rights Act and a European Court of Human Rights case in 1997 (see below). RIPA has been used to convict the News of the World private investigator for voicemail hacking in 2005-6.

More information on the connection between the Human Rights Act (HRA), the European Convention on Human Rights (ECHR), RIPA and the phone hacking conviction:

### European Court of Human Rights Cases

- There was no statutory regulation of interception of communications until the Interception of Communications Act 1985.<sup>1</sup> Before the Act the Secretary of State issued warrants for interception but there were no legal consequences if a warrant wasn't obtained.<sup>2</sup>
- The 1985 Act was introduced following the European Court of Human Rights (ECtHR) ruling in *Malone v UK* in 1984.

#### Malone v UK – ECtHR 1984

- The case involved evidence relied on by the police in a theft case which had been obtained from a tapped phone conversation. The defendant challenged the lawfulness of the government warrant authorising the tap and claimed that his post and phone communications had been intercepted.
- The ECtHR found the absence of legal regulation of state interceptions of communications and protection against arbitrary interception violated the right to respect for private life (Article 8).
- The 1985 Act dealt with some of the ECtHR's concerns by putting the arrangements for intercepting mail and phone calls on the public communications system on a statutory footing.
- The 1985 Act created the offence of unlawfully intercepting communications sent by post or by a "public telecommunications system". (This is defined as a telecommunications system which is run under licence granted under the Telecommunications Act 1984.)
- **The 1985 Act only dealt with part of the ECtHR's findings in the *Malone* case. It did not deal with their finding that 'metering' was also a violation of Article 8.** 'Metering' involves using a device to register the numbers dialed on a telephone, the time and duration of each call. It can allow security services and the police to build up a picture of an individual's friends and contacts. The ECtHR held that metering, like telephone tapping, was not governed by legal rules so was in breach of Art 8. However, the government failed to provide for oversight of metering in the 1985 Act.
- Whilst the government maintained that some use of email was covered by the 1985 Act where public telephone lines were used, **email transmission outside the public telecommunication system was not covered by the 1985 Act, nor were cordless phones.**<sup>3</sup>

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<sup>1</sup> Except for some specific offences relating to postal employees and interference with mail.

<sup>2</sup> Liberty's response to the Home Office consultation on RIPA, July 2009.

<sup>3</sup> See Helen Fenwick, 'Civil Liberties and Human Rights', (Routledge, 2007).

### Halford v UK - ECtHR 1997<sup>4</sup>

- This case concerned the hacking of an employee's calls on the internal phone system at her place of work - Merseyside police.
- The Court found that calls at work may be covered by Article 8 and that there was an interference with Article 8 in this case as there was a reasonable expectation of privacy.
- The government had to concede that the finding of an interference with Article 8 rights was not "in accordance with the law" under Article 8(2) since domestic law did not provide any regulation of interceptions of calls made on telecommunications systems *outside* the public network.
- The ECtHR noted that **the 1985 Act did not apply to internal communications systems operated by public authorities**, such as that at Merseyside police. They found a breach of Article 8, since the domestic law did not provide adequate protection to Ms Halford against interferences by her employer.
- The ECtHR also found a violation of the right to an effective remedy under Article 13 as there was **no provision in domestic law to regulate interceptions of telephone calls made on internal communication systems operated by public authorities**, such as the police, so the applicant was unable to seek relief in the UK.
- **The Court did not make general statements about the need for regulation of other types of communication. Their findings relate to the facts and circumstances of this case and are based on the lack of regulation for internal phone systems at work.**

### RIPA 2000

- The Regulation of Investigatory Powers Act 2000 (RIPA) was passed in 2000 to cover private networks, including mobile phones, which it was far from clear were included under the 1985 Act.<sup>5</sup>
- RIPA became law in July 2000, two years after the HRA was passed in 1998 and shortly before it came into force in October 2000, a period in which the government prepared for implementation of the HRA.
- At the end of 1998, the Home Office asked each department to review its legislation, policies and procedures to ensure compliance with Convention rights. Research on the Cabinet Office's assessment in April 2000, based on returns from departments, indicated that "comparatively few areas would remain in the 'red' category [of strong chance of challenge where action must be taken as a priority] if the legislative programme stayed on track (particularly, the Regulation of Investigatory Powers Bill)".<sup>6</sup>
- **RIPA** was passed in order to ensure that investigatory powers, including interception of communications, are used in accordance with human rights. But it **went beyond the requirement in *Halford* to regulate interceptions of telephone calls made on internal communication systems operated by public authorities**. This was in contrast to the

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<sup>4</sup> *Halford v UK* (1997). The case concerned the tapping of the applicant's office telephone by the police at a time when she was bringing a claim of sex discrimination against the police authority in question.

<sup>5</sup> Mobile-to-mobile communication would fall appear to fall outside the 1985 Act. Mobile communication which partially uses the telecommunications system may be within the 1985 Act. See Helen Fenwick, 'Civil Liberties and Human Rights', (Routledge, 2007).

<sup>6</sup> 'Whitehall and the Human Rights Act 1998', Jeremy Croft, The Constitution Unit, UCL, September 2000. This report is based on research about the preparations being made within the Government for the coming into force of the HRA and "relied primarily on interviews and information from a large number of serving civil servants".

then government's response to *Malone* (see above) – years prior to the HRA – which did not address the totality of the ECtHR's findings, let alone exceed them.

- Speaking in the House of Commons in 1988, Conservative MP Richard Shepherd, said of “minimalist attempts to meet the contentions of the ECtHR”:  
“We have seen it happen before, in what *The Times* called an insult, in the Interception of Communications Act. That too was minimalist, and one day that too will come before the European Court and we shall be found wanting.”<sup>7</sup>
- It is reasonable to impute that the additional safeguards in RIPA, including regulating intercept of mobile phones, when this was not directly stipulated by the ECtHR in *Halford* were part of the broader attempt to prepare for the HRA. From October 2000, once the HRA was in force, the courts were empowered to declare legislation incompatible with ECHR rights for the first time, **taking into account ECtHR jurisprudence**. RIPA was one of a number of initiatives the government took to prepare for this new development.<sup>8</sup>
- In the consultation paper which preceded RIPA, Jack Straw (then Home Secretary) said:  
“**One of the imperatives for change in the law...is the need to protect human rights** – this has been uppermost in our minds in devising these proposals. Disproportionate, or unfettered, use of interception can have consequences for the rights of individuals.”<sup>9</sup>

On introducing RIPA to the House of Commons for second reading, Jack Straw said:

“This is an important Bill, and represents a significant step forward for the protection of human rights in this country. **Human rights considerations have dominated its drafting**. None of the law enforcement activities specified in the Bill is new. What is new is that, for the first time, the use of these techniques will be properly regulated by law and externally supervised. **That will serve to ensure that law enforcement and other operations are consistent with the duties imposed on public authorities by the European convention on human rights and by the Human Rights Act 1998.**”<sup>10</sup>

- The explanatory note to RIPA explains that the Act repeals the 1985 Act and provides for a new regime for the interception of communications and that these changes “**go beyond what is strictly required for human rights purposes** and provide also for the changed nature of the communications industry since 1985.”
- As Adam Wagner has pointed out in his piece ‘Was it human rights wot won the phone hacking scandal?’, “whilst the law may have changed in spite of the Human Rights Act, it is notable that in the United States, where there is no constitutionally enshrined right to privacy, private phone hacking is not as strictly regulated.”<sup>11</sup>
- Similarly, whilst both the Home Office and Home Secretary commented<sup>12</sup> that there would have been changes to intercept law in response to the *Halford* case, it may well not have gone so far without the impetus of the HRA, for the reasons explained above.

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<sup>7</sup> House of Commons debate on the Security Services Bill, 15 December 1988.

<sup>8</sup> In this period, in preparation for the introduction of the HRA, the Home Office established a Task Force to oversee implementation of the HRA, £4.5 million was spent on judicial training and each department was asked to review its legislation.

<sup>9</sup> ‘Interception of Communications in the UK: a consultation paper’, Presented to Parliament by the Secretary of State for the Home Department, June 1999.

<sup>10</sup> House of Commons Hansard, 6 March 2000, column 767.

<sup>11</sup> ‘Was it human rights wot won the phone hacking scandal?’, Adam Wagner, UK Human Rights Blog, 12 July 2011:

<http://ukhumanrightsblog.com/2011/07/12/was-it-human-rights-wot-won-the-phone-hacking-scandal/>

<sup>12</sup> ‘Interception of Communications in the United Kingdom: A Consultation Paper’, Home Office, June 1999; House of Commons Hansard, 6 March 2000.

### **News International phone hacking scandal**

- Glenn Mulcaire, the private investigator hired by the News of the World, was convicted under RIPA.
- Mulcaire pleaded guilty to five substantive offences of unlawful interception of communications, contrary to section 1(1) of RIPA.<sup>13</sup>

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<sup>13</sup> Clive Goodman, Royal Editor at the News of the World, and Mulcaire also pleaded guilty to conspiracy to intercept communications, contrary to section 1(1) of the Criminal Law Act 1977, which deals with conspiracy, not interception.