IN THE INVESTIGATORY POWERS TRIBUNAL

Case No. IPT/15/110/CH

B E T W E E N:

PRIVACY INTERNATIONAL

Claimant

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS

(4) SECURITY SERVICE

(5) SECRET INTELLIGENCE SERVICE

Respondents

CLAIMANT'S APPLICATION FOR RECONSIDERATION OF THE OCTOBER 2016 JUDGMENT

A. Introduction

1. This is the Claimant's application, developed in oral submissions during the hearing 17-19 October 2017, for the Tribunal to reconsider its findings contained in the judgment in these proceedings [2016] UKIPTrib 15_110-CH (the "**October Judgment**") concerning Commissioner oversight.

2. During the course of these ongoing proceedings, but subsequent to the October Judgment, new and additional evidence and information has been disclosed which fundamentally undermines the Tribunal's findings concerning Commissioner oversight. It follows that the Tribunal is requested to correct its factual findings, and its conclusions consequent to them.

B. The October Judgment

3. At [62] of the October Judgment, the Tribunal summarised the ECHR jurisprudence it was applying as follows (emphasis added):

> *"Accordingly, by reference to our considered assessment of the ECHR jurisprudence, we can summarise in short terms what we conclude the proper approach is:*

(i) There must not be an unfettered discretion for executive action. There must be controls on the arbitrariness of that action. We must be satisfied that there exist adequate and effective guarantees against abuse.

(ii) The nature of the rules fettering such discretion and laying down safeguards must be clear and the ambit of them must be in the public domain so far as possible; there must be an adequate indication or signposting, so that the existence of interference with privacy may in general terms be foreseeable.

(iii) Foreseeability is only expected to a degree that is reasonable in the circumstances, being in particular the circumstances of national security, and the foreseeability requirement cannot mean that an individual should be enabled to foresee when the authorities are likely to resort to secret measures, so that he can adapt his conduct accordingly.

(iv) It is not necessary for the detailed procedures and conditions which are to be observed to be incorporated in rules of substantive law.

(v) It is permissible for the Tribunal to consider rules, requirements or arrangements which are "below the waterline" i.e. which are not publicly accessible, provided that what is disclosed sufficiently indicates the scope of the discretion and the manner of its exercise.

(vi) The degree and effectiveness of the supervision or oversight of the executive by independent Commissioners is of great importance, and can, for example in such a case as Kennedy, be a decisive factor."

4. The Tribunal addressed Commissioner oversight in the period prior to avowal at [72]-[82] of the October Judgment (emphasis added):

"Supervision/Oversight

72 This is the other underlying question, and it is not a straightforward picture. We shall consider the position separately in respect of BCD and BPD.

73 What is clear is that, as set out in the Agreed Facts in [19] above, there was no statutory oversight of BPD prior to March 2015, when the Prime Minister gave his Direction as set out in [13] above, and that there has never been any statutory oversight of BCD, save in respect (in both cases) of data obtained under RIPA , which would fall under the responsibility of the ICC under ss.57 and 58 of RIPA , or under the ISA 1994 , in which case the IS Commissioner had responsibility for its oversight under ss.59 and 60 of RIPA .

74 Mr de la Mare submits that any but statutory supervision is wholly ineffective, because of the absence of the statutory powers and duties contained in those sections. We are not persuaded that that is a sufficient answer to the Respondents' case that there was in fact effective independent oversight by the Commissioners which indeed led to the disclosure of errors from time to time, which they caused to be remedied. It is necessary to look at what in fact occurred.

75 As for BCD, dealing with the successive ICCs, Sir Peter Gibson carried out some oversight from 2006, and as from the appointment of his successor, Sir Paul Kennedy, and then Sir Anthony May, there were six-monthly reviews of the databases and of their use. They were provided with a list setting out details of all s.94 Directions and any that had been cancelled,

although in the July Review the current ICC, Sir Stanley Burnton, criticises the lack of codified procedures and a sufficiently accessible and particularised list.

76 Sir Mark Waller as IS Commissioner also included a review of BCD within his responsibility upon his six-monthly visits, and he reviewed the use of the datasets and the case for their acquisition and retention, including necessity, proportionality and the risk of collateral intrusion. He included consideration of BCD in all his Reports between 2011 and 2015. Those Reports and the witness evidence from the SIAs show that he was concerned to carry out a perceptive examination and analysis both of the directions and the use of the data, but he did not carry out a detailed audit.

77 Both Commissioners approved and subsequently reviewed the ("under the waterline") GCHQ Compliance Guide relating to s.94 Directions.

78 From March 2015 Sir Anthony May was asked to take over full responsibility for oversight of BCD, and agreed to do so as from July 2015, provided that he was given additional staff and enabled to carry out the work properly, and it was only by December 2015 that his successor Sir Stanley Burnton was in a position to do so. At this stage his inspectors were provided with full access to the MI5 electronic systems which processed authorisations for access to the database and communications data requests made to the PECNs, and they undertook query-based searches and random sampling of the MI5 system for authorising access to the database and reviewed requests for authorisations relating to the database, and that process, as we have been informed by the ICC's office, continues in place.

79 Sir Stanley Burnton recorded his conclusion in paragraph 2.5 of the July Review that, leaving aside the involvement of the IS Commissioner, oversight by the ICC of BCD prior to 2015 was "limited because it was only concerned with the authorisations to access the communications data obtained pursuant to the directions. The oversight was not concerned with, for example, the giving of the s.94 directions by the Secretary of State (including the necessity and proportionality judgments by the agency or Secretary of State) or the arrangements for the retention, storage and destruction of the data."

80 There were internal audits pursuant to the internal Compliance Guidance, and there was a regular review of the Directions by the Home Secretary (MI5) and the Foreign Secretary (GCHQ). However, we are not satisfied that, particularly given the fragmented nature of the responsibility apparently shared between the Commissioners, there can be said to have been an adequate oversight of the BCD system, until after July 2015. In the absence of the necessary oversight and supervision by the ICC, the secondary roles of this Tribunal and the ISC were no replacement.

81 We turn to BPD, in respect of which it is plain that it was determined as a result of the 2010 report by Mr Hannigan referred to in [70] above (and as later recorded in the Introduction to the Joint Bulk Personal Data Policy of November 2015), that there should then be an improvement in respect of its oversight. Although there had been some oversight of BPD prior to 2010 by the then IS Commissioner Sir Peter Gibson, and Sir Paul Kennedy as ICC included consideration of BPD on his visits between January 2011 and May 2015, the major oversight of BPD was by Sir Mark Waller, Sir Peter Gibson's successor, as from December 2010, on his bi-annual visits. There is a short summary of his supervision in para.56 of the respondents' Amended Response to the claimant's Supplemental Request for Further Information. This does not adequately take into account (because it was prior to their disclosure in open) the content of the Confidential Annexes

to his Reports, particularly those between 2011 and 2013, which we have read, and, for example, in the 2013 Annexe he referred to the nature of his oversight of BPD:

*"*Firstly I require the services to provide me with a list of all data sets held. What I am concerned to do is to assess whether the tests of the necessity and proportionality of acquiring and retaining the data sets has been properly applied in relation to decisions to acquire, retain or delete those data sets. This is normally quite straightforward because each service has an internal review body which considers the retention of data sets on a regular basis and records the decision in writing. These documents are available for me to inspect.*

**I then consider how operatives and which operatives gain access to the data sets and review how the necessity and proportionality (i.e. the justification) of that intrusion is maintained.*

**Finally I review the possible misuse of data and how this is prevented. I consider this to be the most important part of my oversight in that it seems to me that*

**it is critical to that access to bulk data is properly controlled and*

**it is the risk that some individuals will misuse the powers of access to private data which must be most carefully guarded against."*

We have considered the relevant parts of his recent Report of 8 September, since the hearing, and the short written submissions of the parties in relation to it, which we invited. It is apparent that he has continued a rigorous oversight, and he will no doubt consider as such oversight continues, the important suggestions which the claimant makes.

82 Although the oversight by the IS Commissioner was not made statutory until March 2015, as set out in [13] above, the careful recital was that:

"The Intelligence Services Commissioner must continue [our underlining] to keep under review ... "

It was thus recognised that the supervision had previously existed. We are satisfied that during the period of Sir Mark Waller's supervision the independent oversight of BPD had been and continued to be adequate."

5. The Tribunal considered the oversight subsequent to avowal in the following passages (emphasis added):

91 The most significant of the points emerging from the July Review and from the claimant's submissions relating to it are these:

(i) There is no present limit on the duration of a s.94 direction, i.e. to the period during which the PECNs should continue to comply with it and provide data. The Commissioner did not make a recommendation that there should be a maximum duration imposed on directions made under s.94 , but advised at para.4.14 its proposed inclusion in a code of practice; such a requirement was not included in his recommendations in s.12 . However, we are satisfied that under the Handling Arrangements (and as appears in the Agreed Facts, at para.19(a)(v)) there are adequate restrictions imposed on the SIAs in relation to the duration for which the data can be retained (thus protecting the interests of the persons whose communications data has been obtained), and

there are also provisions for a review of the directions.

(ii) The Commissioner did recommend that there should be standardised processes for the review of directions, and the reporting of errors. We consider that the comprehensive Handling Arrangements, combined with proper oversight by the Commissioners, do adequately provide effective safeguards.

(iii) There are recommendations by the Commissioner as to what should be included in a s.94 direction. A further specification may in due course be introduced, but in our Judgment, given the adequacy of the safeguards provided by the published Handling Arrangements, such is not necessary for compliance with art.8 …

…

94 Whatever the failings in the system of oversight obtaining prior to avowal of these powers, the system now in operation does, in our judgment, operate effectively. The ICC has conducted a review of the s.94 powers. The lines of demarcation between the two Commissioners in relation to the use of BCD have been agreed. The IS Commissioner has, as referred to in [81] above, recently published his annual Report for 2015, which contains a review of the BPD regime. The fact that these reviews are not uncritical, and, particularly on the part of the ICC, contain recommendations for improvement, indicates that the system of oversight is effective.

95 The only area in which we need to give further consideration relates to the provisions for safeguards and limitations in the event of transfer by the SIAs to other bodies, such as their foreign partners and UK Law Enforcement Agencies. There are detailed provisions in the Handling Arrangements which would appear to allow for the placing of restrictions in relation to such transfer upon the subsequent use and retention of the data by those parties. It is unclear to us whether such restrictions are in fact placed, and in para.48.2 of their Note of 29 July 2016 the respondents submit that the Tribunal is not in a position to decide this issue. We would like to do so and invite further submissions."

6. The Tribunal also appended to its judgment the schedule attached to the Respondents' skeleton argument, which included the following (emphasis added):

"48. §§4.6.4 to 4.6.7 address oversight by the Interception of Communications Commissioner:

"4.6.4 The Interception of Communications Commissioner has oversight of:

a) the issue of Section 94 Directions by the Secretary of State enabling the Intelligence Services to acquire BCD;

b) the Intelligence Services' arrangements in respect of acquisition, storage, access, disclosure, retention and destruction; and

c) the management controls and safeguards against misuse which the Intelligence Services have put in place.

4.6.5 This oversight is exercised by the Interception of Communications Commissioner on at least an annual basis, or as may be otherwise agreed between the Commissioner and the relevant Intelligence Service.

4.6.6 The purpose of this oversight is to review and test judgements made by the Secretary of State and the Intelligence Services on the necessity and proportionality of the Section 94 Directions and on the Intelligence Services' acquisition and use of BCD, and to ensure that the Intelligence Services' policies and procedures for the control of, and access to BCD are (a) are sound and provide adequate safeguards against misuse and (b) are strictly observed.

4.6.7 The Interception of Communications Commissioner also has oversight of controls to prevent and detect misuse of data acquired under Section 94, as outlined in paragraph 4.6.2 and 4.6.3 above."

...

59. §§10.1 to 10.4 address oversight by the Intelligence Services Commissioner:

"10.1 The acquisition, use, retention and disclosure of bulk personal datasets by the Intelligence Services, and the management controls and safeguards against misuse they put in place, will be overseen by the Intelligence Services Commissioner on a regular six-monthly basis, or as may be otherwise agreed between the Commissioner and the relevant Intelligence Service, except where the oversight of such data already falls within the statutory remit of the Interception of Communications Commissioner.

Note: The Prime Minister's section 59A RIPA direction was issued on 11 March 2015. Paragraph 3 of this makes it clear that the Commissioner's oversight extends not only to the practical operation of the Arrangements, but also to the adequacy of the Arrangements themselves.

10.2 [T]he Intelligence Services must ensure that they can demonstrate to the appropriate Commissioner that proper judgements have been made on the necessity and proportionality of acquisition, use, disclosure and retention of bulk personal datasets. In particular, the Intelligence Services should ensure that they can establish to the satisfaction of the appropriate Commissioner that their policies and procedures in this area (a) are sound and provide adequate safeguards against misuse and (b) are strictly complied with, including through the operation of adequate protective monitoring arrangements.

10.3 [T]he Intelligence Services Commissioner also has oversight of controls to prevent and detect misuse of bulk personal data, as outlined in paragraph 8.3 and 8.4 above.

10.4 [T]he Intelligence Services must provide to the appropriate Commissioner all such documents and information as the latter may require for the purpose of enabling him to exercise the oversight described in paragraph 10.1 and 10.2 above."

C. Disclosure subsequent to the October Judgment

7. By letter dated 13 April 2017 from the Tribunal, the Commissioners were asked (based on assumed facts) whether, if a transfer of BCD and/or BPD to another agency or organisation, including a foreign agency, had taken place, they would have regarded it as within their remit, and confirm that, in that event, they would have provided active oversight.

8. The Commissioners responded by letter dated 27 April 2017, stating that it was within the

Commissioners' remit. This did not answer the latter part of the question.

9. Following the Claimant's submissions at a hearing on 5 May 2017, the Tribunal wrote to the Commissioners seeking further information.

10. By letter dated 2 June 2017 from the Commissioners, it was confirmed that *"[n]either Commissioner with responsibility for the intelligence agencies, nor their inspectors, has ever conducted a formal inspection or audit of industry"*.

11. At a hearing in June 2017, the Claimant submitted that the oversight provided to date had not been adequate because the Commissioners had not in fact carried out any audit or oversight of industry sharing. This led the Tribunal to send the letter dated 4 August 2017 requesting additional information from the Commissioners.

12. The response dated 19 September 2017 was provided by the Investigatory Powers Commissioner's Office ("**IPCO**"), which took over from ISCom and IOCCO with effect from 1 September 2017. IPCO stated:

> *"A review of the corporate record of ISCom has established that following the Intelligence Services Commissioner (Additional Review Functions) (Bulk Personal Datasets) Direction 2015 there is no corporate record that the Commissioner audited any sharing of Bulk Personal Data sets (BPD) with UKIC "industry partners" nor is there any material in the corporate record to show that such sharing was considered during an inspection visit of UKIC undertaken by ISCom.*
>
> *A review of the corporate record of the IOCCO can establish that following avowal of the use of Section 94 Telecommunications Act 1984 there is no record that the Commissioner audited any sharing of Bulk Communications Data (BCD) with UKIC "industry partners" nor is there any evidence that such sharing was considered during any inspection visit of the UKIC undertaken by IOCCO.*
>
> *Neither ISCom nor IOCCO were previously informed by GCHQ that the sharing of BPD/BCD data sets with industry partners, as described in the statement of the GCHQ witness supplied with the above letter, had occurred.*
>
> ...
>
> *On being advised of the issues raised by this case the IPC immediately ordered than an inspection of those UKIC agencies that may share datasets should be undertaken. I can confirm that these inspections have now incurred."*

13. On 13 October 2017, six additional documents were disclosed to the Claimant in OPEN, namely:

    13.1. A 13-page IOCCO inspection report under s.94 TA 1984 issued on 14 September 2017

("**BCD GCHQ Inspection Report**");

13.2. Investigatory Powers Commissioner's Office ("**IPCO**") summary of the 2017 BPD audit dated 15 September 2017 ("**Audit Summary**"); this was further opened up three times during the hearing, with additional disclosure being provided on 18 and 19 October 2017, and an additional gisted sentence being read out in OPEN on the afternoon of 19 October 2017;

13.3. IPCO letter to the Tribunal dated 20 September 2017; this was further opened up during the hearing on 18 October 2017;

13.4. IPCO response to questions prepared by Counsel to the Tribunal dated 28 September 2017;

13.5. Letter from Sir Michael Burton to IPCO dated 2 October 2017; and

13.6. IPCO response email to Sir Michael Burton dated 10 October 2017.

BCD GCHQ Inspection Report

14. There are two 'amber' ("*non-compliance to a lesser extent… remedial action must be taken in these areas as they could potentially lead to breaches*") recommendations made to GCHQ:

14.1. *"It is recommended that GCHQ work with IOCCO to explore how GCHQ's development tools and current audit systems may be modified to enable a more thorough inspection and audit to be undertaken by IOCCO. In particular, to assess what BCD was accessed and the justifications as to why it was necessary and proportionate. Such a development will enhance the oversight given by the Commissioner."*

14.2. The background to this recommendation is that before an analyst conducts a search, he or she must record on GCHQ's systems an authorised purpose (e.g. national security, serious crime or the economic well-being of the United Kingdom), an intelligence requirement and a written justification of the necessity and proportionality of the search. The written justification must be sufficiently detailed to allow another analyst, not directly involved in that area of work, to determine whether it makes a sufficient case for the intrusion into privacy. This is what GCHQ's witness statement served during the hearing in October 2017 correctly described as the "*audit*

standard". However, IOCCO's understanding was that the written justification was not available to them during their attempted audit. GCHQ's position is that it was not made available routinely, but would have been made available on request. The correct position is irrelevant. The problem is that IOCCO have never looked at any justification for access and therefore cannot have carried out a meaningful audit.

14.3. Further, IOCCO had no access to the actual search terms used (or if IOCCO did in theory have access, it did not in fact obtain such access). This mean that IOCCO could not possibly have made any assessment of whether the search was necessary or proportionate. For example, a search may have been inappropriate or swept too wide. IOCCO would not have been able to assess this. The mere fact that a search (for an unknown selector or search term) was said by an analyst to have been made for national security purposes and a particular intelligence purpose is plainly insufficient to determine whether it was lawful. It is necessary to look at the search terms utilised, the written justification given by the analyst and the results of the search. None of these materials were available to the auditors. Such 'audit' is audit in name only. It provides no meaningful check that searches were in fact being conducted for proper purposes, or that they were in fact necessary and proportionate.

14.4. The ability for the Commissioner to examine and audit what BCD was accessed and why it was necessary and proportionate is self-evidently a precondition to any meaningful oversight; concerns in this regard are therefore central to the lawfulness of the regime. If the records kept are not in fact accessible and accessed, then the Commissioner cannot provide adequate oversight.

14.5. The second recommendation has been redacted in its entirety. It relates to the *"disclosure of BCD in its entirety or as a subset outside of the intelligence services"*.

Audit Summary

15. IPCO confirms that an immediate oversight inspection was necessary in response to the matters raised in this claim.

16. As at 15 September 2017, IPCO had been able to consider only phase one of its review, addressing the matters identified in paragraph 1 of the Audit Summary; the second phase

will consider *"the use of contractors, secondees and integrees by the agencies"*. To date, there has not been *any* review by the Commissioner(s) of these practices.

17. The further opened up 'Overview of findings' stated in paragraph 4 that:

> *"... it was felt that GCHQ fell short of providing IPCO complete assurance of their compliance in some areas. Those included:*
>
> - *That when questioned staff were not considering steps to minimise the level of intrusion from any sharing (Handling arrangements 6.3).*
> - *Identifying and classifying BPDs appeared to cause some difficulty because of the complexity of GCHQ's acquisition methods. There is some question of whether all BPDs held by GCHQ have been adequately identified, while some datasets identified as BPDs were not.*
> - *GCHQ have not provided clear and specific briefings to the Foreign Secretary, other than via the Choice Letter. There is some question of whether the Foreign Secretary has provided ministerial oversight in this area."*

18. Paragraph 17 stated: *"When questioned, staff at one agency were not able to demonstrate any work to ensure that only as much of the information as is necessary is disclosed were any sharing to take place (6.1). That agency explained that due to the complexities of some unstructured datasets this might not be possible."*

19. Paragraph 19 identifies *"a concern"* relating to *"contractors, industry partners and academics and, to an extent, [REDACTION]"* (the Claimant infers the reference is to secondees and/or integrees as these are the categories of staff referred to as subject to further inquiry in paragraph 2). However, further investigation by the Commissioners will need to wait until the second phase of the review. This concern (inappropriate and uncontrolled/uncontrollable sharing with industry third parties), as at 15 September 2017, therefore remained without any proper oversight.

20. Paragraphs 20 and 21 refer to the fact that some system contractors are given administrator rights. It is noted that a contractor with system access rights could enter the Agencies' system, extract data, and then cover their tracks. The Agencies would be none the wiser.

21. On the final afternoon of the hearing, the following additional gist was provided: *"Sir Stanley Burnton has conduct[ed] a review of GCHQ in relation to international sharing, which has covered any sharing of BCD by GCHQ. It has not yet reported"* (Day 3, p. 46, ln 13-15). It

therefore appears that this was the first, and presently incomplete, review of international sharing by the Commissioners, which the Tribunal is awaiting to hear whether IPCO will take over, complete and publish.

Letter dated 20 September 2017

22. The Commissioner has noted that it has been necessary to consider sharing *beyond* that with industry partners, foreign partners and UK law enforcement. There therefore appears to be a yet further category of sharing of which the Claimant is unaware.

23. In respect of industry partners, the Commissioner notes that neither ISCom nor IOCCO was *"made aware of any UKIC practice of the UKIC's sharing BPD/BCD data sets with industry partners"*. Nor is there any material in the corporate record of ISCom or IOCCO to indicate that the issue of any potential sharing with UK law enforcement partners was considered or inspected. In respect of foreign partners, IPCO noted that *"there is material in the corporate record of ISCom and IOCCO that ISCom and IOCCO addressed whether any sharing had taken place"*.

24. In response to question 1, IPCO notes that the fifth GCHQ witness statement is misleading in referring to a briefing of Sir Mark Waller in October 2015 and April 2016: the Commissioner was informed that GCHQ worked with industry partners, but *"he was never made aware of any practice of GCHQ sharing bulk data with industry"* (emphasis added).

Letter dated 28 September 2017

25. IPCO identifies, in frank and highly critical terms, the limited oversight that ISCom was previously able to perform, due to the former Intelligence Services Commissioner's refusal to take on the resources required for the role to be carried out effectively, despite pleas to the contrary from senior officials:

> *"Sir Mark Waller (ISCom) remained wholly resistant to acquiring any inspector resources (or indeed technical/legal resources) to assist him in his duties despite being advised by the then Head of IOCCO, Jo Cavan, and the Interim Head that succeeded her of the benefits of such resourcing in September 2016. …*
>
> *On being made aware of the issues raised in this litigation the IPC ordered that an immediate inspection should be undertaken of any sharing of BPD/BCD datasets by the UKIC"*.

Email dated 10 October 2017

26. By the email dated 10 October 2017, IPCO responded to the Tribunal's request that it address the proportionality questions set out in the Claimant's skeleton argument.

27. It is noted that neither IOCCO nor ISCom had any technical understanding of industry partners' processing techniques; *"IPCO, in contrast, is acquiring these resources"*. It is also noted that the Commissioners conducted no audit of the Respondents' artificial intelligence techniques.

D. Analysis

(i) ***Effect of the new disclosure on the October Judgment***

28. The above disclosure is plainly material to the findings that the Tribunal made in the October Judgment.

29. The Tribunal was unaware that the Commissioner's oversight over one of the key *Weber* categories was missing, in that there was no active oversight over key aspects of disclosure of BCDs and BPDs.

30. The IOCCO inspections of BCD did not consider the justifications as to why its access was necessary and proportionate, nor were they assessing what BCD was in fact accessed (irrespective of the justification given for it), nor did IOCCO examine the search terms used. It follows that the oversight being exercised by IOCCO over BCD could not in fact have been sufficient.

31. The Intelligence Services Commissioner repeatedly refused to take on adequate resources for his role to be carried out effectively, despite pleas to the contrary from senior officials; nor did any of the Commissioners have any technical understanding of processing techniques. Nor had they any understanding or technical ability to audit automated algorithms, modern artificial intelligence processing techniques. In contrast, IPCO is now acquiring these resources. No attempt was made by either Commissioner to audit the "privacy footprint" - to consider whether the level of intrusion into privacy could reasonably have been reduced.In light of the above information coming to light, the account provided by the October Judgment is materially incomplete. Further, various of the

Tribunal's conclusions in the October Judgment are not correct on the evidence now available. For example:

31.1. The finding at [76] that Sir Mark Waller was able to review the necessity and proportionality of BCD. How could he have done so without looking at *any* queries, justifications or results of searches?

31.2. The finding at [81] that the oversight of BPD exercised by Sir Mark Waller was "*rigorous*", and the finding at [82] that "*during the period of Sir Mark Waller's supervision the independent oversight of BPD had been and continued to be adequate*". This conclusion cannot be reconciled with the failure to conduct any audit of modern processing techniques (including the use of algorithms and artificial intelligence techniques) or the failure to accept or obtain appropriate technical support for such audit.

31.3. The finding at [91(ii)], in respect of BCD, that the Handling Arrangements "*combined with proper oversight by the Commissioners*" adequately provided effective safeguards.

31.4. The finding at [94] (and implied at [80]) that the system of oversight over BCD from July 2015 "*does, in our judgment, operate effectively*".

32. Such findings are of broader significance to the finding of compatibility with the ECHR following avowal in respect of both the BCD and BPD regimes. As the Tribunal recognised at [62(vi)], applying *Kennedy*, the oversight exercised by a Commissioner can be a decisive factor as to ECHR compliance. Given that effective Commissioner oversight was lacking until IPCO assumed responsibility (at the earliest), the regimes cannot have been in accordance with the ECHR until such point.

(ii) Tribunal's vires to re-consider the October Judgment

33. To the extent it is contended by the Respondents that the Tribunal lacks the power to revisit its findings in the October Judgment, this is denied.

34. First, the October Judgment reflected, in effect, consideration of a preliminary issue by the Tribunal, in respect of proceedings that are *still ongoing*. It follows that the Tribunal is not *functus officio* in respect of the proceedings, and so is entitled to revisit its findings in determining the matters pleaded.

35. Second, there can be no allegation that an issue estoppel arises, given that these proceedings arise in a context akin to judicial review. See, for example, the judgment of Dunn LJ in R v Secretary of State ex p Hackney BC [1984] 1 WLR 592 (CA), in which he expressed the view that *"the Divisional Court was right to hold that the doctrine of issue estoppel cannot be relied on in applications for judicial review … Like the Divisional Court, I adopt the passage from Professor Wade's* Administrative Law, *5th ed. (1982), p. 246 …"*. The relevant part of the Divisional Court's judgment ([1983] 1 WLR 524 at 539) was as follows:

> *"We respectfully adopt a passage from Professor Wade's treatise on Administrative Law , 5th ed. (1982), p. 246 where he writes:*
>
> *"in these procedures the court 'is not finally determining the validity of the tribunal's order as between the parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction or not.' They are a special class of remedies designed to maintain due in the legal system, nominally at the suit of the Crown, and they may well fall outside the ambit of the ordinary doctrine of res judicata. But the court may refuse to entertain questions which were or could have been litigated in earlier proceedings, when this would be an abuse of legal process; and in the case of habeas corpus there is a statutory bar against repeated applications made on the same grounds."*
>
> *We also quote a short passage from Professor de Smith's Judicial Review of Administrative Action , 4th ed. (1980), p. 108:*
>
> *"It is difficult not to conclude that the concept of res judicata in administrative law is so nebulous as to occlude rather than clarify practical issues, and that it should be used as little as possible."*
>
> *The principle that relief under Order 53 is granted in discretion only, as well as the obligation to obtain leave from the court before an application for relief can be made, seems to us to be contrary to the concept of a final determination of an issue between parties which is at the root of issue estoppel. The court, under this jurisdiction, is fully able to give effect to the rule of public policy that there should be finality in litigation, which underlies the doctrines of issue estoppel in civil litigation and the prohibition against double jeopardy in criminal prosecution, by the use of its powers to refuse to entertain applications and to refuse to grant relief in the process of judicial review of administrative acts or omissions: this is particularly but not exclusively so when the application may be oppressive, vexatious or an abuse of the process of the court."*

36. Third, and in the alternative, even if there could be some form of issue estoppel by virtue of the Tribunal's findings in the October Judgment, the present facts would fall within an exception to it. See the test articulated in Arnold v National Westminster Bank Plc (No 1) [1991] 2 AC 93 (HL) at 109 *per* Lord Keith:

> *"In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by*

reasonable diligence have been adduced in those proceedings."

37. The Claimant undertook all reasonable diligence to adduce the relevant evidence before the Tribunal in advance of the October Judgment. Many of the newly-disclosed materials were first created after the October Judgment; however, they pertain to relevant facts in existence at the time of the October Judgment, which the Respondents did not disclose.

38. Further, following the Court of Appeal's judgment in *Kamoka v Security Service* [2017] EWCA Civ 1665, it is no answer to suggest that the true facts could have been made known to Counsel to the Tribunal, as there is no privity of interest between the Claimant and the Counsel to the Tribunal's position in CLOSED hearings.

E. Conclusion

39. For all the above reasons, the Tribunal is respectfully requested to revisit the findings it made regarding Commissioner oversight in the October Judgment, in the light of the true factual position now known to it.

THOMAS DE LA MARE QC

BEN JAFFEY QC

DANIEL CASHMAN
Blackstone Chambers

BHATT MURPHY
10 November 2017