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IN THE INVESTIGATORY POWERS TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2016

Before:

MR JUSTICE BURTON (PRESIDENT)

MR JUSTICE MITTING (VICE PRESIDENT)

ROBERT SEABROOK QC

SUSAN O'BRIEN QC

CHRISTOPHER GARDNER QC

- -

Between:

HUMAN RIGHTS WATCH INC & ORS	**Claimants**
- and -	
THE SECRETARY OF STATE FOR THE FOREIGN & COMMONWEALTH OFFICE & ORS	**Respondents**

- -
- -

Ben Jaffey (instructed by **Bhatt Murphy Solicitors**) for the **Claimants**
James Eadie QC and **Kate Grange** (instructed by **Government Legal Department**) for the **Respondents**

Hearing date: 15 April 2016

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Approved Judgment

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Mr Justice Burton:

1. This is the judgment of the Tribunal.

2. This has been a hearing in respect of the complaints by ten Claimants, including Human Rights Watch ("the Ten"). It arises out of a worldwide campaign by Privacy International, which was a party to proceedings before the Tribunal, which resulted in two Judgments, **Liberty/Privacy Nos 1 and 2** [2015] 1 Cr. App. R 24, [2015] 3 All ER 142, 212. The campaign resulted from those two Judgments, and from an Open Determination made by the Tribunal dated 22 June 2015 (amended 2 July) (**Liberty/Privacy No 3**)

3. Those Judgments dealt with two sets of assumed facts: first as to the existence of intelligence-sharing with GCHQ of information obtained in respect of non-US citizens by the US intelligence services, as a result of two programmes named "Prism" and "Upstream", and secondly as to the use of warrants pursuant to s.8(4) of the Regulation of Investigatory Powers Act 2000 ("RIPA") in respect of a system called Tempora, whereby communications were allegedly intercepted and gathered and could be accessed by the UK intelligence services. As to Prism and Upstream, the Tribunal left open two issues at the end of the first hearing and judgment, and then, after a further hearing, in **Liberty/Privacy No 2** concluded and declared that, prior to the disclosures by the Respondents made and referred to in the Tribunal's Judgments in **Liberty/Privacy No 1** and **Liberty/Privacy No 2**, the Prism and/or Upstream arrangements contravened Articles 8 and/or 10 of the European Convention of Human Rights ("ECHR"), but that they now complied. As to Tempora, being the (assumed) system operated pursuant to s.8(4) warrants, the Tribunal was satisfied, and declared, that such regime was lawful and compliant with the ECHR.

4. In **Liberty/Privacy No 3** the Tribunal published its conclusions, after considering all appropriate information in Closed session, as to:-

> *"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 Article 8 and/or 10 ECHR as declared to be unlawful by the Tribunal's order of 6 February 2015.*
>
> *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."*

5. The Tribunal recorded at paragraph 14 that in respect of one of the claimants, Amnesty International Ltd ("Amnesty"), we had found that its email communications were lawfully and proportionally 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 respect of the product of that interception,

such that it was retained for materially longer than permitted under those policies. The Tribunal recorded:-

> *"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 section 65 of RIPA and a breach of Article 8 ECHR… The Tribunal is satisfied that Amnesty… 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."*

6. In respect of another claimant, the Legal Resources Centre, South Africa, the Tribunal found (paragraph 15 of **Liberty/Privacy No 3**) that communications from an email address associated with it were intercepted and selected for examination pursuant to s.8(4) RIPA: 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 selection of the communications for examination was, in error, not followed in that case. Hence, as in the case of Amnesty, that amounted to *"conduct"* about which complaint was properly made under s.65 RIPA, and a breach of Article 8 ECHR, but the Tribunal was again satisfied that no use whatever was made by the intercepting agency of any intercepted material, nor any record retained, that no detriment or damage was suffered and that no compensation was required.

7. The origin of the applications now before us is what has been called the Privacy International Campaign, and in particular an entry on Privacy International's website, to the following effect:-

> *"Did GCHQ Illegally Spy on You?*
>
> *Have you ever made a phone call, sent an email, or, you know, used the internet? Of course you have!*
>
> *Chances are, at some point, your communications were swept up by the U.S National Security Agency's mass surveillance program and passed on to Britain's intelligence agency GCHQ.*
>
> *Because of our recent victory against GCHQ in court, now anyone in the world – yes, ANYONE, including you – can try to find out if GCHQ illegally had access to information about you from the NSA.*
>
> *Make your claim using one of the options below, and send it to the Investigatory Powers Tribunal (IPT) to try and find out if GCHQ illegally spied on you.*

> *Privacy International is not representing you in your claim before the IPT. You are responsible for filing your claim and following up with any requests for additional information or action that you may receive from the IPT.*
>
> *To start your claim, please click on the link below that applies to you."*

8. A standard application form was made available by Privacy International. The Ten Claimants made use of this to present their claims, attaching it to Tribunal Forms T1 and T2, the former relating to human rights claims and the latter to non human rights claims. These, apart from giving the names, addresses and, where relevant, dates of birth, of the Claimants, and identifying the proposed Respondents, simply cross-referred to the standard form to which we have referred.

9. There have been 663 such applications, following that same course. The Tribunal has listed for hearing the first ten applications received, in order to enable issues to be addressed as to whether the claims should be investigated. Of the Ten, six are represented by counsel, Ben Jaffey, and solicitors, Messers Bhatt Murphy, pro bono, ("the Six"), and we have been very grateful for their contribution to the debate which has taken place before us between them, on behalf of the Six, but also clearly inferentially on behalf not only of the remainder of the Ten, but of all 663 Claimants, and the Respondents, represented by James Eadie QC and Kate Grange, as to whether, and if so on what basis, any of the Six, the Ten or the 663 applications should be considered and investigated by the Tribunal.

10. The standard form Statement of Grounds supplied by Privacy International and used by each of the 663 Claimants reads as follows:-

> *1) "[…] is a resident of […]*
>
> *2) I believe that the Respondents have and/or continue to intercept, solicit, access, obtain, process, use, store and/or retain my information and/or communications. I also believe that that my information and/or communications are accessible to the Respondents as part of datasets maintained, in part, or wholly, by other governments' intelligence agencies.*
>
> *3) In so doing, the UK Government has breached Article 8 and 10 of the European Convention on Human Rights (ECHR), as incorporated into UK law by the Human Rights Act 1998 (HRA).*
>
> *4) This Tribunal has already concluded that, to the extent my information was shared with the UK Government Communications Headquarters (GCHQ) by the US National Security Agency (NSA) prior to 5 December 2014, such action was unlawful and a violation of Article 8 of the ECHR* **[Liberty/Privacy No 2].**
>
> *5) If my information was so shared, I request a determination pursuant to Section 68(4) of the Regulation of Investigatory Powers Act 2000 (RIPA) that such unlawful sharing occurred, with a summary of that*

determination including any findings of fact: ***Belhadj & Ors*** *[2015] UKIPTrib 13_132-H.*

6) I also believe that the Respondents may have unlawfully intercepted, solicited, accessed, obtained, processed, used, stored and/or retained my information and/or communications, whatever the source of that information or communications may be. It appears that the Respondents have, in many cases, failed to follow their own internal procedures.

7) To the extent the Respondents failed to follow their internal policies or procedures governing the interception, access, obtaining, processing, storage or retention of my information and/or communications, such failure is unlawful and violates Articles 8 and 10 of the ECHR [the Open Determination].

8) These grounds accompany the forms T1 and T2 filed by me. They set out, in summary, the Grounds relied upon.

9) I seek the following relief:

a) A declaration that the UK's intercepting, soliciting, accessing, obtaining, processing, using, storing and/or retaining my information and/or communications is unlawful and contrary to Article 8 and 10 of the ECHR, and RIPA;

b) An order requiring destruction of any unlawfully obtained material;

c) An injunction restraining further unlawful conduct; and

d) Any further relief the Tribunal deems appropriate."

11. Only two out of the 663 Claimants have given supplementary information within the standard form Statement of Grounds, both of whom are part of the Six, now represented by Mr Jaffey at this hearing. One is Human Rights Watch Inc, which supplemented paragraph 1 of the standard form Statement of Grounds to explain that it is a charitable organisation registered in New York state, but with a major office in the United Kingdom, and explaining that it undertakes research and advocacy to further observance of fundamental human rights globally. The other, referred to only by the initial R, explained, by expansion of her paragraph 2, that she is a non-UK human rights lawyer based in London, who has been substantially involved in human rights matters, including sensitive legal matters. As to the other four of the Six, they did not so supplement the standard form Statement of Grounds, but for the purposes of this hearing they have now given further information about themselves. G is an independent privacy and security researcher, materially involved in intelligence matters, living in a Council of Europe state. B is a journalist, resident in the United Kingdom and materially involved in intelligence and security matters. Mr Weatherhead, resident in the UK, is a technology officer for Privacy International, again substantially involved in the intelligence field, and Mr Wieder, resident in the

United States, is an IT professional and independent researcher, again substantially involved in intelligence and security matters.

12. Of the four who form the remainder of the Ten listed for this hearing, none are represented and none are therefore identified, save that it can be recorded that three are resident in the United States and one in the United Kingdom. None of them have given any additional information to supplement the standard form Statement of Grounds. Of the total 663 (including the Ten), 294 are resident in the United Kingdom, 191 are resident in other countries party to the ECHR (94 from Germany, 12 from Italy and Sweden and 11 from France), 145 are from the United States and 33 are from other countries (including 12 from Canada and 10 from Australia). Seventeen have added some additional material into their T1 or T2 forms, but none of that material appears to be relevant to whether they are or may be the subject of interception, or information-sharing, and most is of no materiality at all. In any event the decision in this judgment is being given by reference to the applications by the Ten, being the first ten applications lodged pursuant to the Privacy International Campaign, listed for the purpose of our consideration, with the assistance of counsel. They are not strictly test cases or even sample cases, but cases on the basis of which it was convenient to have inter partes legal argument as to whether any of the 663 applications should be considered, and if so what, if any, would be the test for the Tribunal to apply as to whether they should be considered or not.

13. There are effectively two issues before the Tribunal. The first has been loosely called the *"victim"* issue, or perhaps more traditionally the question as to the locus of the Ten and, because all of them rely on the same Statement of Grounds, of the other 653. The second relates to the question of jurisdiction, namely, assuming any of them have locus, whether any of the Claimants other than those resident or based in the UK are entitled to pursue these claims.

The victim issue

14. The question of locus has been dealt with by the Tribunal, encouraged by the jurisprudence of the European Court of Human Rights ("ECtHR") on a very open-minded basis, and without requiring from its claimants the kind of arguable case which they need in order to present a case in High Court: see **Liberty/Privacy No 1** at para 4 (ii), referring to **Kennedy v UK** [2011] 52 EHRR 4, **Weber & Saravia v Germany** [2008] 46 EHRR SE5 and **Liberty v UK** [2009] 48 EHRR 1.

15. The question has been addressed and explained recently by the ECtHR in **Zakharov v Russia** 4/12/2015 Application no 47143/06, in which (as is clear from paragraph 152 of the Judgment of the Court), the Russian government submitted that *"the applicant could not claim to be a victim of the alleged violation of Article 8… and that there had been no interference with his rights* (because) *he had not complained that his communications had been intercepted."* At paragraph 163 the Court recorded that *"the applicant in the present case claims that there has been an interference with his rights as a result of the mere existence of legislation permitting covert interception of mobile telephone communications and a risk of being subjected to interception measures, rather than as a result of any specific interception measures applied to him."* The Court stated in paragraph 164 that *"the Court has consistently held in its case-law that the Convention does not provide for the institution of an actio popularis and that its task is not normally to review the relevant law and practice in abstracto,*

but to determine whether the manner in which they were applied to, or effected, the applicant gave rise to a violation of the Convention…. Accordingly, in order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he or she was "directly affected" by the measure complained of. This is indispensible for putting the protection mechanism of the Convention into motion although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings."

16. Thus at paragraph 165 the Court set out that it *"has permitted general challenges to the relevant legislative regime in the sphere of secret surveillance in recognition of the particular features of secret surveillance measures and the importance of ensuring effective control and supervision of them. In the case of* **Klass and Others v Germany** [1979-80] 2 EHRR 214 *the Court held that an individual might, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures had been in fact applied to him. The relevant conditions were to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures*."

17. However the Court continued:-

> *"166 Following the* ***Klass and Others*** *case, the case-law of the Convention organs developed two parallel approaches to victim status in secret surveillance cases.*
>
> *167 In several cases the Commission and the Court held that the test in* ***Klass and Others*** *could not be interpreted so broadly as to encompass every person in the respondent State who feared that the security services might have compiled information about him or her. An applicant could not, however, be reasonably expected to prove that information concerning his or her private life had been compiled and retained. It was sufficient, in the area of secret measures, that the existence of practices permitting secret surveillance be established and that there was a reasonable likelihood that the security services had compiled and retained information concerning his or her private life... In all of the above cases the applicants alleged actual interception of their communications. In some of them they also made general complaints about legislation and practice permitting secret surveillance measures…*
>
> *168 In other cases the Court reiterated the* ***Klass and Others*** *approach that the mere existence of laws and practices which permitted and established a system for effecting secret surveillance of communications entailed a threat of surveillance for all those to whom the legislation might be applied. This threat necessarily affected freedom of communication between users of the telecommunications services and thereby amounted in itself to an interference with the exercise of the applicants' rights under Article 8,*

> *irrespective of any measures actually taken against them… In all of the above cases the applicants made general complaints about legislation and practice permitting secret surveillance measures. In some of them they also alleged actual interception of their communications…*
>
> *169 Finally, in its most recent case on the subject,* ***Kennedy v. UK****, the Court held that sight should not be lost of the special reasons justifying the Court's departure, in cases concerning secret measures, from its general approach which denies individuals the right to challenge a law in abstracto. The principal reason was to ensure that the secrecy of such measures did not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and the Court. In order to assess, in a particular case, whether an individual can claim an interference as a result of the mere existence of legislation permitting secret surveillance measures, the Court must have regard to the availability of any remedies at the national level and the risk of secret surveillance measures being applied to him or her. Where there is no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified. In such cases, even where the actual risk of surveillance is low, there is a greater need for scrutiny by this Court (see* ***Kennedy v UK****…* at para *124)."*

It was in **Kennedy** that the ECtHR approved the role of this Tribunal.

18. What the ECtHR described as its *"harmonisation of the approach to be taken"* then appears in the following paragraph:

> *"170. The Court considers, against this background, that it is necessary to clarify the conditions under which an applicant can claim to be the victim of a violation of Article 8 without having to prove that secret surveillance measures had in fact been applied to him, so that a uniform and foreseeable approach may be adopted.*
>
> *171. In the Court's view the* ***Kennedy*** *approach is best tailored to the need to ensure that the secrecy of surveillance measures does not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and of the Court. Accordingly, the Court accepts that an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures, or legislation permitting secret surveillance measures, if the following conditions are satisfied. Firstly, the Court will take into account the scope of the legislation permitting secret surveillance measures by*

> *examining whether the applicant can possibly be affected by it, either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his or her communications intercepted. Secondly, the Court will take into account the availability of remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies. As the Court underlined in* ***Kennedy****, where the domestic system does not afford an effective remedy to the person who suspects that he or she was subjected to secret surveillance, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified (see* ***Kennedy****…* para *124). In such circumstances the menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8. There is therefore a greater need for scrutiny by the Court and an exception to the rule, which denies individuals the right to challenge a law in abstracto, is justified. In such cases the individual does not need to demonstrate the existence of any risk that secret surveillance measures were applied to him. By contrast, if the national system provides for effective remedies, a widespread suspicion of abuse is more difficult to justify. In such cases, the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures.*
>
> *172. The* ***Kennedy*** *approach therefore provides the Court with the requisite degree of flexibility to deal with a variety of situations which might arise in the context of secret surveillance, taking into account the particularities of the legal systems in the member States, namely the available remedies, as well as the different personal situations of applicants."*

In paragraph 288 the Court makes a further reference to **Kennedy v UK** and its compatibility with the Convention because *"in the United Kingdom any person who suspected that its communications were being or had been intercepted could apply to the Investigatory Powers Tribunal."*

19. The Tribunal considers that the appropriate approach in the United Kingdom is accordingly that *"the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures."*

20. The Tribunal's jurisdiction pursuant to s.65(2) of RIPA, for purposes material to our consideration, is by s.65(4) that:-

> *"The Tribunal is the appropriate forum for any complaint if it is a complaint by a person who is aggrieved by any conduct…which he believes –*
>
> *a) to have taken place in relation to him, to any of his property, to any communications sent by or to him, or intended for him, or to his use of any postal service, telecommunication service or telecommunications system; and*
>
> *b)… to have been carried out by or on behalf of any of the intelligence services."*

21. As to the exercise of that jurisdiction, s.67 provides by subsection (1) that, subject to subsections (4) and (5), *"it shall be the duty of the Tribunal… to consider and determine any complaint or reference made to them by virtue of section 65(2)(b)"*, and by, subsection (3), *"where the Tribunal considers a complaint made to them by virtue of s.65 (2)(b), it shall be the duty of the Tribunal to investigate"* whether the persons against whom any allegations are made in the complaint have engaged in relation to the complainant or his property or communications etc in any conduct falling within s.65(5).

22. As to the two exceptions referred to in s.67(1), the first is:-

> *"(4) The Tribunal shall not be under any duty to hear, consider or determine any proceedings, complaint or reference if it appears to them that the bringing of the proceedings, or the making of the complaint or references are frivolous or vexatious."*

The second, s.69(5), relates to a one year time bar, with a discretion to extend.

23. The Tribunal must thus exercise its jurisdiction, pursuant to the guidance of the ECtHR, in relation to the admissibility of the applications now before us, both by the Ten and, in due course, in the light of our conclusions, in respect of the remainder of the 663.

24. It is important to pay regard to the fact that all these complaints, in accordance with the standard form provided by Privacy International, and all by reference to the Tribunal's judgment in **Privacy/Liberty**, direct a case as to both Prism/ Upstream, i.e. the alleged information-sharing of intelligence obtained by the US authorities under Prism and Upstream by reference to non-US citizens outside the US, and the s.8(4) RIPA regime of alleged interception by UK Intelligence Services.

25. Addressing Prism/Upstream first, they were explained in paragraphs 47 and 48 of **Liberty/Privacy No 1.** A request may be made by the Intelligence Services to the US authorities for (unanalysed) intercepted communications, and associated communications data obtained by them under Prism/Upstream, only (subject to

exceptional circumstances which have never occurred) if there is in existence a relevant RIPA interception warrant permitting specific targeting of their communications of identified non-US parties. Accordingly the Respondents submitted, particularly in the light of **Zakharov,** as follows, in their skeleton argument of 12 April 2016 ("the Respondents' Skeleton"):-

> *"9. Consequently the Applicants would have to be in a position to satisfy the Tribunal that they belong to a group of persons who may be said to be possibly affected by the Intelligence Sharing Regime. In particular:*
>
> *a. The Prism and Upstream programmes permit the interception and acquisition of communications to, from or about specific tasked selectors associated with non-US persons who are reasonably believed to be outside the US. i.e. they concern unanalysed intercepted communications (and associated communications data) relating to particular individuals outside the US, not broad data mining.*
>
> *b. As stated in the Disclosure which was provided in the Liberty/Privacy proceedings, the Intelligence Services have only ever made a request for such unanalysed intercepted communications (and associated communications data) where a RIPA warrant is already in place for that material, but the material cannot be collected under the warrant. Any request made in the absence if a warrant would be exceptional, and would be decided upon by the Secretary of State personally: see the Interception Code at para 12.3.*
>
> *10. As the Tribunal will be well aware, the conditions for intercepting communications pursuant to a RIPA warrant are as set out in s.5(3) RIPA. They are the interests of national security; the prevention or detection of serious crime; or the safeguarding of the UK's economic well-being, in circumstances appearing relevant to the interests of national security. Those conditions substantially mirror, and are no narrower than, the statutory functions of the Intelligence Services under the SSA and ISA. If the victim hurdle is to be satisfied, the Claimants will need to advance a credible case that their data could be collected and shared under any of the conditions in s.5(3) RIPA, the SSA or ISA. Certainly the assertion that individuals have been involved in campaigning activities concerning e.g. freedom of expression would be inadequate to meet that test. Such activities would not give any grounds for the issue of a warrant for interception of the Applicants' communications under s.5(3) RIPA. Nor, by the same token, would they give grounds for intelligence sharing without a warrant in pursuance of the Intelligence Services' statutory functions.*

> *11. In those circumstances the Tribunal's determinations and declarations in the **Liberty/Privacy** proceedings provide the appropriate remedy in relation to the Intelligence Sharing Regime and unless the Claimants are able to establish that they have victim status none of them are entitled to individual case-specific examination."*

26. Mr Jaffey accepted that, subject to any challenge hereafter, although there was a potential distinction resulting from this Tribunal's conclusion in **Liberty/Privacy**, the s.8(4) RIPA regime had been lawful throughout but that any information-sharing in respect of Prism/Upstream would have been unlawful prior to 5 December 2014, nevertheless it could be inferred, by virtue of the making of no determination in the **Liberty/Privacy** case, that there had been no such information-sharing prior to that date in respect of any of the claimants in that case. He also accepted that there was a distinction between any case now sought to be made by an individual claimant with regards to Prism/Upstream and one relating to the s.8(4) RIPA regime, by virtue of the necessarily targeted nature of the former, as explained above. Nevertheless he submitted that if there were non-US persons who might be of interest to GCHQ, Prism/Upstream might be a source of obtaining information about them.

27. It is quite clear to us in the circumstances that a case of belief by a claimant that he may be subject to information-sharing pursuant to Prism/Upstream is far more difficult to establish than a claimant's belief as to interception pursuant to the s.8(4) RIPA regime, which, as explained in **Liberty/Privacy**, relates to the interception of communications as a result of an untargeted warrant pursuant to s.8(4) RIPA. Nevertheless as far as the s.8(4) RIPA regime also is concerned, issue is joined between the parties as to whether what is contained in the standard form is sufficient.

28. The primary stance taken by the Respondents (paragraph 13 of their Preliminary Submissions dated 9 December 2015 ("the Respondents' Submissions")) is that the applications raise no new issues of law, the issues they raise having been comprehensively and conclusively addressed in the **Liberty/Privacy** proceedings, and that there is no proper basis upon which detailed individual investigations need to be carried out in response to the Privacy International campaign. The case is expanded as follows in those Submissions:-

> *"15. It is clear from the standard template Statement of Grounds which is being used by all of the new complainants that the legal issues are identical to those which were considered in **Liberty/Privacy**, namely the legality of the intelligence sharing regime and the legality of the interception regime. Indeed, as expressly noted at §4 of the Grounds, the Tribunal has already given a declaration on the historic lawfulness of the intelligence sharing regime in* [**Liberty/Privacy No 2]**. *Consequently there are no new legal issues which these standard-form complaints seek to have determined.*
>
> *16. For the avoidance of doubt, it is the Respondents' position that the Grounds are to be read as confined to the legal issues as determined in **Liberty/Privacy**. Although paragraph 6 of the*

standard template (and possibly the first sentence of paragraph 2) suggest that the Tribunal is being invited to consider every potential source of information about the Claimants, from whatever source, including whether there has been compliance with "internal procedures" in some unspecified way, those parts of the Grounds are so broad-ranging and ill-defined that they cannot properly serve to widen the complaints beyond the scope of the legal issues which were considered in ***Liberty/Privacy****.*

…….

20. It is submitted that three matters are central to the proportionate remedial response to the Privacy campaign:

a. The Tribunal has already scrutinised the legality of the regime in detail in the ***Liberty/Privacy*** *proceedings. It has made findings about the lawfulness of the regimes and, in respect of the intelligence sharing regime, the past forseeability deficiency. That deficiency was corrected by the further disclosures which were put into the public domain during those proceedings.*

b. In… [**Liberty/Privacy No 3]** *the Tribunal examined what had occurred in respect of each of the individual Claimants and it made determinations in favour of the Third and Sixth Claimants. However the breaches which had occurred were technical in the sense that, in relation to the Third Claimant, the information was not accessed after the expiry of the relevant retention time limit (§14) and, in relation to the Sixth Claimant, no use whatever was made of any intercepted material, nor any record retained (despite the procedure for selection having been in error in that case) and therefore no material detriment, damage or prejudice occurred. Importantly, the Tribunal indicated in* [**Liberty/Privacy No 3**] *that steps should be taken to ensure that neither of the breaches of procedure occurs again and the Tribunal indicated it would be making a CLOSED report to the Prime Minister pursuant to s.68(5) of RIPA. Thus the Tribunal has itself taken steps to ensure that such breaches do not occur again.*

c. The Tribunal has also approved and emphasised the importance of the oversight arrangements which are in place and which are there to ensure compliance with, inter alia, the Agencies internal policies/procedures. In ***Liberty/Privacy*** *the Tribunal highlighted the importance of both the ISC and the Commissioner in this regard [see §§91-92 and 121 of* [**Liberty/Privacy No 1**]*. The Commissioner in particular with his "fully implemented powers of*

> *oversight and supervision" (§92) has demonstrated the "scope and depth of his oversight duties and activities" (§92) and is there to keep under review the compliance by the Agencies with the legal framework, including their internal policies and procedures. The Commissioner will of course be aware of the judgments in **Liberty/Privacy** and can therefore be expected to focus on making sure that the technical breaches which occurred in individual instances in that case are not repeated.*
>
> *21. Consequently there has already been detailed scrutiny of the relevant regimes by this Tribunal and compliance with the adequate internal arrangements is a matter which the Commissioner is well placed to scrutinise and oversee. There would be no material remedial deficit were the Tribunal in the copycat cases simply to rely upon its earlier judgments rather than requiring individual case examination by the Agencies. The Tribunal can properly conclude that such a course of action is disproportionate and unnecessary given the extent of work which would be required to conduct such an examination."*

29. In paragraph 5 of their Skeleton the Respondents assert that *"there is no justification for going further than* [the declarations made in **Liberty/Privacy**] *in other individual cases. The composition of organisations considered in the **Liberty/Privacy** proceedings provided a demonstratively appropriate sample of cases against which to test the lawfulness of the operation of the intelligence sharing regime."*

30. The Claimants emphasise that in the **Liberty/Privacy** proceedings the Tribunal went on to investigate the individual complaints by those claimants, in the light of the findings that intelligence sharing pursuant to Prism/Upstream had been unlawful prior to 14 December 2015 and that the s.8(4) RIPA regime had been lawful at all times, and made the findings recorded in paragraphs 5 and 6 above in relation to two of the claimants. Mr Jaffey in his Submissions on behalf of the Six ("the Claimant's Reply") stated:-

> *"10. The purpose of the claims made as part of the Privacy International Campaign is to enable individuals to ensure that bulk surveillance (whether through intercept or receipt from a foreign agency) carried out against them is carried out lawfully, and discover if their private and personal information has been <u>unlawfully</u> obtained. The claimants have no entitlement to know about <u>lawful</u> surveillance. But an essential feature of any democratic society is that covert breaches of the law by the State are disclosed to the victim."*

31. He characterised the Respondents' position in argument as being *"True it is that some of the claimants in Liberty/Privacy were successful and there were violations found in those cases, but we have decided in your cases,* [that] *we are not even going to look."*

32. The second submission by the Respondents is that the core purpose of these proceedings is to reveal the extent of the Agencies' knowledge, and thus evade the key principle of Neither Confirm Nor Deny, which is enshrined in the answer required by s.68(4) of RIPA namely:-

> *"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.*

33. They set out this case in paragraphs 31-35 of the Respondents' Submissions:-

> *"31. This campaign is a very deliberate attempt on the part of individuals to find out whether the intelligence agencies hold information on them. In circumstances where the legality of the relevant regimes has already been addressed, that can be the only purpose of the complaints, as is wholly borne out by the statements made in the public campaign which has generated these complaints.*
>
> *32. The Respondents have, in the past, expressed considerable concern about the prospect of the Tribunal's remedial discretion being used in such a way that would permit individuals (including current investigative targets) to discover whether they have been the subject of interception (as noted in the **Belhadj** IPT proceedings – see judgment dated 29 April 2015). For example, interception is one of the most sensitive and important forms of intelligence gathering and one which cannot work if the subject of the interception is aware that his communications are being intercepted and examined: see e.g. **Weber…** at §93 and §135. Revelation of such information could cause targets of interest to change their behaviour, with the obvious impact this could have on continued intelligence gathering. In addition it is to be noted that these complaints seek to discover whether intelligence information may have been shared with GCHQ by the NSA prior to the Tribunal's December 2014 judgment. So not only does this affect the ability of domestic intelligence agencies to keep such information secret, but it also could potentially compromise the NSA and its intelligence gathering activities, with a consequent impact on the intelligence relationship between the UK and the US.*

> *33. Those concerns have come into ever sharper focus as a result of this large-scale, direct and deliberate attempt to find out what information is held by the intelligence agencies.*
>
> *34. The Tribunal has recognised that circumstances may arise in which it is appropriate to put considerations of public safety and security before rights of individuals to specific determinations on their complaints. In **Belhadj** the Tribunal left open the possibility that exceptional circumstances might arise where, either by reference to discretionary Administrative Court principles (pursuant to s. 67(2) of RIPA 2000) or otherwise, it may be appropriate to preserve NCND when approaching the Tribunal's remedial discretion (see §18 of the judgment dated 29 April 2015). The Tribunal did so even in relation to individual cases in which a breach of the ECHR had been found. That discretionary Administrative Court principles, which this Tribunal is obliged to apply pursuant to section 67(2) of RIPA, can lead to a pragmatic approach, is well recognised in the case law – see for example **R (Tu) v Secretary of State for the Home Department** [2003] Imm AR 288 at §24. In addition it is well established that strong public policy reasons can lead to denial of a remedy, even where unlawfulness has been shown – see, for example, **R v Attorney General ex parte Imperial Chemical Industries** [1987] 1 CMLR 72 at §112, **R v General Medical Council ex parte Toth** [2000] 1 WLR 2209 at §6 and **R (C) v Secretary of State for Justice** [2009] QB 657 at §41.*
>
> *35. It is accordingly and unsurprisingly proper and appropriate for public security considerations to impact on the exercise of the Tribunal's remedial discretion. Such considerations are squarely and obviously in play in circumstances in which there is an orchestrated campaign the central purpose of which appears to be to enable individuals to discover whether information about them might be held by the Agencies."*

34. Mr Jaffey takes exception to, and joins issues with this, not least as set out in paragraph 30 above, and in paragraphs 31-34 of his Reply:-

> *"31. The Respondents suggest that the generic foreseeability declaration is appropriate <u>even if the Tribunal finds that a particular claimant has been a victim of unlawful conduct</u>. They argue that, where the Tribunal concludes that a public body had acted unlawfully, it would be able to withhold not only the details or reasons for its decision, but the very fact a positive determination had been made. This cannot be correct.*
>
> *32. First, the Tribunal has already determined this exact issue in **Belhadj**. It rightly held that claimants had to be told when a*

decision was made in their favour and endorsed (§ 19) the fact that such notification is:

a. Mandatory under s. 68(4) of RIPA 2000;

b. Necessary for the purposes of compensation under the regime;

c. Required for compatibility with Articles 6 and 8 of the Convention. In ***Kennedy v UK*** *at § 189, the ECtHR held that a successful claimant is entitled to information on the findings of fact made in his or her case;*

d. Required for public confidence in the Tribunal. In the Tribunal's words [in **Belhadj**] *it has been:*

> *'entrusted with the task of investigating complaints, to a large extent in closed proceeding… 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…" (§ 19).*

33. The Respondents nonetheless argue that the Tribunal should exercise its discretion to avoid giving a successful claimant notification of his or her decision. They rely on one obiter passage in the ***Belhadj*** *judgment ("There may perhaps be exceptional circumstances (not relevant in the present case) in which particular facts may drive the Tribunal to a different conclusion, whether by reference to discretionary Administrative Court principles pursuant to s.67(2) or otherwise…" (§ 18)).*

34. The Tribunal made it clear that this "cannot possibly be the ordinary case" (§ 18) and that the circumstances of the ***Belhadj*** *case did not amount to the hypothetical 'exceptional circumstances'. Further:*

a. The Tribunal in ***Belhadj*** *(§ 18) explicitly rejected any distinction between 'substantial breaches' and other breaches for notification purposes:*

i. there is no such requirement in the statutory regime;

ii. the RIPA regime only provides the Tribunal with a binary choice between a determination in favour of the Claimant or not;

iii. Hansard indicates that the Minister explicitly rejected this distinction when the legislation was passed and plainly stated that "We have no intention of limiting the determination when a tribunal makes a

> *finding, however technical, in a complainant's favour".*
>
> *b. The alleged breaches in the present dispute may in fact be substantial, and not 'technical' as the Respondents submit, which would only strengthen the justification for consideration of the individual circumstances of each case."*

35. The Respondents further submit that this is effectively a 'fishing expedition', and that the appropriate response is simply to determine the current complaints by express reference back to the determinations made in the **Liberty/Privacy** proceedings, or by way of a fresh declaration in similar terms in favour of each claimant. The Respondents submit that, unlike in **Belhadj**, where there was a concession that the substance of their policies/procedures for protecting legal and professional privilege material was in breach of Article 8, in **Liberty/Privacy** the only failure, and then only in respect of Prism/Upstream, related to the lack of foreseeability/accessibility arising out of the fact that disclosures about the procedures were not made until the onset of the **Liberty/Privacy** proceedings. In this case the Respondents submit (paragraph 41 of their Submissions) that, unlike in **Belhadj**, *"there is no good reason why the Claimants should not receive the same foreseeability declaration given to all claimants in **Liberty/Privacy**, given that there was no lack of substantive safeguards in the regime and the breach effects the public at large and is not dependent on what may or may not have occurred on the facts of individual cases."*

36. The Claimants respond that the Respondents ignore the Tribunal's findings of breaches in relation to the handling of information in **Liberty/Privacy No 3**, as set out in paragraphs 5 and 6 above, but in any event they rely (in paragraph 29 of the Claimants' Reply) upon their assertion of an entitlement pursuant to Article 6 of the ECHR to have their civil rights determined, relying inter alia upon a decision by this Tribunal IPT 01/62 (at paragraph 85-108) as to the applicability of Article 6.

37. The Respondents vigorously put in issue the applicability of Article 6, in paragraphs 22-27 of their Skeleton, pointing out further in oral argument that the cases upon which the Claimants primarily rely, being **Klass v Germany** (Report of the Commission) 9 March 1977 and **AEIHR & Ekimdzhiev v Bulgaria** (Application 62540/00 28 June 2007), were addressed in **Kennedy v UK** at 177 to 179, and the issue of the applicability of Article 6 was expressly left open by the ECtHR. We are not in the event invited to resolve this knotty question, but on any basis, quite apart from Article 6, the Claimants rely upon our obligation to consider the cases pursuant to s.67 of RIPA as set out in paragraph 21 above.

38. Finally the Respondents submit that we can consider and determine the cases without investigation pursuant to our power under Rule 9 of the Investigatory Powers Tribunal 2000 and s.68(1) of RIPA to determine our own procedure. Mr Jaffey submits that we have no power to take that course, but only if pursuant to s.67(4) we conclude that a claim is frivolous and/or vexatious; though he concedes that we could follow the latter course if we did conclude that the 663 claims or any of them are unsustainable, and therefore frivolous. However, seemingly recognising the burden upon the Tribunal, and even more so upon the Agencies, if investigation of them be directed, Mr Jaffey in his Reply suggested in paragraph 7 what he called a solution, namely to adopt a *"streamlined approach"*, which he there described, of identifying issues and

types of breaches that may have occurred, by reference to the bringing of equal pay and other claims in other tribunals. However, as he recognised himself in argument, that would in no way resolve the need for individual consideration by the Agencies as to each Claimant, to see whether there has been intelligence-sharing or interception of any of his or her communications, and if so in each case to trace through what occurred in relation to any information so obtained.

39. We are satisfied that there is no shortcut available which would prevent the full consideration of each individual claim, if we so direct it. The Respondents in their Skeleton pointed to what they called the *"important recognition"* by Mr Jaffey in his paragraph 7, referred to above, of the need for a *"proportionate and pragmatic solution"* for addressing the *"current influx of claims"*. They state as follows:-

> *"13…. What is suggested is that a group of lead claims should go first to identify the type of breaches which might have occurred, followed by a "streamlined approach to dealing with the remainder". But that is precisely what has already occurred. The Tribunal in the* ***Liberty/Privacy*** *proceedings has already considered the circumstances of 10 human rights/privacy campaigning organisations. It has pronounced on the legality of the Regimes and made case-specific findings in all cases, including in two cases where technical breaches had occurred. That enabled the IPT to highlight areas of concern in respect of which steps were necessary to ensure that such breaches never occur again. The Prime Minister and the Commissioner were accordingly made aware of the situation.*
>
> *14. It is also to be noted that this part of the Claimants' case must necessarily proceed on the basis that persons making a complaint to the IPT are not simply entitled without more to have their individual circumstances examined and determined. The question on that basis is thus where, not whether, to draw and proportionate and pragmatic line before declining to consider individual cases."*

40. The Respondents continue:-

> *"17… the Claimants' submissions fail to recognise the importance of the fact that these claims have been brought as part of a deliberate campaign with the principle purpose of discovering whether GCHQ held information about individuals/organisations. Such a campaign very obviously has resource implications both for the Agencies and for the IPT itself. In that regard, whilst the claims may or may not qualify for dismissal solely on the grounds that they are frivolous or vexatious (see s.67(4) of RIPA 2000), it is nevertheless highly relevant that the campaign has some features of vexatiousness which should feed into the overall analysis as to how the claims are dealt with and particularly as regards the exercise of the Tribunal's remedial discretion.*

> *18. Thus the fact that the claims impose a heavy burden on the Agencies and the IPT, coupled with the fact that the motivation for these complaints appears to be to go behind the important and well-established NCND principle (see §§31-35 of the Respondents' Preliminary Submissions), are relevant considerations which suggest a degree of vexatiousness and which are highly relevant to how the broad discretion of the Tribunal should be exercised in these cases. As made clear in* ***Dransfield v Information Commissioner and Devon County Council*** *[2015] EWCA Civ 454 at §§67-69 per Arden LJ, both the burden imposed on a public authority and the motive of the claimant are relevant considerations when assessing whether vexatiousness can be inferred. The fact that less than 3% of the Claimants have included any additional information, over and above submission of the standard template (prepared by Privacy International) supports the assessment that the motivation for these claims is to impose a considerable and disproportionate burden on the Agencies."*

Our conclusions

41. We are satisfied that, as to the Respondents' primary case, the judgments in **Liberty/Privacy No 1 and No 2** were not the finishing point, but only the starting point for the potential investigation of any proper individual claims. Just as the claimants in that case, who had established sufficient locus to bring the claim, were entitled, after the legal issues had been decided on assumed facts, to have investigations of their own individual circumstances, so that would be the case in respect of any other such claimant who can satisfy the locus requirement. The **Liberty/Privacy** claims were <u>not</u> sample or specimen cases. We are equally satisfied that any decision that we would not *look at* the individual cases of other claimants who could establish the relevant locus would be contrary to **Weber** and **Zakharov**, and to the Tribunal's own duty within RIPA, and indeed would undermine the position as accepted by the ECtHR in **Kennedy v UK**, approving the UK regime so far as concerns the role of this Tribunal to such an extent that, as set out in paragraph 17 above, it was prepared to recognise in **Zakharov** that there could in consequence be a different test for the approach to locus in claims before this Tribunal.

42. These present applications may have been instigated by a Privacy International campaign, but each application must still be considered by reference to its own merits, if any. Whatever the purpose of the campaign, we are satisfied that these applications will not lead to a breach or evasion of the NCND principle. It is only if a particular application were investigated and a relevant breach or unlawful act were established that there would be any question of revelation of the underlying position. We agree with paragraphs 32-34 of Mr Jaffey's Reply set out in paragraph 34 above.

43. However, as discussed, there can be no shortcut if the applications are to proceed, and considerable care is required before the Tribunal takes upon itself, and imposes upon the Agencies, 663, or possibly more (subject to any limitation argument), individual investigations. That is why we have listed these cases for hearing.

44. We are satisfied that there was not, as Mr Jaffey sought to allege, some kind of systemic or wide-ranging failure by the Respondents by virtue of what was disclosed in **Liberty/Privacy No 3**. There were, as described in paragraphs 5 and 6 above, two relatively minor breaches of procedure, as described. That is not to say that other complaints may not on investigation be justified. It is not however our role, as it is that of the Commissioners, to supervise and oversee the performance of the Agencies. Our role is to investigate individual complaints that are made to us, after establishing the legal framework which is to apply to them. We are a tribunal dedicated towards an efficient disposal of claims by those who have grounds of some kind for belief that their communications are being intercepted, as opposed to being a recipient of possibly hundreds or thousands of applications from people who have no such basis other than the mere existence of the legislation. We reported the position as recorded in **Liberty/Privacy No 3** both to the Commissioners and also, pursuant to our obligation under s.68(5) of RIPA, to the Prime Minister; and would so report any further breaches we might find pursuant to any similar complaint.

45. The standard forms as used by all the Claimants do record a belief that the Respondents *"have and/or continued to intercept, solicit, access, obtain, process, use, store and/or retain"* their information and/or communications, though they result from a website in which Privacy International, having asked the obvious question as to whether the reader has *"ever made a phone call, sent an email or … used the internet"* then invites them to *"try and find out if GCHQ illegally spied on you"*. It is difficult if not impossible to distinguish between a 'fishing expedition' and such an asserted general belief as in the standard claim form. In the course of his always eloquent submissions, Mr Jaffey suggested that the Six are *"exactly the kind of people who might well properly ask the IPT to investigate whether or not they have been the victims of unlawful conduct."* That may be so, but it is impossible even to suggest the same as to the remainder of the 663.

46. We are satisfied that the appropriate test for us to operate, which would accord with **Zakharov** and our obligations under RIPA, is whether in respect of the asserted belief that any conduct falling within subsection s.68(5) of RIPA has been carried out by or on behalf of any of the Intelligence Services, there is any basis for such belief; such that the *"individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or legislation permitting secret measures only if he is able to show that due to his personal situation, he is potentially at risk of being subjected to such measures."* (**Zakharov** at 171). This continues to be the low hurdle for a claimant that this Tribunal has traditionally operated.

47. We are persuaded that, in relation to the Six, whose circumstances we have set out in paragraph 11 above, they satisfy such a requirement for consideration by the Tribunal, and investigation by the Agencies, in respect of the s.8(4) RIPA regime and, with a considerable element of doubt, also in respect of Prism/Upstream, save in respect of the US citizen Mr Wieder. Subject to what we say below in relation to the question of jurisdiction, we would direct enquiries to be made in respect of the Six. But we are entirely satisfied that there is insufficient information in the standard form which is being used by all the other 657 Claimants (including the rest of the Ten) to justify such a course, though we shall carefully address in due course whether the seventeen referred to in paragraph 12 above have added anything material to the standard form,

such as to set out any basis for the asserted belief or to show any potential risk, if they otherwise satisfy the requirements for jurisdiction, to which we turn below.

48. Subject therefore to the second issue, we conclude that the Six alone have established locus. With regard to the balance of the Ten and (subject to possible reconsideration in relation to the seventeen referred to) the balance of the 663, we do not propose to direct any enquiries or investigation by the Agencies. We shall leave open the question as to whether, as the Respondents submit, there is in these circumstances a power, explicit pursuant to s.68(1) or implicit, to dismiss such claims, or to make no determination without having investigated them, but we are satisfied that we can in any event take the course, which Mr Jaffey agrees is available if we decide, as we do, that the claims are not sustainable, to reject them as frivolous within s.67(4).

The jurisdiction issue

49. As appears from paragraph 11 above, of the five individual Claimants among the Six, two have not, at any material time, been resident in the United Kingdom; Mr Wieder is a citizen of the United States of America and lives there and G is a citizen of one Council of Europe state, resident in another. Both have submitted a human rights claim in Form T1 as well as a complaint in Form T2. They both use the standard form Statement of Grounds. As set out above, they assert a belief that the Respondents have performed a number of actions, including interception, use and storage of "my information and/or communications" and may have received "my information" from the NSA prior to 5 December 2014. In consequence, each claims that his rights under Articles 8 and 10 ECHR have been infringed. The Respondents contend that if, which is neither confirmed nor denied, any such interception or sharing has occurred, it cannot, as a matter of principle, give rise to a claim under s.6 Human Rights Act 1998, because the United Kingdom has no obligation under the ECHR to secure the rights under Articles 8 and 10 to them.

50. The foundation for the argument is Article 1 ECHR:

> *"The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this convention."*

Mr Eadie submits that neither Claimant is or was at any material time within the jurisdiction of the United Kingdom, and such is not in issue. In consequence, the UK owed no obligation to them to secure Article 8 or 10 rights in relation to their "information" or "communications".

51. Mr Jaffey submits that the point has never been taken before in the Tribunal, in circumstances in which it could have been; and while that does not prevent it from being taken, it is a reliable indicator that the point is not good. His more principled argument is that, by analogy with other circumstances in which the ECtHR has held that the Convention does apply to persons not present in the territory of a contracting state, the obligation exists. We understand him to accept that the issue can be determined under Article 8 and that Article 10 adds nothing to his argument. Article 8(1) provides,

> *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

Mr Jaffey submits that the acts claimed would amount to an infringement of the right to respect for private life and/or correspondence.

52. When it has addressed its mind to the issue, the ECtHR has always held that, subject to identified exceptions, the reach of the Convention is territorial. The modern starting point is **Bankovic v UK and Others** [2007] 44 EHRR 75. The Court acknowledged the principle of public international law, that the jurisdictional competence of a state is primarily territorial: paragraph 57. It was of the view that *"Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case":* paragraph 59. It took into account the travaux préparatoires, so as to include within the scope of the Convention *"others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the contracting states"*: paragraph 61. It expressly approved in paragraph 64 an earlier statement of principle in **Soering v UK** [1989] 11 EHRR 439,

> *"…The engagement undertaken by a contracting state is confined to "securing" ("reconnaître" in the French text) the listed rights and freedoms to persons within its own "jurisdiction".*

53. The most recent clear and authoritative summary of the law by the ECtHR appears in **Chagos Island v UK** [2013] 56 EHRR SE15 at paragraph 70:-

> *"i. A State's jurisdictional competence under Article 1 is primarily territorial;*
>
> *ii. Only exceptional circumstances give rise to exercise of jurisdiction by a State outside its own territorial boundaries;*
>
> *iii. Whether there is an exercise of jurisdiction is a question of fact;*
>
> *iv. There are two principal exceptions to territoriality: circumstances of "State agent authority and control" and "effective control over an area";*
>
> *v. The "State agent authority and control" exception applies to the acts of diplomatic and consular agents present on foreign territory; to circumstances where a Contracting State, through custom, treaty or agreement, exercises executive public powers or carries out judicial or executive functions on the territory of another State; and circumstances where the State through its agents exercises control and authority over an individual outside its territory, such as using force to take a person into custody or exerting full physical control over a person through apprehension or detention.*

> *vi. The "effective control over an area" exception applies where through military action, lawful or unlawful, the State exerts effective control of an area outside its national territory.*
>
> *vii. In the exceptional circumstances of the cases before the Grand Chamber, where the United Kingdom had assumed authority and responsibility for the maintenance of security in South East Iraq, the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, had exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention."*

54. Subsequent developments have primarily concerned the scope of the exceptional cases in which acts of contracting states performed or producing effects outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1. The exceptions so far recognised are acts of diplomatic and consular agents present on foreign territory, the exercise of control and authority over an individual outside its territory, with or without the consent of the state in which control and authority are exercised, the exercise of effective control of an area outside the territory of the contracting state and the occupation by one contracting state of the territory of another: **Al-Skeini v UK** [2011] 53 EHRR 18 at paragraphs 133 – 142.

55. Mr Jaffey does not, save in one respect, submit that the two Claimants fall within any of the recognised exceptions. In the case of G, resident in another signatory state, he submits that he is within the *"espace juridique"* of the Convention and so falls within the fourth exception which, in **Al-Skeini** was expounded under the heading *"General principles relevant to jurisdiction under Article 1 of the Convention: the Convention legal space (espace juridique)."* This contention, if correct, would radically alter the nature of the obligation undertaken by a contracting state: it would impose an obligation in respect of all persons within the jurisdiction of any contracting state. Such a construction of Article 1 would go well beyond any conceivable construction permitted by public international law and is inconsistent with the careful incremental approach of the ECtHR, when dealing with issues which may not have been fully foreseen by those who negotiated the Convention. The ECtHR has made it clear that, at least for the time being, the notion of the espace juridique requires that when one contracting state has occupied the territory of another, it must be accountable for breaches of human rights within the occupied territory: **Al-Skeini** paragraph 142. We do not see any room for a distinction between Claimants abroad on the basis that some are resident in another Convention state.

56. Mr Jaffey's core submission is that, on a true analysis, the impugned acts have both occurred in the territory of the United Kingdom. Therefore, it does not matter that the person whose Article 8 rights may have been infringed was at all material times abroad. He relies on **Bosphorus v Ireland** [2006] 42 EHRR 1 and **Markovic v Italy** [2007] 44 EHRR 52. In **Bosphorus**, an aircraft owned by an entity in the former Republic of Yugoslavia and leased by a Turkish company was seized in Dublin pursuant to UN and EU sanctions measures. The Turkish lessors had no connection with Ireland other than the maintenance contract with an Irish company pursuant to which the aircraft had been flown to Dublin. Neither the Irish Government nor other

intervening parties, including the European Commission, submitted that Article 1 ECHR excluded the application because the Turkish lessors were not within the jurisdiction of Ireland when the aircraft was seized. (The submissions under Article 1 which were made were that the application was outside the Convention for other reasons). Nevertheless, the Court addressed the issue in paragraph 137 of its Judgment:

> *"In the present case it is not disputed that the act about which the applicant complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent state on its territory following a decision to impound of the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the "jurisdiction" of the Irish state…"*

In **Markovic**, the claimants were relatives of people killed on 23 April 1999 when the RTS building in Belgrade was struck by a missile launched from a NATO aircraft. They claimed damages in the Rome District Court. On 8 February 2002 the Court of Cassation ruled that the Italian Courts had no jurisdiction to hear the claim. The applicants contended that their rights under Article 6 ECHR had been infringed. In answer to a preliminary question raised by the ECtHR of the parties, the Italian Government conceded that the applicants had brought themselves within the ambit of the State's jurisdiction by lodging a claim: paragraph 38 of the Judgment. In the light of that concession, it is unsurprising that the Court held that if civil proceedings are brought in domestic courts, the state is required by Article 1 ECHR to secure in those proceedings respect for the right protected by Article 6, so *that "there indisputably exists…a "jurisdictional link""* for the purposes of Article 1: paragraphs 54 and 55 of the Judgment.

57. Although the Court did not spell out its reasoning in either case for its conclusion that the contracting state owed the relevant convention obligation to the applicants, the outcome was not unprincipled. In **Bosphorus** the aircraft's lessors had submitted their property to the territorial jurisdiction of the Irish State when they caused it to be flown to Dublin. Accordingly, although they were not physically present in Ireland at the time of the impugned act, their property was within its territorial jurisdiction. In **Markovic**, the applicants had submitted to the jurisdiction of the Italian Courts when they brought their civil claims there. Like the aircraft lessors, they had voluntarily submitted to the jurisdiction of a contracting state and were entitled to the benefit of the only relevant article of the Convention, Article 6, in the determination of their civil claim.

58. Neither case assists the two Claimants. In so far as their claim is founded on belief that their right to respect for their private life has been infringed, neither of them allege that, at any material time, they enjoyed a private life in the United Kingdom. Accordingly, under Article 1, the United Kingdom was under no obligation to respect it. The analogy with **Bankovic** is close. Further, information about a person is not property: **OBG Limited v Allan** [2008] 1 AC 1 at paragraph 275 per Lord Walker. Even in the autonomous Convention meaning, it has never been held to amount to a *"possession"*, for the purposes of Article 1 of Protocol 1. Accordingly, the retention by GCHQ of information shared with it by the NSA, even in circumstances which do

not comply with UK law, could not amount to a breach of the two Claimants' right to respect for their private life.

59. Mr Jaffey focussed on the Article 8 right to respect for *"correspondence"*. The interception of telephone calls and the interception and seizure of electronic mail amount to an interference with *"correspondence"*: **Lüdi v Switzerland** [1992] 15 EHRR 173 paragraph 39 and **Wiser and Bicos Betiligungen v Austria** [2008] 46 EHRR 54 at paragraph 45. Whether or not interception of electronic mail or telephone calls which happen to pass by cable or airwave through the territory of a contracting state sent or made to and received by persons outside the United Kingdom are within the scope of Article 1 is a moot point. It was raised as an objection by the German Government in **Weber**. The Court did not consider it necessary to rule on the issue: paragraph 72 of its Judgment. In **Liberty v UK** two of the claimants were Irish NGO's and the point was not taken or addressed.

60. Our view is that a contracting state owes no obligation under Article 8 to persons both of whom are situated outside its territory in respect of electronic communications between them which pass through that state. Further, and in any event, as a UK tribunal we are obliged by domestic law not to do more than to keep pace with the Strasbourg jurisprudence: **R (Ullah) v Special Adjudicator** [2004] 2 AC 323 at paragraph 20 per Lord Bingham and **Smith v Ministry of Defence** [2014] AC 52 at paragraph 44 per Lord Hope. We are also not persuaded that a privacy right is, as Mr Jaffey contended, a right of action present in the jurisdiction, and that too would similarly be extending the bounds of the UK Courts' jurisdiction under Article 8.

61. For those reasons, we are satisfied that the two Claimants' human rights claims cannot succeed, because they are claims about matters which are outside the scope of the ECHR, alternatively, because it has not been established by the jurisprudence of the ECtHR that they clearly are within it.

62. Consequently, we dismiss, on the ground that the Tribunal has no jurisdiction, the human rights claims made in their T1 forms by G and by Mr Weider, but Mr Eadie has accepted that he cannot resist the claims made by them in respect of their T2 form, insofar as the Claimants, albeit abroad, make claims otherwise than by reference to the Human Rights Act in respect of conduct that might turn out to have been committed in the UK, with regard to the result and treatment of any intercepted information.

63. So far as concerns the human rights claims in their T1 forms in respect of the other three US residents who (as appears in paragraph 10 above), form part of the Six, the same would apply, as it would to all of the 663, save for the 294 resident in the United Kingdom.

The Tribunal's conclusions

64. Accordingly the Tribunal will direct enquiries in respect of the Six (with the exception of the T1 forms of G and Mr Weider, and of any claims in respect of Prism/Upstream by Mr Weider). In respect of all the other Claimants the Tribunal will send a copy of this judgment to their identified addresses, notifying all of those Claimants save those resident in the United Kingdom ("non-UK Claimants") that their T1 Form claims are dismissed for lack of jurisdiction. In respect of the UK

Claimants, and the non-UK Claimants in respect of their T2 Form claims, they will be notified that, in the absence of receipt by the Tribunal within 28 days of the date of dispatch of the judgment of any further submissions, their claims will stand dismissed as unsustainable, that is frivolous within s.68(4) of RIPA.