IN THE INVESTIGATORY POWERS TRIBUNAL **Case No. IPT/15/110/CH**

B E T W E E N:

PRIVACY INTERNATIONAL

Claimant

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS

(4) SECURITY SERVICE

(5) SECRET INTELLIGENCE SERVICE

Respondents

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT

for the hearing on 25 September 2018

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1. Pursuant to paragraph 13 of the Tribunal's Order dated 23 July 2018 ('**July Order**'), the purpose of this hearing is to consider (a) disclosure (and the adequacy of the searches that have taken place to date), and (b) submissions on what determination the Tribunal should make.

2. The Claimant invites the Tribunal to apply its findings on the legal position re Article 8 ECHR (the position on EU law awaiting the reference from the CJEU) as set out in its judgments dated 17 October 2016 (*Privacy International* [2017] 3 All ER 647, [2016] HRLR 21) and 23 July 2018 ([2018] UKIPTrib IPT_15_110_CH) to the facts. In order to achieve that, the Tribunal will need to ensure that as much as possible has been disclosed to the Claimant, and make findings of fact as to the nature and extent of the breaches that have occurred.

A. Legal Background

3. Where, as here, there has been unlawful conduct by the Security and Intelligence Services, the Tribunal's constitutional duty is to investigate what happened, make findings of fact, and publicly to make a determination in the Claimant's favour, accompanied by as full reasons as possible, along with a report to the Prime Minister.

4. Section 67(7) of the Regulation of Investigatory Powers Act 2000 ('**RIPA**') provides:

> *"Subject to any provision made by rules under section 69, the Tribunal on determining any proceedings, complaint or reference shall have power to make any such award of compensation or other order as they think fit; and, without prejudice to the power to make rules under section 69(2)(h), the other orders that may be made by the Tribunal include–*
>
> > *(a) an order quashing or cancelling any warrant or authorisation; [...]*
> >
> > *(b) an order requiring the destruction of any records of information which–*
> >
> > > *(i) has been obtained in exercise of any power conferred by a warrant or authorisation; or*
> > >
> > > *(ii) is held by any public authority in relation to any person."*

5. Section 68(4)-(5) of RIPA provides:

> *"(4) Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either–*
>
> > *(a) a statement that they have made a determination in his favour; or*
> >
> > *(b) a statement that no determination has been made in his favour.*
>
> *(5) Where–*
>
> > *(a) the Tribunal make a determination in favour of any person by whom any proceedings have been brought before the Tribunal or by whom any complaint or reference has been made to the Tribunal, and*
> >
> > *(b) the determination relates to any act or omission by or on behalf of the Secretary of State or to conduct for which any warrant, authorisation or permission, or notice under Part 4 of the Investigatory Powers Act 2016 or under section 252 or 253 of that Act or direction under section 225 of that Act, was issued, granted or given by the Secretary of State,*
>
> *they shall make a report of their findings to the Prime Minister."*

6. Section 69 of RIPA provides:

> *"…*
> *(2) Without prejudice to the generality of subsection (1), rules under this section may–*
> *…*
> > *(i) require information about any determination, award, order or other decision made by the Tribunal in relation to any proceedings, complaint or reference to be provided (in addition to any statement under section 68(4)) to the person who brought the proceedings or made the complaint or reference, or to the person representing his interests.*

…
(6) In making rules under this section the Secretary of State shall have regard, in particular, to–

> *(a) the need to secure that matters which are the subject of proceedings, complaints or references brought before or made to the Tribunal are properly heard and considered; and*
>
> *(b) the need to secure that information is not disclosed to an extent, or in a manner, that 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.*

…"

7. Rule 12 of the Investigatory Powers Tribunal Rules 2000/2665 (the '**Rules**') provides:

> *"12. – Remedies*
>
> *(1) Before exercising their power under section 67(7) of the Act, the Tribunal shall invite representations in accordance with this rule.*
>
> *(2) Where they propose to make an award of compensation, the Tribunal shall give the complainant and the person who would be required to pay the compensation an opportunity to make representations as to the amount of the award.*
>
> *(3) Where they propose to make any other order (including an interim order) affecting the public authority against whom the section 7 proceedings are brought, or the person whose conduct is the subject of the complaint, the Tribunal shall give that authority or person an opportunity to make representations on the proposed order."*

8. And Rule 13 of the Rules provides:

> *"13. – Notification to the complainant*
>
> *(1) In addition to any statement under section 68(4) of the Act, the Tribunal shall provide information to the complainant in accordance with this rule.*
>
> *(2) Where they make a determination in favour of the complainant, the Tribunal shall provide him with a summary of that determination including any findings of fact.*
>
> *…*
>
> *(4) The duty to provide information under this rule is in all cases subject to the general duty imposed on the Tribunal by rule 6(1).*
>
> *(5) No information may be provided under this rule whose disclosure would be restricted under rule 6(2) unless the person whose consent would be needed for disclosure under that rule has been given the opportunity to make representations to the Tribunal."*

9. In *Belhadj & ors* [IPT/13/132-9/H & IPT/14/86/CH], the Tribunal made a declaration that "*since January 2010 the regime for the interception/obtaining, analysis, use, disclosure and destruction of legally privileged material has contravened Article 8 ECHR and was accordingly unlawful*".

10. The Respondent objected to a determination being made in favour of the Claimants, even if they had been a victim of the unlawful conduct, on the basis that "*public safety and the preservation of NCND requires that there must ordinarily be a "no determination""* (at [18]). The Tribunal rejected the Respondent's submissions. It held at [19] – [21]:

> "*… It would, in the Tribunal's judgment, undermine public confidence that Parliament had created a means of holding the relevant public agencies to account, if the Tribunal's findings of unlawful conduct by the Intelligence Agencies could be concealed on the basis of a non-specific submission of a risk to public safety.*
>
> *…*
>
> *We do not agree that NCND has no longer any applicability at all after a successful complaint, and to that extent what this Tribunal said in its Procedural Ruling (paragraph 14(ii) above) must be read subject to the fact that NCND may have a role to play in the giving, or the abbreviating, of the reasons or information to be supplied after the making of a determination in a complainant's favour; since Rule 6(1) will apply, as the Claimants accept, to precisely what information can be given. Certainly the Tribunal must have regard to matters such as those set out in paragraph 7 above, whose disclosure could have very damaging effects on the ability of the Respondents to protect the public. But that information is expressly additional to the s.68(4) determination, and if, as will be the case, the making of a determination in favour of a complainant thereby discloses that there has been interference with a complainant's Convention rights, that is a consequence of such contravention, and in our judgment cannot be avoided. NCND is not in itself a statutory rule. It is s.69(6)(b) and Rule 6(1), made consistently with that section, which require the Tribunal to give respect to the NCND principle, but in our judgment Rule 6(1) does not go so far as to empower the Tribunal not to disclose to a complainant, in a case where unlawful conduct has been found, even the fact that the complaint has been determined in his favour. It will however remain the duty of the Tribunal to bear in mind in supplying such additional information that it is under the Rule 6(1) duty to secure the continued protection of the public by the Respondents."*

B. <u>Factual Background</u>

11. The Tribunal's declaration of the relevant legal position (as far as it concerns ECHR compliance) is contained in paragraphs 1 and 2 of the Tribunal's Order of October 2016, as amended by paragraph 7 of the July Order:

11.1. The Respondents' bulk personal datasets ('BPD') regime was not in accordance with the law under Article 8(2) ECHR until 11 March 2015, but has been in accordance with the law under Article 8(2) ECHR since that date.

11.2. The Respondents' bulk communications data ('BCD') regime under section 94 of the Telecommunications Act 1984 ('TA') was not in accordance with the law under Article 8(2) ECHR until 4 November 2015, but has been in accordance with the law under Article 8(2) ECHR since that date, save that GCHQ's BCD regime under section 94 of the TA was not in accordance with the law under Article 8(2) ECHR until 14 October 2016, but has been since that date.

12. The Respondents were ordered, by paragraphs 10 and 11 of the July Order, to prepare a Revised Report on Searches (the '**Revised Report**'). The Respondents have provided that Revised Report, which confirms that:

12.1. All three of the agencies held (or, in the case of GCHQ, more likely than not held) data relating to the Claimant in its BPDs while the BPD regime was unlawful.

12.2. Both GCHQ and the Security Service held data relating to the Claimant in its BCDs while the BCD regime was unlawful.

13. Moreover, the Revised Report must be read together with the Respondents' Re-Amended Open Response to the Searches RFI dated 6 October 2017 (the '**Re-Amended RFI Response**'). Paragraphs 3A to 3C provide:

> *"3A. In July 2017 the MI5 team dealing with the BPD/BCD case established that MI5 held a category of data, in the form of "workings" that officers conducting investigations may have saved, and that this data could be relevant to the accuracy of the searches undertaken in January 2017. In particular, it was established that, in an area known as ["Workings"], officers could (if they needed to do so) save the results of their analysis (arising from a particular investigation) and that these saved "workings" could include (amongst other things) the results from searches that they had undertaken, including the results of searches of MI5's BPD holdings and MI5's BCD database.*
>
> *3B. Because of the possibility that the data that had been saved into "Workings" could potentially be the result of a search of a BPD database or the BCD database, MI5 concluded that it should search "Workings" for any data in relation to the search terms provided by the Claimant. The results of these searches (carried out in August and September 2017) relating to the Claimant's search terms, are reflected in the re-amendments below, and are described in more detail in CLOSED.*
>
> *3C. The search results from "Workings" also caused MI5 to review its corporate record search results."*

14. In light of the amendments made to the Re-Amended RFI Response, the Report on Searches was amended on the same date (6 October 2017) to amend paragraph 7 from initially stating that MI5 did not hold data relating to the Claimant in its BCDs while the BCD regime was unlawful, to stating that it did do so. Paragraph 26 of the Re-Amended RFI Response states: "*The results of the corporate record and BCD searches conducted by MI5 show that data from MI5's BCDs relating to the Claimant was either accessed or examined during the pre-avowal period.*" It is therefore apparent that MI5 has accessed or examined unlawfully-held BCD information relating to Privacy International (or one of its employees).

15. Therefore, this case does not concern only the holding of the Claimant's data in an unlawful BCD database (in itself a breach of Article 8 ECHR), but the unlawful review, selection and storage of that data by MI5 officers (a further, and more serious breach of Article 8 ECHR). That data was then saved into an area known as "Workings", where it was held indefinitely, with no period for its review and deletion, itself a further serious breach of Article 8 ECHR and the sixth *Weber* requirement for procedures under which information held is reviewed and deleted. As MI5 puts it at Paragraph 9F of its Amended Report on Searches (as gisted to the Claimant on 14 September 2018) "*there is no existing review, retention and deletion… period prescribed for the data (officers' workings, including the results of searches) that has been saved in Workings*"".

16. Further, this serious breach (which would never have been identified had this claim not been brought):

    16.1. was not discovered in the initial searches;

    16.2. was only discovered in circumstances that are entirely unexplained (the Tribunal is invited to direct the production of a witness statement providing an explanation); and

    16.3. demonstrates that the Agencies are unable to identify accurately what data they hold, where they hold it and give a comprehensive and accurate statement to the IPT as to what it holds.

17. It also appears that the Claimant has not yet seen the full relevant evidence. The reports on searches have not yet been through the full disclosure process and Counsel to the Tribunal considers that further material ought to be disclosed. The Tribunal is

invited to ensure that this takes place in good time prior to the hearing on 25 September 2018.

18. It is a matter of serious concern to the Claimant that NGOs continue to be subject to surveillance by the Security Intelligence Agencies. The Tribunal is invited to include findings of fact concerning this in its Determination.

C. <u>Determination</u>

19. The next step is for the Tribunal to apply its findings on the law to the facts, in the same manner as in *Belhadj* (supra). In order to do that, the Tribunal will need to make findings of fact.

20. The Claimant is entitled to an explanation pursuant to section 68(4) of RIPA and Rule 13(2) of the Rules, including any finding of fact. The Claimant is also entitled to as much disclosure as does not breach Rule 6(1) of the Rules. This is the statutory requirement. The Tribunal will be acutely aware that: any claim to NCND is not a claim based upon a statutory rule; and the (excessive) application of NCND at the remedial stage either defeats or impairs the remedies to which a victim may be entitled (a declaration of wrong, destruction of unlawfully obtained material, damages etc.), not least because the Claimant will be denied the information it requires to identify appropriate relief and to make any remedy in fact awarded intelligible).

21. Further, given the statutory duty to disclose that a determination has been made in the Claimant's favour, and the disclosure by MI5 that material relating to the Claimant has been found (and unlawfully retained) in "Workings", it has also been disclosed that material relating to the Claimant has been the subject of active investigation by MI5.

22. The Respondents' Re-Amended RFI Response refused to provide details to the Claimant of the nature and circumstances of the breach of its Article 8 rights, by reference to a broad and unparticularised claim to the risk of damage to national security (see paragraphs 9, 11, 13, 17, 23(b), 26, 29(b)). The Tribunal in CLOSED, with assistance of Counsel to the Tribunal, will need to submit any such position maintained by the Respondents to intense scrutiny in light of what has already now been disclosed.

23. It is not until the Tribunal has made its findings of fact as to the circumstances of the unlawfulness, and those findings have been disclosed to the Claimant to the full extent possible, that the Claimant is able to address the Tribunal as to the appropriate remedy pursuant to section 67(7) of RIPA. The appropriate remedy will depend upon the facts.

24. The Claimant therefore invites the Tribunal to make a determination in favour of the Claimant and to provide the Claimant with its findings of fact in relation to that determination. The nature and extent of the breaches will affect the Claimant's submissions on the appropriate remedy.

25. Finally, the Claimant observes that the conditions in section 68(5) of RIPA will be satisfied by the Tribunal's determination: it will be a determination in favour of the Claimant, and the determination will relate to any act or omission by or on behalf of the Secretary of State. In the circumstances, the Tribunal is now obliged to make a report of their findings to the Prime Minister.

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19 September 2018

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