that the enjoyment of this type of patronage had contributed more than anything else to the appellant's success in his public service career.

The court held "...it is a considerable leap from an acknowledgment that the appellant served in the Prime Minister's Department and was well known to the Prime Minister to a conclusion that the appellant's success in his career was not justified by his experience and capacity. His service in the Prime Minister's Department would, in the expectation of the ordinary reader of this article, be as likely to give him positive and legitimate qualities for advancement as to make him the object of unjustified favours. His association with the Prime Minister would be seen as no less likely to lead to the Prime Minister recognising the appellant's capacity than it would be to entice the Prime Minister or others under his influence to arrange unmerited promotion of the appellant."

Accordingly none of the imputations pleaded were found to be made out.

The Court then considered the order of Higgins J that there should be no order as to costs because of the failure of the respondents to reply to a letter written on the appellant's behalf demanding an apology, and Justice Higgin's view that the statement in the publication that the appellant Mr Kerin "did not get on" was a lie and that it was necessary for the appellant to commence litigation in order to "nail the lie".

Their Honours held: "It is difficult to see why the possibility that a defendant might have taken a course which would have avoided the litigation (the offering of an apology) should necessarily deprive the defendant of costs where the defendant is successful following a hearing on the merits as in the present case."

And further with words of encouragement to potential plaintiffs: "Since the decision in the Supreme Court, this Court has handed down its judgment in *Humphries v TWT Limited* (unreported, 3 December 1993). According to the judgment of the Court a correction of an error contained in a defamatory publication, or an apology, or a combination of both, does not vindicate the plaintiff's reputation in the same way or to the same extent as a judgment of a court in favour of a plaintiff. Hence a plaintiff does not have to rest content with a published apology, and an apology does not stand in the way of an award of substantial damages for injury to reputation or injury to feelings. The principle so stated runs contrary to the hypothesis presented in the present case that an apology may have avoided litigation." (*Ed.: cf Carson*)

The Court held that Justice Higgins' decision not to award costs against the plaintiff was based on erroneous grounds and that no reason had been demonstrated why the ordinary rule of practice should not be applied and costs follow the event. Accordingly, the appellant was ordered to pay the costs of both the Supreme Court proceedings and the costs of the Federal Court Appeal.

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Evidence from tapping beyond the pale OK

Grantly Brown examines the latest House of Lords case on telephone tapping and suggests the UK falls short of its international obligations

When can telecommunication signals in the UK be said to be transmitted on a "public telecommunication system"? If a signal is not being transmitted on a "public telecommunication system" can it be intercepted by police authorities? What use can be made by the authorities of those intercepted communications in subsequent criminal proceedings? These were just a few of the questions resolved in the House of Lords case of *R v Effik ("Effik")* in July 1994.

The legality of telephone tapping has become something of a fetish within the English legal system. Apart form numerous cases on the subject - including one before the European Court of Human Rights *(Malone v UK (1984))* - telephone tapping has been the subject of at least 5 governmental inquiries. Unfortunately, as we shall see, this latest case is unlikely to have brought an end to this inability of the English legal system and Government to come to grips with the UK's international human rights obligations in this area.

the facts

Put shortly, the facts are that two persons were convicted for conspiracy to supply heroin and cocaine. In the course of their investigations, the police recorded a number of telephone conversations made by one of them, Effik, on a Greemarc cordless telephone. The telephone consisted of a base unit connected to a telephone socket in a house and a wireless transmitter/receiver handset which could be used as a mobile phone within a limited range of the base unit.

When the handset was used by Effik, police observers, in an adjoining dwelling, were able to intercept the transmissions between the handset and base station with a radiocommunications receiver and record the conversations.

The House of Lords found evidence led at the trial of these conversations "was a material contributory factor in the appellants' convictions."

The substance of the appellant's case was that the *UK Interception of Communications Act 1985 ("the Act")* rendered evidence of the telephone conversations inadmissible.

Section 1 of the Act makes it an offence to intentionally intercept "a communication in the course of its transmission by ... means of a public telecommunications system" unless the Secretary of State has issued a warrant under section 2. Section 2 provides for the issue of a warrant where necessary for various purposes including the "preventing or detecting of serious crime". No warrant was obtained by the police in this case.

issues

In the earlier House of Lords case of *R v Preston and Ors (1993)* it was held that sections 2, 6 (which provides for the minimum possible disclosure of recorded conversations) and 9 (which prohibits the leading of evidence in a trial that "tends to suggest" an offence under s.1 has been committed or that a warrant under s. 2 has been issued) permitted use of telephone taps to *prevent* crime but did not permit use of taps for the *prosecution* of crime. Accordingly, material which was intercepted in the manner contemplated by *the Act* was inadmissible in criminal proceedings.

The crucial question in *Effik* was whether *the Act* applied to the tapping of these telephone conversations and this turned on whether the transmissions were by means of a "public telecommunications system". Section 10 of *the Act* provides that this expression has the same meaning as in the Telecommunications Act of 1984 (*"the Telecom Act"*).

Section 4(1) of the *Telecom Act* describes a "telecommunications system" as a system "for the conveyance ... of - [amongst other things] speech." Section 4(2) provides that an "apparatus connected to but not comprised in a telecommunications system shall be regarded as a telecommunciation system ..."

Subsection 4(4) provides that "a telecommunication system is connected to another telecommunication system ... if it is being used ... in conveying", amongst other

things, speech "which is to be or has been conveyed by means of that other system."

Under section 9(1) the Secretary of State may designate a system as a "public telecommunication system". British Telecom's system, which connected to the house from which the calls were made via a junction box in the building, was so designated under a 1984 Order.

Accordingly, the Greemarc phone used by Effik was a telecommunication system connected to but not comprised in British Telecom's public telecommunication system.

The appellants argued that it was impossible to separate the transmission from the point of origin through the public system to the transmitter on the base unit of the cordless phone. That is, that the process of emitting signals was so indivisible and continuous that without the (prior or subsequent) transmission to and from British Telecom's system those signals would not have been capable of reception.

ruling

The Court, however, rejected the notion that "by means of a public telecommunication system" meant "through the intermediate agency of" such a system. Instead, the Court took the view (which it conceded was "a rather artificial concept") that a transmission could be notionally split into "separate temporal sections" so that the expression "by the means of" looks to the point in time at which the interception takes place. Accordingly, where signals which have already passed (or are yet to pass) through a "public telecommunication system" are intercepted, those signals are not relevantly being transmitted "by means of" that public system.

In reaching this conclusion, the Court followed a similar conclusion reached in an unreported decision of the English Court of Appeal in March 1994 *(R v Ahmed)*. Also considered significant was the fact that as it is possible to intercept communications at various stages of their transmission, including entry and physical interference with apparatus (ie "bugging") and, as the scope of the warrant the Secretary for State could issue could not be held to extend to authorising such activity, *the Act* must only be focusing on tapping of public systems.

The Court's opinion was reinforced by the view it took of the "limited purposes of the Act". These were:

- to protect the integrity of public, as opposed to private, systems;
- to provide for limited exceptions to that protection; and
- to ensure that material acquired by this tapping is not used other than for the legitimate purpose of the tapping (here, the prevention of crime).

Accordingly, the legislation was not designed to prevent eavesdropping or intrusion on the privacy of individuals or to provide for any general authorisation for tapping in private premises. The Court went on:

"And there is logic in this. The individual who connects his own private apparatus to the public system has means to protect that apparatus from interference. What he cannot protect himself from is interference with the public system without which his private apparatus is useless. Hence the necessity for statutory protection of that system."

Accordingly, the telephone taps were not covered by *the Act* and the evidence obtained was admissible.

European Convention on Human Rights

Curiously, it does not appear to have been argued by the appellants that the Court should have paid regard to the UK's international obligations under the European Convention on Human Rights (1950) *("the Convention")* in determining which of the two contending interpretations to accept of s.1 of *the Act*.

Article 8 of *the Convention* provides that:-

"(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 in accordance with the law" in pursuit of certain limited and specified objectives.

Article 8 had been held by the European Court of Human Rights to extend to interception of telecommunications in the 1978 *Klass* case.

That the UK's laws on tapping should be interpreted in a way consistent with the UK's obligations under *the Convention* had been raised in the UK case of *Malone v Metropolitan Police Commissioner (No.2)* in 1979 long before the passage of *the Act*. In that case the Court comprehensibly rejected the notion that police phone tapping was illegal under English common law. The Court also declined to pay any regard to *the Convention* because it was not "law" in the UK and the relevant legislation authorising the tapping had not been passed to give effect to the UK's obligations under *the Convention*. Sir Robert Megarry VC did state in that case though that:

"I ... find it impossible to see how English law could be said to satisfy the requirements of the Convention ... unless that law not only prohibited all telephone tapping save in suitably limited classes of case, but also laid down detailed restrictions on the exercise of the power in those limited classes ...

"... telephone tapping is a subject which cries out for legislation ...".

In 1980 the Home Secretary indicated in the House of Commons that the Government saw no need to introduce legislation following the 1979 *Malone* decision and Megarry VC's suggestion was to go unheeded until after Malone appealed to the European Court of Human Rights in 1984.

In that case the Court held that the phrase in "accordance with the law" in paragraph (2) of Article 8 of *the Convention* required "a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 ... [and that in relation to tapping] the law must indicate the scope of any such discretion conferred on competent authorities and the manner of its exercise with sufficient clarity ... to give the individual adequate protection against arbitrary interference ...". As the English law did not meet these requirements the Court unanimously found a breach of Article 8 had occurred.

Following this case and (yet another) White Paper on the *Interception of Communications in the United Kingdom* (1985), which heralded "a comprehensive framework for interception" to bring the UK's laws into line with *the Convention*, the Government finally introduced the *Interception of Communications* Bill into Parliament. The Home Secretary stated in his Second Reading speech that the Bill "fully meets our obligations under the European Convention on Human Rights."

It should be noted that section 5(b) of the *Wireless Telegraphy Act 1949* does supplement the provisions of the Act somewhat by providing that a warrant must be obtained by the authorities before using a radiocommunication apparatus "to obtain information as to the contents, sender or addressee of any message (whether sent by means of wireless telegraph or not)." But this legislation contains none of the detailed restrictions laid down in *the Act* on the tapping of "public telecommunication systems" or as required under *the Convention* generally. It is not clear whether police obtained a warrant under this legislation for use of the receiver in the *Effik* case.

tapping OK

Unfortunately then for the people of the UK their rights under *the Convention* are not comprehensively protected by legislation. Public authorities have now been given the green light to intercept communications on private networks, cordless telephones (including cordless PABX's) and to "bug" telephones and use any material obtained in criminal proceedings without satisfying *the Convention* restrictions. These are very large exceptions to the scope of protection guaranteed by *the Convention*.

It seems therefore that further challenge to the European Court of Human Rights is likely and that additional legislation will be required.

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