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Mr Justice Burton, Sheriff Principal John McInnes QC and Susan O' Brien QC (8/2/2010).

### **INTRODUCTION**

This Judgment deals with the determination of the Tribunal, pursuant to s67 (7) of the Regulation of Investigatory Powers Act 2000 ("RIPA"), of the issue of remedy in relation to a previous finding in favour of the Complainants Mr and Mrs Brown, made by the Tribunal on 20th July 2010. This determination was made on the basis of written evidence and submissions.

The Tribunal had ruled that a specific authorisation of a 'test purchase operation', made within the context of a series of authorisations related to an investigation into allegedly overpaid social security benefits to the Complainants, did not in fact fall within the provisions of RIPA. The investigation by DSD (the Respondent) had eventually concluded that the Complainants had been overpaid benefits due to their misrepresentation of facts and that certain benefit payments and allowances would be disallowed, and further they would need to repay sums to DSD totalling £11,000.

### **THE CASE**

The Tribunal had ruled that surveillance involving entry by officers of the Department for Social Development onto the Complainant's property between 1525 to 1600 on 23rd May 2006, was "not in accordance with the law" within Article 8(2) of the Human Rights Act 1998 (HRA) and so was not justified. The Tribunal therefore examined the issue of remedy in accordance with s.8 of the HRA.

The Tribunal received written submissions on remedies from both parties, and the respondent submitted copies of relevant authorities.

The Tribunal, in summary, made the following findings of fact:

- The Complainants were the joint owners of a house in Coleraine, Northern Ireland and for several years had been in receipt of social security benefits. At that time, the Second Complainant was receiving benefits on the basis that she was resident elsewhere as a single person. The Complainants had decided to sell the house and invited members of the public interested in purchasing the property to view it.
- The Respondent had legitimate powers to grant authorisations under s.28 of RIPA to enable its fraud investigation officers to conduct directed surveillance on individuals suspected of fraud. The Benefits Investigation Service (BIS) of DSD had suspected the Complainants of benefit fraud
- BIS organized surveillance of the First Complainant on 10 occasions prior to 23rd May 2006, for which the correct RIPA authorisations had been obtained. On 23rd May 2006, two officers from the Respondent's fraud unit had called on the Complainants' house posing as prospective purchasers and had been shown round the house by Mrs Brown.
- Soon after 23rd May 2006, a file review by the Respondent had led to a senior manager concluding that the two investigators had gained access to the house without lawful authorisation. The same manager subsequently advised police that the evidence obtained through this unlawful surveillance, which consisted of notes written by the fraud officers, could not be used as part of the ongoing investigation.

- The incorrect authorisation was based on the erroneous assumption by BIS officers that the Complainants' property was a "public place" on account of its being open to viewing by potential house purchasers. The correct procedures had been followed for applying for a directed surveillance authorisation in a 'public place'. The Tribunal had concluded that the fraud officers did not wish to breach RIPA provisions and the authorisation, although unlawful, was granted in error. Furthermore, BIS had reviewed its internal guidelines and practices after the incident and taken various measures to ensure such an error would be repeated.
- The Tribunal also found that the Complainants did not lose any benefits or suffer any financial loss through the unlawful surveillance. The visit lasted 35 minutes, and due to its arrangement as an inspection by a potential purchaser, the officers did not film the premises and were accompanied by Mrs Brown at all times.

## THE ISSUE OF REMEDY

The Complainants' solicitors had sought, in addition to the quashing of warrants and authorisations, destruction of records and an apology, compensation which was suggested to be £100,000 for each of the Complainants. The Respondent's key submission was that, in accordance with s8(3) and (4) of the HRA, the Tribunal had to determine whether it was necessary in this case to award damages as 'full and fair satisfaction' to the Complainants, and if so, the quantum of damages, taking into account the approach of the European Court of Human Rights in such cases.

The Respondent contended that the guidance of the Court of Appeal per Lord Woolf LCJ in **Anufrijeva v Southwark LBC** [2004] QB 1124 at 52-53 established that the remedy of damages played a much less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations, where often the only remedy claimed was damages. The concern, as per Lord Woolf LCJ, was '...to bring the infringement (of an individual's human rights to an end and any question of compensation will be of secondary if any importance...'.

Further, in **R (Greenfield) v Secretary of State for the Home Department** [2005] 1 WLR 673 by the House of Lords per Lord Bingham at 9, Paragraph 17, Lord Bingham pointed out that sums awarded as damages in civil cases for Article 6 violations were 'noteworthy for their modesty', and he reached the same conclusion as Lord Woolf LCJ, coupled with a clear indication that UK courts should look to Strasbourg and not to domestic precedents in relation to breaches of Article 8.

After having considered submissions on the issue of remedy the Tribunal concluded that, in summary:

- Although the invasion of privacy constituted entry into the Complainants' home, consented to by Mrs Brown as a result of deception that the Fraud Officers were potential house purchasers, it was a very limited invasion conducted under the supervision of the second Complainant.
- No pecuniary loss was suffered by the Complainants. At the material time the Complainants would have been willing to show the house to potential purchasers.
- BIS and by extension DSD were acting in the course of an otherwise appropriate investigation in which a number of authorisations for directed surveillance had been correctly obtained. The officers believed they had authorisation, and, had the authorisation been lawful, such conduct as inspecting a private property would have been reasonable and proportionate.
- There was no evidence of suffering of anxiety or stress by the Complainants. If such anxiety or stress did occur this related to their understandable concern at being the subject of a legitimate investigation which resulted in the disallowance of benefit and orders for repayment.

In reaching its decision the Tribunal referred to the guidance given by s8(3) and (4) of the HRA and **Anufrijeva** and **Greenfield**, in addition considering the Strasbourg authorities in respect of non-pecuniary loss when no evidence of distress and frustration had been provided. No award had been made for non-pecuniary loss



in violation of Article 8 cases such as **Heglaz v Czech Republic** [2009], where sustained surveillance of a claimant's mobile phone had occurred. Further, the Tribunal considered damages awarded in cases where distress had purported been caused by one-off intrusion in the claimant's home. In **Taner Kilic vs Turkey** ECtHR 70845/01, the violation of Article 8 consisted of a substantial search of the applicant's home and office and seizure or copy of documents. It was noted that the claim was for €20,000 and €2000 was awarded.

## Outcome

The central issue for the Tribunal was to consider, in the context of this case, whether the finding of a breach of Article 8 was, in the absence of any accompanying compensation, sufficient to afford just satisfaction. The Tribunal ruled that as no pecuniary loss was suffered, and no evidence was submitted to support any case for distress in respect of the showing round for 35 mins by the Second Complainant of individuals she believed to be house purchasers, there should be no award in respect of the first Complainant, as he was not present at the material time. The Tribunal further concluded that, since the Article 8 violation was based upon the Second Complainant's occupation of the house, on the basis that she was claiming benefits in respect of her residence elsewhere as a single person, she was precluded from seeking compensation for distress for invasion of her privacy at "home", and no compensation was awarded.

The Tribunal considered two further issues; quashing the authorisation and an award of costs. On the first, the Tribunal concluded that it was appropriate to quash the authorisation of directed surveillance of 23rd May 2006 and to order the destruction of any notes made on the day, although no use had been made of them in the investigation. In relation to the award of costs, the Tribunal concluded that if it had had jurisdiction (referring to **W v Public Authority IPT/09/134**), it would not have awarded costs. The Complainants had sought and obtained, at a stage when little cost had been incurred, a finding in their favour, and had then proceeded, in a process which had caused the Respondent to expend substantial costs, and obtained no further relief. The Tribunal was satisfied that this was not an appropriate case to exercise jurisdiction vis a vis costs and thus none were awarded.

**Messrs Kevin R Winters & Co of Belfast** for the **Complainants**. **Mr Jason Coppel** of Counsel for the **Respondent**.

## Note

This summary is provided to assist in understanding the Tribunal's ruling. It does not form part of the reasons for the decision. The full Ruling is the only authoritative document and is available at [www.ipt-uk.com](http://www.ipt-uk.com).

## 6. RESPONSE TO JUSTICE AND SECURITY GREEN PAPER

The Tribunal welcomes the Government's recently-published Justice and Security Green Paper. The challenges it seeks to address are not new; whereas in the past the production of a PII Certificate by the Executive would be sufficient simply to exclude sensitive material from public disclosure in a court, the situation has changed significantly in recent years. There has been a significant increase in the number of civil claims where Government has had to withdraw, often at significant cost in financial settlements, from actions due to the lack of a robust mechanism for handling sensitive material in court. In these situations cases cannot be contested fairly on both sides, Judges are having to deliver judgments without full access to key information and the public is left without clear, independent rulings based on the full facts of a case.

The report outlines the procedures developed by the Tribunal throughout its history to overcome the dual challenge of handling sensitive material whilst balancing open justice. Furthermore, the Tribunal has sought where possible, in line with the principle of using 'tried and tested techniques' advocated by Government in the Green Paper, to share its learning in handling sensitive material. This is what the Tribunal feels best qualified to do, and this response is limited to the consideration of the 'enhancing procedural fairness' and 'safeguarding material' sections, rather than 'strengthening intelligence oversight'.

In summary, the Tribunal is a judicial body established to hear and determine ECHR and HRA based claims against the conduct of the Agencies and Public Authorities with RIPA powers. It is important to note that the Tribunal is a judicial body which works in many ways as an extension of the mainstream court system, rather than a Government Department or part of the Agencies. In addition to its exclusive jurisdiction over such claims against the Agencies is its role in considering complaints by individuals against Public Authorities with RIPA powers. The Tribunal thus forms a central component of intelligence oversight in the UK. The Tribunal does not expect either primary function of the Tribunal outlined above to change as a result of the proposals outlined in the Green Paper.

Throughout its history the Tribunal has sought to balance demands for open justice with the necessary protection of sensitive material. The Tribunal's Rules enable it to adjudicate on ECHR based proceedings without breaching the 'Neither Confirm Nor Deny' policy principle or revealing sensitive techniques and capabilities that would prejudice national security. That said, the Tribunal has been sufficiently flexible in its interpretation of its Rules (in particular Rule 9) to hold open hearings. For example, in the cases of **IPT/01/77** and **IPT/06/81** open hearings were held as the Tribunal concluded that the public, as well as parties, had the right to know that there was a dispute about the interpretation and validity of a point of law. Such hearings, if they could theoretically involve disclosure or discussion of sensitive material, are held on the basis of assumed facts, and regularly involve adversarial argument by legal representatives, where appropriate. Furthermore the Tribunal has sought where possible, and with the agreement of Parties, to publish some of its judgments. In such cases, the Tribunal has concluded that the publications of rulings of law on a complaint neither discloses information that may be prejudicial to national security nor contravenes the 'Neither Confirm nor Deny' policy. Clearly a balance does need to be struck between the interests of open justice for complainants and protecting sensitive information. It therefore remains within the power of the Tribunal to hold *ex parte* hearings should the need to protect sensitive information arise. Procedures to protect sensitive information are strengthened by the restrictions laid out in s.69 of RIPA, which preclude disclosure by the Tribunal of any information or documents, or the fact that they have been provided, to any third party.

The Government proposes in the Green Paper to expand the jurisdiction of the ordinary courts to enact closed material procedures (CMPs) for all civil cases that may require the disclosure of sensitive material. If this approach is to be adopted in place of an expansion of the Tribunal's remit, consideration will need to be given to the cases in which the Government is a defendant in a claim of tort brought by an individual. In criminal proceedings or in a SIAC case, the Government may in the event not be permitted by a court to rely

on information unless it is prepared to disclose it: but if it is not prepared to disclose such information, it may still be able to pursue the prosecution or complaint without it, or may have to abandon the prosecution or complaint. In civil proceedings, however, where the Government is a defendant, there is no such option.

Although the Green Paper quite rightly addresses the need to strengthen the Special Advocate system, both in terms of numbers and intelligence analysis training, further thought must be given to the legal support that will be required by Special Advocates over and above the provision of Junior Counsel. A civil claim in which the Government is a defendant requires a very different approach from a criminal prosecution or a SIAC complaint in which the Government is the complainant. Situations will arise where Special Advocates, by their very nature only qualified to advocate for the defendant in court, will not be equipped with the knowledge or experience required to investigate or establish, or pursue perceived deficiencies in, the quantum of sensitive information held or disclosed by the relevant Agency or Government Department that is relevant to the case. In such situations, there will be a need for security cleared, experienced and, most importantly, trusted individuals to investigate what sensitive information is being held by the Agency and whether this needs to be disclosed in the closed proceedings. This would typically be the role of a solicitor or investigator in the majority of civil cases. However, the costs, procedural and national security issues around engaging such a large group of security-cleared investigators would be significant.

A potential solution to this significant issue could, however, be for the Tribunal to undertake this fact-finding role. The Tribunal envisages that, as part of the case management stage discussed in the Green Paper, Judges in a civil court could refer factual issues for determination by the Tribunal or could request the Tribunal to investigate and report on factual issues. This would not be a particularly new arrangement; the Tribunal's members regularly inspect secret material and have previously exercised their power to both instruct Special Counsel (an *amicus curiae*) to advise the Tribunal and an investigator to inquire into the facts surrounding the complaint.

The use of the Tribunal in this role would have a number of advantages

- The Tribunal Members and Secretariat have considerable background knowledge in relation to the working of the intelligence agencies, and experience of investigating complaints about the exercise Agencies' intrusive powers.
- The use of the resources of the Tribunal would not require further individuals to be security cleared to review classified documents.
- The Tribunal already possesses all the statutory powers necessary to investigate complaints against the intelligence agencies effectively.
- As a judicial body, to whom the intelligence agencies are already answerable under RIPA, the Tribunal is likely to have greater moral authority than special advocates or security cleared solicitors to secure speedy cooperation by the agencies in disclosing relevant documents.
- The Tribunal has the trust and confidence of the Agencies.

The Tribunal suggests that the answer to the question at para 2.71 of the Green Paper is that there is scope for considering a change to the existing role of the IPT, by expanding its powers in order to enable it to accept requests for assistance with the handling of sensitive material, where these have been made by a court at a case management stage.

Furthermore, the Tribunal is likely to be a less costly means of dealing with the review of sensitive material held by the Agencies. The part time members of the Tribunal are only called upon as and when required, and the salaries of the judicial members are already funded by Ministry of Justice. The resources of the Tribunal Secretariat would naturally need to be increased if a substantial volume of casework were to be remitted to the Tribunal in the fashion proposed.

## APPENDIX A: FREQUENTLY ASKED QUESTIONS

### **Can I complain on someone's behalf?**

Any complaint or claim must be brought by the person concerned (including any organisation and association or combination of persons). They may receive help in completing the form and it can be submitted by a representative, but the form and any additional statements must be signed by the complainant/claimant.

Although the Tribunal Rules require the forms to be signed by the complainant, a form signed by a parent or guardian in respect of a complaint by a child or vulnerable adult is acceptable.

The Tribunal cannot accept single applications on behalf of more than one person because the Tribunal is required to make a determination in relation to each complaint falling within its jurisdiction\*. Each case is investigated separately and conduct may be found to relate to one complainant but not others who are linked to that complaint and the final determination may be different. For this reason the Tribunal finds it necessary to keep a separate file in relation to each application which is made to it.

\*Which is not out of time and which is neither frivolous nor vexatious.

### **Will the Tribunal tell me if my phone has been intercepted?**

It is not the Tribunal's function to tell complainants whether their telephones have been tapped, or if they have been the subject of other activity. Its purpose is to ascertain whether legislation has been complied with and organisations have acted reasonably. If your complaint is upheld, the Tribunal may decide to disclose details of any conduct. If your complaint is not upheld, you will not be told if any conduct has been taken against you or not.

### **Will making a complaint or claim to the Tribunal cost me anything?**

No. The Tribunal's investigation of complaints and claims is free of charge and it does not have the power to award costs against a complainant who has withdrawn his complaint. The government has an obligation to provide all the resources required by the Tribunal to enable it to carry out its functions. However, if you decide to submit your complaint and claim through a solicitor or other representative, the Tribunal cannot refund any costs you may incur as a result.

### **How long will I have to wait before the Tribunal makes its decision?**

The Tribunal has no set time limit for responding to complaints or claims. This is because all cases vary in scope and detail and each one is dealt with on its own merits. The amount of time taken can also depend on the responses received to the Tribunal's enquiries, which may lead to more information being sought from the applicant or the organisation complained about.

### **Will I be contacted by the organisation that is the subject of my complaint or claim?**

All complaints and claims are dealt with through the Tribunal. The organisations that are the subject of a claim or complaint make all their responses to the Tribunal for its consideration. You will not be contacted directly without your consent by any organisation in relation to your complaint or claim.

**Will I receive information about the progress of my complaint/claim?**

The Tribunal is restricted in what it can disclose during the investigation of a complaint or claim. The Tribunal Rules state that no information or documents provided to the Tribunal, nor the fact that any have been provided, can be disclosed. The Tribunal can therefore only assure you that an investigation is still ongoing.

**Is the Tribunal independent of government?**

Yes. No government department can intervene in a Tribunal investigation or influence its decisions. The Tribunal makes its determinations based entirely on the evidence before it and on the same principles as judicial review.

**How do I know the agency will provide all information requested of it?**

All organisations holding powers under RIPA are required by section 68(6) of the Act to provide all information requested by the Tribunal. Further to this, the Tribunal can demand clarification or explanation of any information provided, order an individual to give evidence in person, inspect an organisation's files, or take any other action it sees fit. RIPA stipulates that all organisations and individuals concerned must provide the Tribunal with such assistance as it requires.

## APPENDIX B: SUMMARY OF IPT RULES

A full version of the Investigatory Powers Tribunal Rules 2000, made under s.69 of RIPA, appear in Statutory Instrument No. 2665. Readers are encouraged to refer to this version rather than the summary of key points below. The full Rules are available on the IPT website [www.ipt-uk.com](http://www.ipt-uk.com) under the 'links section'.

Rule	Summary
<b>Part I</b>	
<b>1</b>	<b>Citation and commencement</b> 2nd October 2000
<b>2</b>	<b>Interpretation</b>
<b>3</b>	<b>Application of Rules</b> The Rules apply to Complaints and claims
<b>4</b>	<b>Exercise of Tribunal's jurisdiction</b> Jurisdiction may be exercised within the UK by any two or more members
<b>5</b>	<b>Functions exercisable by single member</b> A list of the limited decisions which can be taken by only one member
<b>6</b>	<b>Disclosure of Information</b> The confidentiality restrictions placed on the Tribunal. The Tribunal is required by rule 6(1) to carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.
<b>Part II</b>	
<b>7</b>	<b>Bringing section 7 proceedings</b> How to make a Human Rights Act claim (T1 form)
<b>8</b>	<b>Making a complaint</b> How to make a complaint (T2 form)
<b>9</b>	<b>Forms of hearing and consideration</b> If the Tribunal decide to hold a hearing this must be in private. This rule was examined in the case of <b>IPT/01/62</b> and <b>IPT/01/77</b> and the Tribunal determined that it was ultra vires (beyond the power) of section 69 of RIPA. The Tribunal have therefore decided that, subject to the general duty imposed by Rule 6(1) to prevent the disclosure of sensitive information, the Tribunal can exercise discretion and hold open inter partes hearings.
<b>10</b>	<b>Representation</b> If someone is invited to make representation at an oral hearing they can do this themselves or they can be represented by a lawyer who falls within the categories given. Alternatively they can be represented by someone else if the Tribunal gives permission.
<b>11</b>	<b>Evidence</b> Uniquely the Tribunal can receive evidence in any form including evidence that would not be admissible in a court of law. Witnesses can be required to give evidence on oath but no one can be compelled to give evidence at an oral hearing.
<b>12</b>	<b>Remedies</b> This Rule regarding remedies should be read with s67(7) of the Act. Remedies available to the Tribunal are summarised in page 23 of this report.
<b>13</b>	<b>Notification to the complainant</b> This section allows the Tribunal to provide information to a complainant when a determination is made in their favour subject to rule 6(1).

## APPENDIX C: IPT COSTS

The total amount of fees claimed by Members of the Tribunal in 2010 was £63,078. The Tribunal claimed a total of £5983.00 in expenses in 2010

Members' terms and conditions state that their appointment is non-salaried and non-pensionable. A member of the Tribunal who is not a salaried judicial-holder will receive a daily fee of £785.00. The daily fee is equivalent to that paid to a Deputy High Court Judge and is reviewed annually in line with the recommendations of the Senior Salaries Review Body for the Judiciary. Additional payment(s) can also be made for attendance at full Tribunal meetings, attendance at oral hearings and file review visits to those agencies and authorities empowered under the legislation against whom complaints are lodged.

Both the President and Vice President are serving High Court Judges and therefore receive no additional payment for their work on the Tribunal.

