The Covert Human Intelligence Source (Criminal Conduct) Act 2021: Making Lawful Criminal Conduct

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Introduction

In April 2021 the UK government passed the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which came into force in July 2021. A covert human intelligence source, commonly referred to as a CHIS, is in police terms an informant or in the security service terms an agent. For this article they will be referred to as informants. With the Act allowing in specified conditions informants to participate in criminal conduct, the Government felt it had to legislate on this issue following a majority decision of the Investigatory Powers Tribunal that held such action can be lawful. In the case, *Privacy International and others v Secretary of State for Foreign and Commonwealth, and others* [2019] UKIPTrib IPT_17_186_CH the claimants challenged a policy that the Prime Minister acknowledged existed in March 2018 that the Security Service (MI5) authorise the commission of criminal offences by its agents.

The challenge was based on seven grounds:

1. There is no lawful basis for the policy, either in statute or at common law.

2. The policy amounts to an unlawful de facto power to dispense with the criminal law.

3. The secret nature of the policy, both in the past and now, means that it is unlawful under domestic principles of public law.

4. For the purposes of the European Convention on Human Rights (ECHR), the policy was not and is not "in accordance with law".

5. Any deprivation of liberty effected pursuant to a purported authorisation given under the policy violates the procedural rights under Article 5 of the ECHR.

6. Supervision of the operation of the policy by the Intelligence Services Commissioner in the past, and now the Investigatory Powers Commissioner, does not satisfy the positive investigative duty imposed by Articles 2 (right to life), 3 (prohibition of torture and 5 (right to liberty of the person) of the ECHR.

7. Conduct authorised under the policy in breach of Articles 2, 3, 5 and 6 (right to fair trial) of the ECHR is in breach of the negative and preventative obligations in the ECHR. It is submitted that the policy itself is unlawful to the extent that it sanctions or acquiesces in such conduct.

From its beginning both the police and the security services have used informants. As in virtually all cases informants operate within terrorist or criminal circles, their information can be a valuable asset during investigations. For many years the governance of informants was through internal policy and guidelines with no consistency in procedures and it was a practice that was open to challenge regarding the methods as to how informants were recruited and handled. Even though Home Office guidelines in handling of informants was introduced in 1984 to guarantee a degree of uniformity as to how the police in England and Wales handled informants. Following the House of Lords decision in R v Khan (Sultan) [1996] 3 WLR 162 where the Court held the 1984 Home Office guidelines were acceptable, Khan took his case to the

European Court of Human Rights (Khan v UK [2000] 8 EHRC 310). Knowing that the guidelines would not be seen by the European Court as a document that would come under the term 'in accordance with the law', the government introduced the Regulation of Investigatory Powers Act 2000 (RIPA) governing the recruitment and handling of informants came under statutory control. This article will examine the main provisions regarding informants in RIPA and assess the rationale as to why the 2021 Act was introduced amending RIPA by allowing in certain circumstances informers to participate in criminal conduct.

Regulation of Investigatory Powers Act 2000

Compared to the 1984 Home Office guidelines, in essence RIPA tightened up the procedures governing the recruitment and use of informants. As anticipated, the European Court of Human Rights in Khan v UK held that the Home Office guidelines was not an act prescribed by law (a statute) which is required under the limitations given in article 8 ECHR (right to privacy) for the state to interfere with this right. Section 26(8) RIPA defines an informant as one who covertly establishes or maintains a personal or other relationship with a target (person or organisation) to obtain information or gain access to another person to gain information to be passed on to the state agencies. Another key change in informant handling is the accompanying Codes of Practice that provide guidance to the police in applying RIPA when handling informants. Although a breach of the Codes of Practice will not always amount to unlawful action by a police officer, such a breach is likely to result in any information obtained by an informant during an investigation that could be used as evidence in a criminal trial being rendered inadmissible. One significant change in RIPA and Covert Human Intelligence Sources Codes of Practice (CoP) is that under section 29(5) informants are managed by a handler and a controller. Under paragraph 6.8 of the CoP the controller has to be a rank above that of the handler and their role is to maintain a general oversight in the use of the informant by the handler. Under RIPA and the CoP a risk assessment is carried out prior to, during and at the end of the use of the informant regarding the task they are asked to perform, and the likely consequences should it become known that the person was an informant.

Under the previous Home Office guidelines, risk assessments were carried out, but the recording of how they were managed was not as rigorous as RIPA. Under section 29(5) RIPA the handler must report to the controller on a continual basis. In paragraph 6.15 of the CoP it outlines that these reports include informing the controller when and where any meetings or contact will be made with the informant, the conduct of the informant and the safety and welfare of the informant. Under RIPA it is not acceptable for the handler to meet the informant on their own without the knowledge of their supervisor/line manager acting as a controller, and RIPA encourages the handler to be accompanied by a colleague during any meetings with the informant. This is to provide corroboration that the handler was acting ethically with the informant.

Covert Human Intelligence Source (Criminal Conduct) Act 2021

A long-standing condition under section 27 RIPA is when handling informants it has to be ensured they do not get involved in carrying out any form of criminal conduct and if they did then they would be arrested and potentially charged with offences related to the conduct they were involved in. This has changed with the introduction of The Covert Human Intelligence Source (Criminal Conduct) Act 2021 that has amended RIPA in relation to handling of informants that allows in certain circumstances for the informant to carry out criminal conduct. It is important to note that this is only permissible in certain circumstances.

Introducing a new section, section 29B RIPA, it allows for the Secretary of State (which in the case informants linked to terrorist activity will be the Home Secretary) to authorise an informant to carry out criminal conduct. The authorisation tasking the informant to carry out criminal conduct must be granted at the same time as an authorisation is granted to handle the informant under section 29 RIPA. Compared to the grounds for authorising the handling of an informant under section 29, the grounds for an authority tasking an informant to carry out criminal conduct is limited and can only be authorised where it is necessary:

1. When it is in the interests of national security;

2. For the purpose of preventing or detecting crime or of preventing disorder; or

3. When it is in the interests of the economic wellbeing of the UK.

The conditions for this authority are that what is sought to be achieved cannot be achieved by conduct that would not constitute a crime and that the criminal conduct that will be carried out is necessary and proportionate to what is being sought to be achieved. The authorised criminal conduct is conduct carried out in connection with the informant that is specified in the authorisation, that is carried out for the purpose of or in connection with the investigation or operation specified or described in the authorisation. Under section 29B RIPA among the agencies that can apply for a criminal conduct authorisation, includes:

1. Police;
2. National Crime Agency;
3. Serious Fraud Office;
4. Intelligence services;
5. Armed forces;
6. HM Revenue and Customs

The 2021 Act amends section 32 RIPA regarding oversight of authorisations by judicial commissioners. Where an authorisation to use an informant is issued, under section 32A RIPA, approval of the judicial commissioner is required before the authorisation can take effect. The judicial commissioners will only grant an approval if they are satisfied that there are reasonable grounds for the authorisation. In relation to an authorisation for an informant to carry out criminal conduct, the judicial commissioner must have oversight of the authorisation and give notice that it is either granted or cancelled.

The grounds for an authorisation allowing an informant to carry out criminal conduct are limited and the conditions are strict. When looking at the grounds, it is anticipated these authorisations will be primarily in relation to terrorism investigations or serious organised crime, linked to terrorist groups' activity, where there is potentially a life-threatening situation. Section 1 Security Services Act 1989 statutorily defines the role of the UK's security services which is:

1. The protection of national security, in particular protection against threats of espionage, *terrorism* and sabotage, from the activities of foreign states' agents and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means; [my emphasis]

2. Safeguard the economic well-being of the UK;

3. Support the activities of police forces, national Crime Agency and other law enforcement agencies in the prevention and detection of serious crime.

Echoing the mischief rule on statutory interpretation, it appears the intention of the 2021 Act is to place the practice of allowing informers to carry out criminal conduct, mainly by the UK's security services, on a statutory footing.

The security service's practice of authorising some of their informers (agents) to carry out criminal conduct was addressed by the Investigatory Powers Tribunal (IPT) in *Privacy International and others v Secretary of State for the Foreign and Commonwealth Office and others,* where the claimants raised the issue that under the UK Security Services guidelines allows for the authorisation of their informants to commit criminal offences. As the claimants argued that this practice was contrary to a number of rights contained in the European Convention on Human Rights, the IPT were requested to examine the lawfulness of the Security Services' guidelines. In paragraph 13 of the Security Services guidelines, while it is accepted that RIPA did not provide immunity for informers who participated in crime, there may be circumstances where:

'…it is necessary and proportionate for agents to participate in criminality in order to secure or maintain access to intelligence that can be used to save life or disrupt serious criminality, or to ensure the agent's continued safety, security and ability to pass on such intelligence.'

Paragraph 4 of the Security Services Guidelines state that full and accurate records of everything said to an agent on the subject of participation and of their response, adding the agent must be informed the security service authorisation will not bestow immunity from prosecution. In relation to running informers in terrorism investigations, one aspect where *prima facie,* the informer will be committing an offence under section 11 Terrorism Act 2000, where they are a member of a terrorist organisation (i.e., a proscribed organisation as listed in Schedule 2 Terrorism Act 2000). Albeit a 3:2 majority verdict, the ICP found that this practice was legitimate, saying:

'The running of agents, including the running of agents who are embedded in an illegal or criminal organisation … would obviously have been occurring before [the introduction of Security Service Act 1989]. … The 1989 Act did not create the service for the first time: it simply controlled it. It is impossible, in our view, to accept that Parliament intended in enacting the 1989 Act to bring to an end some of the core activities which the Security Service must have been conducting at that time.'

Citing the Manchester Arena bombing and the London terrorist attacks that occurred in 2017, the IPT stated these events serve to underline the need for intelligence gathering and other activities in order to protect the public from serious terrorist threats. On the issue as to whether the Security Service has the power as a matter of public law to undertake the activities of running informants that involve their carrying out criminal conduct, the IPT found that they do have that power.

On the question if the action is in accordance with the law regarding a violation of article 8 ECHR (right to privacy) the IPT found the Secret Service Guidelines have a basis in RIPA, which would be within the meaning if 'in accordance with the law' as held by the European Court of Human Rights in *Zakhorav v Russia* (2016) 63 EHRR 17 where the Court examined the margin of appreciation enjoyed by a national authority in achieving the legitimate aim of protecting national security, including secret surveillance methods. The IPT also held that to claim a violation of article 8 or other ECHR rights, as the ECHR does not in general permit an *actio popularis* (a remedy by a group in the name of a collective interest), it must be the person who claims to be a victim of their rights.

Conclusion

When it was a Bill going through parliament a factsheet was issued by the Home Office stating that the Act would not be providing a new capability, rather it would provide a clear legal basis for a longstanding tactic that is vital for national security and the prevention and detection of crime. The Home Office see the participation in criminal conduct by informers as essential by allowing them to work their way into the heart of groups that would cause harm to the public. The important aspect to the 2021 Act are the safeguards in place sufficient to protect both the agency staff, the informer and the potential victim. It might have been preferable that rather than a politician, in this case the respective secretary of state granting the authorisation, it should be the judiciary. This would definitely meet the ECHR requirements of judicial oversight. However, as the judicial commissioners have an oversight in relation to the granting of authorisations, this may suffice. Another aspect to 2021 Act is there is no coverage of what form of criminal conduct would be permissible in these authorisations. This was an issue human rights groups, led by Reprieve has a major concern with as they said there should clear limits to how far informers working undercover in terrorist groups could be allowed to go. As covered above, in relation to terrorism the recruit-

ment of, the handling, and request for the informer to carry out criminal conduct would invariably involve a member of a terrorist organisation and that in itself is an offence. It is important to ascertain the degree of seriousness of criminal conduct can the informer carry out. For example, it would be totally disagreeable for the informer to be party to murder, but it may involve, conspiracy or party to planning an act of terrorism under section 5 Terrorism Act 2006, where prior to the attack the informer will pass on the intelligence needed for the agencies to make arrests before the attack occurs. There is no doubt that the 2021 Act is a controversial piece of legislation, but one that is necessary. It will be essential that scrutiny and oversight of these authorisations, especially by the judicial commissioners is robust and not simply a rubber-stamping exercise.

Dr David Lowe is a retired police officer and is currently a senior research fellow at Leeds Law School, Leeds Beckett University researching terrorism & security, policing and criminal law. He has many publications in this area including his recent books 'Prevent Strategy: Helping the Vulnerable being drawn towards Terrorism or Another Layer of State Surveillance?', 'Terrorism and State Surveillance of Communications' and 'Terrorism: Law and Policy', all published by Routledge. Routledge will be publishing the 2nd edition of his book 'Terrorism Law & Policy: A Comparative Study' in October 2021. David is regularly requested to provide expert commentary to UK national and international mainstream media on issues related to his research areas and he provides an expert witness service.