

Date: 14<sup>th</sup> November 2006

**Before :**

**LORD JUSTICE MUMMERY**  
**MR JUSTICE BURTON**  
**SIR RICHARD GASKELL**  
**SHERIFF PRINCIPAL JOHN McINNES QC**  
and  
**MR ROBERT SEABROOK QC**

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**Between :**

<b>C</b>	<b><u>Applicant</u></b>
<b>- and -</b>	
<b>(1) THE POLICE</b>	
<b>(2) SECRETARY OF STATE FOR THE HOME</b>	<b><u>Respondent</u></b>
<b>DEPARTMENT</b>	<b><u>Interested</u></b>
	<b><u>party</u></b>

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**MR BEN BRANDON** (instructed by Russell Jones &Walker) for the Applicant

**MR MARK ALDRED** (instructed by Director of Legal Services of the Police Authority) for  
the Respondent

**MR BEN HOOPER** (instructed by the Treasury Solicitor) for the Secretary of State for the  
Home Department, the Interested Party

**MR JEREMY JOHNSON** (instructed by the Treasury Solicitor) Advocate to the Tribunal

Hearing dates: 13<sup>th</sup> and 14<sup>th</sup> July 2006

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**DECISION**

## **The Tribunal :**

### **The issue**

1. This is a preliminary hearing. The issue is whether the Tribunal have jurisdiction under the Regulation of Investigatory Powers Act 2000 (RIPA) to determine a claim made by a retired police officer (the Applicant) against his former police force.
2. The claim is for unlawful covert surveillance in breach of his right to respect for his private and family life and his home under Article 8 of the European Convention on Human Rights (the Convention) and section 6 of the Human Rights Act 1998 (the 1998 Act). The claim is solely concerned with surveillance and it does not raise any question on the provisions in RIPA relating to the interception of communications.
3. It is unlawful for a public authority to act in a way which is incompatible with a Convention right: section 6(1) of the 1998 Act. A police force is a public authority.
4. Under section 7 of the 1998 Act a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may bring proceedings against the authority under the 1998 Act in the appropriate court or tribunal. The Applicant contends that this is the appropriate tribunal. This is disputed by the police, who contend that the Tribunal have no jurisdiction to determine the claim.
5. Article 8 provides

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### **The hearing**

6. The Tribunal decided, without objection from the parties, to exercise their discretion to direct that the hearing should be not be held in private, as provided in Rule 9 (6) of the Investigatory Powers Tribunal Rules 2000 (the Rules), which, in an earlier decision, the Tribunal held to be ultra vires and not to bind them (paragraph 173 of the decision in **Applications Nos IPT/01/62** and **IPT/01/77**). The Tribunal also decided that this Decision should be published, but that it was not necessary to name the parties.
7. The case has no national security implications. It would not be against to the public interest on any other ground to hold a public hearing and to publish the Decision. On the contrary, it is in the public interest that the important points of law dealt with in the oral arguments and in this Decision itself should not be kept private.

### **The facts**

8. No oral evidence was heard by the Tribunal, as the essential facts are agreed.
9. The Applicant served as a sergeant in a police force. He retired on medical grounds on 11 August 2001. He claimed that in August 1998 he had suffered a back injury as a result of tripping on a carpet in a police station while on duty.

He made a claim for damages, which was settled at the end of July 2002 for £100,000.

10. He also made a claim for an “enhanced injury on duty award” under the Police Pension Regulations 1987. The pension benefits are paid out of public monies. He appealed to the Police Pensions Appeal Tribunal against the assessed level of the disability, which would affect his ability to earn as a driver in retirement. The level of disability was increased on appeal from 24% (the lowest level of disability) to 53%.
11. On 9 August 2002 the police force instructed a firm of private enquiry agents to observe the Applicant. He was not subject to any criminal charge or investigation or to any internal disciplinary proceedings, but the police had suspicions about whether the Applicant was as disabled as he had claimed.
12. During the course of 2 September 2002 the private enquiry agents shot 9 minutes of video footage of the Applicant mowing his front lawn in the presence of his wife and 9 year old son at their home. The police say that the footage was shot from a place to which the public have access. The Applicant does not accept this, contending that he was filmed from behind a hedge on a neighbour’s private land. This factual disagreement has no bearing, however, on the question of the Tribunal’s jurisdiction to determine the claim.
13. The Applicant was also videoed in his car. The agents made a video and surveillance report to the police on 3 September 2002. (The Applicant alleges that information in the surveillance report about his car appears to have been obtained from the Police National Computer. He makes other allegations of malpractice by the police, which are not relevant to the jurisdiction issue.)

14. No authorisation for these activities was obtained by the police under Part II of RIPA. The Applicant alleges that the activities bore all the hallmarks of a directed surveillance operation against him.
15. The police contend that the activities objected to by the Applicant were lawful; that they did not require any authorisation under RIPA, as the activities had not been carried out in the exercise of the specific or “core” public functions of the police; and that the Tribunal have no jurisdiction to determine the claim. The police had obtained counsel’s opinion as to the lawfulness of the activities, the purpose of which was to determine whether the Applicant could walk normally and drive a vehicle and whether he was involved in any physical activity.

### **Jurisdiction hearing**

16. This is one of a number of employment-related surveillance claims and complaints pending in the Tribunal. In view of the doubts raised about the Tribunal’s jurisdiction to determine this and similar claims, the Attorney General was asked to appoint an advocate to the Tribunal. Mr Jeremy Johnson was appointed. He gave valuable assistance to the Tribunal on the question whether the Tribunal have jurisdiction to adjudicate on the claim.
17. Cases of unauthorised covert surveillance by a public authority of its employees would appear at first sight to be the kind of case that would fall within the jurisdiction of the Tribunal. As explained in the Tribunal’s decision in **Applications Nos IPT/01/62 and IPT/01/77** (23 January 2003) the main purpose of RIPA is to ensure that the relevant investigatory powers of public authorities, such as interception of communications and various forms of

covert surveillance, are used lawfully and compatibly with Convention rights. RIPA covers the purposes for which relevant investigatory powers can be used. It identifies the authorities who have and use the powers and who can authorise their use in accordance with prescribed internal procedures and a Code of Practice published in 2002 under section 71 RIPA. RIPA also defines what use can properly be made of the material obtained.

18. The purpose of Part II of RIPA is to provide a legal framework, which did not previously exist, to regulate the use of surveillance by public authorities in compliance with Article 8 of the Convention. The 1998 Act brought the Convention into English law as from 2 October 2000. The relevant provisions of RIPA came into force on the same date.
19. Means of redress for persons aggrieved by the use of investigatory powers are provided by the Tribunal, on which there is conferred jurisdiction to consider and determine proceedings and complaints. For the purposes of certain proceedings under section 7(1)(a) of the 1998 Act for actions incompatible with the Convention the Tribunal are the only available forum. They are also the appropriate tribunal to consider and determine various complaints made by people who are aggrieved by conduct of the kind for which a claim may be brought under section 7(1)(a) of the 1998 Act.
20. The procedure of the Tribunal is contained partly in RIPA and partly in the Rules. The Rules contain special provisions to cater for the fact that the secret nature of interception and surveillance operations and of security and intelligence gathering activities necessitate restrictions on the normal openness and adversarial nature of procedures for the adjudication of claims. So the

Rules impose restrictions on the disclosure of information contrary to the public interest or prejudicial to national security and on the notification of determinations. They also provide for the holding of oral hearings to take place in private (Rule 9(6)) and for separate hearings. Rights of appeal and access to judicial review are unavailable to challenge the determinations of the Tribunal.

21. For present purposes the important point is that the Tribunal are a statutory creation with limited jurisdiction and special procedures. Their jurisdiction and powers are entirely governed by RIPA and the subordinate legislation made under it.
22. The experience of the Tribunal over the last 5 years has been that RIPA is a complex and difficult piece of legislation. The Tribunal have been assisted in interpreting and applying it from time to time by legal submissions of counsel at hearings like the present. This case, which turns on a narrow, but difficult, point of statutory interpretation, is no exception.
23. The Tribunal heard detailed submissions from Mr Ben Brandon appearing for Applicant and Mr Johnson arguing that the Tribunal have jurisdiction; the Tribunal have also heard detailed submissions from Mr Mark Aldred appearing for the police force and from counsel for the Secretary of State, Mr Ben Hooper, as to why the Tribunal do not have jurisdiction in this case. The Secretary of State was permitted to intervene and was joined as an interested party to the proceedings.

24. As a result of these divergent submissions on a point fundamental to the work of the Tribunal other pending cases have been stayed awaiting the ruling on jurisdiction in this case.

**Jurisdiction provisions: general**

25. The logical starting point is the provisions in RIPA which define the jurisdiction of the Tribunal to hear claims for breach of the 1998 Act and to consider and determine complaints.

26. The jurisdiction provisions are contained in section 65 of RIPA. The section defines the proceedings and complaints falling within the jurisdiction of the Tribunal by reference to the type of conduct covered, to the person whose conduct is relevant and to the circumstances in which the lawfulness of that conduct can be challenged.

27. As set out in paragraph 19 above, for certain kinds of complaints and proceedings the Tribunal are the only appropriate forum. Their proceedings are governed by the Rules, about which more is explained in later paragraphs of this Decision.

28. The exclusive jurisdiction of the Tribunal is defined in section 65(2).

“(2) The jurisdiction of the Tribunal shall be-

- (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section ( proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section.



(b) to consider and determine any complaints made to them which, in accordance with subsection (4), are complaints for which the Tribunal is the appropriate forum;”

29. Section 65 also specifies the various kinds of proceedings and of conduct of which complaint can be made to the Tribunal.
30. First, as to proceedings falling within section 65, the provision relevant to this case states that they must relate to the taking place “in any challengeable circumstances” of specified conduct: section 65 (3) (d).
31. Secondly, as to complaints, they must be by a person who is aggrieved by any specified conduct, which he believes to have taken place “in challengeable circumstances.”: section 65(4)
32. Thirdly, as to specified conduct, section 65(5)(d) provides that it includes conduct to which Part II RIPA applies, for example, directed surveillance. It will be necessary to return to Part II in order to examine the kind of surveillance covered and the system of authorisation governing it. Sections 26 and 28 RIPA are the key sections and are discussed in detail later in this Decision.
33. Fourthly, as to persons, the specified conduct includes conduct by, or on behalf of, a person holding any office, rank or position with “any police force.” Section 65(6)(c).
34. Fifthly, as to grounds of challenge, the specified conduct takes place “in challengeable circumstances” if, as provided in section 65(7),

“(a) it takes place with the authority, or purported authority, of anything falling within subsection (8);”[This includes an authorisation under Part II of RIPA: see section 65(8) (c)] “or

(b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought; ”

## **Part II RIPA**

35. Part II RIPA covers three kinds of specified conduct: directed surveillance, intrusive surveillance and the conduct and use of covert human intelligence sources.

36. It is common ground that the Tribunal only have jurisdiction in this case if the surveillance alleged by the Applicant is “directed surveillance” within the meaning of sections 26 and 48 (1) and (2).

37. Section 26 provides-

“(2) Subject to subsection (6), surveillance is directed for the purposes of this Part if it is covert but not intrusive and is undertaken-

- (a) for the purposes of a specific investigation or a specific operation;
- (b) in such manner as is likely to result in the obtaining of private information about a person (whether or not specifically identified for the purposes of the investigation or operation); and
- (c) otherwise than by way of immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under this Part to be sought for the carrying out of the surveillance.”

38. Under section 48(2) “surveillance” in Part II includes

“(a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;

(b) recording anything monitored, observed or listened to in the course of the surveillance; and

(c) surveillance by or with the assistance of a surveillance device.”

39. There is disagreement as to whether there was “directed surveillance” in this case, for which authorisation could have been obtained under section 28, as discussed later in this Decision.

40. On the one hand, it is submitted that the surveillance of the Applicant and his family by the private inquiry agents on behalf of the police was “directed surveillance” for which authorisation could and should have been sought. This surveillance should not have taken place without an authorisation under Part II RIPA. It took place in “challengeable circumstances” and therefore falls within the jurisdiction of the Tribunal.

41. On the other hand, it is submitted that there was no “directed surveillance” in this case for which authorisation could have been obtained, because there was no “specific investigation” or “specific operation” within the meaning of RIPA. In the absence of that pre-requisite for jurisdiction the Tribunal cannot consider and determine the complaint.

### **Directed surveillance**

42. Surveillance by public authorities (or, indeed, by anyone else) is not in itself unlawful at common law, nor does it necessarily engage Article 8 of the Convention. For example, general observation of members of the public by the police in the course of carrying out their routine public duties to detect crime and to enforce the law is lawful. It does not interfere with the privacy of the

individual citizen in a way that requires specific justification: see, for example, **Friedl v. Austria** (1995) 21 EHRR 83.

43. Surveillance of that general nature would not fall within the RIPA framework of authorisations, which are designed to cover certain specific types of covert surveillance by public authorities (i.e. directed, intrusive and the conduct and use of covert human intelligence sources), which may be subject to the scrutiny of the Tribunal when a claim or complaint is made.
44. The main question is whether the Applicant was a target of “directed surveillance” within RIPA. A number of different points arise under the terms of sections 26 and 48(1) and (2) of RIPA on the scope of “directed surveillance” covered by RIPA.

### **Surveillance point**

45. The first point is: Did the police actions of which the Applicant complains amount to *surveillance*? It is common ground that he was under “surveillance.” His movements and other activities were monitored, observed and recorded by the private agents on behalf of the police. The fact that private inquiry agents were used by the police to conduct surveillance on their behalf does not affect the responsibility of the police for the purposes of RIPA.

### **Covert point**

46. The second point is: Was the surveillance *covert*? It has not been contended that the surveillance was other than covert. The Applicant was unaware that it was taking place. There would be little to be gained in carrying out the

surveillance at all, if it was not covert and the target of the surveillance was aware that it was or might be taking place.

### **Specific investigation/operation point**

47. The third point is: Was the surveillance for *a specific investigation* or *a specific operation*? This is the key question. The Tribunal heard much argument on it.
48. The surveillance was carried out for the sole purpose of determining whether the Applicant was as disabled as he had claimed with regard to the effect of his injury on his daily activities. The information was sought in connection with the response of the police to his pension appeal.
49. Mr Johnson's submission was that the surveillance of the Applicant was "a specific investigation" or "a specific operation" on the ordinary and natural meaning of those undefined expressions. It was not general and it was not routine. It was "specific" to the Applicant in observing and recording his movements and in gathering "specific" information about him for a "specific" purpose. "Investigation" and "operation" are, Mr Johnson commented, words of wide meaning capable of covering the activities of the private enquiry agents in this case.
50. Mr Hooper disagreed. He submitted that the consequences of this interpretation suggested that it was unlikely that Parliament had contemplated cases like this being caught by RIPA at all and that "directed surveillance" was intended to have a more restricted scope.

51. The first difficulty is that under RIPA not all public authorities are permitted to grant authorisations for directed surveillance and not all of the specified grounds for authorising directed surveillance (such as the interests of “the economic well-being of the country” which might apply to employee-related surveillance) are available to all public authorities.
  
52. The power to grant authorisations under section 28 for directed surveillance is limited to relevant public authorities in Part I or II of Schedule I to RIPA. Not all public sector employers, or even all government departments, are included in Schedule 1. For example, the Department of Constitutional Affairs, the Treasury and the Foreign and Commonwealth Office are not included. They are not therefore “relevant public authorities” that have power to grant authorisation for directed surveillance. This would produce an anomalous situation. Why should directed surveillance of employees by some government departments (and other public authorities) fall within the regulatory regime of RIPA and directed surveillance by other government departments (and public authorities) fall outside it?
  
53. As for available grounds for authorisation, it was pointed out that the “economic well-being” ground of authorisation, which was potentially the most relevant in cases of this kind and other situations related to expenditure of public money, was not available to any local authorities or to the Department of Trade and Industry or to the Department of Work and Pensions, who could only grant authorisations for preventing and detecting crime or preventing disorder (section 28(3)(b)).

54. There was no rational basis in this type of surveillance (i.e. of employees or officers in relation to civil proceedings or other private law purposes relating to the employer/employee relationship or other contractual relationship as with suppliers and outsourcing) to differentiate between one public authority and another. This, it was submitted, was an indication that surveillance by public authorities in this private law type of case was intended by Parliament to fall outside the RIPA regime altogether.
55. The second difficulty is in relation to the requirements of Article 6 of the Convention and the special procedures governing proceedings in the Tribunal under section 65. The Tribunal's procedural regime for hearings departs significantly from the fair trial standards ordinarily required by Article 6 in terms of the open adversarial determination of issues. The Tribunal held in their 2003 decision in **Applications IPT/01/62 and IPT/01/77** that the Tribunal's procedure under RIPA and the Rules is compliant with Article 6 having regard to the kinds of cases dealt with by them.
56. The point highlighted by Mr Hooper was that surveillance of an employee in the circumstances of this kind of case is unlikely to justify the use of a procedurally restrictive regime and special safeguards, which are tailored to the needs of the public interest and national security cases that clearly fall within the Tribunal's jurisdiction. This is not such a case.
57. In these circumstances, the interpretation to be preferred is one which limits "directed surveillance" under RIPA to the discharge of the public authority's particular public or "core functions" specific to it, rather than the carrying out of "ordinary functions" common to all public authorities, such as employment

(or its nearest equivalent in the case of the police) and entering into contracts to receive or supply other services.

58. These arguments on competing interpretations will be examined in more detail below.

### **Private information point**

59. The fourth point was: Was the surveillance likely to result in the obtaining of *private information*? The purpose of the surveillance was to obtain information about an aspect of the Applicant's private life which was not fully known to the police i.e. specifically about his state of health, the degree of his disability and whether he had exaggerated his disability.

### **Immediate response point**

60. The fifth point was: Was the surveillance other than an *immediate response*? This is not an "immediate response" case. There was sufficient time for the police to seek authorisation, if it was appropriate to do so. Surveillance was first contemplated on 10 June 2002. The private enquiry agents were instructed on 9 August 2002.

### **RIPA authorisations**

61. The definitions of "directed surveillance" in section 26 must be read in the context of the scheme of RIPA as a whole. One relevant consideration is whether authorisation could, in principle, have been sought and obtained for the activities on which the Applicant bases his claim. As "directed



surveillance” is an activity that can be authorised under RIPA, it is necessary to look to the scheme of the authorisation provisions themselves.

62. First, some general observations. Although RIPA provides a framework for obtaining internal authorisations of directed surveillance (and other forms of surveillance), there is no general prohibition in RIPA against conducting directed surveillance without RIPA authorisation. RIPA does not *require* prior authorisation to be obtained by a public authority in order to carry out surveillance. Lack of authorisation under RIPA does not necessarily mean that the carrying out of directed surveillance is unlawful.
63. This is re-inforced by a general saving for lawful conduct in section 80 of RIPA-

“80. Nothing in any of the provisions of this Act by virtue of which conduct of any description is or may be authorised by any warrant, authorisation or notice, or by virtue of which information may be obtained in any manner, shall be construed-

(a) as making it unlawful to engage in any conduct of that description which is not otherwise unlawful under this Act and would not be unlawful apart from this Act;

(b) as otherwise requiring –

(i) the issue, grant or giving of such a warrant, authorisation or notice, or

(ii) the taking of any step for or towards obtaining the authority of such a warrant, authorisation or notice,

before any such conduct of that description is engaged in; or

(c) as prejudicing any power to obtain information by any means not involving conduct that may be authorised under this Act.”

64. If, however, authorisation under RIPA has been properly obtained for directed surveillance and the surveillance is carried out in accordance with it, RIPA provides that the surveillance is lawful. Section 27 provides that directed surveillance is lawful if an authorisation under RIPA confers an entitlement to engage in that conduct on the person whose conduct it is and his conduct is in accordance with the authorisation. An authorisation under RIPA affords protection to the public authority, if it is properly obtained and complied with. It also provides protection for the target of the surveillance in the form of the safeguards relating to the grant of authorisation and the scrutiny that is available through the Tribunal. The consequences of not obtaining an authorisation may be that, where there is an interference by a public authority with Article 8 rights and there is no other source of authority, the action is unlawful by virtue of section 6 of the 1998 Act.
65. Sections 28 (1) and 30 RIPA designate the persons who have power to grant authorisations to carry out directed surveillance, such as individuals holding offices, ranks or positions with “relevant public authorities” prescribed in Schedule 1 Part I and II and by Order. “Any police force” is a relevant public authority for the purposes of sections 29 and 29 within Part I of Schedule 1.
66. However, not all public authorities are included in Schedule I. Further, there are, by virtue of the Schedule to the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003 (SI 2003/3171) (the 2003 Order), public authorities who are also employers and are included in Schedule 1 but who, as a result of limitations upon some authorities resulting from the Schedule to the 2003 Order, are unable to grant

RIPA authorisations under section 28(3)(c) (“in the interests of the economic well-being of the country”). This is, as we shall see, the only ground that potentially covers this case.

67. Section 28(2) sets the conditions that a person shall not grant an authorisation, unless he believes it is necessary on one or more of the specified grounds (section 28(3)) and that authorised surveillance is proportionate to what is sought to be achieved by carrying it out. Section 28(2) and (3)
68. An authorisation of surveillance can only be granted on specified grounds for interfering with the right to respect for private life under Article 8. The grounds specified in section 28(3) RIPA are based on Article 8 (2) of the Convention and include “in the interests of the economic well-being of the United Kingdom” as well as other grounds, which do not apply in this case, such as in the interests of national security, for the purpose of preventing or detecting crime or of preventing public disorder, in the interests of public safety and protecting public health.
69. The grounds are in themselves an indication of the types of surveillance to which RIPA applies and to which authorisation procedures apply. Similar indications are to be found in the allocation of the various grounds, on which different public authorities under the 2003 Order may authorise directed surveillance under section 28 RIPA. Not all public authorities are entitled to rely on all of the grounds for the purposes of obtaining authorisation. The particular grounds available to a public authority are related to the carrying out of the particular public functions (“core functions”) of that authority, rather than to the “ordinary functions” common to all public authorities. For

example, the police may be authorised to conduct directed surveillance on nearly all the grounds in section 28(3), including the economic well-being ground, whereas many others, including local authorities, are limited to ground (b) “ for the purpose of preventing or detecting crime or of preventing disorder.” If this is directed surveillance to which RIPA applies, the anomalous situation arises in which only some public authorities would be able to use RIPA to obtain authorisation for directed surveillance for this type of case. Some public authorities are not in the list in Schedule 1, while others in the list are not entitled to obtain authorisation on the “economic well-being” ground in a case such as this where there is no other available ground for directed surveillance.

70. The ground of necessity “in the interests of the economic well being of the United Kingdom” found in section 28(3)(c) can cover a wide variety of activities, including the allocation of public funds. In this case the police contend that it can cover making sure that money spent on disability pensions is properly spent. It is a possible ground on which authorisation could have been sought for surveillance in a specific investigation or specific operation.
71. In **MS v. Sweden** (1999) 28 EHRR 313 the applicant, a nursery school teacher, had injured her back when she slipped and fell at work and made a claim for compensation under the state industrial injury scheme. She complained that copies of her confidential medical records had been submitted without her consent, by the women’s clinic, where she had been treated, to the Social Insurance Office in breach of the professional duty of confidence. The ECHR held that the interference was justified to ensure that public funds were

only allocated to deserving claimants and that fell within the economic well-being of the country. The information was necessary and relevant to determine her claim for compensation. The Court said-

“38. The object of the disclosure was to enable the Office to determine whether the conditions for granting the applicant compensation for industrial injury had been met. The communication of the data was potentially decisive for the allocation of public funds to deserving claimants. It could thus be regarded as having pursued the aim of protecting the economic well-being of the country. Indeed this was not disputed before the Court.”

72. A similar approach to “the interests of the economic well-being of the country” in relation to quite modest amounts of public money was adopted in the earlier case of **Funke v. France** (1993) 16 EHRR 297 which arose out of the customs officers’ search of the applicant’s house and seizure of documents in order to obtain details of overseas assets held by the applicant and his wife. The interference with the applicant’s rights under Article 8 (1) of the Convention was held to be justified under Article 8(2) on the ground of the economic well-being of the country. The Court said-

“ 89. The interference complained of was quite clearly in a legitimate interest, namely the economic well-being of the country and the prevention of crime. It remains to be examined whether this interference was proportionate and could be considered necessary for the protection of that interest.”

73. The surveillance in this case was in the context of the justification for enhanced pension payments to an injured claimant out of public funds. Mr Johnson contends that, on the authority of **MS v. Sweden**, the case is within the ground of “the economic well-being of the UK” specified in section 28(3)(c) RIPA and in Article 8(2) of the Convention.

## **Discussion and conclusions**

74. The question of jurisdiction raised by the claim must be approached with careful attention to the scheme of RIPA and the context of the provisions which define the powers of the Tribunal. We have reached the following conclusions.

### **“Employment-related” surveillance**

75. In an attempt to analyse this case the expression “employment-related” surveillance was coined and it was used in some of the written and oral arguments. It is helpful as a general indication of the territory of the case, but there are several reasons why it is not an accurate guide to the scope of RIPA or the limits to the jurisdiction of the Tribunal.

76. First, there is the fact special to this case that the relationship of the police force to police officers is not one of employment. A police officer does not have a contract of employment. The relationship between the police and individual officers is regulated principally by the Police Act 1996 and the Police Regulations 2003.

77. The second point is more general. Directed surveillance, as defined in RIPA, could plainly include surveillance relating to some employment situations. If, for example, an employee was suspected by his public authority employer of criminal activities in the course of his work or activities, which would endanger national security or involve threats to public order, and it was necessary and proportionate for the purposes of an investigation to put him under surveillance, an authorisation of directed surveillance for a specific investigation may be obtained by a relevant public authority under RIPA depending on the grounds which are available to that authority.

78. In short, the employment relationship does not preclude the possibility of directed surveillance under RIPA. It is not possible to carve out an area of surveillance, which can be labelled “employment-related” and falls outside RIPA.
79. Further, the kind of surveillance would not be limited only to an employment relationship. The same arguments could arise in relation to surveillance of a customer or supplier, in relation to suspected overcharging or defective methods of manufacture.

### **Specific investigations and operations**

80. The conclusion we have reached is that the definition of “directed surveillance” in RIPA is not as wide and general as it would at first sight appear to be. Its scope is limited by two particular aspects of its context: first, the overall regime of self-authorisation by public authorities for specified purposes which are related to their particular public functions; and, secondly, the nature and purpose of the special procedures of the Tribunal for dealing with claims and complaints under RIPA.
81. The activities of the agents of the police in this case were certainly covert surveillance for the purpose of obtaining private information about the Applicant, but they were not, in our view, “directed surveillance” in the sense defined in RIPA. Although “specific investigation” and “specific operation” used in the description of directed surveillance are expressions capable of a wide meaning, they are subject to limitations implicit in their context in the legislation.

82. Directed surveillance under RIPA is carried out by public authorities which are responsible for the discharge of the specific public functions and are equipped with investigatory powers for the performance of those functions. Directed surveillance by specified public authorities can only be authorised on specified grounds. Those grounds are linked to the specific public functions of the public authority and vary according to the functions of the particular public authority.
83. The voluntary system of self-authorisation and of record keeping and the defence afforded by section 27, if authorisation is obtained and complied with, are appropriate for the exercise by the public authority of its particular public functions.
84. The concept of specific core functions of public authorities is not expressly mentioned as such in RIPA. It not easy to define the concept in general terms or to propound a general test for distinguishing between the core functions and the ordinary functions of public authorities. Nevertheless, we are satisfied that such a distinction is implicitly recognised in RIPA by the nature of the grounds on which the particular public authority may be authorised to conduct directed surveillance under RIPA.
85. The specific core functions and the regulatory powers which go with them are identifiable as distinct from the ordinary functions of public authorities shared by all authorities, such as the employment of staff and the making of contracts. There is no real reason why the performance of the ordinary functions of a public authority should fall within the RIPA regime, which is concerned with the regulation of certain investigatory powers, not with the regulation of



employees or of suppliers and service providers. There is nothing special about the case of the employee suspected of non-criminal conduct that cannot be covered by the ordinary law. There is no reason for the case of an employee suspected of non-criminal misconduct in relation to civil proceedings or claims to be brought within the RIPA regime. It was and is governed by the ordinary law. The surveillance activities in this case related to the ordinary function of the police in their relationship with members of the force.

86. A coherent RIPA scheme includes the special procedures for dealing with claims and complaints about the use of investigatory powers in performing the core public functions of the public authority. The special procedures are not required for and do not fit a case like this. The application of the special procedures for adjudicating on claims and for investigating complaints would mean that the applicant would be deprived, for no sensible reason, of the protection of ordinary procedures of an open adversarial hearing, of a reasoned decision and of a right of appeal against or judicial review of an unfavourable decision. It is improbable that Parliament ever contemplated that these restrictions would apply in a situation in which there is no sensitive information or intelligence, and in which no national security or other public interest considerations could arise.

87. No public interest would be served by giving the Tribunal exclusive jurisdiction over such a case. No canon of statutory interpretation requires RIPA to be read in a way which would deprive the citizen of the ordinary procedures for determining his civil claim. On the contrary, we think very

clear wording and a good reason would be required for depriving the ordinary courts of their jurisdiction to deal with a case like this.

88. For the above reasons the activities of the police in this case were not “directed surveillance” within RIPA. The surveillance of the Applicant for the purposes of obtaining evidence as to whether he was as disabled as he had complained in connection with service benefits claimed by him was not a “specific investigation” or a “specific operation” within the meaning of RIPA.

89. Although this means that the Tribunal have no jurisdiction to consider and determine the claim, it does not mean that covert surveillance activities by the police or other public authorities in this kind of case are unaffected by law. All that we are deciding is that they are not subject to RIPA or to the jurisdiction of this Tribunal. There are other ways in which the lawfulness of surveillance by a public authority in the context of a private law relationship, such as employment, may be challenged, if it engages Article 8, as amounting to an interference with the right to respect for private and family life, or if it breaches some other specific statutory requirement or private law right at common law or in contract.

## **Result**

90. For the reasons stated above this is not a case of directed surveillance within RIPA. It therefore falls outside the jurisdiction of the Tribunal.

91. It is unnecessary and undesirable to express a view on further questions that might arise on whether the interference with the Article 8(1) right was “in

accordance with the law” for the purposes of Article 8(2) or whether the interference was “necessary and proportionate”.