

FortyTwo Talks

Covert Recordings – An Update

Tina Cook KC: Hello and welcome to FortyTwo Talks, the podcast which takes a deep dive into the legal world led by the experienced members of 42BR Barristers. I'm Tina Cook, a member of the family team at 42BR and I'm delighted to be joined by Jennifer Young to discuss Covert Recordings.

Jennifer did a lecture in March 2024, along with Lee Kelleher, and that will be on the 42BR Barristers website. We'll begin this talk because, or we are really just going to have a chat, don't worry too much, it's going to be 20 minutes max. We absolutely promise so you can listen to it on the tube or in the car!

Because the Family Justice Council has just issued outdated guidance. Slightly different, but not much to the earlier guidance. We find it interesting that many people make covert recordings because of a lack of trust. A lack of trust in the court system and in the justice system, but we think it goes much beyond the culture of how non-lawyers perceive the court process and we were struck by the similarity of the thrust of advice on covert recording, and also transparency in courts.

And it was interesting that the President a couple of weeks ago, 16 of May, at the Resolutions Conference as part of his speech to the Resolutions conference, said the following, I'm just going to read out a very short quote, you'll have to look at the whole of the speech to get the whole context, but I think it makes the point that covert recordings are obvious because of people's lack of understanding and lack of trust.

What he said was, 'that being transparent is about much more than simply allowing a journalist to report what they see. Being transparent is an attitude of mind that should infect all that we do. The aim is to be open and to be seen rather than closed and hidden, this involves talking in the public space and in media about what happens in the family court. It involves leadership judges, inviting local media representatives and local MPs into the court building and explaining who we are and what we do. It involves having access to and then publishing accurate data. This is very much work in progress and it will be a mistake to think that, with the rule change about journalists now in place, we have in some way got transparency done. Whilst what has occurred thus far has been great achievement by all those involved, be they judges, lawyers, court staff, or journalist, there is still much to do and in the sense that being transparent is a continuing state, the work can never said to be finished'.

And, we were just really struck by, the motivation and we'll come to the motivation in a moment for making covert recordings. We've all been there, we've all had clients say, *'I've recorded this social work, I've recorded this, I've recorded the other'*. How the transparency might reduce the need to do that?

So, Jennifer, could you just start by just keying us up with really, what as far as the advice, the Family Justice Council advice, is concerned what is a covert recording?

Jennifer Youngs: Well, in essence, I think it is just a recording that the person that you are recording doesn't know is happening. That can be in a various different contexts, the sort of three headings I think that we used in the previous seminar that we did were broadly recording of professionals, and that's much more likely, I think, to occur in a public law context potentially when you are exposed to a number of professional and then the other two types being recordings of children and recordings of other members of the family.

So, those were the broad three types that we categorise when we spoke about this previously. I think it's interesting, Tina, that you said that you have had experience of clients who have recorded professionals in the context of your work. Certainly, I've come across it more in the context of private proceedings when parents have been recording each other or the children. So, I don't know if you could perhaps set out a specific example as far as you're able to.

TCKC: I absolutely can! I had one that really springs to mind is a client who recorded everything, absolutely everything, every conversation. I'm jolly sure she recorded me!

But, in the same way the guardians are given advice and perhaps we'll come to that, maybe we won't have time. You really ought to be only saying things to clients and saying things within your professional domain, which you mean, and which you can explain and justify ex post facto.

So, as much as I'm sure she did record me, she was recording social workers going into the home and then she would play them back to me and when the social worker was giving evidence, before which point I didn't know. And she would say, *'but that wasn't said'* and it wasn't said. And there's a couple of cases which we know about, which are referred to in the guidance, the new guidance, and the old guidance and the authorities, which highlights situations precisely like that where, I think one you'll recall, and you discussed it in your seminar, where somebody

was in a foster care situation and the evidence was X and she had been recording it and in fact there'd been all sorts of horrible racial comments to the mother in the foster care situation. And of course, unless she'd recorded it, the court wouldn't have believed her.

So, it's a very difficult thing and the advice that we are now getting from the Family Justice Council would've been enormously helpful to me at the time when I did this case four or five years ago, because it deals with what you ought to do. And perhaps we'll come to that, what you ought to do and the welfare of the child is priority and it's going to waste a lot of time very often and sometimes there are hundreds and hundreds, there were hundreds of hours of this lady's recordings and she'd say, *'oh no, just wait a moment. I can find that'*.

The judge took a very dim view of it and we were allowed to use some of it. It was, acute embarrassing because of course you're hit by a client in mid proceedings saying, *'well, that wasn't said, it was this'*. And you can understand without lack of trust, Jennifer.

Interestingly to me in what you mentioned in the private situation, how the Family Justice Council draft advice and advice that came out a couple of weeks ago, the final advice, really deprecates children being involved in this in any way, shape or form. Of course it's obvious, but I was struck by the fact that the draft advice said, we don't encourage it, and the final advice is a lot firmer, isn't it, on that?

JY: Yes, and I think that is the context in which I have encountered it is in a private law setting and often where the parent who has recorded the child thinks that that's sort of their 'trump card' in their case, so that they can establish what has happened. And in fact, the court takes a very negative view of that behaviour because it's seen, for example, as not having prioritised the child's welfare and there are the usual concerns around coaching, and what may have been said before that recording started.

And in fact, I have had a case where it was adduced by one party and then sought not to be relied upon. So, it had been adduced in pre-hearing correspondence, but then my client said, *'no, we need to admit these, because actually they helped my case because they show what the other parent has been saying to this child'*. So, it is interesting, I think the distinction between the criticism that you might encounter in a private law context as opposed to this increased push towards further transparency in the public law context.

And actually, the importance of professionals being open might lend itself to more support for they're being recorded than when it is a child. I think probably the distinction is obvious there as to the impact on who is being recorded, but it is an interesting distinction that is drawn, I think.

And I wonder if that Judge, in your case, Tina, may have been less critical after this advice has come out, this guidance has come out.

TCKC: I think that's right and one of the things that struck me by reading through both sets of guidance, which are pretty similar, and in fact the authorities, which I did, before our discussion, is that, it's not rocket science, that if it's a covert recording by nature, the other person does not know it's being recorded.

And you phrase, especially if you're clever, or even if you're not so clever, you phrase, your questions, you phrase the context of everything you do within that conversation in a different way because you know it's being recorded, and the other person doesn't and as much as that is loads of advice now, it's worth reading, sounds a bit geeky, but it is worth reading the advice because it makes you think, of course I knew that if I was recording somebody there would be things I didn't say or I said in a different way or I encourage them to say, but until actually you see it in black and white, as much as the advice goes along the lines of, well, one has to be very careful, it might have been edited, it might have been picked up in a different AI type situation, and you need to look at this and the court needs to think about those things, the whole nature of a conversation, whether it's a conversation between you and I, Jennifer, or a conversation between me and my closest best buddy, you say things to people in different ways, whether it's public or private, don't you?

So, the whole context of what was being said to the child, and because that person, that parent knew they were recording it. I think not only that it is academic, the judicial side of it, the court side, I think there's a whole lot of human nature in there.

JY: Oh, entirely. And I think actually that's why it's interesting that the limited guidance that there is for professionals does appear to differ between social workers and Cafcass and then the British Psychological Society Guidance, which actually says that they are concerned that recording of psychological assessments, for example, may impact the validity of that assessment if people know they are being recorded.

And as you say, that's an interesting point about just the impact of human nature on what you're saying and if you're engaging in it in the same way, is if you knew it weren't being recorded in that way.

TCKC: And does that, I haven't read the psychological guidance, but does that psychological guidance, touch upon some of the things that are in those two documents?

The Family Justice documents about, if there's loads of it, I think there was one case where there were 600 hours of it that in itself amounts to harassment and that in itself amounts to an indication of the power balance or the power imbalance within the relationship, does the psychological guidance touch upon that?

JY: I'm not sure, I think the thrust is predominantly the impact on what may or may not be said and how it's said and how the profession is conducting themselves. It is an interesting point because again, the Family Justice Council guidance deals with harassment in the context, I think in the private law setting, in saying that it might be a course of, or a further course, of coercive control or controlling behaviour. I'm not sure the Family Justice Council guidance actually deals with it, if it might constitute harassment of a professional.

I'm not sure that's actually something that's explicitly addressed because it certainly could be potentially, although, as against that, I suppose you've then got the argument that, *'well, if they're doing their job and they're doing it properly, why does that constitute harassment?'*

TCKC: Exactly, and if people say to me, can I record this? I say, well, look, some people, view that very dimly. If you want to record me, you record me because I'm going to be able to stand by what I say to you.

It does make you think twice as a professional sometimes where you might make the odd inappropriate or slightly inappropriate comment, for example, about a Judge or an opponent or it makes me, might not make you Jennifer because she probably wouldn't do this, but it does make me think, *'Oh Golly, it shouldn't, keep my mouth shut!'* But I think that's good for us as professionals to have to justify what we say.

JY: Yes, indeed. It will be interesting, I think, to see how the case law around it develops, particularly in regards to recording social workers, because so often there is that *'they didn't give me that advice or they didn't say that'*.

And actually, sometimes it may be that that a recording could be helpful.

TCKC: In my experience is that it has shown it's not right and there's so much, isn't that in the nuance of how something is said, you and I know how the system works, whether we're talking private or public law, we know how the system works and we know how the process works. But if you're a parent, somebody saying one thing to you when you've no experience of this might mean something very different. So, it's all that nuance as well. It's so difficult, one person hearing one thing. Well, we all interpret things differently, don't we? But one person hearing one thing, might mean something very different to another person. So, I don't discourage it, I kind of always think, well, please don't take a dim view of it, please. I guess everyone needs to be up front and say, *'I'm going to record you or can I record you?'*

Shall we have a quick look at what the changes are? I'm looking at the new advice, the most recent one, and in fact, you pointed out to me when we were discussing it earlier that it fans out that paragraph 2.6 on data protection, GDPR, because it was a bit woollier, I thought, in the draft and this one in terms of whether it's lawful or not. Can you just give us a quick summary on what it says about the lawfulness or otherwise and what recording a family conversation or recording something for use in court, how does that balance lie?

JY: Indeed. So, I think what has happened in the interim is that the Family Justice Council have sought advice from the Information Commissioner's Office, and that is where the guidance has emanated from in the final draft.

It sets out essentially that if you are taking recordings for the purposes of your personal life. So, if you're taking videos of people or things like that, it doesn't come within the scope of UK GDPR. However, what the guidance does confirm is that the Information Commissioner's Office confirmed that if data is processed by family members and then used in a professional setting, such as in the home with the social worker present, then it would qualify under the scope of UK GDPR. And then, the Information Commissioner goes on to set out further guidance on the detrimental use of data, which is summarised that you must not use children's personal data in ways that have been shown to be detrimental to their wellbeing.

I think in essence, that does accord with the previous guidance and the case law and the factors that the court is going to be taken into account because as always, the welfare of the child is paramount, and the court will have to consider that when it decides how to deal with recordings that have been induced.

However, I think what the thrust of that part of the guidance is going to is probably the sanctions outside of the family court context as to your use of personal data. If that breaches any other legislation.

Tina Cook KC: And to me it was clearer that the word 'process', if you are processing it, if you're sharing it, if you are using it, those recordings, then it becomes within that group you have to comply with the UK GDPR, and that to me was much clearer in the final draft. And what the final draft of Family Justice Council guidance helps us with also is what you need to do if you want to rely upon the recording and it now says very clearly that you need to make a C2 application, you need to provide a summary of what the nature of the recording is, its context, whether it's been edited, the dates, the times, the method of recording, why it was obtained covertly and the relevance of its contents to the issue in the proceedings.

All that seems to me, Jennifer, really common sense, but the fact that we are now told, *'You need to make that C2, you need to share it in advance, you can't just do what I did and pitch up with the recordings and say look, I've got a recording'*, everybody needs to have the opportunity to deal with it in as objective way as possible. I think that is an improvement, that's paragraph 4.18, it's a big improvement to what was there before.

JY: Certainly, I think interestingly, it doesn't specifically provide for transcripts, which I think some of the previous case law had done. Obviously, it'll be case specific because as you say, if you've got 600 hours of recordings, you're unlikely to transcribe all of those recordings and as I say, it will likely be case specific, but it is interesting as it doesn't deal specifically with that point.

TCKC: It doesn't, but one of the others, it's paragraph 6.3 of the changes, is making suggestions for costs.

Costs sanctions to cover recording, and that does deal with transcripts because certainly they cite in that paragraph 6.3 that although it's unusual in family courts for there to be costs, that there have been costs orders made in MVF covert

recording of children and the father was ordered to pay £1500 transcription charges and £9000 toward their mother's cost in respect of the recording.

So, although transcriptions are not there per say, it's the penalty. It's unusual, isn't it? It's an unusual penalty to, I guess it's sort of a veil threat as costs always are. It's one of those things that in the family courts, it's very tricky to deal with anybody actually, cost is always a quite a scary moment in any case.

But interestingly, that is something to be taken into account as a separate and distinct issue, covertly recorded your peril because if we find it's wrong or if you've incurred costs because of it, you will be paying the costs.

JY: Indeed, yes. I think, that case in particular makes quite clear the very real risks of, certainly, again, in the private law context, I'm not quite sure it would apply in the same way in public law, but in the private law context, the risks that are involved in making covert recordings and then adducing them, because obviously the bar for costs is always so high that actually by ordering costs, the court has made very clear its views as to the conduct that led to those recordings being made.

TCKC: Yes, and I think the final bit I would like to touch upon in respect to the new advice is the section 7 and 9, which really are sort of an attempt to develop a policy on overt recordings. And I know you covered this in your seminar when you did that in March last year because there, it's a little bit contradictory I think, because, advice on covert recordings by their nature, their covert, developing a policy on overt recordings. We've already dealt with a bit on the fact that Cafcass has advice for their guardians about being open to somebody saying, *'I want to record'*.

But it's a very difficult thing, isn't it, for a client, private or public, very often to say, well, *'I'm recording you because I don't trust you'*, in effect. I suppose the other thing you could be putting forward is, *'I'm recording you because there's so much to take in'*, *'I'm going to need to have to go back to this later and think about it'*. So, I think those attempts at policy making in terms of 'we should all stand by our professional opinions and advice', and 'we should all behave appropriately at all times' might bear fruit. What do you think?

JYs: I think taking into account the power imbalance is often there. If a social worker is in someone's home, I think it probably would be very difficult for a client to say, *'I'm now going to record this'*, and they presumably will be asked why by that

professional if they say they want to record it. So I think if there is a policy in place that everyone is aware of, and for example, if local authorities made parents aware of it, it would potentially put them in a bit of a stronger position if they wanted to do that, and I can see how that might assist and also may assist the court in what to do with those recordings when they have been obtained.

So, I think it would likely assist. I can see though that it may involve a culture shift that might take a while to implement.

TCKC: Yes, it's interesting, I'm looking at paragraph 9.2 of the latest guidance and it says, guidance developed by the Professional Association for Children's Guardians, family court advisors and Independent social workers, identifies constructive reasons to adhere to a request to record meetings, thereby avoiding some of the risks and problems associated with covert recordings.

I think for me, one of the interesting things about that is, and I would always say yes, people do ask from time to time, and I always say, *'yes of course you go ahead, you record me'*.

But I think in the cases I've done, the one I was giving you the example of earlier, where the Judge really took umbrage and said to my client, *'did you tell them you are recording this? Did they know you are recording it?'* And to her, it wasn't the fact of the recording, it was the fact that she hadn't told the professionals that she was recording it and I understand that. But I also understand that if you look at the motivation for recording, it's because of that lack of trust. So, I do think, as you say, it's going to take a little while, isn't it, to be that, culture change that we probably would like to see.

Were there any other things in the final guidance, Jennifer, that you thought were particularly significant?

I quite like the Appendix four, which was the litigants in person guide to covert recordings. It's kind of a little two page guidance to what you should be doing and why you shouldn't be doing it and I just thought that actually was like an idiot's guide to covert recording, which I think just actually should have been for the lawyers and not for the litigates in person because I think that is helpful for people to know what we should be doing and what we can't do.

JY: Indeed, it is probably quite a useful resource to discuss it with clients that appendix to just summarise what exactly the approach the court will take is.

So yes, I certainly agree that that is definitely helpful.

TCKC: Yes, so, if anyone wants to go have a look at that, it's appendix four and it really is almost one side of A4 just setting out what we've been talking about and applications need to be made and the advice about asking permission to record.

It's really simple stuff, but it makes you think, and I think maybe now if I was in a case where I suspected someone was going to record, I'd almost just print it out and send it to them and say, look, just bear this in mind.

JY: Great. Well, as Tina said earlier, there is a fuller seminar with some slides that is available on the 42BR website. So, by all means, go and have a look at that.

Thank you very much for tuning to FortyTwo Talks. We hope you enjoyed the podcast. To listen to other episodes, follow us on Spotify, apple Podcasts, or wherever else you get your podcast.