IN THE INVESTIGATORY POWERS TRIBUNAL

Before :

MR JUSTICE BURTON

SHERIFF PRINCIPAL JOHN McINNES QC

SUSAN O'BRIEN QC

- -

Between :

(1) Mr B
(2) Mrs B

Complainants

- and -

DEPARTMENT FOR SOCIAL DEVELOPMENT

Respondent

Messrs Kevin R Winters & Co of Belfast for the **Complainants**

Mr Jason Coppel of Counsel for the **Respondent**

MR JUSTICE BURTON :

1. On 20 July 2010 the Tribunal made a finding in favour of the Complainants, Mr and Mrs B, that, on 23 May 2006, two officers of the Northern Ireland Social Security Agency's Benefit Investigation Service, on behalf of the Respondent, entered the house owned by the Complainants in Coleraine, posing as potential house purchasers, and remained in the property for 35 minutes, from 15.25 to 16.00. This took place in the course of an investigation into allegedly overpaid social security benefits and allowances, which was the subject of a series of surveillance authorisations. There was a specific authorisation of this action, by way of a "*test purchase operation*", but, as will appear below, such authorisation did not in fact fall within the provisions of the Regulation of Investigatory Powers Act 2000 ("RIPA"). The Respondent's investigation eventually led to a conclusion that sums were repayable by each of the Complainants, and to a disallowance of benefits and allowances, and a requirement for each of the Complainants to repay sums to the Respondent.

2. The Complainants brought proceedings by way of a complaint against the Respondent, pursuant to s65(4) of RIPA. They did not fill in a separate form alleging breach of the Human Rights Act 1998 (HRA), in terms of s65(2)(a), but the Tribunal proceeded on the understanding that breach of Article 8 of the European Convention of Human Rights ("ECHR") was the substance of the complaint. The Tribunal also read the complaint as referring to an event on 23 May 2006, rather than 23 May 2005, as was stated in the forms. The complaints were made out of time, but the Tribunal accepted the explanation that they had first been raised with the Police Service of Northern Ireland and then the Police Ombudsman. The Tribunal exercised its discretion under

section 67(5) of RIPA and decided that it was equitable to permit the complaints to proceed out of time. The Tribunal's formal Determination dated 10 July 2010 was made on the basis of written evidence, and no written Judgment was issued. Consequent on the finding in the Complainants' favour, to which we have referred, the Tribunal has the power, pursuant to s67(7) of RIPA, "*to make any such award of compensation or other order as they think fit*". Pursuant to s67(2), the Tribunal are to apply the same principles for making this determination in these proceedings, including determinations as to remedy, as would be applied by a court on an application for judicial review. By making its conclusion, set out in paragraph 1 above, the Tribunal has found that the Respondent acted in breach of the Complainants' right to respect for their private life and their Article 8 of the ECHR.

3. We are satisfied that we should address the complaint by reference to this breach. The surveillance on 23 May 2006 was not "*in accordance with the law*" within Article 8(2), and so was not justified. Just as would the Administrative Court in judicial review proceedings for breach of Article 8, this Tribunal must examine the issue of remedy in accordance with s8 of the HRA. This provides, in relevant respect:

> "*(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*
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> *(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.*
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> *(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –*

> *(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and*
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> *(b) the consequences of any decision (of that or any other court) in respect of that act,*
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> *the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.*
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> *(4) In determining -*
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> *(a) whether to award damages, or*
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> *(b) the amount of an award,*
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> *the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.*"

4. The Complainants were represented by solicitors, Messrs Kevin R Winters & Co, Belfast, who, pursuant to the Tribunal's request dated 20 July 2010, submitted to the Tribunal submissions dated 27 July 2010. The Respondent replied to those submissions on 13 August 2010. The parties were each invited to make further detailed submissions, by reference to authorities which might assist the Tribunal in reaching its conclusion. The Respondent put in Submissions on Remedies, by reference to a number of authorities, which were settled by Counsel, Mr Jason Coppel, dated 16 December 2010.

5. The Complainants' solicitors sought, and were granted by the Tribunal, a number of adjournments in order that they could obtain legal advice, particularly advice in response to the detailed analysis of the law as to remedies, set out by Counsel, but the Tribunal was eventually notified by letter dated 26 May 2011 that the Complainants were unable to obtain funding for any such legal submissions. Although initially an oral hearing was convened, once the matter was continuously adjourned, and then the Complainants made

their decision above referred to, the Tribunal concluded that the applications ought to be, and could satisfactorily be, resolved by the Tribunal considering the case without such a hearing, which the Tribunal has now proceeded to do.

6. The facts were set out in the Respondent's submissions of 16 December 2010, to which no response was made by the Complainants in the circumstances described in paragraph 5 above, as follows:

> "*6(1) The surveillance which occurred on 23 May 2006 was part of a legitimate investigation of irregularities in the Complainants' claims to social security benefits.*
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> *6(2) The Complainants had both claimed social security benefits from separate addresses during the period 1996 to 2005; Mrs B had claimed benefit as a single person. The investigation of their claims, initially by the Benefits Investigation Service ("BIS"), led to decisions by the Agency that both Complainants had misrepresented or failed to disclose material facts relating to their claims ... and, as a result, had been overpaid substantial amounts of Disability Living Allowance (Mr B) and Jobseeker's Allowance (Mrs B). Mr B appealed against the disallowance of Disability Living Allowance but his appeal was rejected by the social security tribunal. Mrs B did not appeal. Both of the Complainants are now in the process of repaying the overpaid amounts.*
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> *6(3) The surveillance on 23 May 2006 was mistakenly authorised on the assumption that the Complainants' property* [in Coleraine] *was a public place, on account of its being open to viewing by prospective house purchasers.*
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> *6(4) At the material time, the property was jointly owned by the Complainants but Mrs B had claimed benefit from a different address, as a single person, and so had warranted that she was not living with Mr B at the property. However, at the time of the surveillance in question, Mrs B was present at the property but Mr B was not.*
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> *6(5) Subsequently, BIS realised that the surveillance on 23 May 2006 should not have been authorised. At that point, evidence which had been gathered on that day was withdrawn from the investigation and was not relied upon for the purposes of later decisions.*"

7. The Tribunal makes the following findings:

i) The First Complainant is Mr B. He was an owner and occupier of a house in Coleraine, Northern Ireland, in May 2006. The Second Complainant is Mrs B, his wife, who was the joint owner of that house.

ii) The Respondent is the Department for Social Development, and in particular the Northern Ireland Social Security Agency's Benefit Investigation Service. It employs fraud investigation officers. The Respondent has a duty to investigate allegations of benefit fraud. In certain circumstances, in terms of RIPA s 28, the Respondent is entitled to grant authorisation to fraud investigation officers to conduct directed surveillance of people suspected of defrauding the Department.

iii) Both Complainants were in receipt of various social security benefits for several years leading up until May 2006. At that time, the Second Complainant was receiving benefits on the basis that she was not living at that house, but was living elsewhere as a single person. The Respondent suspected them of benefit fraud.

iv) The Complainants decided to sell the house. They asked estate agents to market the property. Members of the public who might want to buy the house were invited to view it.

v) On 22 May 2006 the Respondent's officers sought and obtained Departmental RIPA authorisation to carry out directed surveillance of the First Complainant's house.

vi) On 23 May 2006, two officers from the Respondent's fraud investigation unit attended at the complainants' house, posing as prospective purchasers. Mrs B showed them the house. Mr B was not present.

vii) Soon after 23 May 2006, the Respondent's investigation of the complainants led to review of their files, and a senior manager concluded that the two investigators had gained access to the house without lawful authorisation. The senior manager advised the police that surveillance evidence obtained on 23 May 2006 could not be used in an ongoing investigation of the complainants. The surveillance evidence consisted of notes written by the officers who gained entry to the house. That evidence was not used.

viii) The Respondent's officers had followed appropriate procedures and protocols to obtain authorisation for directed surveillance in a "public place", as they erroneously believed that the invitation to the public to view the house meant that it had become a public place at the time of their visit. They did not intend to breach the RIPA provisions. The purported authorisation was granted in error.

ix) The Respondent's authorisation of directed surveillance of the complainants' house on 23 May 2006 was unlawful.

x) The Respondent had organised surveillance of the First Complainant on 10 dates prior to 23 May 2006, for which they obtained the correct RIPA authorisation. On the basis of information lawfully obtained on those dates, and excluding evidence obtained unlawfully on 23 May

2006, the Respondent concluded that the First Complainant had been overpaid benefit by a figure in excess of £8,000, which he was later ordered to repay to the Department. The Second Complainant had been subject to directed surveillance on three dates prior to 23 May 2006, for which the Respondents obtained the correct RIPA authorisation. She had been overpaid benefits, and she was ordered to repay over £3,000. In both cases, the overpayment had occurred by reason of the Claimants' misrepresentation of the facts, or by their failure to disclose material facts. They were not prosecuted. The First Complainant was disallowed Disability Living Allowance and the Second Complainant was disallowed Job Seekers' Allowance.

xi) The Respondent has reviewed internal guidelines and practices relating to the control of authorisations, and it has taken various measures to ensure that a similar breach could not happen again. It admitted the breach of the relevant RIPA provisions from the outset.

xii) The Complainants did not lose benefits as a result of the unlawful surveillance. They did not suffer any other financial loss in consequence of the unlawful surveillance.

8. The invasion of the Complainants' privacy lasted for 35 minutes, and, although, indeed because, it was obtained by the pretext of an inspection by a potential purchaser, the officers were at all times accompanied by the Second Complainant, who showed them round the house. There was no filming of the premises.

9. In their further submission dated 27 August 2010, the Complainants' solicitors sought, in addition to the quashing of warrants/authorisations, destruction of records and an apology, compensation in a sum which was put at a "*significant 6-figure sum*", subsequently suggested by letter dated 2 November 2010 to be £100,000 for each of the Complainants, without prejudice to any other proceedings which the Complainants might issue directly against the Respondent. By reference to s67(2) referred to in paragraph 2 above, the Respondent submitted that, in accordance with s8(3) and (4) of the HRA there referred to, the Tribunal must decide whether it is necessary in this case to award damages to "*a full and just satisfaction*" to the Complainants, and, if so, the quantum of damages, taking into account with the approach of the European Court of Human Rights in similar cases. The Respondent referred to the guidance of the Court of Appeal per Lord Woolf LCJ in **Anufrijeva v Southwark LBC** [2004] QB 1124 at 52-53:

> "*52. The remedy of damages generally plays a 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, more often than not, the only remedy claimed is damages.*
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> *53. Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance.*"

10. This guidance was approved 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, and he gave three reasons why damages in such cases, if granted at all, were in a small compass. At paragraph 17, Lord Bingham pointed out that sums by way of general damages for violation of Article 6 by

the European Court were "*noteworthy for their modesty*", and he reached the same conclusion, coupled with a "*clear indication*" that courts in the United Kingdom should look to Strasbourg and not to domestic precedents, also in relation to breaches of Article 8. He set out his conclusions, by reference to three broad reasons:

> *"... First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. Secondly, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg. This intention was clearly expressed in the White Paper "Rights Brought Home: The Human Rights Bill" (Cm 3782, 1 October 1997), para 2.6:*
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> > *"The Bill provides that, in considering an award of damages on Convention grounds, the courts are to take into account the principles applied by the European Court of Human Rights in awarding compensation, so that people will be able to receive compensation from a domestic court equivalent to what they would have received in Strasbourg."*
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> *Thirdly, section 8(4) requires a domestic court to take into account the principles applied by the European Court under article 41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents. The appellant contended that the levels of Strasbourg awards are not "principles" applied by the Court, but this is a legalistic distinction which is contradicted by the White Paper and the language of section 8 and has no place in a decision on the quantum of an award, to which principle has little application. The Court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are*

judged by the Court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them. They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the Court might be expected to be, in a case where it was willing to make an award at all."

11. The Respondent's contentions were set out at paragraphs 6, 13 and 17-20 of Mr Coppel's submissions as follows:

> "*6(6) Therefore, the Complainants have not suffered any loss of benefit, or any other financial loss as a result of the surveillance complained of. They were found to have over-claimed benefit on the basis of other evidence, unconnected with that surveillance.*
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> *6(7) As has been already explained to the Tribunal, the Agency considers the incident in this case to be an isolated one. There is no evidence of any similar errors having been made. The Agency has taken steps to ensure that the error is not repeated, by reviewing internal guidance and strengthening procedures for the recording of surveillance operations and reviewing surveillance authorisations for compliance with RIPA.*
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> *...*
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> *(13) The Respondent takes the view that the breach of Article 8 in the Complainants' cases did not give rise to any financial loss: the evidence gathered was not relied upon and it is, in any event, not "loss" to have to repay social security benefit which should never have been claimed. Therefore, no submissions are made as to the approach adopted by the ECtHR to pecuniary loss in Article 8 cases.*
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> *...*
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> *(17) In the present case, the Respondent submits, firstly, that the decision of the Tribunal upholding their complaints should constitute just satisfaction for the Complainants and that no award of damages should be made. As to pecuniary loss, the Respondent repeats the submission above, that no financial loss has been suffered, and there is certainly no evidence before the Tribunal that any has been suffered. Nor has there been any loss of reputation arising from the surveillance complained of. Any adverse effect upon the Complainants' reputation was caused by their own conduct in over-claiming social security benefits, and then by the decisions of the Agency that benefit*

had been overpaid, which were taken without reference to any evidence acquired through the surveillance here at issue.

(18) Similarly, no award of damages should be made for non-pecuniary loss. Again, there is no evidence whatsoever that the Complainants have suffered any anxiety or distress as a result of the surveillance complained of. They have had ample opportunity to submit such evidence; without it, there is no basis for any award of damages.

(19) If any such evidence had been submitted, the Respondent would look upon it with scepticism. The surveillance was a one-off event, which did not adversely affect the Complainants' position vis-à-vis the Agency. It was at a property which, according to Mrs B, was not her home at the time. Mr B, whose home it was, was not present. It is far more likely that feelings of anxiety or distress on the part of the Complainants would have been caused by the investigation of their benefit claims and the overpayment decisions made in their cases, for which they were responsible and which (a) were entirely lawful, and (b) did not rely upon the surveillance here at issue.

(20) Even if the Tribunal were persuaded by evidence that some non-pecuniary loss had been suffered, the Respondent would submit that that will be sufficiently compensated for by the Tribunal upholding the complaints. As explained in ***Greenfield****, the emphasis of the HRA is on bringing the violation in question to an end, and that was achieved some time ago in this case.*"

12. The Tribunal is satisfied in those circumstances as follows:

    i) Although the invasion of privacy constituted an entry into the home of the Complainants, which was only consented to as a result of the deception that the officers were potential house purchasers, it was a very limited invasion, both short-lived and under the Second Complainant's supervision.

    ii) It is plain that no pecuniary loss was suffered, and it was at a time and in circumstances when the Complainants would have been willing to show their home to genuine house purchasers, and extended no further than such an inspection.

iii) The Respondent was acting in the course of an otherwise appropriate investigation, the officers believed that they had authorisation, and that, had it been lawful to grant authorisation to inspect a private property, such conduct would have been reasonable and proportionate in the circumstances of such investigation.

iv) There is no evidence that the Complainants suffered any anxiety or distress as a result of the short-lived invasion of their privacy on 23 May 2006. If and insofar as there was any distress or anxiety on the part of the Complainants, described by their solicitors themselves in their letter dated 27 August 2010 referred to in paragraph 8 above, as being "*loss, distress or inconvenience sustained throughout this period*", and a "*high degree of aggravation sustained by each of them over a lengthy period of time*", this related to their understandable concern at being the subject of what was in the end a justified investigation which resulted in disallowance of benefit and orders for repayment.

13. Against the background of the guidance given by s8(3) and (4) of the HRA, and **Anufrijeva** and **Greenfield**, the Tribunal has considered, in the absence of any evidenced or proven financial loss, the Strasbourg authorities in respect of non-pecuniary loss, such as distress and frustration. No award was made for non-pecuniary loss in respect of a violation of Article 8 in the cases of **Niemietz v Germany** [1993] 16 EHRR 97 (1½ hours search and removal of documents, including privilege documents), **Cremieux v France** [1993] 16 EHRR 357 (a lengthy search and seizure at the claimant's house), **Hewitson v**

UK [2007] 44 EHRR 30 (covert bugging in the applicant's garage over five months) and **Heglas v Czech Republic** [2009] 48 EHRR 44 (sustained surveillance of the claimant's mobile phone).

14. Mr Coppel has drawn attention to two cases in which damages have been awarded for what he calls distress caused by a one-off intrusion into the home, **Taner Kilic v Turkey** ECtHR 70845/01 of 24 October 2006, and **Keegan v UK** [2007] 44 EHRR 33. In the **Taner Kilic** case, the violation of Article 8 consisted of a substantial search of the applicant's home and office and seizure of documents or copy documents and video tapes. The claim was for €20,000, and €2000 was awarded. In **Keegan**, the claimant family (two adults and four children) was in their flat in the early morning when the Police broke in, looking for armed robbers. Although the search was, the court found, carried out in good faith, it took account of what it described as the "*violent and shocking nature of the Police entry*". The court accepted evidence, by reference to medical reports, that the parents and children had suffered psychiatric injury with potential long term effect which would benefit from therapeutic intervention. The claimants claimed £15,000 general damages plus £58,000 in respect of psychiatric and psychological injury. The court awarded a total of £15,000 (£6000 for the parents and £9000 for the four children) taking into account the psychiatric injury and the need for such therapeutic intervention.

15. The Respondent also referred to an English decision in the Administrative Court per Wyn Williams J (**R (AM) v The Chief Constable of West Midlands Police** [2010] EWHC 1228 (Admin)) in which, in respect of a

finding that the defendant was in breach of Article 8 by virtue of an unlawful caution of the claimant which resulted in his being required to register as a sex offender, the sum of £500 was awarded. We do not gain a great deal from this authority, because, although Wyn Williams J referred to **Anufrijeva** and the common ground in that case that damages under the HRA would be modest, the claimant had, in the course of the hearing, agreed to limit his claim for damages to £500.

16. The Tribunal has already concluded that the entry into the Complainants' property on 23 May 2006 was in breach of Article 8, and is satisfied that the finding that the Respondent was in breach of Article 8 in that regard is an important declaration of the infringement of the Complainants' human rights. We have to consider whether, in the context of this case, and in particular in the circumstances of our findings in paragraph 11 above, such a conclusion is, without any accompanying compensation, sufficient to afford just satisfaction. No pecuniary loss is established, and there is no evidence to support any case of distress or anxiety, other than may be capable of being inferred in respect of the Second Complainant, who was present during the 35-minute visit of the officers, believing that they were genuine house purchasers, when in fact their purpose was to further their investigation against her and her husband. The First Complainant was not present. It appears to us that, on consideration of the authorities, this case is far more analogous to **Niemetz** and **Cremieux** than to **Keegan**, which must have involved a very distressing event for the claimants indeed, and had admittedly long term effect. Following the approach of the Court of Appeal in **Anufrijeva**, at para 48, we have had regard to "*the*

extent of the culpability of the [failure to] *act and to the severity of the consequence.*"

17. In our judgment, there should not be any award in respect of the First Complainant, who was not present on the occasion of the officers' visit. We might have awarded the Second Complainant a sum of £500, as she was present and actually deceived by the officers, but as she was claiming benefits on 23 May 2006 on the basis that she was a single person who was living elsewhere, the Tribunal considers that she is precluded from seeking compensation for distress for invasion of her privacy at "home". The Article 8 violation proceeds upon her ownership of the house and no more.

18. As to our other powers under s67(7), we conclude that it is appropriate to quash the authorisation of the surveillance of 23 May 2006, while noting that it was cancelled on 25 May 2006. We also conclude that it is appropriate to order destruction of any notes made of the surveillance of 23 May 2006. These notes were unlawfully obtained and, once that was discovered, were not used in the investigation. They should not continue to form part of the records of the Respondent. There is however no purpose, in our judgment, of taking any further steps in relation to this matter: the investigation of the Complainants' benefits and allowances reached its conclusion, without reliance on the surveillance of 23 May 2006, and we see no purpose in making any further order.

19. The Complainants have asked for their costs. As the Respondent has pointed out, there is an issue as to whether the Tribunal has jurisdiction to award costs. In our decision of **W v Public Authority** Case No IPT/09/134/C, the Tribunal

concluded that, if it had jurisdiction to award costs in favour of the respondent where a claimant withdrew his complaint at a late stage, it would not have exercised such jurisdiction in that case. In this case the Complainants had sought and obtained, at a stage when little cost was incurred, a finding in their favour, and have then proceeded, in a process which has caused the Respondent, properly, to incur costs in defending a claim for £200,000, to recover no financial relief, as concluded by this decision.

20. We do not consider that this is an appropriate case in which to review the issue of whether the Tribunal has a power to award costs in circumstances in which, unlike Rule 10 of the Tribunal Procedure (First-Tier Tribunal) General Regulatory Chamber Rules 2009, there is no express power to award costs in s67(7) of RIPA nor in the Investigatory Powers Tribunal Rules 2000. If we had jurisdiction, we are satisfied that this is not an appropriate case in which we would exercise it. We consequently make no order in respect of costs.

21. The Tribunal concludes that nothing within Rule 6(1) of the Tribunal Rules prohibits the disclosure of any information contained within this judgment, and accordingly this judgment may be published.

Determination:

22. The Tribunal makes a declaration

    i) that the authorisation applied for, and granted, on 22 May 2006, and further acted on by the Respondent on 23 May 2006, did not comply with the requirements of RIPA, and was invalid, and is quashed, and that accordingly the Complainants have been unlawfully subjected to directed surveillance.

ii) That the surveillance which took place on 23 May 2006 was a breach of the Complainants' Article 8 rights to respect for their private life.

23. The Tribunal orders that any notes made of the surveillance of 23 May 2006 be destroyed. No financial or other relief is granted.