

Case Nos: IPT/09/01/C
IPT/09/02/C
IPT/09/03/C
IPT/09/04/C
IPT/09/05/C

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 29 July 2010

Before :

THE PRESIDENT

THE VICE-PRESIDENT

SHERIFF PRINCIPAL JOHN McINNES QC

-and-

MR PETER SCOTT QC

BETWEEN:

Complainants

(1) MS JENNY PATON

(2) C2

(3) C3

(4) C4

(5) C5

and

POOLE BOROUGH COUNCIL

Respondent

MR GORDON NARDELL (instructed by the Legal Director, Liberty) for the
Complainants

MR BEN HOOPER (instructed by Senior Solicitor, Legal & Democratic Services,
Borough of Poole) for the Respondent

Hearing dates: 5 & 6 November 2009

DETERMINATION

A. Notification of determination

1. Under s 68(4) of the Regulation of Investigatory Powers Act 2000 (RIPA) and Rule 13 (2) of the Investigatory Powers Tribunal Rules 2000 (the Rules) the Tribunal shall, where they make a determination in favour of the complainant, give notice to the complainant to that effect and provide the complainant with a summary of that determination including any findings of fact.
2. In the cases of IPT/01/62 and IPT/01/77 the Tribunal decided that the Rules do not, subject to the general duty imposed by Rule 6(1), prevent the Tribunal from notifying and publishing their rulings of law on a complaint.
3. This determination is in favour of the Complainants. It includes the Tribunal's findings of fact and their rulings of law on the complaints. In accordance with the general duty on the Tribunal under Rule 6(1) affecting disclosure of information the Tribunal have duly considered whether the determination discloses any information to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services. The Tribunal are satisfied that the determination does not disclose any such information and that the material findings of fact may be notified to the Complainants consistently with Article 6(1) of the European Convention of Human Rights.

B. The parties and their complaints

4. On 10 February 2009 the Tribunal received 5 Complaint Forms (T2) completed by two adult Complainants and by, or on behalf of, three Complainants who are minors. The complaints, which are in almost identical terms, are made to the Tribunal under s 65 (2) (b) and (4) RIPA.
5. The Complainants are all members of the same family. Their complaints are of unlawful directed surveillance. Three of the Complainants (C3, C4 and C5) are children who were aged between 3 and 10 at the time of the surveillance. Their names have been anonymised to avoid identification. The two adult Complainants, Ms Jennifer Paton and her partner, C2, are their parents. Ms Paton has publicised her complaint in the media. She has not asked for her name to be anonymised. Her children and C2 use a surname different from hers.
6. The Respondent to all the complaints is Poole Borough Council (the Council). It is the local education authority for the area in which all the Complainants ordinarily reside.
7. The essence of the complaints is that, between 10 February and 3 March 2008 inclusive, the Complainants were the victims of unlawful directed surveillance authorised and carried out by the Council. Only after the surveillance had been completed did the Council inform Ms Paton of the operation that had been covertly carried out over the period of 3 weeks.

8. The essence of the Council's response is that the directed surveillance operation was duly authorised under RIPA and was lawful. The Council says that the directed surveillance of the Complainants was necessary for the prevention or detection of crime and that it was proportionate for determining the genuineness of information supplied by Ms Paton to the Council, as the local education authority for the relevant area. That information was about the ordinary residence of the Complainants as at 11 January 2008. Their ordinary residence at that date was stated to be at a property in the catchment area of the particular local education authority school for which Ms Paton had applied for a place for the Complainant C5 from September 2008.

C. The main issue in the case

9. The main issue which the Tribunal have to determine is whether the directed surveillance admittedly carried out by the Council of the activities of each of the Complainants was necessary for the prevention or detection of crime and was proportionate to what was sought to be achieved by carrying it out.

D. Findings of fact

10. As a result of their investigation into and consideration of the complaints the Tribunal find the following facts.

I. The authorisation

11. The circumstances and the terms in which the surveillance operation was

authorised are central to the consideration and determination of the complaints.

12. On 8 February 2008 an application for authorisation of the carrying out of directed surveillance of the Complainants was made and granted. The authorisation was requested under Part II of RIPA by the Head of the Council's Children & Young People's Integrated Services. It was granted by the Council's Head of Legal and Democratic Services. The form used as the application for, and grant of, authorisation was an official Home Office Form. On 17 April 2008 the authorisation was formally cancelled.

13. In describing the purpose of the specific operation the form stated in Box 2 -

“Complaint received by LA [local authority] that applicants for a school place in September 2008 have knowingly used a fraudulent in-catchment area address to obtain a place at the [name of] school. Complainant has given their full name and address.”

14. The surveillance operation for which authorisation was sought was stated to be as follows in Box 3-

“Officer will keep 2 addresses under surveillance to ascertain where applicants are living. Addresses are Property 1 and Property 2... Vehicles used by the family will be observed and may be followed Surveillance may include use of digital camera to record images of persons entering and/or exiting both addresses.”

15. The identities of the subjects of the directed surveillance were stated in Box 4 to be all the Complainants of both addresses Property 1 and Property 2.

16. The information which it was desired to obtain as a result of the directed

surveillance was stated in Box 5 to be-

“Establishing the permanent home address of C5 who is the subject of an application for a school place.”

17. The grounds on which the directed surveillance was necessary under section 28(3) RIPA were identified in Box 6-

“In the interests of national security;

For the purpose of preventing or detecting crime or preventing disorder.”

18. The form did not identify any specific crime to be prevented or detected or any disorder to be prevented. The only potential crime asserted by the Council at the hearing in this Tribunal is an alleged offence by Ms Paton under the Fraud Act 2006, if the information supplied by her to the Council was false.

19. In explaining why this directed surveillance was necessary on the grounds identified it was stated in Box 7 that-

“Parents have supplied a fraudulent address and have informed other people of their intention to do so. Complainant has confirmed that they have been advised that the applicants will be using a fraudulent address to obtain a school place and have used the same address for previous applications for school places.”

20. In explaining why this directed surveillance was proportionate to what it sought to achieve it was stated in Box 9 that the-

“Surveillance is unlikely to be intrusive. Obtaining correct information will enable the LA [local authority] to offer school places to genuine applicants. Evidence cannot be obtained by other means as

applicants are aware of the rules for applying for a school place and have endeavoured to nullify these by providing what is considered to be fraudulent documentation.”

21. The Authorising Officer’s statement on the application form authorised directed surveillance defined in Box 12 in the following terms -

“To prevent the obtaining of a school place using fraudulent information. ... The subjects of the surveillance are the applicants named above and their family..Property 1 and Property 2...Monday 10 February to Monday 3 March 2008. Observation of both premises and the family from vehicles Reg ... and, use of Canon EOS300D Digital Camera. It is to be achieved by observing the day to day movements of the family.”

22. In explaining why the Authorising Officer believed that the directed surveillance was necessary and proportionate to what was sought to be achieved by carrying it out, it was stated in Box 13 that-

“Surveillance is necessary to prevent fraudulent obtaining of a school place. No other way of obtaining accurate information on where family resides on a permanent basis.”

23. The Tribunal find that, in granting the authorisation, the Authorising Officer considered “whether a criminal offence might be being committed.” He took advice on that point from a senior colleague specialising in education law and with experience of cases raising suspicions of fraudulent applications. The Authorising Officer and his senior colleague concluded that, although a prosecution in such circumstances would be unusual and was not certain to follow, the investigation might reveal a criminal offence under the Fraud Act 2006 and that there was the potential for a prosecution to be brought.

24. Account was also taken by the Council of the fact that the relevant Code of

Practice issued by the Department for Children Schools and Families referred to places being obtained “fraudulently”, indicating that such abuse might properly be considered criminal. The Authorising Officer knew that, if abuse were discovered, the offer of the school place in question would be withdrawn.

25. The Tribunal find that the Authorising Officer considered that the directed surveillance was necessary for the purpose of preventing or detecting crime in the sense that the discovery of any abuse might lead to the detection of a criminal offence in circumstances where a prosecution might follow and that this would enable the Council to prevent a school place from being obtained by fraud. It seemed unlikely to the applicant for authorisation and to the Authorising Officer that the true facts could be ascertained without using directed surveillance. It seemed to them that directed surveillance would be a proportionate step.
26. The Tribunal find that there was a factual basis for the Council’s concern about the accuracy of the application for a school place for C5 at the named school and for further investigation by the Council of where the Complainants were ordinarily resident at the relevant date (11 January 2008).
27. The Council’s concern arose from the following matters. It was aware that the preferred school was successful and was oversubscribed. The Council had received two phone calls from members of the public making formal complaints and alleging that the Complainants were not living at Property 1. The first was on 28 January 2008 and the second was on 8 February 2008.

The second formal complaint from a separate source was to the effect that Ms Paton had boasted that she had gained a place at the school by pretending to live at Property 1, which was up for sale and was being advertised as available for rent. That complainant alleged that lights had been left on in Property 1 and that windows were opened to make it look as though the family was living there.

28. The Council records showed that Ms Paton and C2 owned both Property 1 and Property 2, the latter being outside the catchment area for the preferred school. The official documents provided by Ms Paton (her driving licence and vehicle insurance document) in response to the Council's request for documents verifying her home address appeared to confirm that the vehicle was registered at Property 1, but they did not conclusively establish that the Complainants were ordinarily resident at Property 1. Further inquiries showed that, at the schools attended by the children of the family, C3 was recorded as resident at Property 2 and C4 was recorded as resident at Property 1. The phone number for both addresses was the same and was registered at Property 2.
29. There was some urgency in establishing the truth about the Complainants' residence, as offer letters were due to be sent out on 14 March 2008. It was therefore decided to apply for an authorisation under RIPA for directed surveillance.
30. The Tribunal note that the Council's Cabinet has subsequently adopted the recommendation of its Children and Young Persons Overview and Scrutiny

Committee on 28 October 2008 that surveillance should not be used in the schools admissions process. The change of policy does not, of course, bear on the investigation of these complaints or affect the Tribunal's determination of them.

31. There was evidence before the Tribunal that this Council and other local education authorities have to deal with what is seen by many as a growing problem of fraudulent or misleading admission applications by parents, who want the best education for their children, and are determined to secure for them places at successful, over-subscribed schools. Complaints about deception as to residence in the school catchment area, if not properly investigated and dealt with, could potentially undermine the fair administration and integrity of the schools admissions system. The Tribunal were referred to the Report dated 1 October 2009 of the Office of the Schools Adjudicator to the Secretary of State for Children, Schools and Families and to evidence from the Council's Head of Legal and Democratic Services.

II. Complainants' ordinary residence

32. The Tribunal find the following facts about the ordinary residence of the Complainants as at 11 January 2008.
33. Ms Paton supplied information about ordinary residence to the Council in a form *Application for Admission to Reception Class–September 2008*. The form referred to the Council's *Guide to Admission to Schools in Poole 2008/2009* for essential information. The completed application form had to

be returned to the Admissions Team by midday on 11 January 2008.

34. Ms Paton completed the form and dated it 6 January 2008. She signed it below a declaration that

“To the best of my knowledge, the information I have given is correct and complete and this is the only application form I have completed. I will advise the Admissions Team, in writing, of any changes to the information on this form. I understand that the provision of incorrect information could lead to the withdrawal of the offer of a school place....”

35. The form said nothing about possible prosecution or criminal penalties for the provision of incorrect or incomplete information or the completion of more than one application form.

36. The application giving Property 1 as C5’s home address was for an “in catchment” reception place for C5 at a school in Poole in September 2008. To qualify for the September 2008 entry the child C5 had to reside in the catchment area of the named school as at 11 January 2008. That was the cut-off date. One of the Complainants (C4) was already at that school. The Complainant C3 was formerly a pupil at that school.

37. From 2005 Ms Paton and C2 owned 2 residential properties in Poole. Property 1 was purchased in 1998. It was inside the school catchment area. Property 2 was purchased in 2005 as an investment property. It was outside the school catchment area. It consisted of 2 flats. The Complainants occupied Property 2 sporadically between 2005 and 2008. The Complainants lived in Property 2 for 6 months between October 2006 and April 2007, while Property 1 was

rented out to fund the cost of future refurbishment of Property 2. In September 2007 the Complainants moved back into Property 1 after Property 2 was burgled. While living in Property 1 Ms Paton visited Property 2 every day, as she ran a small mail order business from there. She needed to deal with builders and tradesmen while it was being refurbished.

38. In October 2007 Ms Paton and C2 put Property 1 on the market. Offers to buy were received, but, for various reasons, did not result in a sale. The Complainants finally moved from Property 1 to Property 2 in 2008 after the place for C5 was secured and before the September start date at the school. Property 1 was let.
39. When asked by the Council at the end of January 2008 to verify the home address given by her Ms Paton supplied the Council with her driving licence and a vehicle insurance certificate.
40. There was no evidence that, prior to the authorisation, the Council sought to interview Ms Paton or C2, or to visit either of the Properties, or to make any other inquiries in the locality of the Properties in order to discover where the Complainants ordinarily resided at the relevant date. The Council did not invite Ms Paton and C2 to an interview until it sent a letter addressed to Property 1 dated 6 March 2008. That was after the surveillance operation was completed. The letter informed them that the Council was minded to treat the application as though they were out of the catchment area.
41. A meeting with the Council took place on 18 March 2008. There was a

discussion about the Complainants' residential arrangements. At that meeting Ms Paton and C2 were told about the surveillance. They were given a copy of a report on the surveillance dated 4 March 2008.

42. Following completion of its directed surveillance operation and its investigations the Council concluded, on balance, that at 11 January 2008 the Complainants had been ordinarily resident at Property 1 in the catchment area of the preferred school. C5 was offered a place at the preferred school on 14 March 2008. It was accepted on 28 March 2008. At about the beginning of March 2008 the Complainants had begun to move out of Property 1 to live in Property 2.

III. The surveillance operation

43. The surveillance was undertaken by an education officer employed by the Council. He conducted the surveillance from within a vehicle, usually by driving past one or other of the Properties in order to see whether the Complainants' car was present, or whether the Properties were being used. As evidenced by his report dated 4 March 2008, surveillance of the Complainants, of Property 1 and of Property 2 and of target vehicles began at 0805 hours on Sunday 10 February 2008. Part of the period following was the school half term. From that date to the end of surveillance on 3 March 2008 daily visits were made by the education officer to Property 1 and to Property 2.
44. On some occasions the surveillance involved doing something more than

driving past the Properties. On one day (29 February 2008) the target vehicle driven by Ms Paton with children as passengers was followed from Property 2 along 10 named roads to a school. On other occasions the surveillance was conducted from a parked car in order to watch who was getting in or out of the Complainants' car. During the period of the surveillance the target vehicle was only once identified as being in the location of Property 1. At all other times it was located in the driveway of Property 2. No digital camera or recording equipment of any kind was actually used in the surveillance.

45. The Council education officer, who carried out the surveillance, stated in his report that in his opinion “the family’s home address (defined in the admissions booklet as the address at which he/she is ordinarily resident during term time) is Property 2, and not Property 1”

E. Tribunal rulings on the determination of the complaints

46. In making this determination the Tribunal exercised the jurisdiction, followed the procedure and applied the statutory provisions in RIPA and the Rules.

I. Tribunal jurisdiction, procedure and role

47. The parties were agreed (and the Tribunal confirmed) that there is jurisdiction in the Tribunal to hear and determine the complaints. The effect of s 65 (2) (b), (4), (5), (7) and (8) of RIPA is that the Tribunal is the appropriate forum for the complaints, because the Complainants are aggrieved by conduct which falls within Part II of RIPA (Surveillance). They believe the surveillance to have taken place in relation to them “in challengeable circumstances”,

meaning that it took place with the purported authority of the authorisation under Part II of RIPA granted on 8 February 2008.

48. The parties were agreed (and the Tribunal directed) that there should be an inter partes public hearing of the complaints. There was no risk of disclosure of information prejudicial to national security or contrary to protected aspects of the public interest. It was not considered necessary to hear any oral evidence from the Complainants or from the Council in order to find the relevant facts or to determine the complaints.
49. In exercising their jurisdiction the duty of the Tribunal, as the appropriate forum, was to investigate whether the Council had engaged, in relation to the Complainants, in any conduct falling within section 65(5)(d) (“conduct to which Part II applies”); to investigate the authority (if any) for the directed surveillance carried out by the Council; to consider whether the circumstances were such that (whether or not there was 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; and, in the light of their findings of fact, to determine the complaints by applying the same principles as would be applied by a court on an application for judicial review: s 65 (7) and s 67(3) RIPA.
50. The jurisdiction of the Tribunal is not by way of an appeal from the decision to grant an authorisation for the carrying out of directed surveillance, or from the decision to carry it out. Nor is it a re-determination of the application for authorisation. The investigation is into the circumstances and the lawfulness

of the grant of authorisation for the carrying out of directed surveillance and of the conduct falling within s65(5) which has been so engaged in.

II. Directed surveillance

51. The Council accepts (and the Tribunal so rule) that the surveillance in this case was “directed surveillance” within Part II s 26(2) RIPA. It was covert; it was undertaken for the purposes of a specific investigation (i.e. into the ordinary residence of the Complainants at the relevant date); and it was undertaken in a manner likely to result in the obtaining of private information about the Complainants.

III. Authorisation

52. Directed surveillance within Part II RIPA is lawful for all purposes, if an authorisation under Part II confers an entitlement to engage in that conduct on the person whose conduct it is and his conduct is in accordance with the authorisation: s27(1) of RIPA.
53. In the case of the Council the person designated with power to grant authorisations for the carrying out of directed surveillance was the Assistant Chief Officer, Assistant Head of Service, Service Manager or equivalent: Schedule 1 Part 1, as inserted by Article 2 of the 2003 Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order.

54. An authorisation for the carrying out of directed surveillance under Part II shall not be granted unless the person granting it believes (a) that the authorisation is necessary on specified grounds (in this case “for the purpose of preventing or detecting crime or of preventing disorder”) and (b) the authorised surveillance is proportionate to what is sought to be achieved by carrying it out: s 28(1) and (3) (b) of RIPA.
55. Before dealing specifically and separately with each of the cumulative criteria for the grant of an authorisation (i.e. permissible purpose, necessity and proportionality) four features of the authorisation granted on 8 February 2008 are noted. Those four features are relevant to whether, as the Complainants contend, the authorisation was granted on the wrong basis and on an erroneous view of the facts to be determined by the surveillance; whether proper consideration was given to the criteria to be applied in a decision to grant an authorisation; and to whether the authorisation or the circumstances were such that it would not have been appropriate for the surveillance to take place without authority.
56. First, the application for the authorisation asserted as a fact that the information and documentation supplied to the Council was “fraudulent.” The purpose of the surveillance was to discover whether or not that was the fact.
57. Secondly, at two points in the authorisation reference is made to the “permanent” home address or residence of C5. “Ordinary residence” is the correct test to be applied by the Council for schools admissions. “Permanent

home” and “ordinary residence” are not the same. The former is not the correct test of eligibility for admission to the preferred school.

58. Thirdly, unusually the authorisation was for the surveillance of an entire family, including three young children. Each individual, whether adult or minor, is entitled to Article 8 rights and to separate consideration whether the criteria for the grant of authorisation for directed surveillance are satisfied. It is not apparent from the authorisation or from the Council’s evidence that such consideration was given to the case of each Complainant. If proper consideration had been given to the situation of each individual target of the surveillance it might well be that authorisation would never have been granted for any of the children and the surveillance of them would never have taken place. None of the children were believed to have committed or were threatening to commit any crime or disorder.
59. Fourthly, it is agreed that the relevant date at which to determine “ordinary residence” was 11 January 2008, not the 8 February 2008 when the application for authorisation was made and granted. The relevant date had passed before the authorisation was given. Proper consideration was not given to the fact that what had to be determined by the surveillance was ordinary residence at the historic date of 11 January rather than during the period of the surveillance. If proper consideration had been given to that fact alone and the proper question had been addressed, the application for authorisation might never have been granted and the surveillance might never have taken place.

IV. Permissible purpose

60. The first question relating to authorisation of the directed surveillance of the Complainants is: for what purpose was the authorisation sought and granted for directed surveillance of the Complainants?

61. The Council contends that the authorisation of directed surveillance of the Complainants was “for the purpose of preventing or detecting crime” and that the possibility of an offence under the Fraud Act 2006 was considered before the authorisation was granted. It was argued at the hearing that s2 of the Fraud Act 2006, read with ss1 and 5, was capable of covering the case of giving false information to the Council to secure a school place. The Tribunal do not consider that it is necessary or appropriate for them to reach a concluded view on the scope of that provision, or on its application to the circumstances of this case or to other cases of this kind. No other possible crime or offence was identified which could have rendered directed surveillance necessary for the purposes of preventing or detecting crime.

62. The Complainants contend that the sole or predominant purpose of the surveillance was to implement, maintain and enforce the catchment area element of the Council’s schools admissions policy, which is not expressed in the application form or the booklet to be supported by a criminal sanction. The only effective sanction threatened and in fact applied for misinformation was denial or withdrawal of a place at the school. There was no evidence from the Council of any real intention or likelihood of it prosecuting the target of the

surveillance for an offence against the general criminal law. There was no warning or caution given about the possible commission of a criminal offence by supplying incorrect information, no evidence of any instance of the Council bringing or even threatening to bring a criminal prosecution. The surveillance itself rather than the threat of a prosecution, was used by the Council for the purpose of deterring parents from obtaining school places by giving false addresses.

63. The Tribunal's determination is that the Council has not established that this directed surveillance of the Complainants was for the purpose of preventing or detecting crime. The evidence shows that the Council's purpose, in the circumstances of this case, was to detect whether the Complainants were, as Ms Paton informed the Council, ordinarily resident in the catchment area of the preferred school and, if they were not, to prevent C5 from taking up a place at that school. The Tribunal accept that the Council was not seeking to use surveillance to create a secret database of information. But, as the Council asserted in its evidence to the Tribunal, the surveillance was used "to obtain evidence that could be put to the parents concerned to challenge their claims."

64. As for the prevention or detection of crime, no specific crime was identified in the application for authorisation or in the grant of it, though that would not necessarily render the authorisation invalid if it was reasonably clear what sort of criminal offence might be prevented. More important there was no consideration as to whether there was or needed to be any evidence of any actual or potential criminal offence of any kind by the 3 children or their father, yet they were all put under surveillance. As for Ms Paton, the Council

has not established that, even if the information supplied to the Council by her about their ordinary residence was false (which it accepts it was not), that could have amounted to a criminal offence, or to a reasonable belief that such an offence was or would be committed under the Fraud Act 2006, that being the only possible source of criminal offence that was considered when the authorisation was granted.

65. The Tribunal's determination on this point relates to the particular facts of this case and the arguments on the possible application of the Fraud Act 2006 advanced to the Tribunal. This determination is not conclusive of the point of the permissible purpose of directed surveillance in all circumstances or for all time. In another case the facts may be found to be different from this case so as to fall within, or be reasonably believed to fall within, the provisions of the Fraud Act 2006; there may be new arguments on the possible application of the criminal law; or there may have been legislation creating new criminal offences committed by making knowingly false or misleading statements for the purpose of obtaining a school place.

V. Necessity

66. The second question is: did the person granting the authorisation believe that authorisation of directed surveillance of the Complainants was necessary on the ground of preventing or detecting crime?
67. The Complainants contend that authorisation of directed surveillance of them could not reasonably have been believed to be necessary (and was not

necessary) on the specified grounds.

68. This contention applies with particular force to the 3 Complainants who are minors. There was no consideration whether it was necessary to put them under surveillance in order to prevent or detect a crime by their mother in supplying allegedly false information to the Council about their ordinary residence. The Tribunal conclude that there should have been.
69. Nor was there any evidence that the Council had, prior to authorisation of directed surveillance as being reasonably believed to be necessary, considered whether measures other than covert surveillance were feasible and sufficiently effective to enable admissions information to be verified when suspicions were aroused following the inquiries referred to in paragraph 28 above. The Tribunal conclude that consideration should have been given to such measures prior to authorisation.

VI. Proportionality

70. The third question was: did the person granting the authorisation believe that the authorised surveillance was proportionate to what was sought to be achieved by carrying it out?
71. The Complainants contend that the surveillance purportedly authorised could not reasonably have been believed to be proportionate (and was not proportionate) to what was sought to be achieved by carrying it out.

72. The points made on behalf of the Complainants are that the Article 8 right was a fundamental one; that the public interest in this case in preventing or detecting the giving of a false address to the Council to gain a school place was not of a high order and was not a pressing social need; the surveillance measures designed to attain the objective were not rationally connected to it involving the use of means that were disproportionate, extending over a period of 22 days and including children as targets and intrusion extending to residential premises and a private vehicle over the half term holiday and weekends; and that the relevant date for determining the ordinary residence of C5 had already passed when the authorisation was granted and the surveillance was carried out .
73. The Tribunal have concluded that the surveillance was not proportionate and could not reasonably have been believed to be proportionate. No consideration was given and no allowance was made in the setting of conditions of the surveillance for the fact that 3 of the targets were young children who were not believed to be parties to a suspected crime. The suspected crime could be prevented or detected without the children themselves being made targets of the surveillance.
74. Points have also been made about other measures that the Council could have taken to investigate the ordinary residence of the Complainants and establish the facts, such as visits to Property 1 and Property 2 and interviews of Ms Paton and C2. The Council did not appear to have considered them. The Tribunal would not, however, conclude that the grant of authorisation was

disproportionate for that reason. In addition to receiving two complaints from named persons by phone, the Council had requested production of documentary evidence and made other inquiries which had not conclusively established and, indeed, had left some doubt about, the ordinary residence of the Complainants.

75. It follows from the Tribunal's determination of the above points that the Council is not entitled to rely on the authorisation granted on 8 February 2008 to justify the lawfulness of the admitted directed surveillance.
76. A number of other arguments are advanced on behalf of the Council to the Tribunal in order to justify the surveillance. These are briefly dealt with below.

VII. Other points

Local Government Act 1972

77. The Council contend that, to justify the directed surveillance, it could rely on (a) s 111 of the Local Government Act 1972, whereby "a local authority shall have power to do any thing...which is calculated to facilitate, or is conducive to, the discharge of any of their functions"; and (b) paragraphs 1.50 and 1.51 of the School Admission Code issued pursuant to s84 of the Schools Standards and Framework Act 1998, whereby it may be reasonable for an admission authority to withdraw an offer of a school place in very limited circumstances, including "when...the admission authority offered the place on the basis of a

fraudulent or intentionally misleading application from a parent (for example, a false claim to residence in a catchment area)”.

78. That contention would, however, be met by the provisions of Article 8 under which the Council would have to show that the directed surveillance was necessary for the purpose of the prevention or detection of crime or that it was necessary for “the protection of the rights and freedoms of others” *and* was proportionate. The Council would be in no better position as, for the reasons already given, it is unable to establish that the surveillance carried out was necessary for the permitted purpose or was proportionate.

***R(SB) v. Governors of Denbigh High School* [2007] 1 AC 100**

79. The Tribunal do not accept the submission on behalf of the Council that they should reject the complaints on the authority of the decision of the House of Lords in *Denbigh High School*. The contention is that the outcome of the directed surveillance was not a breach of the Complainants’ Article 8 rights and that the complaints should not therefore be determined in the Complainants’ favour. That should be the result, even if the Tribunal found that the Council had not complied with procedures laid down in RIPA for the grant of authorisation of the directed surveillance.

80. The Tribunal do not accept that contention for three reasons.

81. First, RIPA lays down specific criteria and procedures in s28 in Part II of RIPA for the grant of an authorisation for the carrying out of directed

surveillance. Under s67(3)(b) the duties of the Tribunal expressly include an investigation into the authority for the conduct engaged in. In considering and determining the complaints the Tribunal are not simply concerned with whether the outcome of the directed surveillance is a breach of the Complainant's Article 8 rights. They are concerned with the investigation and determination of complaints of alleged non-compliance with RIPA procedures for obtaining and granting authorisation

82. Secondly, the approach requiring attention by the Tribunal to compliance with the criteria and procedure for authorisation of surveillance is consistent with the provision in s65(7)(b) RIPA that the "challengeable circumstances" in which conduct to which Part II applies take place include circumstances "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."
83. Thirdly, the *Denbigh High School* approach does not assist the Council in this case. In that case the only relief sought from the courts was in relation to the outcome and not for alleged breaches of procedure.
84. If, however, the determination of the complaints is only by reference to the outcome of the conduct complained of, the outcome in this case is that the Complainants' Article 8 rights were in fact breached for the reasons already given.

VIII. Article 8 ECHR

85. In the absence of a valid authorisation under RIPA the Complainants contend that the Council, as a public authority, has interfered with the Complainants' rights under Article 8 of the Convention. It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

86. Article 8 provides that

“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.”

87. On the basis of the facts found by the Tribunal the Complainants contend that the directed surveillance by the Council was planned, clandestine and involved the gathering and recording of what was observed. It was not necessary in pursuit of the legitimate aim of the prevention or detection of crime nor was it proportionate. There was no justification for it.

88. The Council's position is that the directed surveillance was not unlawful under English law; that the authorisation of it, even if unlawful, did not of itself render the activity itself unlawful (see the saving provision in s 80 RIPA); and that RIPA has not rendered the surveillance in this case unlawful.

89. The Council also makes the general point that, as a local education authority, it had power to investigate suspected abuse of the schools admission system and that power was broad enough to include the limited directed surveillance undertaken in this case.
90. As for the Article 8 point the Council contends that there was no violation of the right to respect for private life. The surveillance was limited. The log was created to provide evidence to put before the Complainants, not for long term storage on a database.
91. The Council also contends that the minimal level of interference was justified for the protection of the rights and freedoms of others referred to in Article 8 (2) and was in accordance with law.
92. On this point the Tribunal refer to the detailed findings and rulings above and, in the light of them, have concluded that the Council has acted in a way which is incompatible with the Complainants' Article 8 rights.

IX. Determination of form of relief

93. The Tribunal make a determination in favour of the Complainants on their complaints of directed surveillance by the Council. Notwithstanding the limited nature of the surveillance, there was, in relation to each of the complainants, a breach of his or her Article 8 right to respect for private life.
94. As invited by the Complainants, the Tribunal consider that, on the application

of judicial review principles to the facts found, it is appropriate to make the following order under s67(7) and s68(3) RIPA:

(1) A declaration that (a) the authorisation applied for and granted on 8 February 2008 and acted on by the Council did not comply with the requirements of RIPA and was invalid; and (b) the Complainants have been unlawfully subjected to directed surveillance;

(2) That their findings and their determination be published.

(3) That their full findings and determination be sent to the Chief Surveillance Commissioner for information, the Office of Surveillance Commissioners having made an Inspection Report dated 26 June 2008 (Assistant Commissioner HH Lord Colville of Culross).

95. The Complainants do not ask the Tribunal to make any pecuniary award in their favour.