[2016] AACR 32

(BS v Secretary of State for Work and Pensions (DLA)
[2015] UKUT 73 (AAC))

Judge Lane **CDLA/688/2015**
2 February 2016 **CDLA/689/2015**

Tribunal procedure and practice – fair hearing – surveillance of appellant under Regulation of Investigatory Powers Act 2000 – whether authorisation required at First-tier Tribunal

Human rights – Article 6 and Article 8 – whether appellant's rights breached by surveillance under Regulation of Investigatory Powers Act 2000

A fraud investigation, involving video surveillance authorised under the Regulation of Investigatory Powers Act 2000 (RIPA), found that the appellant was regularly playing crown green bowls and the Secretary of State decided that he was therefore no longer entitled to disability living allowance (DLA) and that he had also been overpaid some £41,000 which was recoverable. The appellant appealed against both decisions and the First-tier Tribunal (F-tT) directed the Secretary of State to provide it with a copy of the authorisation under RIPA for the surveillance. The Secretary of State failed to do so, contrary to rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. However, the F-tT rejected the appeals, relying upon the presenting officer's evidence that such authorisation had been obtained and was held by the fraud investigation team. The appellant appealed to the Upper Tribunal (UT) and among the issues before it were whether the absence of the authorisation made it unlawful, the extent to which this might affect the weight of the video evidence and whether there were breaches of the appellant's rights under Article 6 (right to a fair hearing) and Article 8 (right to respect for private life) under the European Convention on Human Rights (ECHR). The Secretary of State subsequently provided the UT with a copy of the authorisation in response to its directions.

Held, disallowing the appeal, that:

1. the question for the UT was not whether the Secretary of State had breached rule 2(4) but whether the tribunal had erred in law. It was not inevitable that impropriety or unfair behaviour by the Secretary of State would cause the F-tT to err as it may put right failures of one party or the other. Nor was it inevitable that unfairness shown by a party would justify the UT in setting aside a decision. If the unfairness was trivial it would be inappropriate or disproportionate to do so and if it could not have affected the outcome it was immaterial (paragraphs 12 to 15);

2. the UT rejected the submission that authorisation under RIPA for the surveillance had to be proven. Unlawfully obtained evidence was admissible in civil litigation, if it was relevant and the unabated "best evidence" rule had been substantially superseded. Rule 15(2) expressly permitted a tribunal to admit evidence whether or not it was admissible in a civil trial. Courts and tribunals may be reluctant to exclude evidence which was reliable and probative although unlawfully obtained, and Strasbourg jurisprudence accepted that there may be no unfairness in admitting such evidence: *Khan v UK* [2001] 31 EHRR 45. If the evidence had been lawfully obtained, the prospect of its exclusion as unfair was minimal (paragraphs 16 to 19);

3. whether the authorisation had been obtained was a question of fact for the tribunal to establish on the balance of probability given the relevance and credibility of the available evidence including the presenting officer's evidence: *PL v Walsall Metropolitan Borough Council* [2009] UKUT 27 (AAC). It was open to the F-tT to accept evidence from the presenting officer that authorisation had been obtained, subject to being satisfied that the evidence had a credible basis (paragraphs 20 to 23);

4. there were no grounds for setting aside the F-tT's decision on the basis of some unfairness or breach of natural justice within the proceedings; the presenting officer had confirmed the existence of the authorisation and explained why it was unavailable, it had not been required by the tribunal and the appellant's case had not been prejudiced. Even if the F-tT had erred by acting without the document, its error would have been immaterial as it could not have affected the outcome of the case (paragraphs 27 to 35);

5. there was no breach of either Article 6 or Article 8 the appellant had had a full and fair opportunity to put his case and to deal with the video evidence while the right to respect for private life was lawfully and proportionately qualified under RIPA (paragraphs 36 to 40).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The decision of the First-tier Tribunal is NOT set aside. Although the F-tT made an error of law, it was immaterial to the outcome.

REASONS FOR DECISION

1. I apologise for the delay in promulgating this decision.

2. In these two related cases, the First-tier Tribunal (F-tT) dismissed the appellant's appeal against the Secretary of State's decisions (i) to revise his entitlement to the middle rate of the care component of DLA from 6 November 2004 and the higher rate of the mobility component of DLA from and including 22 September 2005 and (ii) raise an overpayment of some £41,000 for the periods in question.

The background facts

3. The middle rate of the care component was awarded on the basis of the appellant's claim that he required attention in connection with his bodily functions frequently throughout the day. At the time of the initial award of the care component, the appellant did not satisfy the conditions of entitlement for the mobility component, but he was later awarded the higher rate of the mobility component on the basis of his claim that he was virtually unable to walk. His claim was subsequently investigated by the Fraud Investigation Service which produced cogent evidence that he had misrepresented his disabilities throughout the periods covered by the awards. The evidence showed that the appellant was an active, regular crown green bowls player. The evidence included information from the Bowling League, videos obtained through surveillance, and from an interview under caution.

The initial problems arising from the Regulation of Investigatory Powers Act 2000

4. The appellant's representative (whom I shall refer to as "the representative" hereafter) attacked the F-tT's decision on extensive grounds, but only one of those grounds was arguable: whether the absence of the document authorising the surveillance under the Regulation of Investigatory Powers Act 2000 (RIPA 2000) made the surveillance unlawful. If the surveillance was unlawful, he raised further questions regarding the tribunal's power to admit or exclude evidence, the extent, if any, to which unlawfulness might affect the weight of the evidence, whether unauthorised surveillance breached the appellant's rights under Articles 6 and 8 of the European Convention on Human Rights as incorporated into UK law by the Human Rights Act 1998 and the appropriate remedy, if any, by a First-tier Tribunal (Social Entitlement Chamber).

5. It is helpful to note at the outset that the Department for Work and Pensions (DWP) is a governmental body listed under Schedule 1 of RIPA 2000 as having the power to authorise covert surveillance, in this case "directed surveillance" as defined in section 26 of RIPA 2000.

6. The representative and the F-tT had requested the Secretary of State to supply evidence that the surveillance was authorised, to no avail.

7. The Secretary of State did, however, respond to my directions to produce evidence of the authorisation and provided a copy. In the circumstances of this appeal, the provision of that authorisation provides an answer to the representative's original submissions on this issue.

8. I emphasise here that the representative's objection was to the lack of proper documentation regarding authorisation. He did not suggest that the surveillance carried out was unnecessary, unduly intrusive or disproportionate in any other way. He did, however, rightly criticise the Secretary of State's failure to cooperate with the F-tT, and argued in his reply to the Secretary of State's response that his failure to cooperate made the hearing unfair. The representative sought to compare this case to CIS/1481/2006. As will be seen, I do not accept the comparison or his submission on the effect of the failure to cooperate.

9. Like this appeal, CIS/1481/2006 involved the lawfulness of surveillance under RIPA 2000 which was only shown to be authorised at the hearing before the Commissioner. However, the DWP's behaviour in CIS/1481/2006 was of an entirely different order from that which occurred in this appeal. In CIS/1481/2006 the DWP's refusal to produce evidence regarding authorisation for the surveillance was the least of the problems, and one which attracted guidance (but no more than that) from Mr Commissioner Williams. I consider this later. The gravamen of the DWP's behaviour was their refusal to allow the claimant and the tribunal access to the video evidence obtained by the surveillance, transcripts of the interview under caution and notebooks containing evidence they were saving "for court" (by which they seemed to mean a criminal court) on which they relied. None of these manifest improprieties were addressed, let alone corrected, by the tribunal. It was content to make a decision based on a number of photographic stills selected by the Secretary of State.

10. It is, however, troubling that the DWP held back the authorisation document because they feared its production might impede criminal investigations into the same matter. It is difficult to see how it could do so, given that the surveillance was finished. The Secretary of State's argument was, in any event, decisively rejected in CIS/1481/2006. That case was but one in a line of cases which rebuked the Secretary of State's failure to produce relevant evidence in reliance on the same argument. In CIS/1481/2006 Mr Commissioner Williams (now Upper Tribunal Judge) said, at [85], that "It is not for one side to an appeal to decide on priorities between civil and criminal proceedings about social security matters".

There must be an error of law by the tribunal. It is not automatically or vicariously liable for failures by the Secretary of State.

11. In CIS/1481/2006 the Secretary of State's conduct through his department failed to conform to the standards expected of a public body pursuing litigation. The Secretary of State's duty to cooperate with the Tribunal, as set out in *Kerr v Department for Social Development* [2004] UKHL 23; [2014] 1 WLR 1372, also reported as R 1/04(SF), hardly needs restating. Both parties are, of course, required under rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) to cooperate with the tribunal, whilst the tribunal itself must deal with cases fairly and justly in accordance with the overriding objective in rule 2(1).[1]

[1] The duties have been explored most recently in *ST v Secretary of State for Work and Pensions (ESA)* [2012] UKUT 469, a case in which the Secretary of State's failure to provide evidence of the most recent, previous ESA85 medical report led to unfairness for the appellant meriting setting the decision aside. The case explains the sources of the Secretary of State's duties but otherwise reflects the law as it stood in relation to previous forms of incapacity benefits.

12. But the question for the Upper Tribunal under sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007 is not whether the Secretary of State has breached his duties under the Rules, but whether the tribunal has erred in law. If unfairness or breach of natural justice is asserted, it must be shown that *the tribunal* acted in breach of natural justice and/or in breach of the claimant's right to a fair hearing under Article 6.

13. In CIS/1481/2006, there was only one answer to that question since (i) the claimant was not allowed at any stage, including the hearing, to know the evidence she had to meet and (ii) the tribunal had not redressed the manifest unfairness caused by the Secretary of State's conduct. The tribunal was rightly found to have erred in law by their failure to put right the procedural improprieties that infected the proceedings.

14. It is not inevitable that impropriety or unfair behaviour on the part of the Secretary of State will cause a tribunal to fall into error of law. The tribunal may, through use of its inquisitorial powers and its duty to hear and determine fairly, and to hear all relevant issues afresh, put right failures of one party or the other. If it does so, it is unlikely to have made an error of law in respect of natural justice or Article 6.

15. Nor is it inevitable that unfairness, however minor, shown by a party will justify setting aside a decision. The Upper Tribunal has discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 over whether or not a F-tT's decision is to be set aside. If the unfairness is trivial when looking at the proceedings or decision as a whole, the Upper Tribunal might consider it inappropriate or disproportionate to set the decision aside. If the matter on which the unfairness arose could not have affected the outcome at all, it was immaterial and would not be considered an error at all.

Authorisation under RIPA 2000 – does it need to be proven?

16. The representative's submission in this case was, in effect, that unless the authorisation (or a copy of it) was produced, the surveillance could not be shown to be lawful. There are three problems with this submission. The first is that at common law, unlawfully obtained evidence is admissible in civil litigation, if it is relevant. *Helliwell v Piggott-Sims* [1980] FSR 356 at 357 (CA) confirmed that there was no discretion to exclude evidence on the ground that it was unlawfully obtained and, in civil cases, there was no rule that such evidence should be excluded because its prejudicial effect outweighs its probative value. This is now subject to an individual's right to a fair hearing under Article 6. The requirement of fairness is, as we will see, incorporated into the rules governing Tribunal procedure. The second is that the representative's submission appears to posit the continuing application of an unabated "best evidence" rule. Although vestiges of the rule remain in courts, it has been substantially superseded by the principle that all relevant evidence is admitted. 'The goodness and badness of it goes only to weight, and not to admissibility': *Garton v Hunter* [1969] 2 QB 37; [1969] 1 All ER 451 (Denning J, as he then was). Thirdly, tribunals are not bound by the strict rules of evidence in any event.

17. This was the position long before the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) and remains so. Rule 15(2) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 expressly permits a tribunal to admit evidence whether or not it would have been admissible in a civil trial in the UK. It can also exclude evidence that would be admissible where it would otherwise be unfair to admit it. The rule is the same for all tribunals within the TCEA 2007 system.

"**15.** – (2) The Tribunal may –

(a) admit evidence whether or not –

(i) the evidence would be admissible in a civil trial in the United Kingdom; or

(ii) the evidence was available to a previous decision maker; or

(b) exclude evidence that would otherwise be admissible where –

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or

(iii) it would otherwise be unfair to admit the evidence."

18. Courts and tribunals may, not unnaturally, be reluctant to exclude evidence which is reliable and probative although unlawfully obtained; and Strasbourg jurisprudence accepts in turn that there may be no unfairness in admitting such evidence when the fairness of the proceedings are considered as a whole: *Khan v UK* [2001] 31 EHRR 45.

19. It may nevertheless be important for a tribunal to decide whether the disputed evidence has been lawfully obtained. Realistically, if the evidence was lawfully obtained, the prospect of its exclusion as unfair is minimal.

Authorisation is a question of fact

20. The starting point is that whether or not the authorisation had been obtained was a question of fact for the tribunal, to be established on the balance of probability. It follows that the tribunal was obliged to decide the fact of authorisation as it would any other fact, that is to say on the evidence presented to it, its relevance and credibility.

21. That evidence could be produced by a representative, including a presenting officer. This is established by case law from the Social Security and Child Support Commissioners (now the Upper Tribunal). Representatives may give evidence on questions of fact, even though those facts may be outside their personal knowledge. In CDLA/2462/2003 Commissioner (now Upper Tribunal Judge) Jacobs made it clear that:

> "8. Given that breadth of representation [in tribunals], it is inevitable that the roles of representative and witness cannot be separated in the way that they would in a court. … The tribunal must take care to distinguish evidence from representation so that the former's provenance is known and can be the subject of questioning by the tribunal and other parties. But, subject to the practicalities of the way in which the taking of evidence is handled, there is no objection in principle to the same person acting in different capacities as a witness and as a representative. Nor is there any reason in principle why the probative value of evidence should depend upon whether or not it came from a representative."

22. CDLA/2462/2003 applied to claimants' representatives. The same principles, however, apply to presenting officers: *PL v Walsall Metropolitan Borough Council* [2009] UKUT 27

(AAC). In that case Judge Jacobs, having reconsidered the approach taken in earlier Commissioners' cases, considered the law to be as follows:

> "The law of evidence is now less concerned than in the past with exclusionary rules that prevent a court taking account of particular categories of statements or hearing from specified categories of person as witnesses. Nowadays, the approach is to admit evidence for consideration and to take account of any possible deficiencies when deciding the extent to which it is persuasive of the facts to be proved. That approach was becoming evident by at least 1861: see Cockburn CJ in *R v Birmingham Overseers* (1861) 1 B & S 763 at 767. It is now the accepted approach. By 1973, Lord Simon was able to say in *Director of Public Prosecutions v Kilbourne* [1973] AC 729 at 756 that relevance and admissibility 'are frequently, and in many circumstances legitimately, used interchangeably'.
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> Moreover, the strict rules of evidence do not apply in a tribunal: see the decision of the Chief Commissioner in *R(U) 5/77* at paragraph 3. All that is required is that the tribunal's findings of fact should be based on material that is logically probative of those facts: see the opinion of the Privy Council delivered by Lord Diplock in *Mahon v. Air New Zealand* [1984] AC 808 at 820-821. Evidence given by submission writers or presenting officers, even if hearsay, is as capable of being logically probative as evidence, whether or not hearsay, given by anyone else.
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> Moreover, in the context of a tribunal, roles are often not as clear cut as they are in a court. For example: a claimant may be accompanied by someone for moral support who also acts as representative and gives evidence that is in part derived from personal knowledge and in part based on information provided by the claimant. Likewise, the role played by a presenting officer may be less clear cut than decisions such as *CSB/582/1987* suggest. There is no reason in principle why a presenting officer cannot give evidence, as was recognises [*sic*] by the Commissioner in *R(SB) 10/86* at paragraph 5. There is no reason to draw a distinction, so far as admissibility is concerned, between evidence within the officer's personal knowledge and other evidence. If the officer relays statements made by another officer, what is said is nonetheless evidence. However, it is hearsay evidence and this may affect its probative worth: see *R(SB) 5/82* at paragraph 9.
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> On the modern approach to evidence and to the nature of proof in a tribunal, the submission writer's statement was evidence. It was also of some probative value. The writer may, or may not, have personally made the decision on 17 December 2007. If so, the writer could speak from personal knowledge. If not, the writer was able to report the contents of the computer records of the claim and was under a duty to report that information to the tribunal, as it was not accessible by the claimant: see Baroness Hale in *Kerr v Department for Social Development* [2004] 1 WLR 1372 at paragraph 62. Moreover, the writer had no reason to misstate what the records contained or to mislead the tribunal, as the local authority's role in the proceedings is a non-contentious one: see Diplock LJ in *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456 at 486."

23. It follows that it was open to the F-tT to accept evidence from the presenting officer that authorisation had been obtained, subject to being satisfied that the evidence had a credible basis.

Weight

24. The representative submitted that the presenting officer's evidence should have been given less weight without the authorisation. Whether this is appropriate depends on the nature of the evidence being given. In this case, the presenting officer was either reporting a fact accurately or not. Either the authorisation existed or it did not. There was no middle ground. On this type of issue, either the tribunal believed the presenting officer as a person who had access to files and no personal interest in the matter, or it did not. It chose to believe him. That was a matter for the tribunal, as I will explain a little later.

25. This is not to excuse the Secretary of State for failing to provide the authorisation. Had he done so when the document was requested by the appellant and then as directed by the F-tT, it would have saved time and expense.

26. Having finally seen a copy of the authorisation, the representative argued – albeit faintly – that the authorisation might be invalid because instead of signatures, the signature boxes in the document contain e-mail numbers. I do not accept this. The document plainly contains the information which justifies its issue under RIPA 2000 including the names and ranks of the authorising officers, as required. There is reason whatever to suppose that the original document was not properly signed.

Other unfairness?

27. Since the surveillance was found to be – and actually was, in fact – authorised, the appellant cannot succeed unless he shows that there was some unfairness in the proceedings beyond the simple lack of the document. (It matters little whether one uses "unfairness" or "breach of natural justice", but where one or the other covers the conduct in the submission more clearly, I shall refer to that one in preference to the other.)

28. There were three possibilities. (i) An inadequacy in "facts and reasons" arising from the tribunal's somewhat bald statement in the Statement of Reasons that it accepted the presenting officer's evidence that they had obtained authorisation but had not put it in the papers**;** (ii) as, argued by the representative, that the Secretary of State's failure to cooperate by not producing the authorisation at an early stage meant he could not prepare and present his case properly; and (iii) that he failed to provide relevant evidence, which is an error of law: *ST v Secretary of State for Work and Pensions (ESA)* [2012] UKUT 469 (AAC).

29. As stated in [12], the question for the Upper Tribunal is whether the tribunal has erred in law. For this, it is necessary to consider the appellant's submission that (as in CIS/1481/2006) the tribunal had not shaken itself free of the irregularities in the Secretary of State's conduct, and so acted unfairly.

30. Dealing with (i), the possible inadequacy of facts and reasons: the typed Record of Proceedings did not record evidence or submissions from the presenting officer regarding the authorisation. However, on re-reading the representative's submission to the Upper Tribunal, I note that he states that the respondent (by whom he must mean the presenting officer) "**informed the Tribunal and the representative at the start of the hearing that the RIPA 2000 authorisation was not available but that one had been obtained and was held by the respondent's fraud investigation staff who were not at the hearing**"**.** It is clear, therefore, that the presenting officer did address the issue of the elusive authorisation at the hearing.

31. It was for the F-tT to decide whether the presenting officer's evidence was credible. As this was a matter that was troubling the representative, the F-tT should have recorded the presenting officer's evidence in the Record of Proceedings, and it would have taken little effort to add a few words of explanation about why it was accepted. Having said that, it must be implicit in circumstances like these that there was no reason why the respondent or his Department, who are obliged to obtain authorisation, self-certifying, and accustomed to doing so, would lie on this matter.

32. I should add that, even if the tribunal did err by not spelling this out, I would not have set aside the decision on this basis, having regard to the fact that authorisation did exist, and the otherwise careful and well analysed decision by the tribunal.

33. As regards (ii), I am unable to see that the absence of the authorisation document prejudiced the appellant or his representative in the preparation or presentation of their case. The circumstances are these:

(a) the appellant knew from an early stage that the respondent was relying on surveillance evidence. The only thing he did not see was the document itself;

(b) surveillance evidence was plainly reliable in what is showed *viz* the appellant engaging in activities wholly inconsistent with his claim for benefit;

(c) that evidence was consistent with evidence from the Bowling Club regarding the matches and championship matches he appeared in over a period of time;

(d) the appellant's interview under caution contained certain admissions against interest about his activities;

(e) the parties all saw the videos (unlike CIS/1481/2006);

(f) the appellant and his representative had a full opportunity to address that evidence; and finally

(g) the body with the statutory power to deal with challenges to the lawfulness of covert surveillance is the Investigatory Powers Tribunal. There is nothing in the papers to suggest that the solicitors saw fit to make a complaint to that Tribunal.

In all of these circumstances, it would have been perverse to have excluded evidence.

34. Submission (iii) also fails. *ST v Secretary of State for Work and Pensions* emphasises the duty on the Secretary of State under rule 24(4)(b) of the First-tier Tribunal Rules to provide documents relevant to an appeal. In *ST* the appellant's submission was that she had passed the work capability assessment (WCA) previously and her condition had not changed. Indeed, the same doctor had examined her on both occasions. If, as the appellant believed, her condition had not changed, it was relevant to compare the two reports to see why she had passed before, but no longer did so.

35. But as *ST* also points out, it is not *every* document that must be supplied. Nor will the tribunal have necessarily erred in law if it goes ahead without a document that is relevant, if its contents can be established credibly in another way. In the instant appeal (and insofar as it was necessary to do so at all) the tribunal found that authorisation had been granted on the basis of the presenting officer's evidence. The tribunal did not need to compare documents. All it needed to do was decide if it was likely that government body accustomed to obtaining authority for surveillance and having the power to issue it themselves, had done so in a routine case.

What if my analysis is wrong?

36. Finally, even if I am wrong and the F-tT did err in law by acting without the document, my conclusion is that its error would be immaterial. It could not have affected the outcome of the case.

37. Whilst one can think of situations in which a tribunal can be said to have acted unfairly or to have made a material error even though it came to the correct factual conclusion on the evidence, I cannot see how that occurred here. In terms of natural justice and fairness, the appellant had a full and fair opportunity to put his case, and did so with legal representation throughout. He had the opportunity to deal with the video evidence. His only complaint is that he would have liked to see the actual authorisation document. But as I have explained, that was not a legal necessity. I do not, therefore, see any breach of Article 6 or of natural justice, insofar as there is any difference.

38. As far as Article 8 is concerned, the appellant's right to respect for his private life is a qualified right. It may be found to give way where an interference by a public authority, such as surveillance in a benefit fraud investigation, is in accordance with the law and the interference is necessary in a democratic society in the interests, amongst other things, of the economic well-being of the country or the prevention of disorder or crime.

39. RIPA 2000 provides the framework to ensure that surveillance by public bodies takes place within a clear legal framework which is compliant with the UK's obligations under the European Convention on Human Rights. RIPA 2000 lays down the requirement of proportionality in designing and carrying out that surveillance. No question has been raised about the substance of the authorisation or the proportionality of the surveillance carried out. Section 27 of RIPA is relevant. It provides:

> "**27.** – (1) Conduct to which this Part applies shall be lawful for all surveillance etc. purposes if –
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> (a) an authorisation under this Part confers an entitlement to engage in that conduct on the person whose conduct it is; and
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> (b) his conduct is in accordance with the authorisation."

40. Insofar as breach of the appellant's right to respect for private life might have been in question, the authorisation provides an answer which renders the surveillance lawful.