

Lobster 59

Malcolm Kennedy: European Court of Human Rights judgement

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Malcolm Kennedy's case has been covered by *Lobster* in previous issues, which have described the many avenues Kennedy has pursued in his attempt to put an end to what he says has been persistent and long-standing interference with, and interception of, his phones and other communications, damaging his business and his income. He says this has been going on for more than 10 years, and continues to do so.

Kennedy eventually took his complaint to the Investigatory Powers Tribunal (IPT), set up under the Regulation of Investigatory Powers Act 2000, to hear complaints relating to conduct by the intelligence and security agencies, and complaints about phone-tapping. It is also the only appropriate Tribunal for the purpose of certain proceedings under s7(1)(a) of the Human Rights Act 1998: claims that a public authority has acted in a manner that is incompatible with a Convention right.

In January 2005, the IPT ruled that no determination had been made in his favour in respect of his complaints, which meant either that there had been no interception, or that any interception which took place was lawful.

Kennedy then took his complaints to the European Court of Human Rights (ECHR), which issued judgement on May 18 2010, holding that there had been no violation of Article 8 (right to respect for private and family life and correspondence); no violation of Article 6 §1 (right to a fair

trial); and no violation of Article 13 (right to an effective remedy).

Much of the judgement considers the alleged violation of Article 8 of the Convention, and states (paras 169-170):

'In the circumstances, the Court considers that the domestic law on interception of internal communications together with the clarifications brought by the publication of the Code indicate with sufficient clarity the procedures for the authorization and processing of interception warrants as well as the processing, communicating and destruction of intercept material collected. The Court further observes that there is no evidence of any significant shortcomings in the application and operation of the surveillance regime. On the contrary, the various reports of the Commissioner have highlighted the diligence with which the authorities implement RIPA and correct any technical or human errors which accidentally occur. Having regard to the safeguards against abuse in the procedures as well as the more general safeguards offered by the supervision of the Commissioner and the review of the IPT, the impugned surveillance measures, insofar as they may have been applied to the applicant in the circumstances outlined in the present case, are justified under Article 8 § 2. There has accordingly been no violation of Article 8 of the Convention.'

After considering the alleged violation of Article 6 § 1 of the Convention,

'the Court considers that the restrictions on the procedure before the IPT did not violate the applicant's right to a fair trial. In reaching this conclusion, the Court emphasises the breadth of access to the IPT enjoyed by those complaining about interception within the United Kingdom and the absence of any evidential burden to

be overcome in order to lodge an application with the IPT. In order to ensure the efficiency of the secret surveillance regime, and bearing in mind the importance of such measures to the fight against terrorism and serious crime, the Court considers that the restrictions on the applicant's rights in the context of the proceedings before the IPT were both necessary and proportionate and did not impair the very essence of the applicant's Article 6 rights. Accordingly, assuming Article 6 § 1 applies to the proceedings in question, there has been no violation of that Article. (paras 190-191)'

Considering the alleged violation of Article 13 of the Convention:

'Having regard to its conclusions in respect of Article 8 and Article 6 § 1 above, the Court considers that the IPT offered to the applicant an effective remedy insofar as his complaint was directed towards the alleged interception of his communications. In respect of the applicant's general complaint under Article 8, the Court reiterates its case-law to the effect that Article 13 does not require the law to provide an effective remedy where the alleged violation arises from primary legislation...There has accordingly been no violation of Article 13.' (paras 196-198).

Below are links to more detailed information, including an article by *The Register* and the ECHR judgement in full.

The Register: 'ECHR rules sneaky RIPA peeking perfectly proper' is at www.theregister.co.uk/2010/05/20/surveillance_human_rights_ruling/

The full judgement can be found by Googling 'ECHR judgement Kennedy v. UK (Application no. 26839/05)' and the summary can be found by Googling 'press release Kennedy v the United Kingdom (application no.26839/05)'.

Meanwhile, despite having pursued all the legal avenues available to him, Malcolm Kennedy says that he continues to suffer from interference with his communications, making it virtually impossible for him to earn a living, and also from other forms of harassment. Kennedy says that his flat has been entered on two occasions recently, and certain items removed, other items rearranged, and on one occasion his camera sabotaged. He believes this to have been connected to his filming of the annual United Against Injustice event (UAI is concerned with miscarriages of justice).¹

Kennedy, now 63, says that he only wishes for the interference and harassment to cease, so that he can be allowed to get on with his life, and to earn a living from his business.

¹ <www.unitedagainstinjustice.org.uk/>