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Case No: **IPT/19/181/CH**
IPT/20/31/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 11 May 2022

Before:

LORD BOYD OF DUNCANSBY (VICE PRESIDENT)
SIR RICHARD MCLAUGHLIN
PROFESSOR GRAHAM ZELICK Q.C.

BETWEEN:

(1) SALLY BARTRAM
(2) STEVEN JAMES HOWE

Claimants

- and -

(1) THE CHIEF CONSTABLE OF BRITISH TRANSPORT POLICE

Respondents

James Berry (instructed by **Simons Muirhead Burton, Solicitors**) for the Respondents
Rosemary Davidson appeared as Counsel to the Tribunal

Hearing date : 10 March 2022

OPEN JUDGMENT

RULING on JURISDICTION

Sir Richard McLaughlin, with whom Lord Boyd of Duncansby agrees:

1. Mr Howe and Ms Bartram have each brought a complaint and a human rights claim in accordance with s. 65(2) of the Regulation of Investigatory Powers Act 2000 (RIPA) and the Investigatory Powers Tribunal Rules 2018. The proceedings were commenced initially by the submission to the Tribunal of forms T1 and T2 by Ms Bartram, both dated 23 September 2019. Mr Howe submitted his forms T1 and T2 on 29 February 2020. Although the papers of Ms Bartram were submitted first, the claim and complaint of Mr Howe were the central focus of the relevant events and therefore his complaints shall be dealt with as the lead case.
2. Both sets of forms were submitted outside the time limit of 12 months for the bringing of such claims and complaints but the explanations for same, not relevant to this matter, were accepted as reasonable; consequently the Tribunal considered it equitable to allow them to proceed and leave was granted to enable them to do so.
3. The proceedings arose from an investigation by the British Transport Police (BTP) into suspected misconduct by Mr Howe in which covert surveillance had been deployed against him without the grant of any RIPA authorisation. In accordance with normal procedures, the Respondent was provided with details of the contents of the forms T1 and T2 and required to provide all relevant documentation to the Tribunal having regard to the nature of the allegations made by the Complainants. Because of the common background facts, and the importance of the issue of jurisdiction, the parties agreed that both cases should be heard together. It is

important to record that both cases must be considered separately as they give rise to different considerations.

Background

4. Stephen Howe is a police constable serving with British Transport Police. As a result of intelligence received by the force, the BTP Professional Standards Department initiated an investigation into his conduct in the course of his duties. The investigation took place in 2018 with a view to establishing whether he had breached any of the standards of professional behaviour set out in the British Transport Police (Conduct) Regulations 2015. Following such an investigation if a determination were made that a case to answer was established for breach of such standards, it would lead to disciplinary proceedings either for misconduct or gross misconduct, depending on the gravity of the facts uncovered.
5. Sally Bartram is a friend of Mr Howe with whom it was thought he was conducting a relationship. All of the allegations and matters complained of by Ms Bartram and Mr Howe relate to the misconduct investigation. The core allegation against Mr Howe was that he had absented himself from duty at his normal place and time of work without permission. Amongst other things it was suspected he was visiting Ms Bartram at her home at times when he was on duty.
6. The Complainants allege that unauthorised covert directed surveillance was used against them by BTP in breach of their right to respect for private and family life protected by Art. 8 of the European Convention on Human Rights. The fact of the

use of the surveillance techniques was revealed to Mr Howe in the course of the disclosure process during the misconduct proceedings which followed the investigation. The disclosure also revealed that in some instances Ms Bartram had suffered collateral intrusion during the surveillance. Ms Bartram was not the subject of a specific investigation or the grant of any form of authorisation, whether under RIPA or otherwise, although the possibility of collateral intrusion was foreseen.

7. The need for an investigation having been decided upon, the matter was passed to the Professional Standards Department Intelligence Unit/Counter Corruption Unit (PSDIU/CCU). The CID were not involved at any relevant point. Initially, what is referred to as a Lawful Business Monitoring (LBM) exercise was carried out which produced a considerable amount of information, e.g. details of his work schedule, contents of electronic pocket book, door entry data for Derby BTP Station, CCTV images, automatic number plate recognition (ANPR) data in respect of PC Howe's private car, GPS data from PC Howe's BTP issued mobile phone and scrutiny of his BTP email and Outlook calendar accounts.
8. Following those initial investigations, it was decided the evidence was insufficient to proceed further and a decision was made to seek authorisation to carry out of surveillance of him. A so-called Tactical Deployment Authorisation (TDA) was accordingly sought by PC Clarke. The application, which was provided to the Tribunal, was submitted to Superintendent Gillian Murray who was the head of the Professional Standards Department at the time. She granted the authorisation, but with important restrictions, on 25 July 2018. In her witness statement she explained

that a TDA is a process set in place by BTP following the decision of this Tribunal in *C v The Police*, in 2006, to authorise, *inter alia*, the use of surveillance in a police non-criminal disciplinary investigation. This was because it was understood that a RIPA authorisation could not be granted in such a case.

9. The TDA system is essentially a mirror image of the process that is used under RIPA to authorise surveillance in a criminal investigation. It would be difficult to find any significant distinction in the two processes. In her witness statement Superintendent Murray said it was her understanding the system was “designed to ensure that there was a process of systematic and careful consideration of questions of necessity and proportionality of proposed surveillance in misconduct investigations, following a process similar to that under RIPA, notwithstanding that RIPA did not apply”.

10. Observations were planned for five occasions but carried out on only four as PC Howe was on sick leave on one of the dates. The specific object of the surveillance was to further the investigation by proving or disproving whether PC Howe was attending Ms Bartram’s address during his hours of duty. The way in which the surveillance was carried out has also given rise to the complaint by Ms Bartram. As part of the investigation, a vehicle with two remote control cameras was parked close to her house to take footage showing PC Howe arriving at or leaving the house. The cameras were activated when the vehicle was put in position and the images were viewed and recorded remotely, using an iPad, only when it appeared that Mr Howe was going to or leaving the house. The only footage retained was when Mr Howe’s car, or he personally, was in view.

11. During the observations carried out on 4 August 2018, shortly after the observation vehicle was put in place and the camera activated, Mr Howe arrived in his car. Ms Bartram was seen to exit the car and go into her house. She returned shortly afterwards and they drove off together. On 24th August the camera was again in place and activated. PC Howe was seen outside Ms Bartram's house heading towards the front door. Sometime later PC Clarke returned to the scene and deactivated the camera in the vehicle with the intention of driving it away. Before he left the scene, however, he saw Mr Howe, Ms Bartram and a young boy leave the house and get into a car. PC Clarke did not have time to reactivate the camera and took three photographs using the camera on his mobile phone.

12. On completion of the investigations into the alleged misconduct the matter then proceeded to a disciplinary hearing, which is not the concern of the Tribunal. The Respondents are adamant there was never a criminal investigation into PC Howe, nor was there any form of investigation (criminal or otherwise) into Ms Bartram. They accepted there were times during the covert misconduct investigation carried out by PSDIU/CCU when they considered whether PC Howe may have committed criminal offences, but those considerations did not crystallise into a suspicion that he had done so and he was not investigated for criminal offences.

The Respondents' initial response

13. In an initial response, Mr Riddle, solicitor for BTP, accepted the fact of the surveillance of Mr. Howe and of collateral intrusion in the case of Ms. Bartram, but

asserted that it had been carried out in furtherance of a misconduct investigation by BTP, which was not a criminal investigation; therefore, he asserted, RIPA could not apply and the Tribunal was not vested with jurisdiction.

The submissions of the parties

14. After this initial submission from BTP, a written submission was received from Mr Howe's solicitors, prepared by Mr Kirtley, which contained a robust response to the claim that the investigation was not criminal in essence and he sought to rebut the assertion of BTP that the Tribunal lacked jurisdiction because of it. He pointed out that the BTP documents referred to the nature, circumstances and timing of Mr Howe's relationship with Ms Bartram and "whether (the alleged relationship) was an abuse of his position for sexual predatory behaviour": they also mentioned that Mr Howe was "currently dealing with a crime that includes another vulnerable victim". He pointed out that improperly exercising the powers and privileges of a constable knowingly could bring a sentence of up to 14 years imprisonment on conviction (see s. 26 of the Criminal Justice and Courts Act 2015). He said further the BTP papers revealed concerns about the possibility that he might be using his position to facilitate a sexual relationship in a sexually predatory way and that there were additional concerns that his unapproved absences from duty could involve fraudulently claiming expenses. He submitted there was potentially serious criminality involved and that "to miscategorise the ... matters, whether that be conscious, subconscious or merely inadvertent, cannot...turn matters that are clearly potentially serious criminal conduct into matters that fall into a 'non-criminal conduct genre'. On such an analysis it would be arguable that any

behaviour of a police officer whilst engaged in the execution his duties, whatever the serious nature of the criminality involved, could be so categorised as a ‘non-criminal misconduct’ matter as the force so pleased.” His submission also made the case that the use of Automatic Number Plate Recognition (ANPR) data by BTP had been intended to acquire private information, namely, that Mr Howe was travelling to, from and otherwise en route to a specified address. It was alleged further that the actions of a fellow police officer (PC X) amounted to his being tasked as a Covert Human Intelligence Source (CHIS) without an authorisation being granted either under RIPA or the BTP’s own system of TDA. It was also argued that the actions of the officer conducting the surveillance at or about Ms Bartram’s address on several occasions rendered him a CHIS. The thrust of the submission therefore was that the provisions of s. 28(3)(b) of RIPA applied (the prevention and detection of crime), but reliance on s. 28(3)(d) (the interests of public safety) or other provisions was not raised.

15. Mr Berry responded on behalf of BTP. He described Mr Kirtley’s submission as totally misconceived as it failed to distinguish between misconduct investigations which could have been categorised as criminal rather than whether this was in fact a criminal investigation. He said it was plain the investigation of Mr Howe was never other than a misconduct investigation pursuant to the British Transport Police (Conduct) Regulations, 2015. He relied on the decisions of the IPT in *C v The Police* (2006, IPT/03/32/H; Mummery LJ; Burton J; Sir Richard Gaskell; Sheriff Principal John McInnes QC; and Mr Robert Seabrook QC) and *Mr and Mrs H v Police Federation of Great Britain* (2005, IPT/03/23/CH) which he submitted established that surveillance by a public authority in the context of a non-core

function of the police, such as employment of staff, did not fall within the definition of ‘directed surveillance’ within the meaning of Part II of RIPA. He said that the investigation of Mr Howe related purely to such non-core functions and the Tribunal was not therefore vested with jurisdiction

16. Up to this point Ms Bartram had not been represented. In view of the fact that she had adopted the submissions on jurisdiction made by Mr Kirtly, and in order to ensure that the issues, including jurisdiction, central to her case, where they differed from those of Mr Howe, were fully explored, the Tribunal appointed Ms Rosemary Davidson to act as Counsel to the Tribunal (CTT). Her brief was to consider the issues of jurisdiction generally, but particularly as they might affect Ms Bartram. The Tribunal is grateful to her for her researches, written and oral submissions and for her work in liaising with the other legal representatives when the offices of the Tribunal were disrupted owing to the effects of Covid-19.

The submissions of CTT and an alternative basis for jurisdiction

17. Ms Davidson noted these submissions and she took account of Mr Kirtley’s argument on behalf of Mr Howe that the surveillance had been carried out in what was in reality a criminal investigation, no matter how it was characterised by BTP.
18. Ms Davidson concentrated however on advancing a further basis upon which she submitted the Tribunal had jurisdiction. She argued that the regulation of police discipline and the conduct of officers are essential in ensuring continuing public confidence in the police and the manner in which officers discharge their duties.

She argued that if the police failed in these respects public safety would be put at risk and therefore s. 28(3)(d) of RIPA was engaged. In so arguing she was saying in effect that the investigation was regulated by RIPA even if it was not a criminal investigation.

19. She relied for support on the case of *BC v Chief Constable of the Police Service of Scotland* [2019] CSOH 48 where the court was concerned with whether the disclosure to the Professional Standards Department of Police Scotland of WhatsApp messages passing between officers, obtained during a criminal investigation, amounted to a breach of Article 8 of the ECHR. Lord Bannatyne, sitting in the Outer House, held that Article 8 was engaged but that the interference was lawful as it was necessary for the prevention of disorder or crime. He explained:

“The principal purpose of the police is the protection of the public. ... An officer who fails to meet the Standards [in the Conduct Regulations] can reasonably be inferred to be likely to be someone who would lose the confidence of the public and cause a decline in the general public confidence in the police. It is essential for the purpose of successful policing that the police maintain the confidence of the public. If the public loses confidence in the police in this way then public safety would be put at risk as the police cannot operate efficiently without such public confidence. This fits in with an intervention being necessary for ‘the prevention of disorder or crime.’ The police, if the public loses confidence in them, are likely to be less able to prevent disorder or crime....

In order to maintain public confidence and to protect the public it is necessary for the police to be regulated by a proper and efficient disciplinary procedure.”

20. On appeal, the Second Division of the Inner House held that Article 8 was not

engaged, but, had it been, the Lord Ordinary had correctly concluded that the interference in the appellant's Article 8 rights was necessary for the prevention of crime or disorder: [2020] CSIH 61; 2021 SC 265, *per* Lady Dorrian, Lord Justice Clerk, at para 113.

CTT relied on that analysis as supporting her in saying police disciplinary matters fell within s. 28(3)(d) of RIPA as being in the interests of public safety.

21. She also noted the stance of BTP that, in the event of the Tribunal possessing jurisdiction, the Respondents would advance the argument in defence of the s. 7 HRA 1998 claim that the surveillance was in fact necessary on the grounds of public safety and the prevention of crime, was proportionate and therefore no unlawful interference with the exercise of the right to respect for private life occurred. She submitted that since these, in effect, mirrored two of the bases upon which directed surveillance under RIPA Part II might be authorised "there was no reason in principle why they should be available to justify surveillance for the purpose of Article 8(2) but not available to authorise the same surveillance under RIPA". There was good reason to do so, she said, because a "central function of the police misconduct regime is the maintenance of public confidence in policing which is a factor of great importance in the maintenance of law and order....the loss of which could put public safety at risk or reduce the ability of the police to prevent crime or disorder". In those circumstances it would be anomalous if the parties in these proceedings were to be deprived of the safeguards afforded by RIPA had the same techniques been authorised in the context of a criminal investigation, just because they were deployed in a disciplinary investigation.

22. In further support of her submission she pointed out that the law enforcement and investigation techniques deployed in this investigation, including remote control of recording equipment, ANPR, public CCTV, social media, and all the tools at their disposal by the use of LBM, as set out in paragraph 7 above, indicated the engagement of the core functions of the police.

23. Given the dispute on the issue of jurisdiction the Tribunal ordered that a hearing should be fixed to facilitate its deliberations. It was decided to direct that all issues should be prepared for determination on the same day but with the issue of jurisdiction being heard as a preliminary issue. In the event this added considerably to the understanding of how the BTP investigation was conducted and their reasoning in arriving at the decision to proceed with the case as a misconduct rather than a criminal investigation.

The relevant provisions of RIPA

24. There is little need to analyse in detail the surveillance conducted in the present case, beyond the fact that it was covert and not intrusive, as all of the parties accept that the nature and conduct of the surveillance were such that it could satisfy the definition of directed surveillance in s. 26(2) RIPA. An authorisation for Directed Surveillance under RIPA, however, may not be granted unless the authorisation is considered necessary on grounds falling within sub-s. 28(3) which includes the following:
 - “(3) An authorisation is necessary on grounds falling within this subsection if it is necessary...

- (b) for the purpose of preventing or detecting crime or of preventing disorder....
- (d) in the interests of public safety.”

25. The jurisdiction of the Tribunal is defined in s. 65(2) of RIPA, so far as is relevant, in the following terms:

- “(a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection 1(a) of that section (proceedings for any actions incompatible with Convention rights) which fall within subsection (3) of this section.
- (b) to consider and determine any complaints made to them, which in accordance with subsection (4)... are complaints for which the Tribunal is the appropriate forum.

Subsection (3) provides that proceedings fall within it if -

- “(d) they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5).”

Subsection (4) makes the Tribunal the appropriate forum for any complaint if it is a complaint by a person who is aggrieved by any conduct falling within subsection (5) which he believes..... (a) to have taken place in relation to him.....and.....(b) to have taken place in challengeable circumstances.”

26. We accept that the surveillance carried out in this case would have been subject to Part II of RIPA if it had been used in a criminal investigation by BTP as a formal RIPA authorisation would have been required and the conduct engaged in would have taken place in “challengeable circumstances.” S. 65(7) defines these as follows:

“For the purposes of this section conduct takes place in challengeable circumstances if -

- (a) it takes place with the authority, or purported authority, of anything falling within subsection (8), [which refers to authorisations under Part II], or
- (b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such an authority should be sought.”

The decision in *C v The Police*

27. In *C* the police force concerned hired enquiry agents to observe the applicant in the context of litigation before the Police Pensions Appeal Tribunal. The agents filmed the applicant in his front garden in the presence of his wife and son and in his vehicle. There could be little dispute *C* had been subject to surveillance but, as pointed out by the Tribunal, not all instances of surveillance, even by the police, are unlawful or require an authorisation. The complainant *C* was not the subject of criminal or disciplinary proceedings; the surveillance had been undertaken solely in defence of a civil claim in respect of his police pension entitlement. The only possible basis that, at a stretch, might have justified a RIPA authorisation was that it was necessary “in the interests of the economic well-being of the United Kingdom” – s. 28(3)(c) - since public money was at stake.
28. The Tribunal in *C* explained that only conduct relating to a public authority’s “core public functions” was capable of falling within Part II of RIPA and these are distinct

from those functions which all public authorities share, such as the employment of staff, the making of contracts, etc. It was put in the following way in their decision:

“84. The concept of specific core functions of public authorities is not expressly mentioned as such in RIPA. It is not easy to define the concept in general terms or propound a general test for distinguishing between the core functions and the ordinary functions of public authorities. Nevertheless we are satisfied that such a distinction is implicitly recognised in RIPA by the nature of the grounds on which the particular public authority may be authorised to conduct directed surveillance under RIPA.

85. The specific core functions and the regulatory powers which go with them are identifiable as distinct from the ordinary functions of public authorities shared by all authorities, such as the employment of staff and the making of contracts. There is no real reason why the performance of the ordinary functions of a public authority should fall within the RIPA regime, which is concerned with the regulation of investigatory powers, not with the regulation of employees or of suppliers and service providers. There is nothing special about the case of an employee suspected of non-criminal conduct that cannot be covered by the ordinary law. The surveillance activities in this case related to the ordinary functions of the police and their relationship with members of the force.”

29. In an earlier passage the Tribunal stated:

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

77. ...Directed surveillance, as defined in RIPA, could plainly include surveillance relating to some employment situations if, for example, an employee was suspected by his public authority employer of criminal activities in the course of his work or activities, which would endanger national security or involve threats to public order, ...

In short, the employment relationship does not preclude the possibility of directed surveillance under RIPA. It is not possible to carve out an

area of surveillance, which can be labelled ‘employment related’ and falls outside of RIPA.”

30. This is clearly a counsel of caution by the Tribunal not to be distracted by generalised labels such as “employment-related” as sometimes police behaviour, which would amount to misconduct, may also involve quite significant criminal activity. A good example of that is contained in the offence created by s. 26 of the Criminal Justice and Courts Act 2015, mentioned earlier.

31. Finally, our attention was also drawn to an earlier decision of the Tribunal in *Mr and Mrs H v Police Federation of Great Britain*. The determination by the Tribunal was made in 2005 but it conflicted with that in the later case of *C* because a note was appended to a summary of the decision in the following terms:

“The Tribunal’s determination in this 2005 case pre-dated its determination of 14 November 2006 in the case of *C v The Police* (IPT/03/32) which has made clear that the Tribunal has no jurisdiction to determine such claims and that RIPA has no applicability if they relate solely to employment and disciplinary matter.”

32. The case of *C v Police* is the central authority in considering the circumstances in which the investigation by police of conduct/misconduct of an officer may or may not be brought within the scope of RIPA. It provides authoritative guidance for public authorities investigating misconduct by an employee (in this case Mr Howe was deemed by statute to be an employee) in the course of their duties or working time. The dividing line is particularly important for the police forces of the U.K., because as mentioned earlier, misconduct by an officer may involve behaviour which is also potentially criminal. That is evident in the present case as such

offences as obtaining a pecuniary advantage by deception, improper use of his authority as a police constable contrary to s. 26 of the Criminal Justice and Courts Act, 2015, or misconduct in a public office might have been committed. At some point a police misconduct investigation may reveal evidence which requires that it becomes a criminal investigation and, if so, there is no uncertainty about the position should surveillance be desired as thereafter a RIPA authorisation should be sought if surveillance is planned.

33. The Tribunal has considered carefully the papers leading to the decision by BTP that their investigation in the present case should be for potential misconduct rather than a criminal matter. In doing so we have scrutinised the application for the authorisation of the TDA and the reasoning it reveals. It is apparent that in reaching their decision the BTP officers sought out and took into account at least four other instances in their own and other forces where serious misconduct was involved, some more serious than in this case, and where it was decided the investigation should be into gross misconduct and not criminal conduct. In the application for the TDA, after reviewing these cases, the officer stated:

“In view of this it is deemed more proportionate for this to be dealt with by way of a Tactical Deployment Authorisation and as misconduct rather than a criminal matter.”

34. In considering the application, and before granting it, C/Superintendent Murray stated that it was not a criminal investigation “at this time”. That conclusion precluded reliance, in her understanding, on s. 28(3)(b) of RIPA as the prevention or detection of crime was not the purpose of the investigation. Having considered

in detail the factual analysis and the reasoning employed by the officers concerned in the process of seeking and granting of the TDA, we are satisfied their decision to treat the enquiry as a misconduct rather than a criminal investigation was done in good faith. The documents demonstrate a rational process of gathering and assessing the facts, and the officers concerned applied their professional judgment and understanding of the law in deciding how to proceed. C/Superintendent Murray also recognised that the situation could change as she was assessing the position “at this time”.

35. The Tribunal is therefore satisfied this was a non-criminal misconduct investigation conducted under the provisions of the British Transport Police (Conduct) Regulations 2015. We reject the proposition, which is implicit in Mr Kirtley’s submission, that their decision was made in bad faith to avoid the use of RIPA because the TDA process was just as rigorous as that under RIPA and had the disadvantage that the protections against civil liability contained in s. 27 would not be available. No advantage could have been gained by so classifying the investigation. Having reached the conclusion that this was not a criminal investigation, the use of a TDA was believed to be their only alternative if surveillance were to be used.

Conclusions

36. In considering the alternative basis of jurisdiction proposed by Ms Davidson we believe it is necessary to return to the basic statutory provisions. If the police wish to conduct directed surveillance the application must first satisfy the definition of

same in s. 26(2), namely that it is for the purpose of a specific investigation, is likely to result in the obtaining of private information and is otherwise than an immediate response to events or circumstances. The relevant officer must then believe the authorisation being sought is necessary on grounds falling within sub-s. (3) and is proportionate to the object to be achieved, before (s)he can grant same. Clearly, therefore, surveillance may only be authorised under RIPA in limited circumstances and it may not be permissible to grant it even when the investigation is of a type mentioned in s. 26(3). The Tribunal in *C* then went further and added that RIPA had no application in the affairs of public authorities unless the investigation related to one of its core functions. Drawing on the seriousness of the nature of the investigations contemplated by the list of grounds in s. 26(3), the Tribunal concluded that authorisations were only permissible if they related to a core function of the public body connected with those grounds and which are distinct from the ordinary functions public authorities share with all authorities and undertakings such as the employment of staff and the making of contracts. That is a gloss on RIPA as there is no reference to “core functions” in the Act. The importance of the matter was reiterated later however when the footnote was added to the decision in *Mr and Mrs H v Police Federation of Great Britain*.

37. The *Police Scotland* case was relied upon by Ms Davidson to support her contention that this case was within the scope of RIPA because it did relate to a core function of the police, namely, ensuring public safety. The case was brought in the Court of Session and concerned a civil claim for breach of Article 8(2) of the ECHR. Access to the pursuer’s WhatsApp messaging had been obtained by the police in the context of a criminal investigation and the information was then handed over to their

Professional Standards Department. The acquisition of the WhatsApp message did not result from directed surveillance under RIPA. The police said their actions were for the investigation or prevention of crime or for the protection of the public by way of a defence to a claim under s. 7 HRA for breach of Article 8 ECHR. In the event the Inner House held that Article 8 was not engaged. It does not follow that where an investigation may have those effects that RIPA Pt II applies as it is essential to have regard to the true nature and objects of the investigation before it does so. As noted, there are very many cases in which police misconduct may involve, or border upon, criminal behaviour. That does not make every ensuing inquiry a criminal investigation, or one intended to protect the public so as to attract RIPA and the jurisdiction of this Tribunal. Both the Inner and Outer Houses agreed that police misconduct should be regulated by a proper and efficient disciplinary process and this is provided by statute in the form of the 2015 Regulations, but they made no attempt to suggest that the Regulation of Investigatory Powers (Scotland) Act 2000 applied to the *Police Scotland* investigation.

38. In effect all police disciplinary and misconduct investigations have at their root the protection of the authority and discipline of police forces, which is a prerequisite of public confidence in the police and thus for the protection of the public. We consider that extending the concept of a misconduct enquiry in the way suggested by her would lead, almost inevitably, to the vast majority of misconduct cases being brought within the ambit of RIPA and this Tribunal, a result that we do not believe could have been intended by Parliament and which was rejected by the panel in the *C* case.

39. In the years since the decision in *C* Parliament has not sought to redefine the ruling in any way despite having obvious opportunities to do so, e.g. in the British Transport Police (Conduct) Regulations 2015 (together with the equivalent Regulations governing the so-called Home Office police forces) and the Investigatory Powers Act 2016. Additionally, there have been three editions of the Home Office Code of Practice on Covert Surveillance and Property Interference (in 2010, 2014 and 2018) since the decision in *C*. Each of these gave guidance in line with the decision of the Tribunal in 2006 and state that the disciplining of an employee is not a core function of a public authority although related criminal investigations may be. Police forces rely on the Codes for guidance in deciding whether a RIPA authorisation should be sought. The Tribunal panel members have applied it routinely in its work since 2006.
40. Another argument in favour of the *status quo*, as advanced by Mr Berry, is that as most forces now employ civilians in roles including not just secretarial, personnel, catering and similar, but also as Crime Scene Officers, Forensic Examiners and other specialists, it would be wrong to remove disciplinary cases involving such employees from the ordinary courts by treating any alleged misconduct by them, which might potentially be criminal as being within the scope of RIPA.
41. We consider the nature and purpose of the specific investigation remains the paramount consideration for police forces when deciding whether or not a RIPA authorisation should be sought. As this was neither a specific investigation for the purposes of preventing or detecting crime, nor preventing disorder, nor conducted in the interests of public safety, the principle in *C* remained valid when considering

whether a core function of the police was engaged. To concentrate on the incidental effects of an investigation rather than its purpose simply clouds the fact that the investigation in question was not a specific investigation for a purpose mentioned in s. 26(3) and that C/Superintendent Murray could not have believed the authorisation sought was for a specific purpose. We are satisfied that this investigation was not related to a core function of policing and in line with the decision in *C RIPA* did not apply it. If it had become a criminal investigation later, or a specific investigation in the interests of public safety, then that might have changed.

42. We are not bound by the decision in *C* but we consider it to have been decided correctly and so we reject the alternative basis of jurisdiction advanced by Ms Davidson. In those circumstances, as we indicated at the conclusion of the hearing on 10 March 2022, we decline jurisdiction. The effect of our decision is that the parties ought to pursue any remedies they seek in the ordinary civil courts.
43. Mr Howe also raised issues about the use of Automatic Number Plate Recognition and alleged that the roles of certain police officers in the investigation ought to have been the subject of CHIS authorisations. These aspects of his case were integral parts of the misconduct investigation and they also are excluded from the jurisdiction of the Tribunal for the same reasons. We make no further comment lest they are the subjects of consideration in another court or tribunal.
44. As stated earlier, Ms Bartram was never the subject of any investigation or directed surveillance by BTP, though she was a victim of collateral intrusion during the

investigation of Mr Howe. As we have found there is no jurisdiction to hear Mr Howe's claim or complaint, it follows that the Tribunal has no jurisdiction to consider her claim or complaint either.

Professor Graham Zellick QC:

45. This is a curious case. The respondent police force is contending for an outcome that will in future cases deny the police the protection afforded by the Regulation of Investigatory Powers Act 2000 (RIPA) and could well leave them unable to defend an action on these facts in the ordinary courts, while the Claimants argue for a forum that is said to involve many disadvantages for litigants and would result in future claimants having no right of action in such circumstances where RIPA procedures have been correctly followed. The fact is neither outcome is entirely satisfactory, as I shall seek to explain below, and primary legislation may be required to resolve the problems.

46. The facts, statutory provisions and submissions are fully set out in the judgment of Sir Richard McLaughlin. For present purposes suffice it to say that the Claimant, Mr Howe, a constable in the British Transport Police (BTP), was suspected of absenting himself from duty when he should have been working. As part of the investigation into this suspected misconduct, he was subjected to covert surveillance, chiefly in the form of a vehicle parked outside Ms Bartram's house containing a remotely controlled camera with a view to capturing evidence that he was with Ms Bartram when he should have been on duty.

47. Surveillance in certain circumstances is governed by Part II of RIPA whose principal purpose is to secure compliance with Art 8 of the European Convention on Human Rights (ECHR) because any interference by a public authority with a person's private life is proscribed by Art 8(1) and is unlawful unless it can be justified on one or more of the grounds specified in Art 8(2). Art 8(2) also requires that the interference must be "in accordance with the law". RIPA (where it applies) provides "the law" for this purpose.
48. A variety of public authorities are listed for the purpose of Part II of RIPA, including of course the police, who frequently use techniques of surveillance in the discharge of their law-enforcement functions. But surveillance is also used by the police and the other bodies listed in RIPA, as it is by authorities not listed and by ordinary private bodies, such as companies, for what might be called their own internal purposes. Surveillance is frequently used, for example, in connection with investigations into suspected misconduct by members of staff or in connection with civil litigation or pension disputes where the employer suspects that the employee or ex-employee is exaggerating the extent of an injury or disability.
49. When a non-public entity utilises such measures, there is no legal problem provided that it does not infringe the ordinary law; but when a police force or other public body does so it is caught directly by the Human Rights Act (HRA). It therefore has to be able to justify its actions under Art 8(2) or it will be liable for a breach of Art 8(1)'s guarantee of the right to respect for private and family life. This dilemma lies at the heart of this case. (It is possible that the guarantee in Art 8(1) could be imposed

by the courts on non-public employers, as it has been, for example, on newspapers in analogous situations, but at present the distinction holds true.)

50. I should say at the outset that I agree that the contention on behalf of the Claimants that this was in truth a criminal investigation by the BTP, and thus unquestionably within RIPA, must be rejected. The documentary evidence shows clearly that, even though there was some conjecture about possible criminal offences, the investigation proceeded purely on the basis of possible misconduct, and indeed it culminated in misconduct proceedings and not in criminal charges.

51. In February 2005, a two-member panel of this Tribunal, chaired by the President (Mummery LJ), after a public hearing, awarded a police officer £3,000 in respect of surveillance to which he had been subjected as part of a disciplinary investigation: *Mr & Mrs H v The Police Federation of Great Britain* (IPT/03/23/CH, 28 February 2005). H had been suspected of using a police vehicle for personal use. As no authorisation for the surveillance under RIPA had been obtained, the surveillance was admitted and held to be unlawful.

52. Less than two years later, however, a five-member panel, again chaired by the President (Mummery LJ), decided the case of *C v The Police* (IPT/03/32/H, 14 November 2006). The Home Secretary was an interested party and was represented by counsel, as were C and the police. An Advocate to the Tribunal was appointed by the Attorney-General.

53. C was a retired police sergeant who was subjected to surveillance by inquiry agents

appointed by his former police force which doubted the extent of C's disability for the purpose of his pension. No RIPA authorisations were in place. The police on this occasion did not accept liability. They argued that RIPA did not apply. RIPA, they submitted, applied only to the specific or core functions of the police. As RIPA did not apply, the Tribunal lacked jurisdiction.

54. The Tribunal agreed. To reach this conclusion in the face of statutory provisions which pointed to the applicability of RIPA, the Tribunal construed the requirement in s. 26(2)(a) that the surveillance must be "for the purposes of a specific investigation or a specific operation" as meaning an investigation or operation related to a core function of the public authority in question. Thus, as an investigation relating to the pension of the retired sergeant in *C* was not a core function, RIPA did not apply. The decision in *C* is central to the decision in the case now before the Tribunal.

55. Surprisingly, there is no mention in the *C* judgment of the earlier decision in *Mr & Mrs H*, which might suggest that the Tribunal did not think it was overruling *H* because investigating suspected police misconduct, under the relevant statutory conduct regulations, was indeed a core police function unlike surveillance relating to a disability pension and its associated civil proceedings. It is worth recalling that *H* was decided less than two years previously, Mummery LJ had presided and Sir Richard Gaskell had sat in both cases.

56. However, if one now looks at the judgment in *H*, one finds that a final paragraph has been added under the heading "Supplementary" which reads as follows:

“The Tribunal’s determination in this 2005 case pre-dated its determination of 14 November 2006 in the case of *C v The Police* (IPT/03/32) which has made clear that the Tribunal has no jurisdiction to determine such claims and that RIPA has no applicability if they relate solely to employment and disciplinary matters.”

57. It is not known when precisely this was added or on whose authority, though it seems highly unlikely that it would have been added other than on the authority of the President or perhaps the Vice-President. The supplementary paragraph has been accorded a paragraph number and therefore appears as if it is part of the original judgment, which it plainly is not. It might have been better if it had appeared as a separate coda to the judgment added by the secretariat merely stating that it should now be read in the light of the later decision in *C*.
58. Ms Davidson, Counsel to the Tribunal (CTT), did not ask us to disavow the decision in *C* nor did she challenge the core functions principle, but she invited us to refine its scope by concluding that non-criminal police conduct matters were indeed a core function of the police. She developed a strong and attractive argument to this effect. She rightly pointed out that *C* itself was not about police discipline and could therefore be distinguished. She referred to the statutory nature of the conduct regulations, though she placed less weight on that factor than I would. As Underhill LJ observed in *Eckland v. Chief Constable of Avon & Somerset Constabulary* [2021] EWCA Civ 1961, para 20: “. . . misconduct proceedings against a police officer are very unlike disciplinary proceedings by an ordinary employer.” CTT emphasised the singular importance of maintaining public confidence in the police by a strong and efficient misconduct regime. She pointed out that a number of features of the IPT identified by Mummery LJ which detracted from a claimant’s Art 6 rights (right to a fair trial) no longer applied. She also attached significance to

the skills, techniques and equipment available to the police to carry out surveillance, but I cannot see the relevance of this to the legal point in issue.

59. Despite the strength of these arguments, I am in the end unpersuaded that we should so modify the decision in *C*. It is true *C* was not about police misconduct investigations and that the panel would not have focused on that aspect of police functions with the intensity with which we have; but it is impossible to escape the conclusion from reading the judgment that the panel believed that its exclusionary principle applied to police discipline as to all other employment-related (and certain other) matters. I would express that view even in the absence of the supplementary note to *Mr & Mrs H*.
60. It is also the case that IPT procedures are now more favourable to claimants and more compliant with Art 6 requirements: appeals are now possible (Investigatory Powers Act 2016, s.242); judicial review applies (*R (Privacy International) v IPT* [2019] UKSC 22); reasons are given for decisions whenever possible (IPT Rules 2018, SI 2018 No 1334, r. 15); any hearings must wherever possible be held in public (*ibid*, r. 10(4)); and in general the inquisitorial powers of the Tribunal, the simplicity of its procedures, the specialist expertise of its members and the absence of any liability on claimants for costs may be regarded as positive attributes.
61. Nevertheless, there are, in my judgment, compelling reasons for declining CTT's invitation to pronounce police misconduct investigations a core function of the police for the purpose of Part II of RIPA.

62. A formidable hurdle to overcome in arguing for the applicability of RIPA is that the grounds on which authorisations may be granted, as set out in s. 28(3) and based on, but more limited than, those in Art 8(2), are not, for the most part, apt for investigations into non-criminal police misconduct. The only two that are arguably relevant are the economic well-being of the UK (in cases such as the instant one where the officer is being paid for work he has not done) and public safety (if it can be shown that the misconduct is of a kind that may put the safety of the public at risk). This is a further indication that RIPA was not intended to apply and that *C* was correctly decided. (The Home Secretary is empowered by s. 28(3)(g) to add to this list by order, but nothing else in Art 8(2) seems apposite and a bespoke ground – such as “for the purpose of maintaining public confidence in the police” or, more broadly, “for the purpose of maintaining standards of integrity and propriety in the public service” – would not only leave the respondent authority vulnerable to challenge in Strasbourg but would be equally nugatory in the domestic courts, since a defence to an action brought under s. 7 of the HRA would not satisfy the requirements of Art 8(2) even if justifiable under RIPA.)
63. There may be no rule of law that requires a tribunal to follow its own previous decisions or inhibits it from modifying an earlier decision, but there are powerful considerations of public policy that dictate adherence to a practice of precedent. Certainty in the law is an essential ingredient of justice and it would be most undesirable if later panels revisited and rejected earlier decisions of the Tribunal because they thought them wrongly decided. There will, of course, be rare instances where reconsideration of and possible departure from a previous decision will be desirable. *C* itself is the paradigm example. The point in *H* had not been fully argued

by counsel. RIPA was a relatively new statute and, as Mummery LJ observed in *C*, “The experience of the Tribunal over the last 5 years has been that RIPA is a complex and difficult piece of legislation” (para 22). A five-member Tribunal was empanelled. Counsel appeared not only for the parties but also for the Home Secretary as an interested party and the Attorney-General appointed an Advocate to the Tribunal. There was at that time no right of appeal (s. 67(9) of RIPA never having been brought into force) and it was thought judicial review was excluded (s. 67(8)). The point of law in issue was of national significance and of immense practical importance.

64. For this reason alone it would now be highly questionable for this Tribunal to take the step urged by CTT, but there are even more pressing reasons why we should not in effect disapply or at any rate re-engineer the decision in *C*.
65. In the 16 years since the decision in *C*, it has (as we understand it) been applied in respect of police misconduct investigations by every police force in the UK. It finds expression in the Home Secretary’s statutory Code of Practice on Surveillance (Home Office, *Covert Surveillance and Property Interference: Revised Code of Practice*, August 2018, para 3.35, pp 26-27). It has been applied consistently in this way by the Tribunal. And no opportunity has been taken to amend the law, such as when the Investigatory Powers Act 2016 was before Parliament.
66. In these circumstances it would, in my judgment, be profoundly wrong for this Tribunal to disturb such a well-settled and respected situation, particularly as there is now a right of appeal in cases such as this. If we are wrong it is for the Court of

Appeal (or the Supreme Court) to put matters right.

67. But I am mindful of the problematic situation caused by this decision; indeed it is surprising that these problems have not emerged sooner.
68. The Tribunal in *C* did not fully confront the consequences to public bodies like the police of being deprived of the protection afforded by RIPA when using surveillance in non-core situations. The police seemed to assume that, as the surveillance involved no infringement of the ordinary criminal or civil law, they had no need of the protection afforded by RIPA, but this betrayed an imperfect understanding of the impact of the HRA and ECHR, which is that the unlawfulness arises exclusively from the interference with privacy regardless of any other legal provisions: such interference by a public body under Art 8(1) is unlawful unless it can be justified under Art 8(2) and any such justification would have to be “in accordance with the law”. Mummery LJ for his part realised this. While explaining convincingly why it should not fall within the RIPA regime, he acknowledged that such matters fell to be litigated in the ordinary courts if RIPA did not apply (para 89), but considered it “unnecessary and undesirable to express a view on . . . whether the interference with the Art 8(1) right was ‘in accordance with the law’ for the purposes of Art 8(2)” (para 91). In other words, the potential vulnerability of the police, without the shield of RIPA, to liability under Art 8(1) was not a factor that could override the other objections to bringing such matters within the ambit of RIPA.
69. Counsel for the Respondents during oral argument in the present case acknowledged this risk to the police. He thought there was a legal argument that could be mounted

outside of RIPA to satisfy the requirements of Art 8(2) – *e.g.* the Data Protection Act 2018 and the Information Commissioner’s Employment Practices Code - but it remains to be seen whether this speculation will be found to be firmly based.

70. The problem arises from the conflation of public and private bodies in such matters as employment and contracts. Mummery LJ saw no reason to treat public and private bodies any differently with respect to such matters as employment and contracts, but this is to overlook the fact that a public authority is governed by the HRA whereas non-public bodies (for the most part) are not. The latter may therefore lawfully engage in activities which in the case of a public body would render it liable for a breach of Art 8(1). But if that had been in the mind of Parliamentary Counsel when drafting RIPA, he or she would have given the appropriate powers to all public bodies, not just the few identified for the purpose of Part II of RIPA. Mummery LJ’s conclusion, therefore, seems irresistible. RIPA is not the appropriate vehicle for this purpose.

71. If the police cannot justify surveillance in police misconduct investigations under Art 8(2), it will mean that they will either have to abandon the use of surveillance techniques in such cases – and it would be extremely odd to deprive the police of a power available to all non-public employers and hardly in the public interest – or remedial legislation will be required. That would not have to be, and perhaps should not be, under the RIPA umbrella. The same problem arises for all public bodies. It is, I suspect, unlikely that this decision of the Tribunal will be the last word on this subject.

72. Accordingly, I have come to the conclusion that surveillance conducted by the police as part of an investigation into suspected non-criminal misconduct by a police officer does not constitute “directed surveillance” within the meaning of Part II of RIPA. That conclusion follows from the decision in *C v The Police* which confines the RIPA regime to the core functions of the public body in question. We must follow and apply this decision. Investigating non-criminal misconduct, however important, is not a core function of the police. I therefore agree that we have no jurisdiction to entertain these complaints and claims. That does not mean that the Claimants are necessarily left without a remedy, but it is not for us to speculate or suggest what might be the likely result if the Claimants, or either of them, were to continue their litigation in the ordinary courts.