[2019] UKIPTrib IPT_17_191_C

Case No: **IPT/17/191/CH**

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 5 February 2019

Before:

LORD JUSTICE SINGH, PRESIDENT
PROFESSOR GRAHAM ZELLICK CBE QC
and
MR DESMOND BROWNE QC

- -

Between:

AB	**Claimant**
- and -	
Hampshire Constabulary	**Respondent**

- -
- -

The Claimant and Respondent did not appear and were not represented
Rosemary Davidson (instructed by **the Government Legal Department**) as **Counsel to the Tribunal**

Hearing date: 18 January 2019

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Approved Judgment

Lord Justice Singh:

Introduction

1. This is the judgment of the Tribunal on a preliminary point of law which has arisen in this complaint under section 65 of the Regulation of Investigatory Powers Act 2000 ("RIPA"). The issue which the Tribunal has to determine is whether the conduct alleged in that complaint is capable of amounting to "surveillance" within the meaning of Part II of RIPA. The conduct complained of consisted of the recording of a meeting with the Complainant (AB) at his home in circumstances where a police officer's body worn camera was switched on but the Complainant was not informed that it was on.

2. Both the Complainant and the Respondent informed the Tribunal that they would not be attending this open hearing. At the invitation of the Tribunal, the Surveillance Camera Commissioner served written submissions, for which we are grateful. In addition the Tribunal is grateful for the assistance which it has received from Counsel to the Tribunal (Ms Rosemary Davidson), who made written submissions and also appeared at the hearing before us.

Factual Background

3. On 28 November 2017 AB reported a burglary at a non-residential property owned by him. On the following day officers from Hampshire Constabulary made an unannounced call at his home address (which was not the location at which the burglary had occurred) to inform him that they would not be investigating the offence reported by him. It was only after the officers had been in AB's home for some time that he was informed that one of the officers' body worn cameras was switched on and was recording the interview.

Material legislation

4. Part II of RIPA applies to "surveillance", which is either "directed" or "intrusive". An essential element of both forms of surveillance is that they are "covert".

5. Section 26(2) defines "directed surveillance" as follows:

> "… 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 a manner is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); and

> (c) otherwise than by way of an 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." (Emphasis added)

6. Section 26(3) defines "intrusive surveillance" as follows:

> "Surveillance is intrusive for the purposes of this Part if, and only if, it is *covert* surveillance that –
>
> > (a) is carried out in relation to anything taking place on any residential premises or in any private vehicle; and
> >
> > (b) involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device."

7. Section 26(4)-(6) defines conduct which is not "directed" or "intrusive" within the meaning of the Act.

8. Section 48(2) provides that, subject to the exceptions in subsection (3) – which does not apply on the facts of this case –

> "'surveillance' 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 surveillance; and
> >
> > (c) surveillance by or with the assistance of a surveillance device."

Relevant guidance

9. The Home Office has issued guidelines on: 'Covert Surveillance and Property Interference, Revised Code of Practice' (2018). At para. 3.40, this states:

> "The recording, whether overt or covert, of an interview with a member of the public where it is made clear that the interview is entirely voluntary and the interviewer is a member of a public authority [does not constitute either directed or intrusive surveillance]. In such circumstances, whether the recording

> equipment is overt or covert, the member of the public knows that they are being interviewed by a member of a public authority and that information gleaned through the interview has passed into the possession of the public authority in question."

10. The Office of Surveillance Commissioners ("OSC") issued guidance in a document dated 20 July 2016: 'Procedures and Guidance: Oversight Arrangements for Covert Surveillance and Property Interference Conducted by Public Authorities and to the Activities of Relevant Sources'. At para. 141 this guidance referred to the decision of the IPT in *Re A Complaint (24 July 2013)* for the proposition that the covert making of a "voluntary declared interview" in the course of investigation or operation is not surveillance within the meaning of Part II of RIPA.

11. That was a reference to the decision of this Tribunal in *Re a Complaint of Surveillance* (IPT/A1/2013); [2014] 2 All ER 576. That was a decision of a five-member panel of this Tribunal, including the then President (Mummery LJ) and Vice-President (Burton J). We will return to consider that judgment in more detail below.

12. That decision was applied by Ouseley J in *R (Butt) v Secretary of State for the Home Department* [2017] EWHC 1930 (Admin), at para. 268.

13. There are other decisions of this Tribunal to which our attention has been drawn by Counsel to the Tribunal, including *Vaughan v South Oxfordshire District Council* (IPT/12/28/C).

The Respondent's submissions

14. In correspondence with the Tribunal the Respondent has set out its position that the conduct complained of does not amount to "covert surveillance" within the meaning of section 26(9) of RIPA, because the body worn cameras were in full view and there was no evidence that surveillance was carried out in a manner calculated to ensure that the subject was unaware that it was, or may have been, taking place.

The submissions of the Surveillance Camera Commissioner

15. The written submissions of the Surveillance Camera Commissioner (which are undated but were served on 20 December 2018) may be summarised as follows:

    (1) Police body worn cameras are capable of being a surveillance camera system within the meaning of the Protection of Freedoms Act 2012; and the overt use of such a camera in a public place in England and Wales would fall within the Surveillance Camera Code of Practice.

    (2) Covert surveillance by public authorities is not covered by that Code but is regulated by RIPA. The Commissioner noted that the question whether the use of body worn

cameras in the circumstances of this case amounts to surveillance is therefore a matter for this Tribunal.

(3) Body worn cameras are usually worn on a clip fitted to the chest of the user and the Commissioner's advice to the National Police Chiefs Council was that:

> "All [body worn camera] equipment must be so marked with a flashing warning light and a visible written notice that video surveillance was in operation".

The submissions by Counsel to the Tribunal

16. Counsel to the Tribunal submits that there remains a possible basis upon which the decision in *Re A Complaint* might be distinguished in the present context. That is, if the body worn camera was activated in AB's home for some other purpose, which itself amounted to an act of surveillance, separate from the act of interviewing AB.

17. Counsel submits that, initially, the Respondent had provided no explanation to the Tribunal as to why the body worn camera was turned on prior to the interview. She points out that, as the Surveillance Camera Commissioner has noted, it is difficult to understand why any user would wish to utilise a body worn camera when interviewing the owner of premises that have been subject to an attempted break in.

18. As the Tribunal found in *Vaughan*, when considering whether or not conduct amounts to surveillance, it is necessary to consider both the purpose of the monitoring or observation and the manner in which it was carried out. The Tribunal said something similar in *Re A Complaint*, when it rejected the submission that every act of observing or listening to persons amounts to surveillance regardless of its purpose: see para. 44.

19. Counsel observes that the relevance of the purpose of the monitoring is also recognised in the Home Office guidelines, which note that the overt use of CCTV does not usually require authorisation under RIPA but it may do so where the cameras are used in a covert pre-planned manner that goes beyond their intended purpose for use in the general prevention or detection of crime or protection of the public: see para. 3.39.

20. In a response to a direction issued by the Tribunal on 10 January 2019, dated 16 January 2019, the Respondent has provided information received from the officer concerned:

> "… My justification … is that before attending the address I was warned by my sergeant and members of the Lymington neighbourhood's team that AB was renowned for making complaints against the police on a regular basis. For this reason I also attended the incident with another colleague to ensure that anything said was witnessed. At no point had I operated the Body Worn Video device for surveillance purposes, it was to record the interaction between myself and AB."

21. In the same response it is not denied on behalf of the Respondent "that there was a failure by the officer to inform AB that he was being recorded but notwithstanding this error by the officer which has been dealt with, the use of BWV in light of the information available to the officer was justifiable under the Policy." The Respondent relies on a copy of the procedure for BWV "incident recording".

22. Counsel to the Tribunal also makes reference to Article 8 of the European Convention on Human Rights ("ECHR"), which is one of the Convention rights set out in Sch. 1 to the Human Rights Act 1998 ("HRA").

23. Article 8 was not found to be engaged on the facts of *Re A Complaint*.

24. Counsel to the Tribunal suggests that it does not arise in the present case either and that it may be preferable for this Tribunal to leave the issue to be addressed in a future case where Article 8 is engaged and there has been a deliberate use of a BVC to covertly record a voluntary declared interview.

25. Finally, Counsel to the Tribunal notes that the failure to declare use of the camera in this case is said to have been unintentional and this may be relevant to the question whether any surveillance was "carried out in a manner that [was] calculated to ensure that persons who are subject to the surveillance were unaware that it [was] or maybe taking place", so as to meet the statutory definition of "covert" in section 26(9) of RIPA. However, as Counsel observes, this issue would only arise if the Tribunal first found that the use of the camera in this case was capable of amounting to "surveillance". That is the only issue which the Tribunal has to decide at this stage.

The decision of this Tribunal in *Re A Complaint of Surveillance*

26. In *Re A Complaint of Surveillance* this Tribunal addressed the following preliminary legal issue: whether the covert recording of a "voluntary declared interview" of the complainant amounts to "surveillance" for the purposes of Part II of RIPA.

27. At para. 51 of its judgment the Tribunal made the following declaration:

> "The Tribunal declares that the covert making of a recording of a 'voluntary declared interview' of the complainant in the course of an investigation or operation is not 'surveillance' within the meaning of Part II of the Regulation of Investigatory Powers Act 2000."

28. The reasoning of the Tribunal is set out in paras. 41-50 and can be summarised as follows.

29. First, it would not be correct to read section 48(2) of RIPA as providing a comprehensive definition or description of surveillance itself, as distinct from the various ways in which it may be conducted. The Tribunal noted that (i) section 48(2) uses the non-exhaustive word "includes"; and (ii) it refers to "surveillance" as if it had

a meaning independently of the provisions of paragraphs (a), (b) and (c) to which it is made subject.

30. Secondly, in the absence of a statutory definition, the correct approach must be to regard "surveillance" as bearing the meaning that it has in ordinary English usage. That said, we would note that the Tribunal do not make reference to any English dictionary for this purpose. In any event, the Tribunal said that the "essential meaning" of "surveillance" is "a covert intelligence gathering activity."

31. Thirdly, the Tribunal rejected the contention that, regardless of the purpose, nature or circumstances of the intelligence gathering activities in question, every act of "observing or listening to persons", their conversations or communications is automatically to be treated as surveillance. As a matter of ordinary English usage, the awareness and participation of the interviewee in the process of the voluntary declared interview means that no surveillance of the interviewee by the interviewer is involved. As the Tribunal concluded on this point, at para. 45:

> "… A person is not being subject to an intelligence gathering activity if he knows what is going on and voluntarily engages in that process."

32. Fourthly that conclusion was consistent with the purpose and context of Part II of RIPA. That purpose was to afford protection for the private lives of citizens from unjustified intrusion by the state within the framework established by Article 8 of the ECHR. The Tribunal noted that RIPA came into force on the same day as the HRA: 2 October 2000. The Tribunal was of the view that the awareness and participation of the interviewee in the voluntary declared interview mean that the activity does not fall within the scope of Article 8. As the Tribunal put it at para. 47:

> "… The interviewer is simply asking questions, listening to the answers given by the interviewee and observing the interviewee. A record of the questions and answers made by the interviewer, either manually or by a device, in the course of the voluntary interview could not, for the same reason, reasonably be regarded as an infringement of Article 8 rights. …"

33. Finally, since the interviewer in a voluntary declared interview was not engaged in surveillance of the interviewee, the recording of that interview was not observing or listening "in the course of surveillance" within the meaning of section 48(2)(b) of RIPA. The Tribunal put it thus at para. 50:

> "… The making of the recording only involves the recording process itself. It does not involve a separate act of 'observing or listening to' the person being interviewed."

34. We assume it was only an audio recording since there is no reference made in the judgment to it being a video recording.

35. In our view, it is clear from the above summary of this Tribunal's analysis in *Re A Complaint of Surveillance* that the recording in that case was simply no more than a substitute for a person's writing down notes of an interview. Since the interview itself was entirely voluntary, and since the recording was not a "separate act" of observing or listening, the Tribunal concluded that what happened in that case did not fall within the meaning of "surveillance" for the purposes of Part II of RIPA.

Our analysis of the present case

36. In our view, the facts of the present case are materially distinguishable from *Re A Complaint of Surveillance* in several ways.

37. First, this was a video recording and not merely an audio recording of what someone said. While the latter could be regarded as being no more than a substitute for a police officer's written notes, we think that a video recording does more than that. It not only records the physical attributes of the person speaking, it may and probably will also capture whatever else may be in view in the surrounding environment. Although it can be said that the body worn camera does no more than record what the police officer wearing it can see anyway, in our view it is a much greater intrusion to have something which is recorded permanently and could be viewed by others much later on.

38. We are supported in that view by decisions of the High Court and Court of Appeal in the context of privacy. In *Theakston v Mirror Group Newspapers* [2002] EMLR 398 Ouseley J restrained publication of photographs of the claimant in a brothel, but not a verbal account of what took place. In *Hyde Park Residence v Yelland* [1999] EMLR 654 Jacob J said that "a picture says more than a thousand words". The same point was made by the Court of Appeal in *Douglas v. Hello* [2001] QB 967, at para. 165: "The photographs conveyed to the public information not otherwise truly obtainable, that is to say, what the event and its participants looked like … The same result is not obtainable through the medium of words alone … ."

39. Secondly, the recording in the present case took place in the home of AB. That does therefore give rise to Article 8 considerations, since Article 8 protects not only the right to respect for private life but also the home. Furthermore, without speculating on the facts, it would not be unusual, for example, for a person to have things like family photographs in the room where the recording takes place at their home. Even if there were no such private material which was recorded, the simple fact of the inside of their home being recorded, in our view, constitutes an activity which falls within the scope of Article 8. That again helps to distinguish this case from *Re A Complaint of Surveillance*, where this Tribunal expressly held that the facts did not fall within the scope of Article 8.

40. Our view in this regard again derives some support from decisions of the High Court and Court of Appeal in the context of privacy law. In *McKennitt v Ash* [2006] EMLR 10, at para. 135, Eady J protected as private a written description of the claimant's home. He pointed out Article 8(1)'s express reference to respect for the home: "even

relatively trivial details would fall within this protection simply because of the traditional sanctity accorded to hearth and home". The case went to the Court of Appeal: [2008] QB 73, which approved the Judge's approach. The décor, the layout and even the state of cleanliness were all regarded as within the scope of the protection.

41. Thirdly, it must be recalled that what this Tribunal was considering in *Re A Complaint of Surveillance* was the concept of a "voluntary declared interview". As the Tribunal itself said, the purpose for which the recording takes place is relevant in assessing whether it constitutes "surveillance".

42. In the present case, what took place at AB's home was not an interview at all. The reason why the officers went to his house was not to ask any questions but to inform him that they were not going to investigate the reported non-domestic burglary which he had reported to them. Furthermore, it is clear from the evidence which has been filed by the Respondent (dated 16 January 2019) that the justification which was given by the officer concerned was as follows (which we repeat here for convenience):

> "… Before attending the address I was warned by my sergeant and members of the Lymington Neighbourhood's Team that AB was renowned for making complaints against the Police on a regular basis. For this reason I also attended the incident with another colleague to ensure that anything said was witnessed. At no point had I operated the body worn video device for surveillance purposes, it was to record the interaction between myself and AB."

43. In our view, with respect, it is not for the officer concerned to decide whether he was using the device for "surveillance purposes": that is a matter for this Tribunal. The fact is that it was not to record an interview, as was the case in *Re A Complaint of Surveillance*. Rather it was, it would seem, to record by way of anticipation anything that might happen, in other words the behaviour (possibly anticipated misbehaviour) of AB.

Conclusion

44. For the above reasons we have come to the conclusion that the video recording in this case was capable of amounting to "surveillance" for the purposes of Part II of RIPA.

45. Having decided that preliminary issue of law, this Tribunal will continue with its investigation of these matters after due liaison with the parties.