[2015] UKIPTrib 13_77-H_2

Case Nos: IPT/13/77/H, IPT/13/92/CH, IPT/13/168-173/H, IPT/13/194/CH, IPT/13/204/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

P.O. Box 33220
London
SW1H 9ZQ

Date: 22 June 2015

Before :

MR JUSTICE BURTON (PRESIDENT)

MR ROBERT SEABROOK QC

MRS JUSTICE CARR

THE HON CHRISTOPHER GARDNER QC

HIS HONOUR GEOFFREY RIVLIN QC

- -

Between :

IPT/13/77/H	**Liberty**	**First Claimant**
	- and -	
	(1) The Government Communications Headquarters **(2) The Secret Intelligence Service** **(3) The Security Service**	**Respondents**
	- and -	
IPT/13/92/CH	**Privacy International**	**Second Claimant**
	- and -	
	(1) The Secretary of State for Foreign and Commonwealth Affairs **(2) The Secretary of State for the Home Department** **(3) The Secret Intelligence Service** **(4) The Security Service** **(5) The Government Communications Headquarters** **(6) The Attorney General**	**Respondents**

- and -

IPT/13/168-173/H	**(1) American Civil Liberties Union** **(2) Canadian Civil Liberties Association** **(3) Egyptian Initiative for Personal Rights** **(4) Hungarian Civil Liberties Union** **(5) Irish Council for Civil Liberties** **(6) Legal Resources Centre**	**Third Claimants**
	- and -	
	(1) The Government Communications Headquarters **(2) The Secret Intelligence Service** **(3) The Security Service**	**Respondents**
	- and -	
IPT/13/194/CH	**Amnesty International Limited**	**Fourth Claimant**
	- and -	
	(1) The Security Service **(2) The Secret Intelligence Service** **(3) The Government Communications Headquarters** **(4) The Secretary of State for the Home Department** **(5) The Secretary of State for Foreign and Commonwealth Affairs**	**Respondents**
	- and -	
IPT/13/204/CH	**Bytes For All**	**Fifth Claimant**
	- and -	
	(1) The Secretary of State for Foreign and Commonwealth Affairs **(2) The Secretary of State for the Home Department** **(3) The Secret Intelligence Service** **(4) The Security Service** **(5) The Government Communications Headquarters** **(6) The Attorney General**	**Respondents**

Mr Matthew Ryder QC, Mr Eric Metcalfe and Mr Edward Craven (instructed by **Mr James Welch of Liberty**) for the **First and Third Claimants and Others**
Mr Dan Squires and Mr Ben Jaffey (instructed by **Bhatt Murphy Solicitors**) for the **Second and Fifth Claimants**
Mr Hugh Tomlinson QC, Mr Nick Armstrong and Ms Tamara Jaber (instructed by **Amnesty International Ltd**) for the **Fourth Claimant**
Mr James Eadie QC, Mr Ben Hooper and Mr Julian Milford (instructed by **the Treasury Solicitor**) for **All Respondents**
Mr Martin Chamberlain QC (instructed by **the Treasury Solicitor**) as **Counsel to the Tribunal**

OPEN DETERMINATION

1. These are the determinations made by the Tribunal in these proceedings in accordance with s.68(4) of the Regulation of Investigatory Powers Act 2000 ("RIPA").

2. The Tribunal has addressed the following, as the only matters left after the resolution of the issues in the Liberty proceedings by its Judgments of 5 December 2014 ("the December Judgment") and of 6 February 2015, and in doing so the Tribunal has applied its guidance in its Judgment in **Belhadj & Ors** [2015] UKIPTrib 13_132-H ("the **Belhadj** Judgment"):

   (i) Whether in fact there has been, prior to 18 November 2014, soliciting, receiving, storing and transmitting by UK authorities of private communications of the Claimants which have been obtained by the US authorities pursuant to Prism and/or Upstream in contravention of Articles 8 and/or 10 ECHR as declared to be unlawful by the Tribunal's order of 6 February 2015.

   (ii) Whether in fact the Claimants' communications have been intercepted pursuant to s.8(1) or s.8(4) of RIPA, and intercepted, viewed, stored or transmitted so as to amount to unlawful conduct and/or in contravention of and, not justified by, Articles 8 and/or 10 ECHR. In this regard questions of proportionality arise, and the Tribunal has taken fully into account the submissions made by the Claimants and the Respondents.

3. Those submissions, for which the Tribunal is grateful, 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:

   (i) The Tribunal has carefully considered and followed the guidance of both Lord Sumption and Lord Reed in **Bank Mellat v HM Treasury (No.2)** [2014] AC 700 at paragraphs 20 and 74, as to how the issue of proportionality should be approached.

   (ii) It has also considered and taken into account the words of Lord Sumption in **R (Lord Carlile) v Home Secretary** [2014] 3 WLR 1404 at paragraphs 32-34, adopting the words of Lord Hoffmann in **Secretary of State for the Home Department v Rehman** [2003] 1 AC 153, Lord Bingham in **A v Secretary of State for the Home Department** [2005] 2 AC 68 and Laws LJ in **R (Al-Rawi) v Secretary of State for Foreign & Commonwealth Affairs** [2008] QB 289 as to the approach by the Courts to decisions of the Executive.

   (iii) The Tribunal has also found it useful and important to ask itself in the course of its consideration the following questions (derived from an amalgam and adaptation of the submissions of Mr Ryder QC and Mr Tomlinson QC):

(a) What is the identity and nature of the claimants concerned and the nature of their communications and their activities (including their position as NGOs)?

(b) What is the nature of the interference (if any) with their rights and what was the purpose of the interference?

(c) Identification with precision of what exactly (if anything) has been intercepted, obtained, retained and/or used, with reference both to communications and communications data.

(d) Identification of what material (if any) has been obtained, retained and/or used, for how long (if at all) it has been retained and whether (if so) it has been retained in accordance with the procedures on obtaining and retention whose existence has been referred to in the December Judgment.

(iv) Where appropriate, that is in relation to any issues of storage, retention or use, the Tribunal has had regard to **S v United Kingdom** [2009] 48 EHRR 50, **MK v France** [1952/09] (Judgment 18 April 2013) **R(T) v Chief Constable of Greater Manchester Police** [2014] 3 WLR 96 and **Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources** (ECJ) now reported in [2014] 3 WLR 1607.

4. The Tribunal has already concluded in the December Judgment:

(i) (Paragraph 160) Pursuant to a s.8(4) warrant enabling the interception of substantial quantities of communications, large quantities are lawfully intercepted but:

(a) material can only then be accessed lawfully if it is necessary in the interest 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 ("the statutory purposes") and it is only proportionate if it is proportionate to what is sought to be achieved by lawful conduct.

(b) Once it has been accessed by the Intelligence Services, either by specific targeting or selection, intercepted material, including communications data, may only be retained for as long as is necessary for the statutory purposes; thereafter it must be destroyed.

(c) In respect of all intercepted information which they receive and retain by any of these means the Intelligence Services are accountable: the receipt, handling and destruction of material must be carefully managed, monitored and recorded, and all this information must be freely available for inspection by the relevant authorised oversight bodies, who must be given full and on-going cooperation in that work.

(ii) (Paragraphs 94-95, 101, and by reference to Issue (x) recorded at paragraph 79) It is neither necessary, nor indeed possible, to differentiate at the interception stage what is lawfully intercepted pursuant to the warrant, but the careful and proportionate consideration of what is proportionate for the statutory purposes arises at the stage of selection for examination.

(iii) (Paragraph 116(vi)) There is no basis for objection by virtue of the absence of judicial pre-authorisation of a warrant.

5. The Tribunal has not felt it necessary or appropriate to consider instructing a special advocate in this case, but has been greatly assisted by Counsel to the Tribunal.

6. The Tribunal, exercising its powers under section 68(7) of RIPA, has required and received full cooperation from the Respondents in disclosing all documents and information required in order to investigate the complaints made by the Claimants and it has taken fully into account the evidence, both open and closed, put before it by the Claimants and the Respondents.

7. In the light of the foregoing, the Tribunal's Determinations are as follows.

8. In IPT/13/77/H (Liberty), no determination is made in the Claimant's favour.

9. In IPT/13/92/CH (Privacy International) no determination is made in the Claimant's favour.

10. In IPT/13/168-173CH (Organisations affiliated or associated with Liberty), no determination is made in favour of the First Claimant (the American Civil Liberties Union), the Second Claimant (the Canadian Civil Liberties Union), the Fourth Claimant (the Hungarian Civil Liberties Union) or the Fifth Claimant (the Irish Council for Civil Liberties).

11. In the same proceedings, IPT/13/168-173CH, the Tribunal makes a determination in favour of the Third Claimant (the Egyptian Initiative for Personal Rights), and the Sixth Claimant (the Legal Resources Centre).

12. Under Rule 13(2) of the Investigatory Powers Tribunal Rules 2000 where the Tribunal makes a determination in favour of a complainant it is required to provide him with a summary of that determination including any findings of fact. However that duty is subject, under Rule 13(4), to the general duty imposed on the Tribunal by Rule 6(1).

13. The general duty imposed on the Tribunal under Rule 6(1) is to carry out its functions "*in such a way as 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 … or the continued discharge of the functions of any of the intelligence services.*" The Tribunal may not provide any information by way of findings of fact that raise any substantial risk of damaging national security interests by, inter alia, revealing or indicating the methods of operation of the intelligence agencies in carrying out surveillance or interception functions. For that reason this summary states only the essential elements of the Tribunal's determination.

14. In respect of the Third Claimant (The Egyptian Initiative for Personal Rights), the Tribunal has found that email communications of the Third Claimant were lawfully and proportionately intercepted and accessed, pursuant to s.8(4) of RIPA. However 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. We are satisfied however that the product was not accessed after the expiry of the relevant retention time limit, and the breach can thus be characterised as technical, though (as recognised by the Tribunal in the **Belhadj** Judgment) requiring a determination to be made. Though technical, the breach constitutes both "conduct" about which complaint may properly be made under s.65 of RIPA and a breach of Article 8 ECHR. The latter conclusion flows from the fact that retention of intercept in and of itself constitutes an interference with the Third Claimant's Article 8 rights, irrespective of what was done with it thereafter, and from the fact that such an interference can be justified if and only if it is "*in accordance with the law*". For these purposes "law" includes at least those aspects of GCHQ's internal policies – including retention limits – which the Tribunal has identified as necessary to ensure compliance with Article 8 standards. Therefore, to the extent set out above, the complaint is upheld and it is declared there has been a breach of the Claimant's Article 8 rights. GCHQ is hereby ordered to destroy any of the Third Claimant's communications that were retained for longer than the relevant retention time limit. One hard copy of the documents will be delivered within 7 days 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 Respondents may only seek to inspect that copy by application to the Tribunal, which will only be permitted on grounds other than the use of the information for intelligence purposes. The Tribunal has also required GCHQ to provide within 14 days a closed report confirming that the destruction and deletion of the said documents has effectively been carried out. In the circumstances described above, the Tribunal is satisfied that the Third Claimant has not suffered material detriment, damage or prejudice as a result of the breach, and that the foregoing open determination constitutes just satisfaction, so there will be no award of compensation.

15. In respect of the Sixth Claimant (The Legal Resources Centre, South Africa), the Tribunal has found that communications from an email address associated with the Sixth Claimant were intercepted and selected for examination pursuant to s.8(4) of RIPA. The Tribunal is 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 selection of the communications for examination was in error not followed in this case. This amounts to "conduct" about which complaint may properly be made under s.65 of RIPA and the fact that there was interception in those circumstances constitutes also a breach of Article 8 ECHR, for the same reason as is set out in paragraph 14 above. Therefore the complaint is upheld and it is declared that that there has been a breach of the Claimant's Article 8 rights. The Tribunal is satisfied that no use whatever was made by the intercepting agency of any intercepted material, nor any record retained, and that the Sixth Claimant has not suffered material detriment, damage or prejudice as a result of the breach. In those circumstances, the Tribunal is satisfied that the foregoing open determination constitutes just satisfaction, so there will be

no award of compensation. Since no record was retained, there is no cause for any order for destruction.

16. In IPT/13/194/CH (Amnesty International Ltd), no determination is made in the Claimant's favour.

17. In IPT/13/204/CH (Bytes for All), no determination is made in the Claimant's favour.

18. The Tribunal is concerned that steps should be taken to ensure that neither of the breaches of procedure referred to in this Determination occurs again. For the avoidance of doubt, the Tribunal makes it clear that it will be making a closed report to the Prime Minister pursuant to s.68(5) of RIPA.