

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Fifth Delegated Legislation Committee

DRAFT INVESTIGATORY POWERS ACT 2016
(REMEDIAL) ORDER 2023

Tuesday 23 January 2024

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The Committee consisted of the following Members:

Chair: STEWART HOSIE

† Bell, Aaron (*Newcastle-under-Lyme*) (Con)
 Coyle, Neil (*Bermondsey and Old Southwark*) (Lab)
 † Graham, Richard (*Gloucester*) (Con)
 † Jarvis, Dan (*Barnsley Central*) (Lab)
 Jayawardena, Mr Ranil (*North East Hampshire*)
 (Con)
 † Johnson, Dame Diana (*Kingston upon Hull North*)
 (Lab)
 Jones, Mr Kevan (*North Durham*) (Lab)
 † Lynch, Holly (*Halifax*) (Lab)
 † McDonald, Stuart C. (*Cumbernauld, Kilsyth and*
Kirkintilloch East) (SNP)

Mather, Keir (*Selby and Ainsty*) (Lab)
 † Mullan, Dr Kieran (*Crewe and Nantwich*) (Con)
 † Thomas, Derek (*St Ives*) (Con)
 † Throup, Maggie (*Erewash*) (Con)
 † Tugendhat, Tom (*Minister for Security*)
 † Vickers, Matt (*Stockton South*) (Con)
 † Webb, Suzanne (*Stourbridge*) (Con)
 † Wood, Mike (*Lord Commissioner of His Majesty's*
Treasury)

Robi Quigley, *Committee Clerk*

† **attended the Committee**

Fifth Delegated Legislation Committee

Tuesday 23 January 2024

[STEWART HOSIE *in the Chair*]

Draft Investigatory Powers Act 2016 (Remedial) Order 2023

4.30 pm

The Minister for Security (Tom Tugendhat): I beg to move,

That the Committee has considered the draft Investigatory Powers Act 2016 (Remedial) Order 2023.

It is a pleasure to serve under your chairmanship, Mr Hosie. The order was laid before the House on 18 October 2023. Maintaining our national security and keeping the public safe is a priority for the Government. The Investigatory Powers Act 2016, or the IPA, provides extensive and robust privacy safeguards in relation to investigatory powers. We rightly have world-leading standards in place on transparency, privacy, redress and oversight to accompany the exercise of these important powers.

The order will make necessary amendments to the IPA following the judgment of the Grand Chamber of the European Court of Human Rights in May 2021 in the case of *Big Brother Watch and Others v. the United Kingdom*, which I will refer to as *BBW*. The Grand Chamber ruling related to the bulk interception regime under the Regulation of Investigatory Powers Act 2000, known as *RIPA*, which was the predecessor to the IPA. The Grand Chamber found that there were violations of articles 8 and 10 of the European convention on human rights, which I will refer to as “the convention”.

Although most of the incompatibilities were addressed through the introduction of the IPA, one further change required primary legislation to implement. To be compliant with article 10 of the convention, the IPA’s bulk interception regime needed to include a requirement for prior independent authorisation for the use of criteria to select intercepted material for examination. Such a requirement applied where a purpose of the search was to find confidential journalistic material or information that could identify a source of journalistic material. The requirement also applied to searches carrying a high likelihood of confidential journalistic material or sources of journalistic material being selected for examination.

Finally, prior independent authorisation is also required for the retention of items containing confidential journalistic material or sources of journalistic material. Bulk interception warrants authorised the interception in bulk of communications. That material is then retained for the minimum amount of time necessary for the authorised purposes. Criteria are used to search through that material to find material useful for operational purposes. Useful material is then retained for the minimum amount of time necessary for the authorised purposes. It is the use of these criteria that will require judicial authorisation if a purpose of using them is to identify

confidential journalistic material, or to identify or confirm a source of journalistic material, or if the use of them is highly likely to lead to such outcomes. Currently, section 154 of the IPA, which covers the journalistic safeguards for bulk interception, requires only that the Investigatory Powers Commissioner be informed if material thought to contain confidential journalistic material or sources of journalistic material is retained following examination for a purpose other than its own destruction.

There are additional safeguards in the interception code of practice that require the relevant intelligence agency to seek the agreement of a senior official within a warrant-granting department before the agency may select material for examination in order to identify or confirm a source of journalistic information. This remedial order therefore strengthens the existing safeguards. It does this by requiring that approval from the Investigatory Powers Commissioner be obtained before any criteria are used, with the purpose of that being to select material for examination that is confidential journalistic material or a source of journalistic material or where it will be highly likely to do so. The retention of confidential journalistic material or sources of journalistic material must also be authorised by the Investigatory Powers Commissioner. There is also an urgency provision, which I will come to later. *[Interruption.]* It is an honour to see my hon. Friend the Member for Gloucester.

It is necessary that the Government make this change to the IPA, so that our intelligence agencies can maintain their ability to carry out bulk interception. It is an important operational tool, used to identify threats to national security—it was recognised by the Grand Chamber as such—tackle serious crimes and maintain the United Kingdom’s economic wellbeing.

The Investigatory Powers Commissioner already provides oversight of confidential journalistic material and sources of journalistic material obtained under bulk interception, but legislative change is needed to mandate those safeguards within the IPA. Failure to amend the IPA could result in applications for bulk interception warrants being refused.

The draft remedial order will reform three different areas of the IPA, by amending section 154, inserting proposed new section 154A, and making a minor amendment to section 229(8). The amendment to section 154 will introduce enhanced safeguards relating to the criteria used to select material for examination that will identify confidential journalistic material, or identify or confirm sources of journalistic material derived from material acquired through bulk interception. The permission of the Investigatory Powers Commissioner will be required before such material can be purposefully selected for examination, or knowingly retained for a purpose other than destruction.

Proposed new section 154A introduces an urgency process for dealing with requests that need to be approved out of hours for authorisations to use criteria to select material for examination. Such authorisations will be subject to subsequent judicial authorisation if the relevant condition is met. Activity must cease if that is not the case, so urgent applications will still be subject to rigorous judicial scrutiny.

The amendment to section 229(8) is a consequential amendment that includes references to the new functions of the Investigatory Powers Commissioner in section 154 and proposed new section 154A, so that they are treated consistently within the IPA. Section 229(6) and (7) require

judicial commissioners not to act in a way that is contrary to the public interest, national security, the prevention or detection of serious crime, or the economic wellbeing of the United Kingdom. Subsection (8) then disapplies that requirement when the judicial commissioner is exercising various functions, such as considering whether to approve the authorisation of a bulk interception warrant.

Section 229(8) is amended by this draft statutory instrument to include decisions by the judicial commissioner under section 154, as amended, and proposed new section 154A. That is consistent with similar judicial commissioner functions in other parts of the IPA, and ensures that judicial commissioners can exercise their functions properly.

In summary, the changes will ensure that the United Kingdom is meeting its obligations under the convention and that the bulk interception regime is compliant with article 10 of the convention. The changes will also further strengthen the privacy safeguards contained in the IPA, in line with the BBW judgment, while continuing to give our intelligence agencies the powers and flexibility to keep our country safe. I commend the draft order to the Committee.

4.38 pm

Dan Jarvis (Barnsley Central) (Lab): It is a particular pleasure to serve under your chairship, Mr Hosie.

I thank the Minister for his remarks. As he set out, this statutory instrument, the draft Investigatory Powers Act 2016 (Remedial) Order 2023, came about after the European Court of Human Rights ruling on the case of *Big Brother Watch and Others v. the United Kingdom* on 25 May 2021. We do not intend to oppose this statutory instrument, and I do not intend to detain the Committee any longer than is necessary, but while these matters can be technical, they are also important. I have a couple of points to make and a couple of questions for the Minister to respond to.

It is also worth noting that the Investigatory Powers (Amendment) Bill has its Report stage in the other place today. I look forward to debating it with the Minister when it reaches this place in the not-too-distant future.

On the substance of the matter, the ECHR ruling found that parts of the bulk interception regime under the UK's Regulation of Investigatory Powers Act 2000—RIPA—were incompatible with article 8 on private and family life and article 10 on freedom of expression in the European convention on human rights. Most of the incompatibilities were addressed with the introduction of the Investigatory Powers Act 2016—IPA—which superseded RIPA. While I will always pay tribute to the men and women serving in our intelligence and security services, in government and in our police, on this occasion, as this remedial order is designed to include additional protections in relation to confidential journalistic material, it is also right on this occasion to pay tribute to the journalists who hold the powerful to account, including Government, Parliament and the Opposition. At its heart, journalism is a noble profession, and journalists have a crucial role to play in our democratic system, not least when there are those who would seek to mislead, obfuscate and, frankly, lie.

The need for impartial journalism is critical. Two matters have recently brought this into sharp focus: the fact that highly professional and hugely committed journalists on the BBC's "Newsnight" programme are at risk of redundancy, and the concerns raised on both sides of the House about the future ownership of *The Daily Telegraph*. It is also worth noting that, in the ruling on *Big Brother Watch and Others v. The United Kingdom*, the European Court of Human Rights is a guarantor of those freedoms.

Given that an ECHR ruling has shaped this remedial order changing UK law, I want to briefly touch on the context of this statutory instrument. The Minister will know that the UK was one of the founding signatories of the ECHR in 1950, and has had a fundamental role to play in guaranteeing rights and freedoms for over seven decades now. I know the Minister agrees with me on this because when he was asked about his party's policy on remaining in the ECHR on 2 October last year, he said that the prospect of leaving it raises

"some pretty big questions, whether that's about the Good Friday Agreement, whether it's about the devolved administrations, whether it's about our relationships with other countries, including, in fact, the TCA and the Windsor Agreement with the European Union."

Have the Minister's questions have been answered, and will he confirm the Government's long-term commitment to the ECHR?

I do not intend to detain the Committee for much longer, so I will make one further point about this statutory instrument. While the IPA 2016 replaced the relevant parts of RIPA that make express provision for bulk interception in the existing section 154 of the Act, this remedial order substitutes a new section 154 that includes a requirement for the Investigatory Powers Commissioner's approval before criteria are used for certain purposes to select material for examination acquired under a bulk interception warrant; the public interest test that the commissioner must consider in these cases; and provision, when there is an urgent need for an approval of such criteria, that it may be done by a senior official acting on behalf of the Secretary of State.

Delegation of powers when there is an urgent need for an approval is essential to meet operational requirements. I know this matter has already been discussed in some detail during the progress of the Investigatory Powers (Amendment) Bill in the other place, and I look forward to discussing this with the Minister in due course. But given these are important and really quite technical matters, it would be helpful to the Committee if the Minister gave an assurance that these arrangements are fit for purpose and, if not, if he can say what work is under way to ensure that they are.

Keeping our country safe and protecting our basic freedoms is not always an easy balance to strike. The Opposition are under no illusions about the challenges in striking this balance, but we will work constructively with the Government on them.

4.43 pm

Stuart C. McDonald (Cumbernauld, Kilsyth and Kirkintilloch East) (SNP): It is very good to see you in the Chair, Mr. Hosie. I am grateful to the Minister for his explanation of the order before us today, and I join

[Stuart C. McDonald]

the shadow Minister in sending our praise and thanks both to the security services and to the journalists who also serve this country.

As you know better than anyone, Mr Hosie, the SNP has regularly raised concerns about the vast scope of some bulk interception powers and various others in our investigatory powers legislation, as well as the inadequacy of certain oversight arrangements and protections. For those reasons, we welcomed the European Court judgment in the Big Brother Watch case, which emphasises the importance of that institution and remaining part of the convention. We note that in this Parliament the Joint Committee on Human Rights has supported the draft order. For the reasons set out by that Committee, the SNP supports the remedial measure proposed today, which aims to make our arrangements compliant with the Big Brother Watch judgment.

I emphasise that the draft order does not fix all our concerns about the sweeping powers enjoyed by our services under the Investigatory Powers Act, but our ongoing concerns are a matter for another day. For the time being, we support the order.

4.44 pm

Tom Tugendhat: I am grateful to the Labour and SNP spokesmen for their comments, especially my friend the hon. Member for Barnsley Central, who correctly set out the reason why oversight is so important. It is right to place on the record my extreme gratitude to journalists in this country who, correctly, see their role as one of the guardians of our unwritten constitution. It is essential that we maintain the integrity of our political process, and journalism—good journalism—is part of doing that.

The hon. Gentleman tempts me to take various other lines, and of course it would be wrong of me not to praise the Scottish Conservatives, who have made such a fantastic impact on our national life, and who I look forward to seeing returned in much greater number after the coming election.

The Chair: Order. I think the Minister is out of scope.

Tom Tugendhat: I pay huge tribute in particular to Viscount and later Earl of Kilmuir, David Maxwell Fyfe, who was not only the first Home Secretary to have MI5 reporting to him rather than the Prime Minister, but one of the principal drafters of the European convention on human rights and a key individual in building the post-war order, in which British justice was used as the template for a new European convention.

Richard Graham (Gloucester) (Con): Does this remedial order and its compliance with the ECHR worry or reassure allies with whom we share intelligence?

Tom Tugendhat: When we make it clear that the work we do, necessarily in secret, is supervised and checked against a legal basis, it hugely reassures our friends and partners. It assures them as well that we are not just a partner to be trusted, but a partner with which intelligence can be shared very freely, because of the clear legal oversight. This is a strong element in building the security and building up the trust that we need to keep our people safe. I commend the order to the Committee.

Question put and agreed to.

4.47 pm

Committee rose.