Neutral Citation Number: [2015] UKIPTrib 13_132-H

Case No: IPT/13/132-9/H & IPT/14/86/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

P.O. Box 33220
London
SW1H 9ZQ

Date: 29/04/2015

Before :

MR JUSTICE BURTON (PRESIDENT)

ROBERT SEABROOK QC

CHARLES FLINT QC

SUSAN O'BRIEN QC

PROFESSOR ZELLICK CBE QC

- -

Between :

(1) ABDEL HAKIM BELHADJ **(2) FATIMA BOUDCHAR** **(3) SAMI AL SAADI** **(4) KARIMA AIT BAAZIZ** **(5) KHADIJA SAADI** **(6) MUSTAFA AL SAADI** **(7) ANAS AL SAADI** **(8) ARWA AL SAADI** **(9) AMNESTY INTERNATIONAL LIMITED**	**Claimants**
- and -	
(1) SECURITY SERVICE **(2) SECRET INTELLIGENCE SERVICE** **(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS** **(4) SECRETARY OF STATE FOR THE HOME DEPARTMENT** **(5) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH**	**Respondents**

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Mr Ben Jaffey and Mr Conor McCarthy (instructed by **Leigh Day**) for **(1) to (8) Claimants**
Mr Hugh Tomlinson QC, Mr Nick Armstrong and Miss Tamara Jaber (instructed by **Mr Nick Williams, Legal Counsel for Amnesty International**) for **Amnesty International**
Mr James Eadie QC, Miss Marina Wheeler and Miss Kate Grange (instructed by **the Treasury Solicitor**) for the **Respondents**
Mr Jonathan Glasson QC (instructed by **the Treasury Solicitor**) as **Counsel to the Tribunal**

Hearing date: Friday, 13th March 2015

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Approved Judgment

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MR JUSTICE BURTON
(President)

Mr Justice Burton (President) :

1. This is the judgment of the Tribunal.

2. The background to this judgment was the making of the declaration by the Tribunal on 26 February 2015, in conjoined applications brought by Mr Abdel Hakim Belhadj and Mr Khadija Saadi and their families ("the Belhadj Claimants") and by Amnesty International Limited ("Amnesty"), as follows:

> "*UPON the Respondents conceding that from January 2010, the regime for the interception/obtaining, analysis, use, disclosure and destruction of legally privileged material has not been in accordance with the law for the purposes of Article 8(2) of the ECHR and was accordingly unlawful.*
>
> *AND UPON the Security Service and GCHQ confirming that they will work in the forthcoming weeks to review their policies and procedures in the light of the draft Interception Code of Practice and otherwise.*
>
> . . .
>
> *IT IS ORDERED THAT:*
>
> *1. there be 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.*"

3. The next step after that declaration was to follow the course set out in the balance of the Order:

> "*3. the factual issue as to whether the Claimants' legally privileged communications have in fact been intercepted/obtained, analysed, used, disclosed or retained ("relevant interception") shall be considered by the Tribunal in a CLOSED hearing.*
>
> *4. there will be an Open hearing to consider, on the hypothetical assumption (the true position being neither confirmed nor denied), that there has been relevant interception, what if any remedies should be granted to the Claimants, at 10.30 am on Thursday, 12 March 2015 in the Rolls Building in a court to be notified.*
>
> *5. the Claimants shall serve and lodge written submissions as to what remedies ought to be granted to them on the hypothetical assumption (the true position being neither confirmed nor denied) that there has been relevant interception, by 12 noon on 3 March*

> *2015: the Respondents shall serve and lodge written submissions in response by 4 pm on 5 March 2015: Counsel to the Tribunal shall serve any submissions by 10 am on 9 March 2015.*"

4. The Tribunal has held a closed procedure, in which consideration of any documents and information relating to any legally privileged material ("LPP") relating to any of the Claimants intercepted or obtained by the Respondents has taken place, and an open hearing in which the consequences of there being any such material has been addressed. This is the Tribunal's judgment after such process.

5. The issues arise out of the provisions of the Regulation of Investigatory Powers Act 2000 ("RIPA") and the Investigatory Powers Tribunal Rules ("the Rules"), as follows:

   i) RIPA

> "*68(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.*
>
> *68(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 was issued, granted or given by the Secretary of State,*
>
> *they shall make a report of their findings to the Prime Minister.*
>
> *. . .*
>
> *69(1) The Secretary of State may make rules regulating—*
>
> *(a) the exercise by the Tribunal of the jurisdiction conferred on them by or under section 65; and*
>
> *(b) any matters preliminary or incidental to, or arising out of, the hearing or consideration of any proceedings, complaint or reference brought before or made to the Tribunal.*

. . .

69(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.

. . .

69(6) In making rules under this section the Secretary of State shall have regard, in particular, to -

. . .

(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."

ii) The Rules

"*6(1) The Tribunal shall carry out their 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, 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.*

. . .

13(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. "*

6. The Claimants submit that, by virtue of the fact that the LPP procedures have now been declared to have been unlawful, if the Tribunal has found that there has been any interception or obtaining of LPP material (i) a determination must be made by the Tribunal in favour of that Claimant or those Claimants, and (ii) a summary of the Tribunal's determination including any findings of fact must be provided to that Claimant or those Claimants – i.e. reasons for the determination must be given.

7. The Respondents are naturally very concerned to protect national security. Their submission is that if in this case a determination is made in favour of the Claimants and/or reasons are given in favour of the Claimants then it would follow that this must happen in every case, and this will include cases in which national security could be put at risk by disclosure – for example in revealing that a particular person – Jihadi John is used as an exemplar – is under surveillance and some procedural error has occurred: and there would also be the risk of disclosure of procedures, technology, methodology or intermediaries, which disclosure could have very damaging effects on the ability of the Respondents to protect the public. Accordingly Mr Eadie QC, with Ms Wheeler and Ms Grange, submits:

   i) Even in a case where the Tribunal considers that there has been a contravention of Articles 8 or 10 (or a non-compliance with RIPA) the Tribunal should still make no determination (*the Respondents' primary case*):

      a) so that (paragraph 26(a) of their submissions of 6 March 2015) "*In a case where there has been a systemic determination that the regime was not "in accordance with the law" under Article 8 ECHR and where to make individual determinations would reveal the fact of intercept, it should make a systemic determination alone. In the current proceedings it should indicate that the declaration which was made on 26 February 2015* [set out in paragraph 2 above] *is a sufficient remedy under Article 8 and that no further remedy is appropriate in any individual cases where it is alleged that LPP material may have been intercepted*";

      b) but such that (paragraph 29 of those submissions) "*the Respondents accept that if, in an individual case, it is established that there has been a substantial breach of the claimant's Convention rights and the claimant has suffered significant disadvantages as a result of the Respondents' unlawful conduct* [as explained, in a footnote, by reference to the ECtHR's admissibility threshold for minimum seriousness of complaints, and also by reference to the discretionary principles in a domestic judicial review] (applicable to the Tribunal by virtue of s.67(2) and s.67(3)(c) of RIPA) *then it is likely that the balance will require a determination in favour, notwithstanding NCND principles*".

ii) Alternatively (*the Respondents' alternative case*) (paragraph 26(b) of those Submissions) *if the Tribunal is minded to make a determination in favour it should do so on the express basis that LPP communications might have been intercepted (without confirming or denying the factual position in Closed) and that since the system was "not in accordance with the law" there is a determination in favour under Article 8 ECHR* [there is a cross reference to **Liberty v United Kingdom** (2009) 48 HRR1 at paragraphs 57 and 59].

In any event the Respondents submit that, even if a determination is made in favour of any of the Claimants, either no reasons or summary should be provided or such as is as abbreviated as possible to accord with Rule 6(1), set out above.

8. In addition to our resolution of the above issues, the Tribunal is to consider any questions of remedy arising in relation to any finding it makes as to any LPP in relation to any of the Claimants. Mr Jaffey, with Mr McCarthy on behalf of the Belhadj Claimants, and Mr Tomlinson QC with Mr Armstrong and Ms Jaber on behalf of Amnesty, refer us to s.67(7) of RIPA:-

> "*67(7) 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; and*
>
> *(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.*"

The relevant rule (there referred to) is Rule 12, namely:

> "*12(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*."

9. The Claimants seek:

   i) compensation:

   ii) destruction of any such LPP material intercepted or obtained:

   iii) injunctions.

   In addition Mr Tomlinson QC on behalf of Amnesty seeks orders for procedures to be introduced by the Respondents, including the introduction of an independent lawyer assessment process, as set out in paragraph 10(3), (4) and (5) of his submissions of 3 March 2015.

10. With regard to the issue of injunctions (and the procedures proposed by Amnesty), quite apart from submitting that any such remedies would be inappropriate and/or unnecessary, the Respondents point out the context of the present hearing, namely, as set out in paragraph 2 above, that the Respondents are and have been, in accordance with their confirmation given to the Tribunal, working, including the involvement of the Interception Commissioner, on an urgent review of their LPP policies and procedures, as to which consultation (in which Amnesty and indeed the Belhadj Claimants' representatives have been free to participate) has been taking place.

11. We permitted written submissions to be put in by the Law Society by way of emphasising the importance of the legal protection for LPP material, from Simon Salzedo QC, which accorded with the submissions made by the Claimants in that regard. It should be noted that the Bar of Northern Ireland and the Faculty of Advocates of Scotland considered intervening in these proceedings, but did not proceed when the concession narrated at paragraph 2 was made. The Tribunal has had the benefit of written submissions from counsel for the Tribunal, Mr Glasson QC. He attended closed hearings, and played his role in safeguarding the interests of the Claimants.

12. The Tribunal has, in the light of the oral and written submissions made to it, carried out the task, as Mr Jaffey recorded in paragraphs 4, 5 and 54 of his Submissions of 3 March 2015, of determining whether there has in fact been any *relevant* i*nterception* of the Claimant's privileged communications, as defined in the Tribunal's Order, at paragraphs 3 and 4. It has made its Determination of even date as a result of its investigation, and this judgment seeks to clarify what the Tribunal considered to be the correct approach to adopt in making that Determination. It has not been necessary, in the light of the Determination (particularly at paragraph 8), to address all the Claimant's arguments.

13. There was no dispute between the parties as to the importance of protecting and preserving the concept of legal and professional privilege, as clarified or enunciated particularly in **R v Derby Justices ex p B** [1996] AC 487 at 507, **R (Morgan Grenfell) v Special Commissioners** [2003] 1 AC 563 at paragraph 39 and **R v Grant** [2006] QB 60 at paragraphs 52 and 54. The Respondents relied on the following propositions, by reference to the authorities to which we have been referred:

(i) The principle of NCND ("Neither Confirm Nor Deny"), which has been upheld on a number of occasions by this Tribunal, is an important principle to be retained and buttressed in the context of national security. It has often been explained and justified, and exemplified in relation to confirmation or denial that a person is an agent (and as such relevant, by analogy, in a case of confirmation or denial that there is interception or surveillance) in **Scappaticci, Re An Application for Judicial Review** [2003] NIQB 56 per Carswell LCJ.

(ii) In the application of the Convention, there is a proper balance to be sought and reached between protection of individual rights and national security. Mr Eadie refers to **Klass v Germany** (1979-80) 2 EHRR 214 at paragraph 59.

(iii) There is a role in the consideration of (in particular) Article 8 for a conclusion that an interference is *de minimis*: Mr Eadie refers to **M v Secretary of State for Work & Pensions** [2006] 2 AC 91 at paragraphs 63 and 83-84, and to **Cha'are Shalom Ve Tsedek v France (App no. 27417/95)**, **Gough v United Kingdom (App no. 49327/11)** and **Uhl v Czech Republic (App no. 1848/12)**.

(iv) Mr Eadie also submits that the protection for LPP is not absolute: apart from the obvious "iniquity exception", he points to **BR v Germany** (unreported 23 October 1997), **Foxley v United Kingdom** (2011) 31 EHRR 25 at paragraph 44 and **McE v Prisoner Service of Northern Ireland** [2009] 1 AC 908 at paragraphs 19, 86 and 102.

14. Save for the iniquity exception, the Claimants do not accept that the authorities in paragraph 13(iv) above establish the alleged or any limitation on protection for LPP. Further:

(i) With regard to **Klass**, that was a case where the surveillance itself had been lawful, and the issue was as to the significance (if any) of the absence of any post-surveillance notification (an issue which was also considered in **Weber and Saravia v Germany** (2008) 46 EHRR SE5 and **Association for European Integration and Human Rights v Bulgaria** App No. 62540/00). Mr Jaffey submits that there is no case where the ECtHR has sanctioned the non-disclosure of unlawful acts such as, in the light of the Declaration in this case, is assumed, and now, in the light of the Tribunal's Determination of even date, found in respect of the Third Claimant alone, to have occurred.

(ii) Mr Jaffey refers to the words of this Tribunal in the IPT Procedural Ruling of 22 January 2003 (IPT 01/62 and IPT 01/77), at paragraph 191, a judgment in which (inter alia) the Tribunal concluded that there was or should be no limit upon publication of a ruling in respect of a preliminary issue of law by virtue of the words of s.68(4). The Tribunal said:

> "*The Tribunal conclude that the natural and ordinary meaning of "determination" in the relevant context does not include the legal rulings on the preliminary*

> *issues, which do not determine the merits of the substantive matters or bring the proceedings to an end for one of the reasons specified in rule 13(3). In the circumstances there can be publication of the reasons for legal rulings on preliminary issues, but, so far as determinations are concerned, the Tribunal are satisfied that section 68(4) and rule 13 are valid and binding and that the distinction between information given to the successful complainants and that given unsuccessful complainants (where the NCND policy must be preserved) is necessary and justifiable.*"

It is right to say, as Mr Eadie submits, that there was then no argument before the Tribunal by reference to the point now in issue, but nevertheless, without such argument, we differentiated plainly between the consequences for successful and for unsuccessful complainants.

(iii) Mr Jaffey also drew specific attention to the decision of the ECtHR in **Kennedy v United Kingdom** (2011) 52 EHRR 4, in which the Court approved the procedures of this Tribunal, which were specifically being challenged before the Court, and a part of the procedure, which was addressed with approval, appears as follows:

> "*183. The Government argued that the procedure before the IPT offered as fair a procedure as could be achieved in the context of secret surveillance powers. . . Finally, in the event that the complainant was successful, a reasoned decision would be provided.*
>
> . . .
>
> *189. Concerning the provision of reasons, the Court emphasises that the extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. In the context of the IPT's proceedings, the Court considers that the "neither confirm nor deny" policy of the Government could be circumvented if an application to the IPT resulted in a complainant being advised whether interception had taken place. In the circumstances, it is sufficient that an applicant be advised that no determination has been in his favour. The Court further notes in this regard that, in the event that a complaint is successful, the complainant is entitled to have information regarding the findings of fact in his case.*"

(iv) Finally Mr Jaffey referred to **Hansard**, on the basis that if, contrary to his contention, the statutory scheme as construed by the Claimants in their submissions was ambiguous, the Court could take into account the words of the Minister on the occasion of the consideration by the House of Commons

in Committee of the then Regulation of Investigatory Powers Bill, when she said:

> "*We expect to provide for successful complainants to be given details of the findings in question. However, there is no such elaboration for those individuals in whose favour the Tribunal has not found . . . Were reasons to be given, or confirmation that a person had been the subject of interception or other surveillance techniques, a person could apply to the Tribunal merely to discover whether he had been under surveillance* [an important justification for the NCND principle].
>
> . . .
>
> *We must prevent individuals from using tribunal proceedings to circumvent our 'neither confirm nor deny' policy. That is why there is a restriction on what the tribunal can say when it does not find in favour of the complainant. When it does find in favour of the complainant it will be entitled to give reasons and to award damages* [though note: not *'obliged'*].
>
> . . .
>
> [In answer to a question from Mr Allan MP *"If there has been a breach of procedures but it is not too serious, will a subsection (4) determination always be made in favour of the complainant or will proportionality considerations be taken into account?"*] . . . *"We have no intention of limiting the determination when a tribunal makes a finding, however technical, in a complainant's favour. "*

15. Mr Eadie submits as follows:

(i) The role of the Tribunal in the context of national security is deliberately limited by Parliament. S.68(4) is restrictive, Rule 6(1), imposing the duty on the Tribunal 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*", is paramount, and that is made clear by the specific cross-reference to it in Rule 13(4), relating to the duty to provide information.

(ii) The issues of remedy for a complainant are (as he submits in paragraph 4(a) of his Submissions) "*highly complex and potentially of the very greatest security concern – particularly in the light of the real potential for both a very large number of claims to be made to the IPT and for applications to be used by those of real security interest as a mechanism for seeking to*

discover if the agencies hold information about them": this of course is said in the context of the concession and Declaration now made. The Respondents are obviously very conscious, as is the Tribunal, that this judgment will set a precedent for future cases. Although s.17 of RIPA (which excludes from legal proceedings reference to interception) is disapplied by s.18(1)(c) to any proceedings before the Tribunal, nevertheless that principle, of protecting any risk to the continued lawful interception of communications is uppermost in the concerns of the Respondents, who are responsible for public safety.

(iii) Any disclosure that there has been interception enables those who discover that they have been intercepted to alter their conduct in future so as to avoid such interception. Mr Jaffey's submission (paragraph 56(d) of his 3 March Submissions) that "*disclosure of a proper statement of the Tribunal's reasons and decision does no harm to the public interest*" is wholly mistaken, and rather the Tribunal should adopt an approach which does not risk such harm.

(iv) The Respondents submit that there may be no "*relationship of proportionality as between the finding of a breach by the Agencies and the extremely serious damage that would be caused by a public statement confirming the fact of interception*". He submitted orally that Parliament should not be taken to have required that this Tribunal should put public safety at risk because of an error or series of errors by the gatekeeper of public safety.

(v) S.68(4) should not be interpreted as being a blanket statutory ouster of NCND. National security is still the key, and by s.67(3)(c) the Tribunal's duty in relation to its findings from its investigations "*to determine the complaint by applying the same principles as should be applied by a court on an application for judicial review*", allows it a discretion in relation to its rulings.

(vi) Mr Eadie heavily emphasised the safeguards which there would be for an individual, after an investigation by the Tribunal, namely a report to the Commissioner under s.68(3)(b) and to the Prime Minister under s.68(5), and orders for destruction and quashing of relevant documents or instruments, even though such would not be published.

16. Mr Jaffey emphasised the seriousness of the breaches now conceded by virtue of there not being in place a lawful system for dealing with LPP, the significance of the Tribunal's role, the need for public disclosure and confidence where there has been contravention of Article 8, and the need, so far as possible, for the giving of reasons by the Tribunal in order to comply with Article 6, always subject to the requirements of NCND, which he fully accepted, but which he submitted was disapplied, or at any rate diminished, once there was a contravention of Article 8 or other unlawful act found by the Tribunal. The Claimants submitted, fortified by the submissions of the Government in **Kennedy**, as recited and incorporated with approval by the ECtHR, and set out in paragraph 14(iii) above, and so far as necessary the extracts from **Hansard**, that the statutory scheme is or should be clear, as follows:

(i) S.68(4) provides that the Tribunal *shall* give notice to a complainant as there provided, thus an express statutory ouster, to that extent, of NCND. Mr Jaffey submitted as follows, in paragraph 54(g) of his 3 March Submissions:

> "*g. Section 68(4) of RIPA serves an obvious constitutional purpose. The provisions protect the Agencies' legitimate need for secrecy over interception for so long as they act lawfully. But where the Agencies breach the law, their conduct must be disclosed. If it were otherwise, unlawful conduct by the Agencies would never be subject to public scrutiny. This requirement is necessary not only on the plain wording of the legislation, but in order to ensure that the UK legal regime is compatible with Articles 6 and 8 of the Convention.*"

(ii) The wording in Rule 13(1) and (2) is also mandatory, whereby the Tribunal *shall* provide information "*in addition to any statement under s.68(4) of the Act*" and, where they make a determination in favour of a complainant, the Tribunal *shall* provide him "*with a summary of that determination including any findings of fact*". He accepted that both Rules 13(1) and (2) were expressly subject, by s.13(4), to the general duty of the Tribunal under Rule 6(1). He submitted that there was no question of any veto by the Respondents as would, prior to such determination, have applied, by reference to the bar on any disclosure to the complainant by virtue of Rule 6(2), without the consent of the Respondents, but accepted nevertheless that by Rule 13(5) the Respondents would be given an opportunity to make representations, and the Tribunal would remain under the Rule 6(1) duty.

(iii) Mr Jaffey pointed to the remedy of compensation, which is expressly available in respect of a successful complaint, under s.67(7). Although Rule 6(1) would on the face of it apply to the award of such compensation, there is express provision in Rule 12, set out in paragraph 8 above, whereby the Tribunal is mandatorily required to give a complainant an opportunity to make representations as to the amount of the award. Of course such representations can and will, as in this case, be likely to be made at an earlier stage when the allegations are simply assumed, and before, after a closed investigation or hearing, they are found to be established; but it is difficult to see how there can be such an award without a determination in favour of a complainant and at least minimal reasons.

17. The Claimants submit that there can be no doubt that, pursuant to s.68(4), the Tribunal must make a determination in favour of a complainant if it has made a finding in his favour of some contravention or unlawful act:

(i) Mr Jaffey submitted that to suggest otherwise would be in effect to license the Tribunal to lie.

(ii) Mr Jaffey submitted there was no room in the legislation for a differentiation between a *technical* breach, for which a no determination

decision could be made, and a more substantial and significant breach (as suggested by the Respondents per paragraph 7(i)(b) above). Mr Jaffey submitted orally that the concession there set out by the Respondents, made because, as he submitted, they were driven to such concession due to the unattractiveness of their position, was incompatible with the wording of RIPA. Under RIPA there is no requirement to show a significant disadvantage or substantial breach in order to succeed with a complaint: it simply has to be unlawful conduct. He submitted that this was entirely inconsistent with the clear answer given by the Minister in Parliament.

(iii) There is any event no room for some 'third way' to avoid disclosure of an unlawful act within the very framework of s.68(4). It was in fact Mr Glasson who first used the word "*binary*" in argument in relation to its framework: a choice of two courses, and two alone, a statement either of a determination in favour of a complainant or of no determination in his favour. Mr Tomlinson completed this argument by pointing out the existence of the words "*as the case may be*". This he submitted can only mean that a finding in favour of a complainant leads to the first, and a finding against a complainant leads to the second, of the two possible statements.

(iv) The Claimants accepted that there was however more flexibility in relation to the giving of reasons, by reference to the Rules, than in relation to the giving of the determination statement itself. Mr Jaffey described the latter as the "*absolute bedrock, the bare minimum, that the Tribunal has to do*", but both he and Mr Tomlinson accepted that the mandatory obligations to provide a successful complainant "*in addition to any statement under s.68(4)*" with information, and in particular with a summary of the determination including any findings of fact, were subject to the overriding duty of Rule 6(1), by virtue of Rule 13(4).

(v) The gloss put orally on the Respondents' *primary case* by Mr Eadie in argument was not persuasive. He submitted that in an individual case governed by the systemic concession declaration, as here, there could automatically be a determination in favour of a claimant alleging interception of LPP, if such was mandatory, and that the reasons, which are accepted to be subject to Rule 6(1), could then be abbreviated. This would mean that every complainant complaining about interception of LPP would have an automatic determination in his favour, and provided that the reasons were exiguous enough, there would be no disclosure as to whether in his case there had been interference or not. Unless nothing at all was said by way of reasoning, and no compensation was paid, this course would be bound, and in a most unsatisfactory way, to lead to the same speculation and inference as the Respondents are trying to avoid, but without any resolution of the complainant's actual complaint.

(vi) As for the Respondents' *secondary case*, there is, as Mr Tomlinson put it in oral argument, no kind of "*half way house between no determination and a determination in favour*", permitted by the statute. The suggested justification for it, by reference to the approach of the ECtHR in dealing with claims before it, he submitted to be irrelevant. Just as this Tribunal is

prepared to allow claims to be put forward on an assumed basis, so too does the Court, but this Tribunal is also a fact-finding Tribunal (ordinarily in closed) which the Court is not. Indeed Mr Jaffey pointed to the passage from the Procedural Ruling of 22 January 2003 set out in paragraph 14(ii) above for the distinction between a preliminary ruling (on assumed facts) and a determination. As he submitted orally this case is not simply about a hypothetical question on the facts, but about whether or not there was, in fact, a breach of the Claimants' rights. Indeed that is plain from paragraph 3 of the Order in this case, set out in paragraph 3 above. It is inappropriate to end up with the same hypothetical statement with which the proceedings commenced. In any event, the Claimants submit, public scrutiny is required if there has in fact been an unlawful act by the Respondents (see e.g. **Abu Zubaydah v Poland App no. 7511/13** at paragraph 489 and **R v Shayler** [2003] 1 AC 247 at paragraph 21). Mr Jaffey submitted orally there was nothing calculated to undermine confidence in the Security Services more than a public perception that unlawfulness had occurred and had not been revealed.

18. Mr Eadie submitted orally that if the position is that the Tribunal has no option under this legislation but to make a public statement that there has been a determination in favour whenever a breach is found, then Parliament must be taken to have required the Tribunal to put public safety at risk because of an error or series of errors by the gatekeeper of public safety. That is a heavy burden for this Tribunal to shoulder. But the nub of Mr Eadie's case (subject to his exception, the statutory route to which seems to us unclear, set out in paragraph 7(1)(b) above, of a case where there has been a substantial breach and a significant disadvantage) is that public safety and the preservation of NCND requires that there must ordinarily be a "no determination", even though there may be in closed proceedings a finding in favour of a complainant that there has been some contravention of his rights. 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, but we are satisfied that such cannot possibly be the ordinary case, simply by reference to the preservation of NCND, to such an extent as to lead to no determination, when in fact there has been an unlawful act such as to amount to a breach of Article 8.

19. The Tribunal is persuaded by the submissions of the Claimants set out in paragraphs 16 and 17 above. We consider that it is contrary to the interests of the public and inconsistent with public confidence in this Tribunal, who are trusted to investigate matters, which investigation for the most part has to be carried out in closed proceedings, for the situation to be that the answer of no determination by reference to s.68(4)(a) could mean that there has been no interception, or could mean that there has been lawful interception (both as now, in order to preserve NCND) or could mean that there has been unlawful interception. That level of ambiguity would place the validity of all the decisions of this Tribunal in doubt. The Tribunal has been entrusted with the task of investigating complaints, to a large extent in closed proceedings, and without divulging details which might place security at risk. 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.

20. In the Tribunal's judgment, for the reasons given by the Claimants, neither the Respondents' *primary case* nor their *secondary case* are consistent with the statutory scheme. Neither the making of a simply systemic determination, nor a finding that the Claimants' LPP material might have been intercepted would provide an adequate remedy for the citizen where his Convention rights had been violated nor, in the small number of cases where that might be relevant, would permit an assessment to be made of the impact of such violation on the individual's right to a fair trial for the purposes of Article 6.

21. 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.

22. In this case, as can be seen from the Determination of even date, the Tribunal has concluded that a determination should be made, but in favour of the Third Claimant only and in respect of two documents. The Tribunal is satisfied that the information it has there included, and no more, should be disclosed. It has concluded that the security concerns of the Respondents can be so addressed, without breach of its duty under Rule 6(1). It follows that, for example, the application by Mr Jaffey for the production by the Respondents of a detailed witness statement is (save to the extent provided for in paragraph 13 of the Determination) inappropriate and is refused.

23. We turn to address the submissions that were made to us at the hearing in relation to remedies. As is clear from our accompanying Determination, we have, after considering matters in closed proceedings, concluded that there is no basis for any compensation in respect of the only finding we have made, namely in respect of two documents relating to one of the various Claimants. We have carefully considered all the authorities that have been put before us, as indeed the Tribunal did in **B v Department for Social Development** [2010] IPT09/11, and we have noted paragraph 77 of **Liberty v United Kingdom**, and the Practice Direction 'Just Satisfaction Claims' issued by the President of the ECtHR on 28 March 2007. In particular it is

plain, from paragraph 9 of that Practice Direction, that two of the matters raised by Mr Jaffey, even if we had otherwise been persuaded by them, namely the asserted culpability of the Respondents' conduct and the manner of the Respondents' handling of the proceedings, would not have been appropriate considerations in any event. We have concluded, as set out in paragraph 12 of the Determination, that this is a case in which no compensation is called for, and that there is just satisfaction by virtue of the finding in favour of the Third Claimant.

24. The undertakings given by the Respondents in these proceedings expire automatically on the determination of these complaints. However we note the following:

(i) The present regime governing interception of LPP has been declared unlawful, as above;

(ii) A new Code has not yet been put before, or approved by, Parliament;

(iii) The High Court action by the Third Claimant, who alone has been the subject of the Tribunal's Determination, has now concluded;

(iv) The claims in these proceedings by Amnesty, including applications for relief by way of an appointment of an independent lawyer, which Mr Tomlinson accepted only arose in the event of Amnesty's claim being established, have not succeeded;

(v) Although the claims in these proceedings by the Belhadj Claimants have not succeeded, they continue to be involved in litigation with the Respondents;

(vi) The Respondents have persuasively contended that any suggested injunctive relief, to include such procedural suggestions as automated destruction, as mentioned by Mr Jaffey, is best dealt with by awaiting the review of the system, in which all the Claimants have had, and no doubt taken, the opportunity to take part during the consultation period. The Tribunal has noted a similar view taken in **R (GC) v Commissioner of the Metropolis** [2011] 1 WLR 1230 by the Supreme Court (see paragraphs 47 per Lord Dyson and 73 per Baroness Hale);

(vii) It may be that the Respondents are willing to give relevant and appropriate undertakings to the Belhadj Claimants, pending the introduction of a new Code; and

(viii) Although we have heard no argument on the point, it may be that there would be a doubt, by reference to s.67(7) of RIPA, as to the Tribunal's power to grant relief (in the absence of undertakings) where there has been no determination in favour of a Claimant.

25. In the light of the above, the Tribunal invites the parties to see if agreement can be reached in relation to such undertakings as are adumbrated in paragraph 24(vii) for a period of say 6 months or until a new Interception of Communications Code of Practice is approved by Parliament. If the parties are unable to reach agreement in that regard within 7 days of delivery of this judgment, then the Tribunal would be

prepared to assist or hear further argument, on paper unless it appears necessary to hold a further hearing.

26. The Claimants have sought the quashing of any applicable warrants. On the facts as ascertained by the Tribunal, the unlawful conduct found here derived solely from the deficiencies in the LPP policies and practices in place at the relevant time, which we have declared unlawful as above, are to be replaced by new policies. In those circumstances, the Tribunal finds that it is unnecessary to quash any warrant.