



Neutral Citation Number: [2026] UKIPTrib 5

Case No: IPT/21/199/C & IPT/21/203/C

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 27 July 2026

Before :

LADY CARMICHAEL (PRESIDENT)

JUDGE RUPERT JONES

and

FRANCESCA DEL MESE

Between :

(1) LMN

Complainants

(2) XYZ

- and -

**THE CHIEF CONSTABLE OF AVON AND SOMERSET
CONSTABULARY**

Respondent

Hannah Smith (instructed by **Bhatt Murphy**) for the **Complainants**
James Berry KC (instructed by **Legal Services, Avon and Somerset Constabulary**) for the
Respondents
William Hays appeared as Counsel to the Tribunal

Hearing date: 21 January 2026

OPEN JUDGMENT

Introduction:

1. The first and second complainants (“LMN” and “XYZ”, respectively) have brought proceedings and made complaints pursuant to sections 65 (2)(a) and (b) of the Regulation of Investigatory Powers Act 2000 (“RIPA”) in relation to the conduct of Avon and Somerset Constabulary (“the respondent”). Central to their complaints is the lawfulness of surveillance carried out by means of a video camera and microphone installed on the rear face of the home of CDE, who lives next door to LMN.
2. On 27 February 2021 PC Roth, of the respondent, applied for directed surveillance authority (“DSA”) to install a CCTV camera at the rear of the home of LMN’s next door neighbour, CDE. He resubmitted the application on 3 March 2021, and on 9 March 2021 Detective Superintendent Raphael approved it.
3. The background, which we examine in more detail below, was one of allegations made by LMN about CDE’s conduct, and allegations by CDE made about LMN’s conduct.
4. On 6 April 2021, two surveillance devices, a covert camera and a microphone were installed in the back garden of CDE’s property. The camera was placed on a fence in CDE’s garden looking towards the first complainant’s garden. A microphone was placed underneath CDE’s kitchen window.
5. LMN’s first floor bathroom window was directly above CDE’s garage and garden. The first floor of LMN’s property is broader than the ground floor and garden of CDE’s property.
6. On one occasion disclosed by the recordings retained by the respondent, the microphone picked up LMN when she was speaking inside her own property. LMN was in the bathroom of her home, at the rear of the property. The bathroom of LMN’s property is on the first floor and is located over the ground floor of CDE’s property.
7. The surveillance devices were not remotely controlled by the respondent. They recorded continuously on to a hard drive located in CDE’s house. It would not have recorded during any period that CDE switched it off. She was not able to access the recording. The respondent instructed her to report any incident to the respondent, and to turn off the equipment at that time, to prevent the recording of the incident from being overwritten. A police community support officer (“PCSO”) would then attend to download the recording by burning it on to a disc. The equipment would then be switched back on. The recording would be viewed and uploaded on the respondent’s system. As a result, the only footage that the respondent has retained is footage that it downloaded following reports from CDE.
8. Recordings were downloaded from the equipment and viewed on seven occasions (6 April, 14 April, 20 April, 21 April, 15 June, 25 June and 11 July 2021). Recordings were successfully uploaded to the respondent’s systems on

four occasions. Certain recordings are referred to in these proceedings as clips 1-4.

- (a) 20 April 2021 (clip 1): the footage showed LMN throwing an item into CDE's garden. LMN was charged with harassment, but the prosecution offered no evidence on 25 February 2022.
 - (b) 23 April 2023: the footage (clip 2) showed LMN spraying CDE with water over the party fence. LMN was charged with and convicted of battery in respect of this incident on 1 April 2022 following a trial at North Somerset Magistrates' Court. The footage also showed LMN removing a fence panel (clip 3). LMN was charged with criminal damage but acquitted at trial.
 - (c) 15 June 2021: CDE reported that LMN had thrown eggs over the party fence, but this was not demonstrated on the footage.
 - (d) 25 June 2021: the audio (only) captured LMN using the words set out below (clip 4). LMN was charged with harassment, but the prosecution offered no evidence on 25 February 2022.
9. On 26 May 2021 PC Roth applied to renew the application. On 28 May 2021 Acting Superintendent Williams authorised directed surveillance. On 22 July 2021 PC Roth applied for cancellation of the DSA and told CDE to switch off the surveillance equipment.
10. The complaint and proceedings raise a number of issues for determination.

Issue 1: Was the surveillance 'intrusive' or 'directed' for the purposes of s.26 of RIPA?

Issue 2: to the extent the surveillance is found to be 'directed', was it lawful? This includes:

Issue 2(a): Limitation in respect of the Article 8 European Convention on Human Rights ("ECHR") complaint.

Issue 2(b): Was the information contained in the application for authorisation of directed surveillance fair, accurate and balanced?

Issue 2(c): Was authorisation of directed surveillance necessary and proportionate (under s.28(2)(a) and (b) of RIPA)?

Issue 2(d): Was surveillance conducted from 6 April 2021 onwards compatible with Article 8 ECHR?

Issue 2(e): Was surveillance conducted after 26 April 2021 compatible with Article 8 ECHR?

Issue 3: was surveillance continued after the surveillance authority had ceased?

11. We are very grateful to all counsel for their assistance and the quality of their submissions, Ms Smith for the complainants, Mr Berry KC for the respondent and Mr Hays as counsel to the tribunal (“CTT”).

Issue 1: Was the surveillance intrusive or directed?

The statutory provisions

12. The definitions of directed and intrusive surveillance are primarily found in subsections 26(2) and (3) of RIPA but additional qualifications are found in sections 26 and 48 of RIPA. Sections 28 and 32 of RIPA provide for the authorisation of directed and intrusive surveillance respectively. Therefore the relevant statutory provisions in this case are contained in sections 26, 28, 32 and 48 of RIPA.

‘26.— Conduct to which Part II applies.

(1) This Part applies to the following conduct—

- (a) directed surveillance;
- (b) intrusive surveillance;
- [...]

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

- (a) for the purposes of a specific investigation or a specific operation;
- (b) in such a manner as 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.

(3) Subject to subsections (4) to (6), 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.

[...]

(5) For the purposes of this Part surveillance which—

- (a) is carried out by means of a surveillance device in relation to anything taking place on any residential premises or in any private vehicle, but
- (b) is carried out without that device being present on the premises or in the vehicle,

is not intrusive unless the device is such that it consistently provides information of the same quality and detail as might be expected to be obtained from a device actually present on the premises or in the vehicle.

28.— Authorisation of directed surveillance.

(1) Subject to the following provisions of this Part, the persons designated for the purposes of this section shall each have power to grant authorisations for the carrying out of directed surveillance.

(2) A person shall not grant an authorisation for the carrying out of directed surveillance unless he believes—

- (a) that the authorisation is necessary on grounds falling within subsection (3); and
- (b) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.

(3) An authorisation is necessary on grounds falling within this subsection if it is necessary—

- (a) in the interests of national security;
- (b) for the purpose of preventing or detecting crime or of preventing disorder;
- (c) in the interests of the economic well-being of the United Kingdom;
- (d) in the interests of public safety;
- (e) for the purpose of protecting public health;
- (f) for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; or
- (g) for any purpose (not falling within paragraphs (a) to (f)) which is specified for the purposes of this subsection by an order made by the Secretary of State.

(4) The conduct that is authorised by an authorisation for the carrying out of directed surveillance is any conduct that—

- (a) consists in the carrying out of directed surveillance of any such description as is specified in the authorisation; and
- (b) is carried out in the circumstances described in the authorisation and for the purposes of the investigation or operation specified or described in the authorisation.

(5) The Secretary of State shall not make an order under subsection (3)(g) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

32.— Authorisation of intrusive surveillance.

(1) Subject to the following provisions of this Part, the Secretary of State and each of the senior authorising officers shall have power to grant authorisations for the carrying out of intrusive surveillance.

(2) Neither the Secretary of State nor any senior authorising officer shall grant an authorisation for the carrying out of intrusive surveillance unless he believes—

- (a) that the authorisation is necessary on grounds falling within subsection (3); and
- (b) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.

(3) Subject to the following provisions of this section, an authorisation is necessary on grounds falling within this subsection if it is necessary—

- (a) in the interests of national security;
- (b) for the purpose of preventing or detecting serious crime; or
- (c) in the interests of the economic well-being of the United Kingdom.

[...]

(4) The matters to be taken into account in considering whether the requirements of subsection (2) are satisfied in the case of any authorisation shall include whether the information which it is thought necessary to obtain by the authorised conduct could reasonably be obtained by other means.

(5) The conduct that is authorised by an authorisation for the carrying out of intrusive surveillance is any conduct that—

(a) consists in the carrying out of intrusive surveillance of any such description as is specified in the authorisation;

(b) is carried out in relation to the residential premises specified or described in the authorisation or in relation to the private vehicle so specified or described; and

(c) is carried out for the purposes of, or in connection with, the investigation or operation so specified or described.

48.— Interpretation of Part II.

(1) In this Part—

[...]

“directed” and “intrusive”, in relation to surveillance, shall be construed in accordance with section 26(2) to (6);

[...]

“residential premises” means (subject to subsection (7)(b)) so much of any premises as is for the time being occupied or used by any person, however temporarily, for residential purposes or otherwise as living accommodation (including hotel or prison accommodation that is so occupied or used);

[...]

“surveillance” shall be construed in accordance with subsections (2) to (4);

“surveillance device” means any apparatus designed or adapted for use in surveillance.

(2) Subject to subsection (3), in this Part “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.

[...]

(7) In subsection (1)—

[...]

(b) the reference to premises occupied or used by any person for residential purposes or otherwise as living accommodation does not include a reference to so much of any premises as constitutes any common area to which he has or is allowed access in connection with his use or occupation of any accommodation.

(8) In this section—

“premises” includes any vehicle or moveable structure and any other place whatever, whether or not occupied as land.’

13. There was no dispute that the surveillance was carried out using a surveillance device or devices and that it was covert.

Submissions

Complainants

14. The complainants submitted the surveillance was carried out in relation to things taking place on residential premises. LMN's back garden was residential premises. In support of that submission, counsel referred to the terms of the Covert Surveillance and Property Interference Revised Code of Practice, August 2018 ("the Code"), at paragraph 3.26 and to *Bostan v. the Republic of Moldova*, Application no. 52507/09 and *López Ribalda and Others v. Spain* [GC], no. 1874/13.

Respondent

15. The respondent submitted that one part of premises might qualify as residential premises when another did not. The front garden or driveway of premises was not residential premises: Code, paragraph 3.26. Insofar as video and audio recordings might be captured of LMN or anyone else in her back garden, those were not recordings of anything happening on residential premises. LMN had a reduced expectation of privacy in her back garden. The reasonableness of an expectation of privacy depended on whether an area was visible and accessible, and to whom: *López Ribalda*. LMN's property was overlooked to the rear.
16. So far as the audio recording of LMN was concerned, she had been shouting out of her bathroom window. Her doing so was something taking place on residential premises. The surveillance was not, however, carried out in relation to her doing so because it was not the intention of the authorising officer that the surveillance would capture LMN speaking in her own home, or their expectation that it would do so. It was necessary to look prospectively at what, at the time of authorisation, the proposed surveillance was reasonably likely to capture. To construe section 26(5) of RIPA otherwise would render the provision unworkable.
17. If the surveillance did take place in respect of something taking place on residential premises, the device was not such that it consistently provided information of the same quality and detail as might be expected to be obtained from a device actually present on the premises. In respect of the audio of LMN speaking in her bathroom – which the respondent characterised as her "shouting out of her bathroom window" – the device sited on CDE's fence was not capable of providing a video image of the inside of LMN's house, including her bathroom. The device was not capable of providing audio of any part of the inside of LMN's house of the same quality and detail as might be expected to be obtained from a device inside LMN's house. It had been capable of picking up LMN, exceptionally, shouting out of an open window.

Decision

18. It is common ground that surveillance in this case was covert surveillance, and that it was carried out by means of surveillance devices which were not present on LMN's premises. Those surveillance devices were a microphone and a video camera. We note that the respondent's submission at times treated these as if they were a single device. That is not the correct approach. The two devices were separate. The microphone was located under CDE's kitchen window. The camera was located on her fence, facing the boundary fence between her property and that of LMN.
19. The questions for the Tribunal are: whether the surveillance was carried out in relation to anything taking place on any residential premises; and whether the devices or either of them consistently provided information of the same quality and detail as might be expected to be obtained from a device actually present on the premises.
20. Before turning to those questions, and in particular the second question, we record our findings about what the equipment did capture. So far as the video camera is concerned, we have formed our own impression of that from the six recordings which the parties agreed we should view. We have also taken into account the agreed accounts of what individual parts of the recordings show. It was agreed that it would help the Tribunal to resolve disputed issues to view Clips 1, 2, 3 and 4, each of which was relied upon by the respondent in bringing criminal charges against LMN. We were invited to view also a recording named 20 April 18_27_03, of which Clip 1 is part, and one named 25 June from 21_27_25 of which Clip 4 is part.
21. The view captured by the video camera shows predominantly CDE's side of a high wooden fence. To the left of the screen, close to the fence, the upper part of LMN's back door is visible. The top part of the fence is formed of latticed squares. The lower part, which is much larger, is formed of wood. There is no view into LMN's back garden through the lower part of the fence. There is a partial view of LMN's back door and of the wall of her property through the upper part of the fence, and above it. It is also possible to see what appears to be the top of a darker wood fence that divides LMN's garden from the garden of her other neighbour, and the top of a bamboo-like plant beside that fence.
22. On Clip 1, captured on 20 April 2021, it is possible to see the hair and the upper part of the face of a woman through the latticed upper part of the fence. It is possible, briefly, to see a hand and arm, which appear to belong to the same woman, as they appear to throw something over the fence and into CDE's garden. It is not possible to see any other part of the woman. It is agreed that this footage shows LMN looking over the fence into CDE's garden. She is below fence height for five seconds, and then throws something over the fence into CDE's garden. A smash can be heard a few seconds later.
23. Clip 1 is part of a longer recording, referred to as 20 April from 18_27_03. It is agreed that the recording shows the following before Clip 1. At 18:27:15, LMN enters her garden. The top of LMN's head is visible at times as she moves

around her garden. Around 18:28:47 – 18:28:55 and 18:29:33, LMN appears to lift and move an object around the garden. LMN’s hosepipe can be seen running from her upstairs window into the garden and at various points, e.g. at 18:40:59 the pipe is moved across the garden. At 18:30:06 water from LMN’s hosepipe is visible as she waters a plant (the top of which is also visible) at the top of the fence between her and CDE’s garden. Some of the water comes into CDE’s garden. At 18:53:39 LMN leaves her garden. At 18:53:48 LMN re-enters the garden. At 18:55:08, a female voice says one word (indecipherable).

24. After Clip 1 the recording shows the top of LMN’s head moving around the garden. Sounds of scraping and movement within LMN’s garden can be heard. At 19:02:31 LMN goes inside her house. Up to this point, the sound of the water from LMN’s hose in her garden is audible, (for example in particular at 18:30:50-18:30:55 and 18:41:20 – 18:41:40) and until 19:03:07 (when the sound of water stops as (it appears) the hose is switched off). Between 19:03:24 to 19:03:40 the hosepipe is lowered from above into the garden.
25. Clip 2, captured on 23 April 2021, shows the top of LMN’s head as she is watering her garden with her garden hose. Around 19:29:50 water sprays from LMN’s hose and lands on CDE. The nozzle of the hosepipe can be seen above the garden fence pointing at CDE. CDE is on the other side of the fence. CDE gasps and says ‘fucking idiot’. The top of LMN’s head is then visible as she continues to water her garden. The sound of the water from the hose in LMN’s garden is audible. At 19:30:04, LMN appears to move closer to where CDE is. Water sprays from LMN’s hose and again lands on CDE. CDE gasps. At 19:30:05 a female voice (it is not clear who) can be heard saying ‘...your own garden’. Around 19.30.10, CDE throws an item over the fence into LMN’s garden. CDE disappears from view.
26. Clip 3 was also captured on 23 April 2021. This footage initially shows the top of LMN’s head as she moves around her garden. CDE is not in view. At 19:37:16, LMN reaches through a gap in the fence to take a fence panel from CDE’s garden into LMN’s garden. LMN then disappears from view. LMN was prosecuted for criminal damage (for removing the item from the fence) for which she was acquitted at trial.
27. Clip 4 is of interest for its audio content. It was captured on 25 June 2021. At the start of the clip someone (understood to be CDE and/or her daughter) is speaking. At 21:42:51 LMN (who is not visible on camera) says (the parties dispute whether she was talking, talking loudly, or shouting) from an open window within her house: ‘*[CDE’s forename] [inaudible – potentially: ‘don’t they know’] restraining order cause you been caught out lying in court, so [inaudible – either good luck with [‘that one’ / ‘it alright’]]*’.
28. On the recording 25 June from 21_27_25, before Clip 4, From 21:41:18 a conversation can be heard (understood to be between CDE and her daughter, but they are not visible). At 21:42:00 a person’s arm can be seen in CDE’s Garden close to the house and the conversation continues. It is in parts audible, but not throughout. After Clip 4, At 21:44:38, a woman (understood to be CDE on the phone, but she is not visible) states ‘Oh hello [inaudible] my neighbour is currently on bail, she’s not allowed to talk to me or [inaudible] she’s stood in

the back garden and shouted things over the fence at me [inaudible] something about a restraining order...that we should get a restraining order because of a court case today um so basically she has just threatened me in front of my daughter.’ At 21:45:14 a voice (unknown whose voice) says something inaudible. At 21:45:23 a woman (understood to be CDE) says ‘okay thank you’.

29. The conduct disclosed in Clip 1 led to LMN’s being charged with harassment. The Crown Prosecution Service (“CPS”) discontinued the prosecution. The conduct disclosed in Clip 2 led to LMN’s being convicted of assaulting CDE by spraying water at her. The conduct disclosed in Clip 3 led to LMN’s being prosecuted for criminal damage. She was acquitted at trial. The conduct disclosed in Clip 4 led to LMN’s being charged with harassment, in relation to the comment made about a restraining order. The CPS discontinued the prosecution.

Information of the same quality and detail as might be expected to be obtained from a device actually present on the premises (s.26(5) RIPA)

30. We are satisfied that the video camera did not consistently provide information of the same quality and detail as might be expected to be obtained from a device actually present on LMN’s premises. It captured only the airspace above the solid part of the boundary fence. If a camera had been located on LMN’s own premises, rather than where it was, and directed towards her back garden, it would have captured much more detail as to the activities being carried out in LMN’s back garden than it did. The view of what LMN, or anyone else, was doing in her garden was very limited, because the greatest part of the camera’s view was taken up with the solid part of the boundary fence. That would not have been the case had the camera been located on LMN’s property and directed at her back garden. The view would not have been impeded by the boundary fence.
31. The position is less clear in relation to the microphone. With the exception of the audio recording of LMN captured in Clip 4, the clearest audio recordings are of CDE speaking, on her own premises.
32. There is no evidence to support a finding that LMN was, as the respondent submitted, “shouting” out of her bathroom window in the recording in Clip 4. There is no dispute that she was in her bathroom when she said the words that were captured in the recording. The fact that there is a clear audio recording of something that LMN said when on her own premises, in the bathroom, on 25 June 2021, is of limited assistance. It is a single occasion. The bathroom window was open. The microphone on CDE’s premises was probably quite well placed to pick up LMN’s speech in that situation. The layout of the properties was such that LMN’s bathroom window was above CDE’s back garden rather than above her own back garden.
33. There is no secure basis in the evidence for a conclusion that the microphone was such that it consistently provided information of the same quality and detail as might be expected to be obtained from a device on LMN’s premises. On the contrary, we are satisfied, on the balance of probabilities, that it did not. Proceeding on the basis of the evidence available to us, the clearest audio

recordings are of CDE speaking in her own garden, with the exception of the recording in Clip 4. It is a matter of common experience that microphones tend to capture sound information more clearly and efficiently when a sound source is close to it, and that the clarity and efficiency diminish as the distance between the microphone and the source of sound increases. We infer that a microphone placed on LMN's premises would have provided information of a better quality than the information that the microphone on CDE's premises was able, consistently, to provide.

34. It follows that the surveillance in this case was not intrusive surveillance. There is no dispute that the surveillance in this case was, if it was not intrusive, directed. Later sections of this judgment relate to the lawfulness of that directed surveillance.

Anything taking place on any residential premises

35. As we have already recorded, we have found that the surveillance was not intrusive surveillance. The question as to whether the surveillance was surveillance of anything taking place on any residential premises was, however, fully argued, and we record our conclusions about that matter here.
36. Residential premises, as defined in s.48(1) of RIPA, means so much of any premises as is for the time being occupied or used by any person, however temporarily, for residential purposes or otherwise as living accommodation.
37. This case involves video and audio recording of things taking place in LMN's back garden, and an audio recording of something she said when she was in her bathroom.
38. LMN speaking in her bathroom was something that took place on residential premises. We do not accept the respondent's submission that the intention of the authorising officer, looked at in isolation, can be decisive as to whether surveillance is directed or intrusive by reference to s. 26(5)(a) of RIPA. In deciding whether to authorise directed surveillance, the officer must have regard to what the equipment is expected to pick up, given its location. The public authority will be protected in relation to unintended recording of something on residential premises if the information from the device is not consistently of the same quality and detail as might be expected to be obtained from a device actually present on the premises. The authorising officer must be properly informed as to the capability of the device employed to be involved in the proposed surveillance. There is nothing in that approach that renders the statutory provision unworkable. On the contrary, an approach in which the subjective intention of the authorising officer determined the lawfulness of the measure, without regard to what the equipment is capable of capturing, would be unworkable.
39. Whether things taking place in LMN's back garden were things taking place on any residential premises is a more complex issue. In the context of this case, the question for the Tribunal is whether LMN's back garden were premises for the time being occupied or used by any person, however temporarily, for

residential purposes or otherwise as living accommodation. The garden was not a shared or common space, and so is not excluded from the definition of residential premises by reference to section 48(7)(b) of RIPA.

40. The definition of premises in section 48(8) includes moveable structures. It would obviously include immovable property such as a house. It is, however, an inclusive definition. Neither the definition of “residential premises” nor that of “premises” requires that there be a structure of any kind. That contrasts with provisions such as section 8 of the Public Order Act 1986, which require that a “dwelling” be “a structure or part of a structure occupied as a person’s home or as other living accommodation, and thereby excluding a back garden: see *Director of Public Prosecutions v Distill* [2017] EWHC 2244 (Admin) [2017] WLR 177.
41. The Code, at paragraphs 3.25 and 3.26, provides:
- “3.25 Examples of residential premises would therefore include:
- a rented flat currently occupied for residential purposes;
 - a prison cell (or police cell serving as temporary prison accommodation);
 - a hotel bedroom or suite.
- 3.26 Examples of premises which would not be regarded as residential would include:
- a communal stairway in a block of flats (unless known to be used as a temporary place of abode by, for example, a homeless person);
 - a police cell (unless serving as temporary prison accommodation);
 - a prison canteen or police interview room;
 - a hotel reception area or dining room;
 - the front garden or driveway of premises readily visible to the public;
 - residential premises occupied by a public authority for non-residential purposes, for example trading standards “house of horrors” situations or undercover operational premises.”
42. The Code is a code of practice issued by the Secretary of State under section 71 of RIPA, relating to the exercise and performance of the powers and duties conferred by Part 2 of the Act. Codes of practice of this sort must be laid in draft before both Houses of Parliament. Persons exercising those powers and duties must have regard to the provisions of the code of practice: section 71(1). If any provision of a code of practice appears to the Tribunal to be relevant to any question arising in proceedings, in relation to a time when it was in force, the provision of the code shall be taken into account in determining the question: section 72(4).
43. *López Ribalda* is a decision of the Grand Chamber. It concerned the use of CCTV cameras, some hidden, and others visible, placed in a workplace with the aim of investigating inconsistencies between stock levels and sales figures. The workers were told about the visible cameras, but not about those that were hidden. Footage from the hidden cameras provided evidence of thefts, and a number of members staff admitted their involvement and were dismissed.

Although the case was not one involving a state interference with Article 8 rights, the Grand Chamber considered the approach that the domestic authorities should have taken to the proportionality of the video surveillance measures in the workplace. It was necessary in that context to distinguish between the various places in which the monitoring had been carried out, in light of the protection of privacy that an employee could reasonably expect. Toilets and cloakrooms on the one hand were private in nature. The expectation of privacy remained high in closed working areas such as offices, but lower in areas that were visible or accessible to colleagues or the general public: paragraph 125.

44. The complainants founded their argument on a passage in *Bostan v Moldova* at paragraph 19. *Bostan* is a decision of the Second Section of the European Court of Human Rights. It is not available in English, but only in French and Ukrainian. Paragraph 19 relates that it was not clear from the evidence that a courtyard and a cold storage room searched by the police were used purely for professional purposes, or that the applicants' house was clearly distinct and separate from those parts of the premises. The Court could not therefore exclude those places from the protection afforded by Article 8 ECHR and that they could be considered as forming part of the applicants' home for the purposes of Article 8. In paragraph 20, however, the Court noted that it was not contested between the parties that the inspection of the courtyard of the house and the cold storage room constituted an interference with the applicants' right to respect for their home, and that the Court saw no reason to differ. The case is of limited assistance, as it relates to potential distinctions between parts of premises used for residential purposes and parts used for professional purposes.
45. The passage in the Code of most obvious relevance is the inclusion of the front garden or driveway of premises readily visible to the public among the examples of parts of premises that would not be regarded as residential. The Code is silent in relation to back gardens. We derive some assistance from the qualification that front gardens or driveways "readily visible to the public" would not be regarded as residential. It leaves open the possibility that front gardens or driveways not readily visible to the public might be treated differently. It supports the proposition that, in construing "residential premises" in the context of RIPA, the concept of expectation of privacy is of importance. It is consistent with the notion that there must be more substantial justification for interferences with privacy in situations where individuals have a higher expectation of privacy. Whether premises are residential premises is a fact sensitive question in every case.
46. LMN would not have had an absolute expectation of privacy in relation to what she did in her back garden. She would be liable to be overheard speaking in her garden at least in the gardens immediately to either side. The respondent asked us to conclude that her back garden was overlooked by neighbouring properties.
47. The complainants produced a photograph of the rear of the property (page 16 of the Open Hearing Bundle) which shows a narrow garden. It shows that it would be overlooked from the upper windows at the rear of CDE's property. They produced also an aerial picture at page 120 of the Open Hearing Bundle. The respondent relied on that photo to support the contention that LMN's back

garden was overlooked by a number of neighbours. That photograph does little to support that contention. It is difficult to tell from it what the sightlines were from particular properties towards LMN's back garden. A further photograph – a screenshot from the covert footage – at page 115 of the Open Hearing Bundle shows a window on the lower floor of a property round the corner from the street where LMN lived, and at right angles to it ("31"). It is reasonable to infer that the upper windows at the rear of 31 would have provided a view of LMN's back garden. It is unclear whether LMN's back garden (a) was overlooked from the property immediately adjacent on the other side of LMN's property from that of CDE, and (b) from a property located round the corner on the next street, but it is difficult to be confident about that on the available evidence. The end of LMN's garden and CDE's gardens farthest from their houses was abutted not by other gardens but by a shared parking area and garages. We can find with confidence only that LMN's back garden was overlooked by CDE's property and 31.

48. LMN's back garden was part of the residential premises. It was used as a private garden attached to a home used for residential purposes. It was not an area shared with any other properties, and the public did not have access to it. In those circumstances we consider that it was used for residential purposes. We are satisfied that things that LMN said and did in her back garden were things taking place on residential premises, and that the surveillance was in relation to her doing those things.

Issue 2(a) – limitation

49. LMN filed a complaint form with the Tribunal on 1 August 2021. In the papers accompanying her complaint form, she alleged a breach of Article 8 ECHR. On being informed of the need to bring proceedings for the purposes of s.7 of the Human Rights Act 1998 ("HRA") and s.65(2)(a) of RIPA, rather than make a complaint pursuant to s.65(2)(b) of RIPA, in relation to that matter she did so, by filing a form T1. She was just over a year out of time when she did so – there being a one year time limit in which to bring proceedings by virtue of s.7(5)(a) HRA which is extendable under s.7(5)(b) HRA if the Tribunal considers it equitable to do so having regard to all the circumstances. The respondent has adopted a neutral position in relation to this matter, and has not submitted that it has suffered any prejudice by reason of the late submission of the form.
50. LMN brought her complaint timeously, and gave notice at that point that she was alleging a breach of Article 8 ECHR. There is no prejudice to the respondent. We are satisfied in those circumstances that we should exercise our discretion to allow the proceedings alleging a breach of Article 8 ECHR to proceed.

Issue 2(b): Was the information in the DSA application fair, accurate and balanced?

Factual background

Events preceding the DSA application

2017-September 2019

51. From December 2017 CDE and LMN each made allegations against the other. Annexed to PC Roth's statement is a series of excerpts from the respondent's Niche system, each bearing a reference number. The entries relate to complaints or reports made by CDE and LMN.

24 September 2019

52. On 24 September 2019, CDE's friend alleged that LMN threatened to kill her while she was visiting CDE. She was charged with an offence under section 4A(1) of the Public Order Act 1986 on 1 February 2020, and was convicted after trial on 26 August 2020. The matter was referred to the Crown Court for sentencing. On 25 June 2021 she was fined £120.

15 October 2019

53. On 15 October 2019 CDE telephoned the respondent. She said that there had been a "huge bang" outside her house. She stated that she had gone out to the front and noticed that someone had smashed glass over her car. She said that her neighbour had done that, and that there was an ongoing issue between them. CDE did not claim to have seen the incident.
54. When police arrived at CDE's property LMN put her head out of a window and shouted abusive words. While she was still in her own house, LMN held scissors to her neck and threatened to harm herself. Officers tried to negotiate with her. She left her house and walked past officers and into CDE's house, through the open front door. She moved around the ground floor of CDE's house, threatening to harm herself. CDE's children were upstairs. LMN was removed from the property. She was arrested and released on police bail. She was charged with an offence under section 139(1) of the Criminal Justice Act 1988 on 1 February 2020. She pleaded guilty on 3 February 2020. On 25 June 2021 she was sentenced to a 24-month Community order, a 40 day Rehabilitation Activity Requirement and an 18 month Mental Health Treatment Requirement.

Application to vacate guilty plea/appeal

55. On 21 November 2020 LMN applied to vacate her guilty plea in respect of the incident of 15 October 2019, and to appeal against her conviction in respect of the incident on 24 September 2019, alleging, broadly, defective representation in the context of her mental health conditions. The application to vacate was listed for 6 April 2021.

Mental health

56. On 5 November 2019 a multi-professional meeting concerning LMN took place. Amongst those present was PC Roth. The minutes of the meeting record that LMN had diagnoses of Autism spectrum disorder (“ASD”), attention deficit hyperactivity disorder (“ADHD”) and post-traumatic stress disorder (“PTSD”). It was noted that longstanding difficulties with her neighbour appeared to have escalated recently.
57. In December 2020 the respondent and LMN’s psychologist finalised a tactical advice questionnaire (“TAQ”) which was directed at informing the police as to matters that might be relevant to interactions that they might have with LMN. It noted that police attendance was likely to exacerbate situations in which LMN was already distressed.

Reports after 15 October 2019

58. After the incident on 15 October 2019, LMN made seven reports about CDE or CDE’s mother. The reports related to incidents on 28 October 2019, 11 August 2020, 17 August 2020 (recorded as 2021, but from context, apparently 2020), 14 June 2020, 4 September 2020, 20 December 2020 and 20 January 2021.
59. CDE, and an associate of CDE, made four reports about LMN in the period after 15 October 2019 and before the DSA.
60. On 26 May 2020 CDE reported that she had noticed a syringe in her garden filled with a red fluid and believed that this was from her neighbour (LMN) and that the incident had occurred in the preceding 90 minutes. This matter was filed ‘NFA’ (no further action) due to lack of evidence of the item being thrown by LMN.
61. On 31 October 2020 CDE reported that LMN had used abusive language towards her. This matter was filed ‘NFA’.
62. On 28 December 2020 CDE called the respondent reporting that her neighbour (LMN) had just been throwing things into her back garden. This had started at 18.00 and the last item, which was glass, had been thrown approximately 5 minutes earlier. This matter was filed ‘NFA’ due to lack of evidence of the item being thrown by LMN.
63. On 15 February 2021 a friend of CDE called the respondent to report an incident. When the caller had attended CDE’s house with her 13 year old son to collect CDE and her 14 year old daughter, CDE’s neighbour (LMN) had thrown a piece of wood at the friend’s car / her son, who was outside the car at the time. When CDE and her daughter were walking to the friend’s car, LMN was shouting and swearing at them. On 6 April 2021 (after the DSA was authorised) this matter was filed ‘NFA’ as it was not deemed to be in the public interest to pursue it.

The DSA application

64. The DSA application contained the following information under the heading “Detail the offences under investigation and the expectations of the surveillance activity”:

“The Niche, [reference number] is the most recent of well over 50 niche reports in an ongoing neighbourly dispute spanning several years. Both parties involved are alleging to be the victim in their reports but all enquiries lack video evidence. The CCTV will hopefully capture the suspect thrown glass and syringes in the victims back garden which has been done previously to endanger the victims children. Glass has been thrown under the victims car tyres to cause damage. The suspect has previously entered the victims home address uninvited brandishing a pair of scissors whilst the victims children were present. This is due in Crown Court in April. The behaviour from the suspect is escalating but with the lack of video evidence, the Evidential Threshold is rarely passed. The OIC is PC ... ROTH.”

65. The “intelligence case” was set out in these terms:

“CDE (Victim) – [address] - CDE is a single mother living with her 3 children. They live in a terraced 3 bedroom house with a back garden. There is space at the front of the house for 1 vehicle. CDE alleges that her neighbour constantly swears at her, swears at her children, throws glass out the front of the house, throws glass in the back garden, shouts out the window if the victim is in the back garden with her children, has thrown a syringe in the garden, has entered the victims house brandishing a pair of scissors with the victims children present (Crown Court Pending), entered the victims friends vehicle uninvited and was threatening (Crown Court pending).

LMN (Suspect) – [address] – [wrong forename] is a single lady and lives in a terraced coach house next door to CDE. LMN has a back garden which is parallel to CDE's. LMN works full time for [employer] and has done for a number of years. More recently, LMN is seeking medical help for a Tick disorder (undiagnosed at this stage). LMN has ADHD and mental health issues but does have capacity. She has previously been banned from the [Health] Centre for threatening her Doctor.”

66. PC Roth noted that the action was likely to be collateral intrusion as a result of the planned surveillance:

“There is likely to be intrusion on the following people....

CDE - Occupant at [address]

3 x Children - Occupants at [address]

LMN - Occupant of [address]

Unknown visitors to either property will be captured but only them entering or leaving from the front, or being in either back garden.

There is nothing which can be done to minimise collateral intrusion for those visiting but to minimise it for other residents within the local area would be to have cameras which are only covering specific areas where the public do not have access. There could be persons passing both addresses which cannot be avoided.

The footage will only be viewed on the back of police reports and will not routinely monitored. This will reduced intrusion.

There are no local sensitivities.”

67. Under the heading “Proportionality” the following appears:

“Various complaints have been made over the years by both parties. Due to LMN's complex issues and increased behaviour, she is becoming more of a risk to her neighbours. Both parties have been advised to provide CCTV for themselves. CDE has financial difficulties so cannot do this. LMN does have CCTV covering her property but has the tendency to switch this off when something happens, and cannot be relied upon to provide the footage for the correct day/time.

Police have had much involvement with LMN and given all opportunities to work with her, but she has previously tried to jump over the concourse (2nd Floor) of [identified] Police Station. She ties cables around her neck in the presence of police, ran past them with scissors into the neighbours house. Her behaviour is escalating and although the issues of throwing items in the victims gardens are minor, actually the impact on the families (sic) life, especially the young children could be detrimental to their wellbeing. LMN has made several complaints to police about her neighbour stating that as a family, they mock her tick disorder. The only way to prove or disprove this is via CCTV.

What we are seeking to achieve is to prove or disprove any offences taking place. If offences are identified, they can be dealt with positively and via the criminal justice system if that is applicable. The reason the issues have been ongoing for several years is due to lack of evidence. This will increase our evidence and enable us to take positive action. The housing company has been informed, but again, are unable to take action due to insufficient evidence.

Statistically, incidents are occurring monthly, if not twice per month. The breach of the subject's right to a private life under Article 8 of ECHR are proportionate due to the nature of the offences under investigation.”

68. In “Any other information”, the officer recorded:

“LMN is Trace on PNC. Most recent in 2019 which is awaiting Crown Court. There is 26 in the previous. LMN is linked to Niche 102 times. They are a mixture of Adult Safeguarding where she has threatened self harm, where she is a suspect and victim. LMN has jumped in front of moving police vehicles which is endangering her and other road users, as well as Police Officers.

The [specified] Neighbourhood Team have exhausted all reasonable lines of enquiry and feel that this is the last resort option. The Team has conducted mediation, gone through Mental Health Services, carried out arrests, liaised with Support Workers and now we are at the option of CCTV.

TSU have been contacted and will conduct a visit as soon as possible.”

69. The authorising officer granted the application having concluded that it was necessary for the prevention and detection of crime, namely harassment, criminal damage and “due to the length of time offending has been taking place the psychological impact”.

Submissions

Complainants

70. Public authorities had to ensure that relevant material was fairly and properly presented to the decision-maker, so that the decision-maker was in a position to make a rational decision on the basis of the material: *R (JP) v NHS Croydon Clinical Commission Group* [2020] EWHC 1470 (Admin), §§25-27; *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB), §§73, 80-81. A decision might be vitiated because it was based on information that was overstated, inaccurate, or incomplete: *Caetano v Commissioner of Police of the Metropolis* [2013] EWHC 375 (Admin).
71. An applicant for an authorisation was under a duty of candour, and had to include in an application the necessary material to enable the authorising officer to be satisfied that the statutory conditions were met, and must also make full and accurate disclosure to them, including disclosure of anything that might militate against the grant: *Chatwani & Others vs. the National Crime Agency* [2015] Lloyds Rep FC 659; IPT/15/84/88/CH, paragraph 15. The burden was on the respondent to show that any errors or omissions would not have made a difference.
72. PC Roth had made inaccurate disclosures, or had failed to make disclosures of material matters in the following respects:
- (a) He had stated, wrongly, that incidents were occurring monthly, if not twice per month;
 - (b) he had failed to say whether those incidents involved allegations made by CDE or by LMN;
 - (c) he had misrepresented that LMN’s behaviour was escalating;
 - (d) he had failed to provide a full picture as to the nature and timing of an incident on 15 October 2019 in which LMN had entered CDE’s home brandishing scissors;
 - (e) he had failed to relate that LMN was awaiting mental health treatment at the time of that incident;

- (f) he inaccurately suggested that surveillance was the last and only option and failed to mention that LMN was waiting further treatment for mental health conditions;
- (g) he had failed to mention that most of her convictions dated from many years earlier.

Respondent

- 73. There was no dispute as to the legal principles and authorities on which the complainants relied. The most relevant authority was *Chatwani*. The DSA application should not be read as if a lawyer had drafted it. It must be read as a whole.

Decision

- 74. There is no dispute as to the applicable law.
- 75. We turn to the various criticisms made of PC Roth's application.
- 76. Between 16 December 2017 and the point at which PC Roth first applied for the authorisation on 27 February 2021, a period of just over 38 months, 33 reports were recorded on the respondent's Niche system. Some of the complaints followed closely on each other. Three were made in December 2017. Three were made between 30 April and 24 May 2018. Five were made in June and July 2018, and three in September 2019.
- 77. Looking at the period more closely connected in time to the date of the application, between June 2020 and the point at which he applied for the DSA, roughly a ten-month period, there had been 10 reports recorded on the respondent's Niche system. Four emanated from CDE or her friend, and the remainder from LMN. Two reports were made in December 2020, one in January 2021 and one in February 2021. We are satisfied both looking at the longer period back to December 2017 and at the ten months preceding the application, that PC Roth's statement that incidents were occurring monthly, if not twice per month, does not contain any material inaccuracy.
- 78. In our view, the fact that the application did not detail how many of the allegations came from LMN rather than CDE is not a material omission. The thrust of the application was that it was difficult to tell which party, if either, was making a well-founded complaint on any given occasion.
- 79. The allegations that predate October 2019 are predominantly of threats, harassment and verbal abuse. They include allegations of criminal damage to property. On an occasion in October 2018 CDE alleged that LMN had thrown fluid out of a window when CDE was outside having a cigarette.
- 80. We have already described the incident that took place on 15 October 2019. It is an incident that would undoubtedly have been very distressing for CDE. The allegation of throwing a syringe filled with red liquid into CDE's garden is of a

more serious character than most of the preceding allegations. The allegation of throwing glass into her back garden is, again, more serious than most of the preceding allegations. The allegation of throwing a piece of wood at CDE's friend's car and/or her son is, at least so far as the possible assault on the son is concerned, more serious than the allegations that pre-dated 15 October 2019. Looking at those matters in the round, we are satisfied that PC Roth's characterisation of LMN's behaviour as escalating was not misleading or inaccurate.

81. PC Roth's account of the events of 15 October 2019 appears in various different sections of the application. The incident is described as "Crown Court Pending". No date is given in the sections of the application where the incident is described. In the section where there is reference to LMN's previous involvement with the criminal justice system, there is an entry: "Most recent in 2019 which is awaiting Crown Court". There are references in the application to two incidents in which Crown Court proceedings were said to be pending at the time. It is clear, however, that neither of these could have a date later than 2019. The criticism that PC Roth may have created an impression that the incident that occurred on 15 October 2019 might have been more recent than that is without merit.
82. It is also clear from the description of the incident under "Proportionality" that the incident in which LMN entered CDE's house with scissors was on an occasion when the police were present. It narrates that she ran past the police on that occasion. The complainants criticise the application in that it did not narrate that she was downstairs and that CDE's children were upstairs, that she threatened only to harm herself during the incident, or that she did so only after the police arrived, in a context where police involvement was, for her, a "trigger". It is true also that the application does not narrate in terms that LMN was awaiting mental health treatment in October 2019. It does, however, make it clear at a number of points that LMN had difficulties with her mental health, and was herself a vulnerable person who had had involvement with the police in the context of adult safeguarding.
83. The complainants' analysis of the application seeks to isolate the 15 October 2019 incident and to diminish its significance by reference to the various potentially mitigatory factors to which they refer. That is not, in our view, the correct approach to the application. It must be read as a whole. The 15 October 2019 incident was quite a concerning incident, even in the context of difficulties with mental health, and a situation which was stressful for LMN. It was an incident that had given rise to a plea of guilty, although, at the time of the application, LMN was seeking to vacate that plea. Reports from both LMN and CDE to the police had continued after the incident. The incident of 15 October 2019 was part of the context in which the subsequent reports of wrongdoing fell to be considered.
84. PC Roth did not require to mention that LMN was awaiting treatment for mental health conditions at the time of the application. He narrated, correctly, that the neighbourhood team had had contact with mental health services. Had he narrated that LMN was awaiting treatment, we do not consider that that would have made any difference to the outcome of the application. There was a

longstanding difficulty, and it was well-known that it was one which arose in the context of mental ill-health. There was no information to indicate that any treatment was pending which would be likely to alleviate those difficulties.

85. The application does not indicate that, before 2019, LMN's most recent conviction was in 1999. The age of convictions can be highly relevant in some situations, for example, when a court is deciding whether or not to admit someone to bail. We are satisfied, however, that had that information been included, it would not have made any difference to the decision of the authorising officer. The application places little reliance on the convictions. The application is generally concerned with the reports made by CDE and LMN and the difficulty in obtaining evidence about them that could result in a prosecution.
86. In summary, for the reasons just given we are satisfied that the application was not incomplete or misleading in any material respect.

Issues 2(c) and 2(d): legality, necessity and proportionality of directed surveillance conducted from 6 April 2021 (s. 28(2)(a) & (b) of RIPA and Article 8 ECHR)

Submissions

Complainants

87. It was for the respondent to demonstrate that the interference with LMN and XYZ's Article 8 rights was necessary and proportionate, applying the four stage test in *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38. It was common ground that the only objective rationally connected to the surveillance was the aim of obtaining evidence of LMN committing offences against CDE such as assault, harassment, anti-social behaviour and criminal damage and which took place in LMN's back garden. It could not be related to proving or disproving LMN's allegations against CDE, given the control that CDE had over what recordings were ultimately downloaded by the police.
88. The Tribunal could derive useful guidance in relation to necessity and proportionality from paragraphs 4.6 and 4.7 of the Code. It was relevant to consider the scope and duration of the surveillance measures; the procedures to be followed for storing, accessing, examining and destroying the data; the authorisation procedures; the arrangements for supervising the implementation of the measures; and any notification mechanisms and remedies provided in national law: *Roman Zakharov v Russia*, Application no. 47143/06.
89. The incident that took place in October 2019 could not justify the surveillance, given its lack of proximity in time. No subsequent incidents of a similar nature occurred. The respondent could not demonstrate that that the objective was sufficiently important to justify the interference with the rights protected by Article 8 ECHR.
90. The respondent had not exhausted all possibilities short of directed surveillance. LMN had had some psychological support and was awaiting more. The

preparation of the TAQ represented the full extent of the respondent's engagement with mental health services. Surveillance could not be regarded as a last resort where LMN had pending an application to vacate her guilty plea, and, depending on the outcome of that, a sentencing hearing.

91. In the event that any surveillance was proportionate, it could have been limited to video, rather than audio surveillance. The respondent had placed memo cams in CDE's property; one in a front window covering the front of the house, and one in a rear window covering CDE's back garden. The complainants' submission indicated that this had happened on 17 October 2021, but the correct date is 17 October 2019. The complainants submitted that no consideration had apparently been given to what those cameras might have disclosed.
92. The individual incidents of conduct in which CDE alleged that LMN had engaged were minor and would not, in isolation, have been sufficiently serious to justify surveillance. They could not properly be viewed in the context of the October 2019 incident, because it was of a different character.
93. The respondent had not considered the possibility that LMN, who was in contact with mental health professionals, and who was the subject of pending criminal proceedings, might be having sensitive discussions with professional people in those contexts. The respondent had not considered the impact of surveillance on a person whose mental health conditions made her vulnerable in the context of interactions with the police.
94. The arrangements for the supervision of the implementation of surveillance, and safeguards against abuse were inadequate. CDE had control of when the device was switched on or off and when police had access to recordings.

Respondent

95. There was no dispute between the parties as to the law that the Tribunal should apply.
96. The objective was to capture evidence to prove suspected offending by LMN against CDE, that could be used support a criminal justice outcome. The surveillance was not intended to capture evidence of CDE offending. The surveillance was rationally connected to the objective of capturing LMN committing offences at the rear of the property. As a matter of fact it did so.
97. The surveillance was no more than necessary to achieve the objective. The respondent had exhausted all reasonable lines of inquiry and did not require to wait to see whether LMN did obtain and then respond positively to treatment for mental health conditions. It did not require to wait for the sentencing hearing that took place in June 2021.
98. A fair balance had been struck, having regard to the pattern of LMN's offending. Campaigns of harassment commonly consisted of a series of acts which in isolation might be described as minor. The October 2019 incident was not the justification for the surveillance. It provided a context in which the subsequent

repeated incidents were to be viewed. The nature and persistence of the alleged offending was sufficiently serious to justify the surveillance.

99. The surveillance did not involve CDE being able to view the product. The intrusion was minimised by the respondent accessing the product only when CDE made a report of an alleged offence. The surveillance captured an area of LMN's garden that was overlooked and overheard on both sides. It was designed to capture LMN offending against CDE when CDE was on her own property. The respondent did not require to consider whether LMN might have held medically sensitive or legally privileged conversations in her own back garden. The respondent did not require to consider the impact of surveillance on LMN in the light of her mental health conditions. Although the respondent had sought advice on interactions with LMN, that was in the recognition that interactions between LMN and the police might at times be unavoidable.
100. The way in which the equipment was controlled and operated provided sufficient safeguards to ensure that the surveillance was limited to what was strictly necessary.

Decision

101. A person must not grant an authorisation for the carrying out of directed surveillance unless he believes that the authorisation is necessary on grounds failing with in section 28(3) RIPA, and that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out: RIPA, section 28(2)(a) & (b). One of the grounds identified in section 28(3) is that it is necessary for the purpose of preventing or detecting crime or of preventing disorder: section 28(3)(b). That falls to be contrasted with section 32(3)(b), the equivalent provision in relation to the authorisation of intrusive surveillance. The purpose identified in that provision is the prevention or detection of serious crime.
102. When considering the proportionality of the directed surveillance in this case, the four-stage test set out in *Bank Mellat* requires the Tribunal to consider the following questions.
 - (a) Was the objective at which the measure was aimed sufficiently important to justify limiting a fundamental right?
 - (b) Was the measure rationally connected to the objective to be achieved?
 - (c) Was the measure no more than was necessary to accomplish the objective?
 - (d) Did the measure strike a fair balance between the rights of the individual and the interests of the community?
103. The guidance in the Code, at paragraphs 4.6 and 4.7, which is the following terms, reflects some of the factors that are relevant when considering those questions.

“4.6 The authorisation or warrant will not be proportionate if it is excessive in the overall circumstances of the case. Each action authorised should bring an expected benefit to the investigation or operation and should not be disproportionate or arbitrary. The fact that a suspected offence may be serious will not alone render the proposed actions proportionate. Similarly, an offence may be so minor that any deployment of covert techniques would be disproportionate. No activity should be considered proportionate if the information which is sought could reasonably be obtained by other less intrusive means.

4.7 The following elements of proportionality should therefore be considered:

- balancing the size and scope of the proposed activity against the gravity and extent of the perceived crime or harm;
- explaining how and why the methods to be adopted will cause the least possible intrusion on the subject and others;
- considering whether the activity is an appropriate use of the legislation and a reasonable way, having considered all reasonable alternatives, of obtaining the information sought;
- evidencing, as far as reasonably practicable, what other methods had been considered and why they were not implemented, or have been implemented unsuccessfully.”

104. In addition, it is relevant to consider the arrangements for the supervision of the implementation of surveillance, and the other matters to which the complainants referred, citing *Zakharov*.

Analysis

105. It is not disputed that the only legitimate objective in this case was the detection of offending by LMN. The respondent does not dispute that the surveillance was not intended to capture offending by CDE. The surveillance was rationally connected to that objective in that it was capable of recording evidence of LMN committing offences against CDE at the rear of their properties.
106. The focus in this case is on the necessity and proportionality of the directed surveillance and whether the legitimate objective of detecting crime (LMN’s alleged criminal offending) was sufficiently important to justify the interference with LMN’s Article 8 rights, whether it was no more than necessary to achieve the objective and whether a fair balance was struck between LMN’s interests and those of the community.
107. We begin with the nature of LMN’s alleged offending against CDE. Each individual allegation after 15 October 2019 was relatively minor in nature. In saying that we recognise that throwing or placing a syringe filled with red liquid into a garden, particularly the garden of a home where children live, is not a trivial accusation. If that conduct takes place, the householder has no way of knowing whether it is done with a view to causing annoyance or distress, or to causing injury. The allegations against LMN after 15 October 2019 require to be viewed cumulatively, and in the context of the relatively serious incident that took place on 15 October 2019. Past conduct is generally relevant to the

assessment of future risk. CDE's initial report to the police on 15 October was of hearing a loud noise and discovering that someone had smashed glass over her car. Three later allegations were that LMN threw objects (including glass) into CDE's garden, or at property or at a person. As PC Roth noted in the application, the impact on the life of CDE's family, including her young children, had the potential to be detrimental to their well-being. We are satisfied, looking at these matters in the round, that the allegations of continuing conduct by LMN were sufficiently serious to merit the measures of surveillance that were authorised, with a view to detecting her engaging in the conduct alleged.

108. In assessing the extent and impact of those measures, we regard the following matters as relevant. CDE was not herself able to view the product of surveillance. The respondent only accessed the product if CDE made an allegation about LMN. The equipment stored the product only for 1.5 days, and then automatically overwrote the recording. These matters were safeguards as to the extent to which any material captured would be retained. CDE's discretion as to whether to report a matter, and as to whether or not to switch off the recording devices, meant that the respondent would be unlikely to detect misconduct on her part. Those features did not expand, and would tend to limit, the extent to which the respondent public authority had access to any product of the surveillance. The vast majority of the product was destroyed 36 hours after it was created, without ever being viewed or listened to by anyone. We deal separately, below, with the arrangements for switching off the equipment.
109. The recording was – with one exception of which we are aware – of LMN doing things in her back garden. That is an area where she had some expectation of privacy, but not an absolute expectation of privacy. She would expect things that she said in her back garden to be overheard by those at least in the immediately neighbouring back gardens. That would be so if she chose to carry on sensitive or privileged discussions by phone in her back garden. The respondent submitted that the back garden was overlooked by neighbours. As we have already said, we have found that it was overlooked from the upper floor of CDE's properties and from 31, but are unable to make findings that it was otherwise overlooked.
110. We are not persuaded that the respondent required to give specific consideration to the impact on LMN of discovering that she had been subject to surveillance. The respondent was aware that LMN had a number of diagnoses and that interactions with the police would be likely to exacerbate situations in which LMN was already distressed. The respondent remained under an obligation to investigate allegations that LMN had committed offences.
111. It is apparent from the DSA application that the respondent had considered other means of carrying out those investigations. The application sets out why it was not possible to investigate matters using recordings made by LMN or CDE. CDE could not afford CCTV, and LMN tended to switch her CCTV off when something happened. The respondent was hindered by a lack of evidence, independent of CDE to substantiate CDE's allegations. The application narrates that the housing company had been approached, and that the respondent's neighbourhood team had conducted mediation and "gone through" mental health services and liaised with support workers. It is difficult to see how

further liaison with mental health or other services would have assisted the respondent in the aim of detecting LMN carrying out offences with a view to prosecuting her.

112. The complainants submitted that the respondent should have awaited LMN's being sentenced in respect of the September and October 2019 offences. Again, that would not have assisted in detecting any offences that she was alleged to be committing in the meantime.
113. Having considered all of those matters, we are satisfied, on balance, that the surveillance was no more than was necessary to achieve the objective of detecting and recording LMN's offending, and that the balance struck between her interest and that of the community was a fair balance. We are conscious that the only offending actually detected that resulted in a successful prosecution was of a single, minor, assault by spraying water. The lawfulness of the measure does not, however, fall to be assessed by reference to the gravity of that offence.
114. The suspected offending in this case was sufficiently persistent and potentially damaging to CDE and her family, viewed in the context of all the known circumstances, to justify the interference that took place with LMN's rights. The suspected offending was, however, towards the lower end of the scale so far as its seriousness was concerned, and this case may be close to the line at which an interference with Article 8 rights by way of directed surveillance might become disproportionate to the legitimate objective of detecting criminal activity.

Issue 2(e) - was the directed surveillance conducted after 26 April 2021 onwards compatible with Article 8 ECHR?

115. By 26 April 2021 the surveillance had captured two incidents in respect of which LMN was charged. On 26 April 2021 at 09:29 PC Roth wrote to a colleague in the following terms, with reference to the recordings:

"It catches the top of the offender's head which I feel would be enough to at least interview her and at the least send it to CPS. I need to get statements first".

At 10:52 on the same day, he wrote:

"One more question, Can we still film or do we need to stop as we may have enough to arrest?"

His colleague advised him that he was justified in continuing.

116. When PC Roth submitted an application on 26 May 2021 to renew the DSA, it included the following information:

"Since the static camera equipment has been installed, it has LMN throwing a stone at CDE's back windows (no damage caused – [reference number]), LMN spraying CDE intentionally with water using a hosepipe ([reference number]) and LMN

removing a fence post and alleging that CDE threw it at her ([reference number]), when she clearly didn't.

The OIC is in the process of speaking with LMN's solicitor to arrange an interview in relation to these offences. LMN continues to pose a risk to CDE and her family as LMN has been convicted but is still awaiting sentence for running into CDE's home address brandishing a pair of scissors."

117. PC Roth recorded that CDE reported an incident on the day on which LMN had appeared in court and been convicted (presumably a reference to her unsuccessful application to vacate her guilty plea), but that it had not been captured on a recording. He noted that the surveillance had "started to see results" where previous less intrusive methods had not.
118. The authorising officer granted authority with a view to the prevention and detection of crime, namely harassment, criminal damage and assault. He noted that since the last conviction the offences had continued. He wrote:

"Whilst the previous conviction does not appear to have stopped the offending it is crucial that investigation and where appropriate prosecution for the most recent offences is prioritised, to show the cumulative effect and allow for escalation of appropriate sanctions and protection. Accordingly I authorise the use of any obtained product for this purpose. This authority however it (*sic*) there to offer continued protection which needs to be supported by the priority of the criminal investigation."

Submissions

Complainants

119. In addition to the arguments advanced generally about the proportionality of surveillance, the complainants submitted that by the time of the renewal application, the aim of capturing evidence such that LMN's behaviour could be dealt with through the criminal justice system had been achieved. Surveillance was no longer necessary or proportionate. The renewal application was not fair and balanced, because it narrated that offending appeared to be continuing on a monthly basis, and failed to distinguish recent alleged offending from historical matters dating from 2019.

Respondent

120. The justification was, if anything, stronger because the evidence obtained on 20 and 23 April added weight to CDE's complaints and demonstrated the probability that the behaviour would continue. A crime of assault had been detected, and featured in the reasons for granting the authorisation. There was nothing misleading in the application.

Decision

121. In our view the continuation of the directed surveillance for a limited period with a view to providing evidence that LMN's offending was continuing – as it appeared to be, even after the “conviction” on 6 April 2021, was proportionate. The recording that had already taken place had captured an assault. Although it was an assault of a minor nature, it represented an offence against the person, something of which there had been no independent evidence at an earlier stage. The respondent was essentially seeking to gather evidence of a pattern of behaviour or course of conduct with a view to prosecution of LMN and of providing a picture of the cumulative impact of that conduct.
122. We are satisfied that the application was not misleading in any material respect. The application does not represent that the offending appeared to be continuing on a monthly basis – that was a comment made by the authorising officer in the authorisation. It is not inaccurate. The list of Niche reports annexed to PC Roth's statement refers to two incidents on 26 and 27 March 2021. A report had been made on 6 April 2021, and two incidents had been recorded on the surveillance equipment, on 20 and 23 April 2021.
123. The information in the application reflected clearly which information had been recorded in the course of recent surveillance, and which information was about older offending. There is no suggestion that the surveillance had given rise to the conviction in April 2021.

Issue 3: Did surveillance continue after the authority ceased?

124. This issue arises because the recording equipment was not uplifted from CDE's home until 28 July 2021, the DSA having been cancelled on 23 July 2021. We do not need to rehearse the parties' competing submissions in any detail in relation to this point.
125. There is simply no evidence to support the proposition that recording continued after 22 July 2021. The evidence before us is that PC Roth applied for cancellation on 22 July 2021. His unchallenged evidence is that he contacted CDE at about 10.30am that day. He told her she needed to turn the camera off, and that police would be round to collect it. He recorded on the cancellation application, which is timed at 10.57am that “[t]he camera was switched off at 10:30 hrs on 22/07/2021 by the victim”. The respondent accepted that PC Roth did not see for himself or check that the camera had in fact been switched off.
126. The contemporaneous record in the application for cancellation supports the proposition that PC Roth told CDE to switch off the camera. He recorded also in the application that CDE was not happy that the camera was being removed. That does not, however, provide a sound basis for us to infer that she disobeyed the instruction to switch it off. She was not to know that some days would pass before officers would attend and collect it. They might have attended at any time. There is no particular reason why she should have kept the equipment running. She could not access the recordings herself.

127. The complainants referred to an email from PC Roth to technical support officers on 26 July 2021 which stated that “CDE is aware that [the equipment] needs to be turned off and collected”. We do not infer from his use of the present tense that he had not instructed CDE to turn the equipment off on 22 July 2021. He was communicating to colleagues, in a relatively informal manner, that the need to switch off the equipment had been communicated to CDE, and that she knew the equipment would be collected.

Other matters

128. In the light of our conclusions as to the lawfulness of the surveillance, it is unnecessary for us to consider separately whether XYZ, LMN’s sister, who visited her at her home, is a victim for the purposes of Article 8 ECHR.

Disposal

129. We make no determination in favour of LMN or XYZ for the purposes of s.68(4)(b) of RIPA.

130. This Notice of Decision is issued to the complainants and the respondent in accordance with Rule 15(1) of Investigatory Powers Tribunal Rules 2018 (“the Rules”). In accordance with Rule 15(2) of the Rules the Tribunal provides herewith its determination, including any findings of fact subject to the Tribunal’s duty under Rule 7(1) of the Rules which provides:

“The Tribunal must carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that it is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services”.

131. All of our essential reasoning is set out in this OPEN judgment. There is a CLOSED judgment which addresses submissions made in a short CLOSED hearing in this case.
132. The Tribunal hereby specifies, in accordance with s.67A(2) of RIPA that, in the event of an appeal, the relevant appellate court in this case is the Court of Appeal of England and Wales.
133. An appeal is possible only in respect of a point of law that raises an important point of principle or practice (or for other compelling reasons) and is not a decision on a procedural matter. An appeal requires permission so an application must first be made to the Tribunal for leave to appeal. A form applying for leave to appeal is attached and full details of the provisions relating to appeal may be found on the Tribunal’s website: www.investigatorypowerstribunal.org.uk

134. The Rules contain detailed provisions in relation to making an application for leave to appeal which are contained in Rule 16 of the Rules. The Rules are available from the Tribunal's website www.investigatorypowertribunal.org.uk