Neutral Citation Number: [2013] EWCA Crim 1026

Case No: 2013/02883

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
The Hon Mr Justice Saunders
T2012/7351

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2013

Before :

THE RT. HON. LORD JUDGE, LORD CHIEF JUSTICE
LORD JUSTICE LLOYD JONES
and
MR. JUSTICE OPENSHAW

- -

Between :

Ian Edmondson **James Weatherup** **Rebekah Brooks** **Andrew Coulson** **Stuart Kuttner**	**Appellants**
- v -	
Regina	**Respondent**

- -
- -

Clare Montgomery QC & Alison Macdonald for the **Appellants**
Andrew Edis QC, Daniel Beard QC, Rebecca Chalkley and Ligia Osepciu for the **Crown**
Hearing date: Friday 14th June, 2013

- -

Approved Judgment

Lord Judge, Lord Chief Justice:

This is the judgment of the Court. The major responsibility for its preparation was undertaken by Lloyd Jones LJ.

1. Ian Edmondson, James Weatherup, Rebekah Brooks, Andrew Coulson and Stuart Kuttner appeal against a ruling on a point of law made by Fulford L.J. during a preparatory hearing on 28 May 2013. That ruling was endorsed by Saunders J. on 3 June 2013 on which occasion he also granted leave to appeal.

2. The appellants are charged with conspiring unlawfully to intercept communications in the course of their transmission without lawful authority contrary to section 1(1) Criminal Law Act 1977. Under section 1(1)(b) Regulation of Investigatory Powers Act 2000 ("RIPA"), it is an offence intentionally to intercept, without lawful authority, any communication in the course of its transmission by means of a public telecommunications system. The underlying allegation against the appellants, all of whom worked at the News of the World as editors or journalists where they were employed by News International, is that they in different permutations conspired, without lawful authority, to intercept mobile telephone voicemail messages.

3. The appellants made dismissal applications on a ground which raises the true construction of sub-sections 2(1), 2(2) and 2(7) RIPA. Expressed in general terms, the issue turns on when the course of transmission of a voicemail message ends and, in particular, whether a voicemail message which is saved by the recipient on the voicemail facility of a public telecommunications system remains in the course of transmission. The central point taken on behalf of the appellants is that the words "in the course of transmission" in section 1(1) RIPA do not extend to cover voicemail messages once they have been accessed by the intended recipient. The decision of Fulford L.J., endorsed by Saunders J., is that section 2(7) RIPA extends the concept of transmission to include the period when the transmission system stores the communication, in such a manner that enables the intended recipient to have access to it, whether or not it has previously been received by the intended recipient.

Jurisdiction

4. Before we turn to the merits, we should deal with a preliminary point, which was raised by the Criminal Appeal Office, that there might not be jurisdiction to hear the appeal at all. There is, of course, no appeal from a judge's decision to reject an application to dismiss the case (*R v Thompson and Hanson* [2007] 1 Cr App R 15). Such an application takes place before arraignment and indeed did take place before arraignment in this case. But this appeal is not directed against that decision but against the ruling of law that Saunders J. made in the course of the preparatory hearing. In accordance with section 30, Criminal Procedure and Investigations Act 1996, the appellants should have been arraigned before the start of the preparatory hearing. Indeed Part 15.6 of the Criminal Procedure Rules requires that:

> "At the beginning of a preparatory hearing, the court must:
>
> (a) announce that it is such a hearing; and

(b) take the defendant's plea (unless already done)."

In fact the defendants were arraigned at some stage during that hearing and it is obviously sensible, and in accordance with the overriding objective, to hear this appeal now despite that fact that there was not scrupulous observance of Part 15.6 at the time.

The History of the Provisions

5. RIPA replaced the Interception of Communications Act 1985 ("ICA 1985"), which had previously governed the interception of electronic communications in the United Kingdom. In 1997 the European Parliament and Council had issued Directive 97/66/EC of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector ("the 1997 Directive"). It is clear that one purpose of RIPA was to implement Article 5 of the 1997 Directive, which required Member States to safeguard the confidentially of communications. Following the enactment of RIPA, in 2002 the European Parliament and Council adopted Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ("the 2002 Directive") which repealed the 1997 Directive.

The Statutory Provisions

6. Section 1 Criminal Law Act 1977 provides:

> "1.— The offence of conspiracy.
> (1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—
> (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
> (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,
> he is guilty of conspiracy to commit the offence or offences in question.
>
> (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place".

7. The relevant substantive offence is contained in section 1(1) RIPA which provides:

> "1.— Unlawful interception.
> (1) It shall be an offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of–

(a) a public postal service; or
(b) a public telecommunication system."

This provision follows closely the language of section 1(1) of ICA 1985 which RIPA replaced.

Section 2(1) defines "telecommunication system" as follows:

> "telecommunication system" means that any system (including the apparatus comprised in it) which exists (whether wholly or partly in the United Kingdom or elsewhere) for the purpose of facilitating the transmission of communications by any means involving the use of electrical or electro-magnetic energy."

Section 2(2) provides:

> "(2) For the purposes of this Act, but subject to the following provisions of this section, a person intercepts a communication in the course of its transmission by means of a telecommunication system if, and only if, he–
> (a) so modifies or interferes with the system, or its operation,
> (b) so monitors transmissions made by means of the system, or
> (c) so monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system,
> as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication."

At the heart of this appeal is the effect of section 2(7) which provides:

> "(7) For the purposes of this section the times while a communication is being transmitted by means of a telecommunication system shall be taken to include any time when the system by means of which the communication is being, or has been, transmitted is used for storing it in a manner that enables the intended recipient to collect it or otherwise to have access to it."

Systems used to transmit voicemail messages

8. The provisions of sections 1 and 2 RIPA are intended to apply to a number of different technologies. In this appeal we are concerned only with voicemail messages left for an identifiable recipient on the voicemail facility of his or her private mobile telephone which is operated by a cellular network service provider and is part of a public telecommunication system to which the phone is connected.

9. For present purposes, it is convenient to adopt the description of such a system provided by the Crown and with which the appellants have not taken issue.

   (1) The mobile handset operates as a radio transmitter/receiver.

   (2) Calls and messages sent to it are sent over the provider's standard network which is a public telecommunications system in the United Kingdom and routes communications to and from the phone through local transceiver base stations (cell sites).

(3) That network is connected to other similar networks operated by other public telecommunications providers.

(4) Calls and messages to the phone number are intended for the subscriber who is the sole user.

(5) In the event that a voice call goes unanswered, the network automatically diverts the call to a voicemail facility, which is housed at switching level within the system, and on which the caller leaves a digitally recorded voice message, the presence of which is later automatically notified to the subscriber.

(6) The subscriber may then access the recorded message by calling his voicemail facility, in practice with the use of a speed dial facility on his own handset but in fact by dialling a mobile phone number, which causes the network to route his call to his voicemail box. This can also be done from another telephone, subject to the use of a PIN code security feature. This call is automatically answered by the network and, by selecting options, he is able to listen to some or all of the recorded message. By selecting further options he may listen again, save or delete the recorded message. Unless he positively acts to delete the message, the recording remains stored within his voicemail box until either he later deletes it or the maximum period for retention is reached in which case it is deleted automatically.

(7) The relevant interception conduct ("hacking") involves remotely accessing the voicemail box by dialling, from another telephone, the telephone number relating to it and bypassing any security feature, so as to be able to listen to the content of the message, without the knowledge or consent of the subscriber, at a time when the recorded message is stored there, not yet having been deleted.

(8) It may be the case that the message either has or has not previously been heard in whole or in part by the subscriber. This will not be known by the hacker when the hack takes place and is outside his control.

(9) The hacker therefore achieves access to the message by "impersonating" the intended recipient. If the message is inaccessible to the intended recipient, it cannot be hacked. Whether before or after it has been listened to by the intended recipient, it will only be capable of being intercepted if it is stored in the system in a manner which means that the intended recipient has access to it.

The competing submissions

10. The appellants submit that, save in the particular circumstances provided for in section 2(7), the references in RIPA to the course of transmission in the context of the use of a telephone system should be understood as meaning that the transmission ends when the signal delivered to the handset is converted back into sound waves or the call is terminated. They accept that section 2(7) effects an extension of the "course of transmission" but submit that the ordinary meaning of "transmission" contemplates conveyance from one person or place to another and that therefore the extension is limited to covering the transient storage of electronic communications before receipt.

They submit that section 2(7) will apply to periods of transient storage that arise as a consequence of the use of modern electronic communications, as well as communications such as e-mail and voicemail when the intended recipient was not immediately available. However, they submit that that is the limit of the extension effected by section 2(7).

11. The Crown submits that there is no warrant for the restrictions which the appellants seek to impose on section 2(7). The Crown does not maintain that the course of transmission necessarily includes all periods during which the transmission system stores the communication. However, it does submit that it does apply to those periods when the system is used for storage "in a manner that enables the intended recipient to collect it or otherwise have access to it".

12. The issue to be determined therefore is whether, on the proper construction of section 2(7), the period of storage referred to comes to an end on first access or collection by the intended recipient or whether it continues beyond such first access for so long as the system is used to store the communication in a manner which enables the intended recipient to have subsequent or even repeated access to it.

Authorities

13. In support of the appellants' proposed reading of section 2(7), Miss Montgomery QC has referred us to a number of authorities. It is clear that RIPA should be construed, if possible, so as to comply with Article 8 European Convention on Human Rights and the relevant Directives. (*R v E* [2004] 2 Cr App R 29 per Hughes J. at para 37). However, beyond this, the authorities to which we have been referred cast no further light on the issue for decision.

14. Miss Montgomery relies on the decision of the Divisional Court in *R (NTL Group Limited) v Crown Court at Ipswich* [2003] QB 131 where Lord Woolf CJ, delivering the judgment for the court observed:

> "Sub-section (7) has the effect of extending the time of communication until the intended recipient has collected it. It is essential on the evidence in this case that if NTL are to preserve the material, they take action before the intended recipient has collected the e-mail. Sub-section (7) means that we are here concerned with what happens in the course of transmission." (at para. 19)

In that case the Divisional Court was considering an application by police officers for the production of the contents of e-mails that were said to be relevant to a fraud investigation. Compliance with a production order, made under the Police and Criminal Evidence Act 1984, required the company to interfere with the operations of its system so as to divert a copy of the e-mail message to a second e-mail address before it was downloaded or otherwise collected by the intended recipient. Accordingly, the case was concerned solely with the period before the e-mail was made available to the intended recipient and the observations of Lord Woolf cited above were made in that context. The court was not addressing the situation under consideration in the present case and, as Fulford L.J. observed, it is unsustainable to suggest that the case is authority for the proposition that, once the intended recipient

has collected the communication, "transmission" has necessarily ceased. Furthermore we note, as did Fulford L.J., that the Divisional Court in *NTL* did not consider the effect of the words "or otherwise to have access to it" in section 2(7). We agree with the judge that it would be impossible to reach a proper determination of the issue raised on the present application without addressing the impact of those words.

15. In support of the contention that "interception" has to occur between two defined points which are the beginning and the end of a "transmission" the appellants rely on *R v E* [2004] 2 Cr App R 29 where this court said:

> "In our view the natural meaning of the expression "interception" denotes some interference or abstraction of the signal, whether it is passing along wires or by wireless telegraphy, during the process of transmission." (at para. 20)

The issue in that case was whether the use of a covert listening device placed in the Appellant's car which recorded words spoken by the Appellant, including words spoken when he was using a mobile phone, constituted an interception of the call. The Court of Appeal decided that it was not, because what was recorded was not the transmission but the Appellant's words taken from the sound waves in the car. Accordingly the case says nothing about when a transmission ends by reference to section 2(7).

16. The same is true of *R v McDonald* (unreported 23 April 2002, Astill J., Woolwich Crown Court) where the judge held that the offence is committed by intercepting a transmission as it is carried in the system and that the system begins at point A, with the start of the transmission of electrical or electromagnetic energy into which the sound waves of the speaker have been converted, and ends at point B, when the energy ceases on being converted into sound waves by the receiver. However, once again, the court was here concerned with telephone calls recorded by external microphones and not with communications received by interference with the system which transmitted them. Accordingly the case is not in point.

17. *R v Effik* [1995] 1 AC 309 is a decision on the Interception of Communications Act 1985. The House of Lords was there concerned with whether a cordless telephone was a public or a private system. The IAC1985 lacked any provision resembling section 2(7) and the reasoning has no bearing on the present issue. For the same reason *Thomas Porter v H.M. Advocate* [2005] SCCR 13 is not in point.

18. In *R v Hardy* [2003] 1 Cr. App. R. 30 this court held that a tape recording by undercover officers of telephone conversations with the Appellants was not an interception of the communication in the course of its transmission within the meaning of section 2(2) RIPA, but was the same as the secret recording by the officer of the conversation whilst meeting the suspect face to face. The decision casts no light on the scope of section 2(7).

Reference to Hansard

19. On behalf of the appellants, Miss Montgomery sought to rely on certain passages in Hansard, in particular the debate on the Regulation of Investigatory Powers Bill in Standing Committee F on 16 March 2000. The circumstances in which it is

permissible for the courts to refer to Hansard for the purposes of statutory interpretation are not present in this case. Even if section 2(7) could be considered ambiguous or obscure, there is certainly no clear statement by the promoter of the legislation which casts any light on the issue before us. (*Pepper v Hart* [1993] AC 593). Rather, the issue falls to be decided on the usual principles of statutory interpretation.

The statutory language

20. Concentrating on the provisions themselves, section 2(7), which has no counterpart in the IAC 1985, was clearly intended to extend the scope of the course of transmission. Miss Montgomery contends, however, that this is limited to periods of transient storage that arise as a consequence of the use of modern electronic communications as well as when the intended recipient is not immediately available. We accept that if section 2(7) is to make effective provision for the mischief of unlawful interception of voicemail communications such an extension is necessary. However, we can see no justification for limiting the extension to such situations. There is nothing in the language of the statute to indicate that section 2(7) should be read in such a limited way.

21. Miss Montgomery draws attention to the speech of Lord Oliver in *R v Effik* [1995] 1 AC 309 at p.318 where he observed, in relation to section 1(1) of the IAC 1985, that to constitute the offence under that section the interception must occur "in the course of" the transmission of the communication which he considered could mean no more than during the transmission of the communication. She submits that it was therefore possible that without any further definition, communications in transient storage might not be treated as being in transmission at that point and therefore interception of the transient store might not be regarded as taking place during transmission. We agree that section 2(7) makes effective provision for that particular mischief. However, in our view that is not a reason for limiting the extension to that situation. Furthermore, there is an element of circularity in Miss Montgomery's submission to the extent that it seeks to invoke a suggested plain meaning of "the course of transmission". Section 2(7) is intended to extend that concept by deeming certain identified situations to be in the course of transmission. It is no answer to say that they would not in normal usage be considered to be in the course of transmission, a proposition which in any event we are unable to accept.

22. Fulford L.J., in accepting the Crown's submission as to the effect of section 2(7), considered that voicemails are not "collected" in the same way as e-mails in that the latter are downloaded from the internet service provider's server to the computer of the subscriber, whereas voicemail messages are "accessed" when they are listened to. Accordingly he considered that the act of listening to voicemails happens at a time when the system by which the message has been transmitted is being used for storing the recording and the intended recipient is enabled to have access to it. In doing so he expressly approved the following submission on behalf of the Crown:

> "The use of the word "collect", no doubt in the sense of "fetch" or "obtain", suggests picking something up and taking it somewhere else. This is what occurs when an e-mail is downloaded from the service provider's server to the computer of the subscriber causing it to be deleted from the ISP's server.

> By contrast, the use of the words "to have access to it" can only mean, in the case of a voicemail, "listen to it". Voicemails are not "collected" they are "accessed". This is especially so when one considers the whole phrase "…enables the intended recipient to collect it or otherwise to have access to it". The addition of the last words appears positively to indicate a different kind of activity from collection, especially having regard to the use of the word "otherwise". "

23. Miss Montgomery seizes on this distinction and submits that it follows from this reasoning that RIPA would provide different levels of protection depending on the form of communication used. She submits that Parliament cannot have intended that communications should be treated differently depending on the method of communication used and whether that communication was subsequently "collected" or "accessed". It seems to us that in each case it would be necessary to examine the incidents of the particular technology used in order to determine whether an interception occurred "in the course of transmission". What may constitute "the course of transmission" may differ according to the technology. Here, one limb of the formulation in section 2(7) may be more appropriate than the other to describe the position depending on the means of retrieval. However, for present purposes what matters is whether the events fall within one or other limb of the extended concept of the course of transmission. Furthermore the fact that the different terms may be more or less appropriate to address the features of different technologies is in no way inconsistent with the Government's stated intention to provide a single legal framework regardless of the means of communication.

24. We agree with the conclusion of Fulford L.J. that there was nothing in the words "for storing it in a manner that enables the intended recipient …. otherwise to have access to it" which suggests that this opportunity is limited by time or that it can only occur on a single occasion. On the contrary, the words suggest to us a continuing state of affairs. There is no basis for reading into the statutory language a limitation restricting it by reference to the first occasion when the intended recipient has access to it.

25. On behalf of the appellants, Miss Montgomery draws attention to the expression "intended recipients" in section 2(7) and submits that this provides further support for the view that the extension of protection effected by that sub-section is not intended to extend beyond the point of first access. However, we agree with Fulford L.J. that these words are not meant to limit the ambit of this provision to the period prior to first access; rather, they are simply intended to identify the person to whom it is addressed and who was entitled to have access to it.

26. The scope of the provision is put beyond doubt, in our view, by the reference in section 2(7) to the system by means of which "the communication is being, or has been, transmitted". The words "has been transmitted" are totally inconsistent with the appellants' suggestion that the extension is limited to transient storage prior to first access. These words make entirely clear that the course of transmission may continue notwithstanding that the voicemail message has already been received and read by the intended recipient.

27. In our view these words in their natural meaning are entirely apt to cover a situation, such as that presently under consideration, where a message having been initially received by the intended recipient is stored in the communications system where the intended recipient may thereafter have access to it by playing back the message. In this regard it is significant that the intended recipient cannot gain access to the voicemail message without resort to the telecommunication system, but is totally dependent on the system. In these circumstances, there is no good reason why the first receipt of the communication should be considered as bringing the transmission to an end nor is there any support for this within the statutory language. We consider that it is readily apparent from the plain words that it was the intention of Parliament that section 2(7) should extend the course of transmission to include this situation.

28. Furthermore, we are led to the same conclusion on the application of the mischief rule. As Fulford L.J. put it:

> "I accept, therefore, that the period of storage covered by the section does not come to an end on first access or collection by the intended recipient, but it continues for so long as the system is used to store the communication, and whilst the intended recipient has access to it in this way. In a comprehensive fashion, this covers the vice that in my view the provision was intended to address, namely unauthorized access to communications, whether oral or text, whilst they remain on the system by which they were transmitted. As the prosecution submits, unlawful access and intrusion is not somehow less objectionable because the message has been read or listened to by the intended recipient before the unauthorized access takes place."

The European Directives

29. One purpose of the enactment of RIPA was to implement Article 5 of the 1997 Directive. Directives are binding on Member States as to the result to be achieved, but leave to national authorities the choice of form and methods. In applying national law and, in particular, in interpreting the provisions of national law introduced in order to implement Directives, the courts of Member States are required to interpret their national law in the light of the wording and the purpose of the Directive in order to give effect to EU law. (Case - 14/83 *Von Colson v Land Nordrhein-Westfallen* [1984] ECR 1891, 1909). In Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 Court of Justice observed, at para 8:

> "It follows that, in applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the results pursued by the latter and therefore comply with the third paragraph of Article 189 of the Treaty." (emphasis added)

It follows therefore that in interpreting RIPA courts must do so, as far as possible, so as to achieve the results pursued by both the 1997 and the 2002 Directives.

30. The 1997 Directive provides:

> "Article 1
> Object and scope
> 1. This Directive provides for the harmonisation of the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the telecommunications sector and to ensure the free movement of such data and of telecommunications equipment and services in the Community. …"

Article 2(c) defines "public telecommunications network":

> "'public telecommunications network' shall mean transmission systems and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means, which are used, in whole or in part, for the provision of publicly available telecommunications services"

Article 5(1) provides:

> "Article 5
> Confidentiality of the communications
> 1. Member States shall ensure via national regulations the confidentiality of communications by means of a public telecommunications network and publicly available telecommunications services. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications, by others than users, without the consent of the users concerned, except when legally authorised, in accordance with Article 14 (1)."

Article 6(1) provides:

> "Article 6
> Traffic and billing data
> 1. Traffic data relating to subscribers and users processed to establish calls and stored by the provider of a public telecommunications network and/or publicly available telecommunications service must be erased or made anonymous upon termination of the call without prejudice to the provisions of paragraphs 2, 3 and 4."

31. The 2002 Directive repeals the 1997 Directive and provides:

> "Article 1
> Scope and aim
> 1. This Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and

> in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.

Article 2 includes the following definitions:

> "(d) 'communication' means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. …
>
> …
>
> (h) 'electronic mail' means any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient."

Article 5(1) provides:

> **"**Article 5
> Confidentiality of the communications
> 1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality."

Article 6(1) provides:

> "Article 6
> Traffic data
> 1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1)."

32. Miss Montgomery submits that the more limited interpretation of section 2(7) for which she contends is supported by the Directives. She submits that it corresponds with the plain meaning of the Directives which distinguish between stored communications and the automatic, transient and intermediate storage of a communication for the purposes of transmission.

33. With regard to the 1997 Directive, she submits that Article 5(1) has to be read in conjunction with Article 6(1) which requires that traffic data must be deleted subject to certain qualifications. She draws attention to the fact that the obligation to erase

arises upon termination of the call. She also draws attention to the fact that the definition of "public telecommunications network" in Article 2(c) refers to the conveyance of signals "between defined termination points".

34. With regard to the 2002 Directive, she points to the new provisions made for the technological storage of communications for the sole purpose of transmission. Thus Article 5(1) provides in its last sentence that the duty to ensure the confidentiality of communications shall not prevent technical storage which is necessary for the conveyance of the communication. In this regard she also relies on recital 22 which distinguishes the "automatic, intermediate and transient storage" required for transmission.

> "(22) The prohibition of storage of communications and the related traffic data by persons other than the users or without their consent is not intended to prohibit any automatic, intermediate or transient storage of this information insofar as this takes place for the sole purpose of carrying out the transmission in the electronic communications network and provided that the information is not stored for any period longer than is necessary for the transmission and for traffic management purposes, and that during the period of storage the confidentiality remains guaranteed."

She submits that these provisions provide the key to understanding the scope of section 2(7) which was intended to extend the scope of the statutory protection only to communications in automatic, intermediate and transient storage for the purposes of transmission.

35. While we accept that the 2002 Directive does make provision for technical storage of communications and is not intended to prohibit any automatic, intermediate and transient storage for the sole purpose of carrying out the transmission, we do not accept that this limits the reading of section 2(7). No doubt section 2(7) achieves that result. However, if it had been the intention simply to ensure that such technical storage necessary for the conveyance of the communication was not prohibited, we would expect section 2(7) to say so in terms. In fact the language employed in section 2(7) is far wider and, for reasons we have already explained, extends the protection of a voicemail message beyond the point of first receipt. In particular, the words "is being, or has been, transmitted" are totally inconsistent with a reading limited to automatic, intermediate and transient storage for the sole purpose of carrying out the transmission.

36. However, there is a further issue on the Directives, namely whether it was open to the United Kingdom, consistently with its obligations in EU law, to enact a provision of the breadth for which the Crown contends. It was common ground between the parties below that Parliament, in enacting section 2(7), had gone beyond the duty in EU law to implement Directives and had afforded protection to communications in circumstances beyond those required by the Directives. Fulford L.J. came to the same conclusion:

> "In the result, the words of section 2(7) of RIPA should be interpreted as extending the concept of transmission in this

> context so as to include any period during which the transmission system itself stores the communication. Undoubtedly, this protection goes further than that seemingly envisaged in Directives 1997/66/EC or 2002/58/EC, but it is entirely a matter for Parliament to decide whether or not to provide a scheme which provides greater protection than that indicated by the European Parliament and Council in a particular Directive, for instance in order to ensure that an individual's right to privacy, when viewed broadly in this context, is substantively upheld…"

37. On this appeal Mr. Edis QC on behalf of the Crown has submitted for the first time that the reading of section 2(7) for which the prosecution contends is in fact required by the Directives. With regard to the 1997 Directive he submits that Article 5(1) protects the confidentiality of "communications" and therefore requires Member States to prohibit, inter alia, "listening" to such communications by persons other than their intended recipients. He submits that the question is whether mobile phone voicemail messages stored on a public telecommunications network are "communications by means of a public telecommunications network". He submits that although there is no specific definition of "communications" in the 1997 Directive, a voicemail message stored on a mobile network plainly falls within the natural meaning of "communication by means of a public telecommunications network". With regard to the 2002 Directive he submits that it is clear from Article 5(1) that the Directive protects the privacy of "communications" and therefore requires prohibition of "listening" to such communications by persons other than their intended recipients. He submits that the only relevant question is therefore whether mobile phone voicemail messages stored on a public telecommunications network fall within "communications" under this Directive. The 2002 Directive does include a definition of "communications" in Article 2(d). Mr. Edis submits that voicemail messages stored on a mobile telecommunications network plainly satisfy each of the three requirements of the definition so as to fall within the protection conferred by Article 5(1): they contain information, they are conveyed between a finite number of parties and they are conveyed by means of an electronic communications service because they are stored on a communications network rather than on an answering device attached to or incorporated in the recipient's handset.

38. In response, Miss Montgomery submits that the obligation imposed by the Directives in this regard is limited to transmission and that ends with the first receipt by the intended recipient of the voice message. Here she relies in particular on Recital 27 to the 2002 Directive which states:

> "(27) The exact moment of the completion of the transmission of a communication, after which traffic data should be erased except for billing purposes, may depend on the type of electronic communications service that is provided. For instance for a voice telephony call the transmission will be completed as soon as either of the users terminates the connection. For electronic mail the transmission is completed as soon as the addressee collects the message, typically from the server of his service provider."

However, we do not derive much assistance from this provision. First, Recital 27 is concerned with a different matter, the definition of the exact moment of the completion of transmission for the purposes of provisions concerning the erasure of traffic data and so, at best, can only be relevant by way of analogy to the scope of the protection conferred by Article 5(1). Secondly, as the recital itself points out, the precise point of completion of transmission for this purpose may depend on the type of service provided. That is clearly correct. This Recital does not specifically address voicemail messages. In addition in this regard, the appellants rely on the definition of "electronic mail" in Article 2(h) of the 2002 Directive which employs the concept of ability to be stored "until it is collected by the recipient". Article 2(h) clearly includes a voice message. However, this provision is not a definition of "transmission" nor does it necessarily indicate the point at which transmission ceases.

39. In any event, it is not necessary for us to decide whether the wider meaning of section 2(7), which we consider was intended by Parliament, goes beyond what is required by the Directives because it is clear that even if it does, it is not prohibited by EU law.

40. Miss Montgomery submits that the Directives provide for the harmonisation of national legislation in order to avoid obstacles to the inter-State market in telecommunications. Here she relies on the reference in Article 1(1) of the 2002 Directive to harmonization "to ensure the free movement of such data and of telecommunications equipment and services in the Community". She submits that if the wider interpretation of section 2(7) were accepted, the obligations for communications service providers in the United Kingdom would be more onerous that in other Member States.

41. In this regard, Miss Montgomery also draws attention to Directive 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communication networks. This Directive modifies the 2002 Directive. In particular she draws attention to Recital 6 of the preamble which states:

> "(6) The legal and technical differences between national provisions concerning the retention of data for the purpose of prevention, investigation, detection and prosecution of criminal offences present obstacles to the internal market for electronic communications, since service providers are faced with different requirements regarding the types of traffic and location data to be retained and the conditions and periods of retention."

42. One of the purposes of the 2002 Directive was undoubtedly to bring about harmonisation in relation to free movement of data, goods and services in the electronic communications sector. However, Recital 8 makes clear that harmonisation in this regard is intended to be limited. It states:

> "(8) Legal, regulatory and technical provisions adopted by the Member States concerning the protection of personal data, privacy and the legitimate interest of legal persons, in the electronic communication sector, should be harmonised in

> order to avoid obstacles to the internal market for electronic communication in accordance with Article 14 of the Treaty. Harmonisation should be limited to requirements necessary to guarantee that the promotion and development of new electronic communications services and networks between Member States are not hindered."

We are not concerned here with exhaustive regulation by the EU of the protection of privacy in the electronic communications sector. Rather, this is a case of minimum harmonisation leaving Member States free to maintain more stringent regulatory standards than those required by the Directives, provided they are otherwise compatible with EU law. The Directives prescribe minimum standards, but it is open to Member States to set higher standards for the protection of privacy of electronic communications, provided that those additional obligations are compatible with EU law.

43. We are totally unable to accept that section 2(7) could give rise to any concerns as to its effect on inter-State trade. In particular, the obligation to ensure the confidentiality of voicemail messages after their first receipt cannot possibly subject undertakings operating in the United Kingdom to any competitive disadvantage. Our conclusion on this point is, moreover, entirely consistent with the protection afforded by Article 5 of the 2002 Directive, whatever its scope, and no question of derogation under Article 15 arises. Finally, in this regard, we note that the 2006 Directive is concerned with a different matter, namely the harmonisation of obligations on service providers to retain data for the purposes of the investigation and prosecution of crime, a matter to which very different considerations apply.

Legal certainty

44. On behalf of the appellants, Miss Montgomery submits that the conduct alleged in these proceedings comes within the provisions of the Computer Misuse Act 1990 and the Data Protection Act 1998. She draws attention to differences between these Acts and RIPA, in particular to the fact that under section 55(2)(ca) Data Protection Act there is a public interest defence which is not available under RIPA. She submits that adopting the broader interpretation of section 2(7) RIPA for which the Crown contends risks creating parallel offences which do not provide the same defence. The same conduct could potentially be lawful under one Act and unlawful under another. She submits that this violates the principle of legal certainty.

45. It is often the case that given conduct may constitute a criminal offence under more than one statute. The offence contrary to section 1(1) RIPA, unlike the offences protecting computers under the Computer Misuse Act or data under the Data Protection Act, is committed only while the communication is in the course of transmission by means of a public telecommunication system. Parliament has clearly concluded that that system requires particular protection and that there should be no public interest defence in respect of such "hacking" activities. Contrary to the submission on behalf of the appellants, the resulting situation is not lacking in legal certainty.

Admissibility of evidence

46. Miss Montgomery draws attention to section 17 RIPA which excludes material from legal proceedings and submits that the wider reading of section 2(7) for which the Crown contends could have far-reaching implications for law enforcement agencies and criminal procedure. However, while section 17 excludes from evidence intercept material obtained under warrant or obtained unlawfully, stored communications are admissible in evidence if obtained by means of a production order under section 1(5)(c) RIPA or with consent. Accordingly, the wider reading of section 2(7), which we find to be its intended meaning, need have no damaging consequences so far as the admissibility of evidence is concerned.

Conclusion

47. For these reasons the appeal will be dismissed.