

B E T W E E N:-

10 HUMAN RIGHTS ORGANISATIONS

Applicants

-v-

UNITED KINGDOM

Respondent Government

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**SUBMISSIONS MADE IN LIGHT OF THE THIRD IPT JUDGMENT OF 22 JUNE 2015**

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**Introduction**

1. These are the further submissions of the Applicants in light of the judgment of the Investigatory Powers Tribunal (“the Tribunal”) dated 22 June 2015 (“the Third Judgment”) in which the Tribunal found that the UK government had violated the Article 8 rights of two of the Applicants. The submissions have been made at the invitation of the Court by its letter dated 1 July 2015. In outline, the Applicants submit:
  - (1) The Tribunal’s Third Judgment shows that – either as part of, or in addition to, their programmes of bulk collection and interception of private communications of undisclosed scope and extent – the UK intelligence services have been actively targeting the private communications of human rights organisations in a number of countries;
  - (2) Insofar as the proportionality of bulk interception surveillance of all internet-based communications entering and exiting the United Kingdom is concerned in general terms, the Third Judgment provides no analysis or explanation as to why such a blanket scheme of interception is a proportionate interference with the rights of each individual whose communications were intercepted. The Tribunal did not require the Respondents to provide adequate disclosure on this issue nor did it hold an open hearing to deal with this issue, even in hypothetical terms. The Third Judgment also did not explain if and why it concluded the interception, collection, filtering and retention of everyone’s communications and communications data is proportionate under Articles 8(2) and 10(2) ECHR;
  - (3) Insofar as the proportionality of bulk collection and interception of the communications of these specific Applicants is concerned, the Third Judgment revealed that the private communications of Amnesty International Limited (“Amnesty International”) and the Legal Resources Centre had been intercepted and accessed (by an unspecified agency) and then selected for inspection and subsequently examined by GCHQ. The Tribunal concluded that such conduct was lawful and proportionate under Article 8(2). This finding was flawed because the Tribunal did not provide any reasoned basis for reaching it. The judgment does not set out sufficient grounds for finding that the admitted interference with Article 8(1) rights was necessary and proportionate under Article 8(2);
  - (4) The Tribunal concluded that while the interception, access and selection for examination were necessary and proportionate the UK intelligence services breached the terms of their internal policies on the selection and retention of intercepted material of those two Applicants. To that limited extent it found their rights had been breached. The following points are significant about

that finding:

- (a) The Tribunal did not provide any meaningful analysis of how that breach had occurred, including its nature and seriousness. Nor did it explain the content of the relevant intelligence services rules that had been breached. The true nature of the breach of those Applicants' rights therefore remains opaque;
  - (b) The Tribunal had previously found, in its first judgment, that the s. 8(4) surveillance regime contained adequate oversight mechanisms to ensure it was in accordance with the law. This finding revealed that the oversight mechanisms had wholly failed these Applicants and had hitherto not identified breaches of their rights. The Tribunal did not address this inconsistency. In a letter dated 24 July 2015, the Tribunal confirmed that these breaches were first identified as a result of the legal challenge brought by the Applicants.
- (5) It is also notable that the Tribunal's Third Judgment initially, and erroneously, declared that the Egyptian Initiative for Personal Rights ("EIPR") had been the victim of a violation of Article 8 rather than Amnesty International. Neither the Tribunal nor the Respondents have fully explained:
- (a) how the Tribunal could have made a detailed analysis of the proportionality of the surveillance of each of the Applicants if, at the time of giving judgment, it was in error as to which of the Applicant's rights had been violated;
  - (b) how, if the both the Tribunal and the Respondents had conducted an individualised, thorough and detailed analysis of the interference of the rights of each Applicant, it could have published a public judgment containing such a fundamental error;
- (6) In light of the above, the Applicants submit that the Third Judgment shows that:
- (a) The UK legal framework by which persons may seek to vindicate violations of their rights arising through bulk interception surveillance is wholly inadequate.
  - (b) The wrongful, unnecessary and excessive use of closed hearings, as operated by the Tribunal and the Intelligence Services in this case, means that mistakes will be made and will not be properly scrutinised or identified.
  - (c) The system of closed hearings also means that Applicants cannot know, or meaningfully make submissions as to whether their rights have been breached. Nor is sufficient information disclosed so that persons may properly understand any judgment concerning any violation they may have suffered.
  - (d) The absence of any earlier identification of the Applicants' rights being violated reveals a deficient oversight regime. It also means that the Tribunal's earlier conclusions that the oversight mechanisms were sufficient are flawed. In order for persons in the UK to have violations of their rights identified and ruled upon many millions of people would need to bring speculative claims before the Tribunal. This is not a properly functioning system.
  - (e) The error made by the IPT as to which Applicants' rights had been breached is indicative of there not being a clear, thorough and specific examination of the rights of each Applicant.
  - (f) The Third Judgment wholly fails to deal adequately with violations of rights under Article 10, which are fundamental rights enjoyed by the Applicants.

2. In the circumstances, the Applicants invite the Court to conclude that the UK government's surveillance of the Applicants violates Articles 8 and 10. It is contrary to the values and ideals of a democratic society as guaranteed by the Convention and cannot be justified under Articles 8(2) or 10(2).

### **The background to the Tribunal's Third Judgment**

3. The proportionality of the Tempora programme (and bulk interception surveillance under the s. 8(4) warrant regime) had initially been an issue agreed by the parties to be considered by the Tribunal.
4. Following its first judgment on 5 December 2014, the Tribunal directed the Applicants to file submissions on the necessity and proportionality of any interception of their communications. However, the Tribunal's directions made it clear that, notwithstanding that one of the agreed issues had been the necessity and proportionality of the s.8(4) regime *in general*, it would now only consider submissions on the *actual circumstances* of any interception and inspection of the Applicants' communications. It therefore did not require the Respondents to provide any disclosure to justify the proportionality of the bulk interception surveillance regime, nor did the Tribunal conduct any open adversarial hearing – even based on hypothetical facts – on that issue. The Applicants objected to this course, but subsequently filed written submissions in January 2015, limited in accordance with the Tribunal's directions.
5. On 3 June 2015, the Tribunal wrote to the parties noting the on-going proceedings before the Court in *Big Brother Watch & Others v United Kingdom* (App. No. 58170/13) and inviting the parties to make any further submissions in light of the observations made in the submissions in that case. The Tribunal's letter stated that for the avoidance of any doubt, "*the Tribunal intended to consider, and has considered, all issues as to proportionality, including what has been called "systemic proportionality" in order to arrive at its conclusions*" as to whether the Applicants' communications had been intercepted, viewed, stored or transmitted in violation of Articles 8 and/or 10.
6. In response, Liberty wrote to the Tribunal complaining that the Tribunal's stance was inconsistent with its earlier directions concerning "systemic proportionality" and explaining that the absence of any disclosure or indication of the arguments that had been raised by the intelligence services meant the Applicants were unable to advance their submissions on this issue any further.
7. Despite the Applicants' request for an opportunity to make oral submissions on necessity and proportionality, the Tribunal maintained its refusal to hold an open hearing in relation to these issues. The UK intelligence services did not provide any disclosure to the Applicants relating to the issue of proportionality (systemic or otherwise). Nor was there ever any indication – even in the most brief or general of terms – of what arguments or evidence relating to this issue may or may not have been advanced before the Tribunal in closed session.

### **The Tribunal's Third Judgment - 22 June 2015**

8. On 18 June 2015, the parties, including the Respondents, received a draft copy of the Tribunal's Third Judgment on a confidential basis. The parties were sent the draft to give them an opportunity to correct any typographical or other errors in the judgment before it was made public. That judgment erroneously identified the EIPR as the victim of a specific violation of Article 8.
9. On 19 June 2015, Liberty sent the Tribunal a list of suggested typographical corrections to the draft judgment (see attached). Later the same day, the government sent the Tribunal its own list of suggested corrections, which agreed with those proposed by Liberty and suggested two further minor amendments of its own (see attached). At no point did the Respondents or their lawyers indicate the error in relation to the EIPR. Similarly, the Tribunal did not identify the error, even when the parties

made references to the violations against the EIPR in the documents they sent to the Tribunal in relation to the draft judgment.

10. On 22 June 2015, Liberty wrote to the Tribunal on behalf of the EIPR and the Legal Resources Centre to request clarification of various points that were not explained by the draft judgment (see attached). The letter explained that it did not wish delay the handing down of the judgment but that it would be content “with a separate addendum in due course if it considers it appropriate to do so”. The Tribunal acknowledged receipt of the letter and went on to publish the Third Judgment the same day.

11. The Tribunal’s Third Judgment found that:

(1) The email communications of the EIPR were “lawfully and proportionately intercepted and accessed” pursuant to s. 8(4) of RIPA but that “the time limit for retention permitted under the internal policies of GCHQ, the intercepting agency, was overlooked in regard to the product of that interception, such that it was retained for materially longer than permitted under those policies” (para 14). Although the Tribunal described this breach as “technical”, it had previously accepted that GCHQ’s internal policies constituted “law” for the purpose of Article 8 and therefore the retention was not “in accordance with the law”. By way of remedy, it ordered GCHQ to destroy any of the EIPR’s communications “that were retained for longer than the relevant retention time limit”, and within 7 days to deliver a hard copy of the documents to the Interception of Communications Commissioner to be retained for a period of 5 years “in case it may be required for any further legal proceedings or inquiry”. The Tribunal also required GCHQ to provide within 14 days a closed report “confirming that the destruction and the deletion of the said documents has effectively been carried out.” It otherwise concluded that the Egyptian Initiative had “not suffered material detriment, damage or prejudice as a result of the breach” and that its open determination “constitutes just satisfaction, so there will be no award of compensation”.

(2) Communications “from an email address associated with” the Legal Resources Centre had been “intercepted and selected for examination pursuant to s.8(4) of RIPA”. Again, the Tribunal was satisfied that “the interception was lawful and proportionate and that the selection for examination was proportionate” but that “the procedure laid down by GCHQ’s internal policies for the selection of the communications for examination was in error not followed in this case”. Since the relevant internal procedures constituted “law” for the purposes of Article 8, there had therefore been a breach of the Legal Resources Centre’s rights under that Article. The Tribunal declared itself to be satisfied that “no use whatsoever was made by the intercepting agency of any intercepted material, nor any record retained”, that the Legal Resources Centre “has not suffered material detriment, damage or prejudice as a result of the breach” and therefore its open determination constituted just satisfaction in its case. Since “no record was retained”, moreover, it found that there was “no cause for any order of destruction”.

(3) The Tribunal indicated that it would be making a closed report to the Prime Minister.

12. The Tribunal’s judgment did not explain:

- (1) The statutory purposes for which the two organisations’ communications were intercepted;
- (2) The nature or content of the retention and selection procedures which were breached by GCHQ (for example, whether the procedures were automated or manual) and how they were breached in these two cases;
- (3) The reasons why GCHQ’s internal policies were not complied with and what procedures were supposed (but failed) to secure such compliance;

- (4) Whether the errors were isolated mistakes or broader systemic errors which may have affected a larger class of people;
  - (5) Whether the errors had previously been identified by any internal audit, or by the Interception of Communications Commissioner, or whether the error was only identified following these proceedings being brought in the Tribunal;
  - (6) Whether the communications that were processed in breach of Article 8 were shared with, or made available to, any other agency or department outside GCHQ;
  - (7) Whether any consideration had been given to notifying the other parties (i.e. the sender/recipient) to the electronic communications that were intercepted and processed in breach of Article 8, in order to enable those individuals to pursue complaints in relation to their rights under Article 8 and 10;
  - (8) The nature of the association between the Legal Resources Centre and the email communications that were intercepted “from an email address associated with” it (e.g. whether it was an email sent from the Legal Resources Centre’s domain name or whether it was the personal email address of a staff member);
  - (9) Whether the “accessing” of the communications that were retained in breach of GCHQ’s internal time limits involved the content of those communications being read or looked at by GCHQ or other agencies and/or the communications data relating to those communications being analysed;
  - (10) Whether, in light of the findings that the treatment of the communications was not “in accordance with the law” for the purposes of Article 8, those findings also amounted to a finding that the treatment was not “prescribed by law” for the purposes of Article 10, having regard to the fact that the Applicant human rights organisations were entitled to the protection of Article 10;
  - (11) The time period in which the violations took place and the extent to which (if at all) GCHQ’s undisclosed internal guidance at the relevant time afforded the Applicants, as non-governmental organisations, the protection of Article 10.
13. In relation to the remainder of the Applicants, including Amnesty International, the Tribunal made no determination in their favour. Nor did the judgment contain any findings or analysis in relation to the issue of “systemic” proportionality.<sup>1</sup>

### **The Tribunal’s correction of 1 July 2015**

14. Thirteen days after the Third Judgment was circulated to the Applicants, and nine days after it was publicly handed down, on 1 July 2015 the Tribunal sent an email to the Applicants to notify them of an error in the Third Judgment, namely that “*the finding that there had been a breach by virtue of the exceeding of time limits for retention (and which have now been delivered to the Commissioner for safekeeping, insofar as not destroyed) in fact related to Amnesty International Ltd (the 4th Claimant in IPT/13/194/H) and not the Egyptian Initiative for Personal Rights (the 3rd Claimant in IPT/13/168-173/H)*”. The Tribunal went on to explain that the mistake “*which has now been drawn to our attention*

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<sup>1</sup> Paragraph 3 of the Tribunal’s judgment stated that the parties’ submissions “have enabled it to take into account questions relating to both generic (or “systemic”) questions and those relating to the individual claimant and its communications”. However the judgment did not contain any further discussion or findings in relation to the issue of “systemic” proportionality of the s.8(4) regime.

*by the Respondents, did not result from any failure by them to make disclosure”.*

15. On 3 July 2015, Amnesty International wrote to the Tribunal seeking clarification of its correction of 1 July (see attached). Among other things, it expressed concern as to how it was possible for the Tribunal to have made the error which it identified and why this error was not picked up when the government commented on the draft judgment.

### **The failure to assess the general proportionality and justification for bulk interception surveillance under Tempora and the s.8(4) warrant regime**

16. The Tribunal was right to have initially agreed to consider the general proportionality of the regime as one of the key issues. But the Tribunal erred in then withdrawing that issue from the Applicants after the first judgment. The apparent attempt to reintroduce it, months later, failed to remedy that error because it occurred without requiring either further disclosure from the Respondents, nor any form of open hearing on what had been a key issue.
17. As a result, there has been no proper consideration of the proportionality of bulk interception surveillance, generally. The Tribunal’s finding that the bulk interception of communications carried out under Tempora and the s.8(4) RIPA regime was proportionate under Article 8(2) was therefore flawed.

### **The targeting of the private emails of human rights organisations by the UK government**

18. The Tribunal’s Third Judgment reveals for the first time that – as a result of s. 8(4) warrants signed by government ministers – the UK intelligence services have deliberately targeted the private communications of at least two human rights organisations, namely:

- (1) Amnesty International, one of the leading human rights organisation which operates worldwide; and
- (2) The Legal Resources Centre, an organisation co-founded by the late Arthur Chaskalson, the former Chief Justice and President of the Constitutional Court of South Africa, and which plays a leading role in promoting respect for constitutional and human rights and defending the rule of law in South Africa.

There has never been any suggestion that either of these well known organisations have been involved in criminality of any kind or threats to the national security of the United Kingdom.

19. It is important to note that the fact that no determination was made in favour of the other Applicants does not mean that their private communications were not also intercepted, selected for examination and subsequently read, looked at or listened to by GCHQ or others. Indeed, it is clear from the Tribunal’s Third Judgment that – but for certain “technical” breaches of GCHQ’s internal procedures governing examination and retention – the interception of private communications of Amnesty International and the Legal Resources Centre would never have been revealed. If UK government ministers consider that it is necessary and proportionate to intercept the communications of Amnesty International and the Legal Resources Centre, then it is unclear why they would not also consider that it is necessary and proportionate to intercept the communications of Liberty (for example). Therefore there are strong grounds to suspect that some or all of the other Applicants have also had their communications intercepted and examined by GCHQ and/or other agencies and, if so, that the Tribunal found such interception and examination to be necessary and proportionate.
20. In proceedings before the Tribunal, the UK government repeatedly stressed that the selection of private communications intercepted under a s.8(4) warrant to be to be read, looked at or listened to is

not permitted unless it is pursuant to a warrant and one or more of the certificates issued by the Secretary of State. If those submissions are correct, the examination of Applicants' private communications by GCHQ and/or other agencies occurred with the knowledge and approval of a number of senior government officials, including the various Secretaries of State responsible for granting the warrants in question. Alternatively, the targeting of human rights organisations took place without the knowledge of the Secretary of State who granted the relevant s8(4) warrant, demonstrating the inherent vagueness in the scope of s.8(4) warrants and the ineffectiveness of ministerial oversight over bulk interception surveillance.

21. The targeting of these human rights organisations has taken place not only with the complicity of senior Government ministers, but without objection from the Interception of Communications Commissioner, the Intelligence Services Commissioner and the Intelligence and Security Committee, if they were made aware that it was going on. In his 2013 report, for instance, the Interception of Communications Commissioner "*emphatically*" denied that that the UK intelligence agencies misused their powers to "*engage in random mass intrusion into the private affairs of law abiding UK citizens who have no actual or reasonably suspected involvement in terrorism or serious crime*" (para 6.6.2). Without further explanation, that approach is very difficult to reconcile with surveillance of human rights organisations.
22. The Applicants' emails have not simply been intercepted by GCHQ as a consequence of its programmes of mass surveillance of electronic communications in and out of the UK (what the Interception Commissioner has referred to as "random mass intrusion"). Rather, this is a case where at least two of the Applicants have had an unknown number of their emails deliberately and specifically accessed by GCHQ and/or other agencies and subsequently read, over an unknown period of time for unknown reasons, in accordance with undisclosed rules. Indeed, as the Intelligence and Security Committee's report in January 2015 makes clear:

*It has been suggested that GCHQ's bulk interception is indiscriminate. However, one of the major processes by which GCHQ conduct bulk interception is targeted. GCHQ first choose the bearers to access (a small proportion of those they can theoretically access) and then use specific selectors, related to individual targets, in order to collect communications from those bearers. This interception process does not therefore collect communications indiscriminately* (para G, p28).
23. The Committee then went on to refer to a "triage" process whereby GCHQ analysts determine which communications "will be of most use" (para 74, p30):

*This triage process means that the vast majority (\*\*\*) of all the items collected by this process are never looked at by an analyst. This figure is striking: even where communications are known to relate to specific targets, the Agencies do not have the resources to examine all of them* (para 75, p31).
24. Of the communications which are selected for examination as a result of this triage, therefore, the Committee was keen to stress that these "*have been specifically selected – via a number of targeted filters and searches – as being only those that are of high intelligence value*" (para 77, p31). The Committee stressed that "*[o]nly the communications of suspected criminals or national security targets are deliberately selected for examination*" (para J, p32).
25. The UK government has repeatedly sought to justify the breadth of interception under s.8(4) warrants by reference to the "*practical differences between gathering intelligence on individuals and organisations within the British Islands and gathering intelligence and organisations that operate outside that jurisdiction*", including the fact that the government does not have "*the same ability to identify either relevant individuals or premises*" (Witness statement of Charles Farr, paras 143-144). However, the revelation that GCHQ is not only intercepting the emails of human rights organisations but apparently actively targeting them for examination undermines the UK government's claim. It

appears that the government deems that human rights NGOs may legitimately be considered, in the words of the Intelligence and Security Committee, “national security targets”. There was therefore a significant burden on the Respondents to justify such serious interferences with the rights of NGOs and it was for the Tribunal to explain why those interferences were justified. The Third Judgment wholly fails to do that.

### **The lack of necessity or proportionality in targeting the private communications of NGOs**

26. Although the Third Judgment states that the Tribunal took into account “*questions relating to both generic (or “systemic”) questions and those relating to the individual claimant and its communications*” (para 3), it is striking the Tribunal provides no explanation of why it found such interference to be proportionate.
27. In relation to the two Applicants in respect of which it found a breach of Article 8, moreover, the Tribunal stated only that their communications had been “*lawfully and proportionately intercepted and accessed*” (para 14 in relation to Amnesty International) and that “*the interception was lawful and proportionate and that the selection for examination was proportionate*” (para 15 in relation to the Legal Resources Centre). It did not indicate on which of the statutory purposes the interceptions and selections were based, e.g. whether they were in the interests of national security, for the purpose of preventing or detecting serious crime or for the purpose of safeguarding the economic well-being of the United Kingdom.
28. The Applicants are in the position, therefore, of not even knowing the legitimate aim for which their Article 8 rights were interfered with, let alone the basis for the Tribunal’s conclusion that the interception and inspection were lawful and proportionate. Nor does the Third Judgment provide Amnesty International or the Legal Resources Centre with any details of the relevant policies in question, or the nature of the errors involved in each case. The two organisations have been provided with only the barest outline of *how* their rights were violated.
29. Regardless of which of the statutory purposes or legitimate aims the government relies upon, the Applicants submit that the deliberate targeting of their private communications is not justified, having regard to the ideals and values of a democratic society that the Convention was designed to maintain and promote. As the Court held in *Klass v Germany*:  
*Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions* (para 42).
30. The Tribunal, by contrast, makes no attempt to explain how GCHQ’s and/or other agencies’ examination of the emails of the Legal Resources Centre or Amnesty International could be regarded as “*strictly necessary for safeguarding the democratic institutions*”. There is no suggestion that reading the emails of human rights organisations could be in any way rationally connected to the detection or prevention of serious crime, or that it corresponds to a pressing social need, or that it strikes a fair balance between the rights of the Applicant and the interests of the community. There is no reference, of even the most general kind, to the case-specific factors that the Tribunal had regard to in reaching the conclusion that the interceptions and examination were proportionate under Article 8(2).

### **The failure to address Article 10**

31. The insufficiency of the Tribunal’s analysis is also apparent in relation to the Applicants’ rights under Article 10. It is not mentioned in the Third Judgment. This failure to address the Applicant’s Article 10 rights is significant for the following reasons:



- (1) It is well-established that interception of private communications of NGOs is an interference with their Article 10 rights as well as their Article 8 rights;
  - (2) The Applicants had relied on Article 10 from the very outset of their claims, and sought disclosure of the relevant internal guidance relating to Article 10. The government had denied that Article 10 applied to the Applicants, or to non-governmental organisations in general,<sup>2</sup> until June 2014 – almost a year after the Applicants had lodged their complaint with the Tribunal;
  - (3) The Tribunal had refused to direct the intelligence agencies to disclose their internal guidance relating to Article 10, despite the same guidance relating to legal professional privilege being disclosed in the case of *Belhadj and others v Security Service and others* [2015] UKIPTrib 13\_132-H. The Tribunal has now found that GCHQ and/or other agencies in fact intercepted and selected for examination emails belonging to non-governmental organisations.
32. The Applicants submit that, however substantial the public interest in tackling serious crime and threats to national security, this does not warrant the intelligence services of a High Contracting Party reading the emails of human rights organisations in circumstances where there is no suggestion that the organisations themselves are engaged in serious criminality or pose any manner of threat to the national security of the United Kingdom. As the Court itself has noted:
- The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society's important contribution to the discussion of public affairs (see, for example, Steel and Morris v. the United Kingdom (no. 68416/01, § 89, ECHR 2005-II). The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social "watchdog" (see Riolo v. Italy, no. 42211/07, § 63, 17 July 2008; Vides Aizsardzības Klubs v. Latvia, no. 57829/00, § 42, 27 May 2004). In these circumstances, the Court is satisfied that its activities warrant similar Convention protection to that afforded to the press. (Társaság A Szabadságjogokért Hungary, 37374/05, 14 April 2009, para 27.)*
33. See also, for example, the OSCE Guidelines on the Protection of Human Rights Defenders:
- In addition to recognizing the particular professional needs of human rights defenders who are journalists or lawyers, participating States should also acknowledge the specific needs of other human rights defenders as regards the protection of their privacy rights, including the confidentiality of their communications, in order to protect their sources or the people whose rights they defend. This is particularly important for those whose sources, including witnesses and whistleblowers, face particular risks for providing information to them, as well as for those who work with people, including victims of trafficking or individuals leaving violent criminal or extremist groups, who are at heightened risk of attacks as a result of turning to human rights defenders for assistance. (para 257)*
34. The covert interception and inspection of human rights organisations' private communications is particularly serious in light of the important role those organisations play in holding governments to account, investigating human rights abuses, and providing confidential advice and support to the most marginalised and vulnerable groups in society. The chilling effect of such surveillance is therefore particularly acute.

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<sup>2</sup> See the response of the Intelligence Services dated 15 November 2013 to Liberty's claim "the [Applicants] cannot ... claim to be victims of any Art. 10 interferences. Neither are journalists or news organisations" (para 35).

35. For the above reasons, the Applicants submit that the interception and examination of the private communications of Amnesty International and the Legal Resources Centre by GCHQ and/or other agencies, and those of the other Applicants as may have occurred, was plainly an unnecessary and disproportionate breach of their rights under Articles 8 and 10 ECHR.

### **No reference in the Third Judgment to the Applicants' communications data**

36. The judgment contains no findings or discussion about the necessity and proportionality of the interception, retention, treatment or sharing of any of the Applicants' communications data. This issue was raised in the Applicants' written submissions. Despite a request for clarification, the Tribunal has not explained whether the "accessing" of Amnesty International's communications involved its communication data being analysed by GCHQ and/or whether the communications data of the Legal Resources Centre was analysed following the selection of its communications for examination by GCHQ.

### **Matters revealed by the Tribunal's correction of 1 July 2015**

37. The Applicants submit that the Tribunal's correction of its judgment, in which it substituted Amnesty International for the Egyptian Initiative for Personal Rights, undermines the Tribunal's earlier findings that the UK surveillance regime contains adequate safeguards to protect fundamental rights in the context of bulk interception surveillance:

(1) None of the oversight mechanisms identified the violation of the Applicants' rights until they were the subject of specific analysis by the Tribunal. This only occurred because these Applicants brought speculative claims before the Tribunal. (Amnesty's inclusion in the claim was initially resisted by the Respondents on the basis that it did not add anything to the claims already being brought by other NGOs.) This indicates that unless people bring speculative claims before the Tribunal to determine whether their rights have been violated, the oversight mechanisms will not identify such violations of their rights. In the context of bulk or mass collection surveillance, intercepting and collecting everyone's communications, this would require millions of persons in the UK, alongside many other millions outside the UK whose communications are intercepted under the s.8(4) regime, all to bring speculative claims in the Tribunal. That is a wholly unworkable process for the vindication of people's rights. This reveals an inadequate oversight regime and undermines the Tribunal's approval of the existing oversight mechanisms in its earlier judgments.

(2) It is extraordinary for a Court or Tribunal to give judgment without realising that its judgment refers to the wrong Applicant as the one whose rights have been violated. Although the Tribunal subsequently stated in its letter of 24 July 2015 (see attached) that the "mistaken attribution occurred after all judicial consideration had taken place and related only to the production of the determination for hand down", the fact that the error was not noticed by either the Tribunal or the Respondents for more than 10 days calls into question both the nature and intensity of that judicial consideration. This strongly suggests that their assessment, in secret hearings, as to the proportionality of the interception of each Applicant's communications lacked sufficient rigour. Without further disclosure, the Tribunal's error appears to reflect a flawed and dysfunctional system of examination of individual Applicants' rights.

38. These concerns about the effectiveness of the Tribunal's closed procedures must also be considered in light of the concerns about the thoroughness and adequacy of the Respondent's disclosure in these proceedings. As explained in paragraphs 15 to 17 of the Application to the Court, in October 2014 the intelligence services made disclosure to the Applicants of an untitled note that appeared to summarise some of the UK government's internal guidance for the receipt of intercepted material from foreign

governments. The note was disclosed following closed proceedings that the Applicants were excluded from. The government provided a total of three different versions of the note, the first two versions having contained significant errors and discrepancies that were only brought to light following requests for clarification by the Applicants.

39. The Tribunal's failure to provide any meaningful explanation about the basis for its conclusions on necessity and proportionality, its fundamental error concerning the identity of the Applicant whose communications were retained in breach of GCHQ's internal policies, and its illogical failure to find a violation of Article 10 despite finding that the intercepted private communications of two human rights organisations were handled in breach of Article 8, demonstrates that the Tribunal falls well short of providing a remedy that is "as effective as can be" in respect of Convention violations committed by the UK intelligence agencies.

## **Conclusion**

40. For the reasons explained above, the Applicants submit that the Tribunal's Third Judgment provides further evidence that the existence and application of the s.8(4) regime violated the Applicants' rights under Articles 8 and 10, and that the unfair and chaotic proceedings before the Tribunal (which was the only domestic forum with jurisdiction to consider the Applicants' complaints against the intelligence services) violated the Applicants' rights under Articles 6 and 13 of the Convention.