Neutral Citation Number: [2023] UKIPTrib 6

Case No: IPT/19/197/C

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 21 June 2023

Before:

LORD JUSTICE SINGH (PRESIDENT)
LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)
ANNABEL DARLOW KC

- -

Between:

ABD AL-RAHIM AL-NASHIRI	**Complainant**
- v -	
(1) SECURITY SERVICE **(2) SECRET INTELLIGENCE SERVICE** **(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS** **(4) MINISTRY OF DEFENCE**	**Respondents**

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- -

Hugh Southey KC, Blinne Ní Ghrálaigh KC and Robbie Stern (instructed by **Sternberg-Reed Solicitors**) for the **Complainant**
David Blundell KC, Charlotte Ventham and Richard O'Brien (instructed by the **Treasury Solicitor**) for the **Respondents**
Samantha Broadfoot KC appeared as Counsel to the Tribunal

Hearing date: 24 May 2023

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JUDGMENT

Lord Justice Singh:

Introduction

1. This is the unanimous judgment of the Tribunal.

2. At a directions hearing on 9 December 2022, the Tribunal (the President, sitting alone) directed that the following preliminary issue be determined:

> "Whether, at the material times, Mr Al-Nashiri fell within the jurisdiction of the UK for the purposes of Article 1 ECHR."

3. On 24 May 2023 we held an OPEN hearing to consider that preliminary issue.

4. In accordance with this Tribunal's normal practice, the preliminary issue will be decided in OPEN on the basis that the facts as pleaded on behalf of the Complainant are assumed to be true, without deciding that they are. This is with the important clarification, which was given on behalf of the Complainant at the hearing on 9 December 2022, that it is no part of his case that he was ever on the territory of the United Kingdom ("UK").

5. In accordance with the Respondents' normal practice, it is neither confirmed nor denied that the Complainant was a subject of interest.

6. At the hearing we heard submissions from Mr Hugh Southey KC for the Complainant and Mr David Blundell KC for the Respondents. We were also assisted in the preparation for the hearing by Counsel to the Tribunal, Ms Samantha Broadfoot KC, although she did not have any oral submissions to make at the hearing.

The nature of the complaint to this Tribunal

7. The complaint before this Tribunal was lodged using Form T2 and was dated 18 October 2019. There was attached to it a document headed 'Complaint Form', which is lengthy (35 pages long) and is in effect a pleading, drafted by lawyers on the Complainant's behalf. We will refer to it as "the pleading".

8. In section 2 of the pleading, in addressing the question 'What is the nature of the conduct complained of?', it was stated, at para. 2.1, that Mr Al-Nashiri complains of "conduct" he believes to have been carried out against him "by or on behalf of the UK Agencies", as set out further in the pleading. At para. 2.2, it was said:

> "His complaint *includes* a claim for breach of Article 3 of the European Convention on Human Rights …" (emphasis added).

As will become apparent later, it is emphasised on the Complainant's behalf that it was never stated that he was making *only* a claim under the European Convention on Human Rights ("ECHR").

9. As we will explain below, this Tribunal has jurisdiction to consider two types of case. The first is "proceedings" under section 65(2)(a) of the Regulation of Investigatory Powers Act 2000 ("RIPA"). This is called a "claim" and is in substance the same as proceedings brought in the ordinary courts under section 7 of the Human Rights Act 1998 ("HRA"). The second is a "complaint" under section 65(2)(b) of RIPA. Strictly speaking, Form T1 should be used to make a claim under the HRA before the Tribunal and Form T2 should be used to make a complaint. In the Tribunal's experience, there is often both a Form T1 and a Form T2 lodged in respect of the same case. But Mr Southey is right to point out that, until recently, the Tribunal's website provided guidance which said that a complaint form could also include a claim under the HRA.

For reasons which are unrelated to this case, the Tribunal's website has recently been revised and that guidance no longer appears there. In any event, it is clear that the complaint form in the present case did include a claim under the HRA. It is that claim which has led to the preliminary issue being listed for hearing before us.

10. At paras. 3.1-3.2 of the pleading, the nature of the complaint was summarised in the following way:

> "3.1 In summary:
>
> (1) It is well documented that Mr Al-Nashiri was subjected to torture and inhuman and degrading treatment and punishment while he was detained pursuant to a secret detention and interrogation programme of the US Central Intelligence Agency ('CIA').
>
> (2) The fact that Mr Al-Nashiri was subjected to torture and inhuman and degrading treatment, according to international standard definitions, has been accepted by the European Court of Human Rights ('ECtHR'), by the US Senate Select Committee on Intelligence and by other bodies (see further below).
>
> (3) There is credible evidence that the UK Agencies and/or their employees, servants and/or agents *aided and abetted and/or were complicit and/or conspired* with the US authorities in the torture and ill-treatment of Mr Al-Nashiri, including by providing questions and/or information to US officials to be put to Mr Al-Nashiri during interrogation, while being aware/the circumstances being such that they ought to have been aware, that Mr Al-Nashiri was being subjected or was likely to be subjected to torture and/or ill-treatment.
>
> 3.2 In particular, since 2002 Mr Al-Nashiri has been held in detention pursuant to a secret detention and interrogation programme of the CIA established in the Counterterrorism Centre ('CTC') and developed and operated following the attack of September 2002. This programme was intended for so-called 'High Value Detainees' ('HVD') – captives suspected by the US of terrorism. The programme consisted of a network of clandestine detention facilities located in a number of countries, including in Central and Eastern Europe. These detention facilities operated outside the law with the acquiescence and involvement of the State authorities in those countries." (Emphasis added)

11. After setting out in detail what has been said in various open-source reports, including by the United States ("US") Senate Select Committee on Intelligence (2014) and the UK Parliament's Intelligence and Security Committee ("ISC") Report (28 June 2018), it was said, at para. 3.48 that:

> "Given the information already in the public domain, a clear presumption is raised that Mr Al-Nashiri's case was one of those in which the UK Agencies participated in *intelligence sharing and complicity* in torture and ill-treatment. …" (emphasis added).

12. In our view, it is clear from the wording of the pleading read as a whole, that the reference to "complicity" in para. 3.48 is a reference back to the summary at para. 3.1(3), in other words that the essential allegation so far as concerns the UK agencies is that they "aided and abetted and/or were complicit and/or conspired" with the US authorities. The only way in which it was expressly alleged they had been complicit was by the provision of questions and/or information to be put to the Complainant. We do not read the pleading as alleging that the UK agencies themselves directly engaged in the ill-treatment of the Complainant. If such a serious allegation were to be made, we would expect it to be made in clear and express terms.

13. In section 4 of the pleading, in addressing the question 'At which place or places did the conduct of which you complain happen?', the following was said at paras. 4.1-4.1 (*sic*: clearly the second reference is a typographical error for para. 4.2):

> "4.1 Mr Al-Nashiri has been detained and interrogated at the following locations since October 2022:
>
> (1) Dubai, United Arab Emirates;

(2) 'Dark Prison', Kabul, Afghanistan;

(3) 'Cat's Eye' / 'Catseye', Thailand;

(4) Stare Kiejkuty, Poland;

(5) Rabat, Morocco;

(6) Guantanamo Bay Military Prison, Cuba;

(7) Bucharest, Romania;

(8) Antavillai, Lithuania;

(9) Afghanistan.

4.1 The conduct on behalf of the Security Services occurred at places unknown, not limited to the above. This included ill-treatment of Mr Al-Nashiri on board rendition aircraft."

14. It is apparent from that list that all of the places mentioned expressly are outside the UK. As we have mentioned above, it was made clear to the Tribunal at the directions hearing on 9 December 2022 that it is no part of the Complainant's case that he was at any material time on the territory of the UK.

15. In section 5 of the pleading, which asks the question 'On what dates did the conduct happen at each place?', it was said that the specific dates of the conduct alleged are unknown but that the Complainant was detained at the locations there set out on various dates between mid-October 2002 and 4/5 September 2006. Since 2006 the Complainant has been detained at Guantánamo Bay.

16. Section 8 of the pleading, which relates to time limits, submitted that the complaint had been made within time since Mr Al-Nashiri's US legal team became aware of the potential complicity of the UK Agencies only on 2 April 2019, when they became aware of the Parliamentary Committee Report of the ISC, although it had been published in

June 2018. If, contrary to that submission, the time limit had begun to run earlier, an extension of time under section 67(5) was requested, at para. 8.9.

17. In section 9 of the pleading, which relates to the remedies sought if the Tribunal upholds a complaint (and/or claim), the remedies included, at para. 9(2) the following:

> "Determination of the complaint and associated claim in favour of Mr Al-Nashiri under section 67(2) and (3) of RIPA 2000, including by making a declaration to the following effect:
>
> > (a) that the conduct against Mr Al-Nashiri by the UK Agencies was unlawful;
> >
> > (b) that Mr Al-Nashiri was subjected to torture and inhuman and degrading treatment or punishment while he was detained; and
> >
> > (c) that the UK Agencies and/or their employees, officers, servants and/or agents were complicit in the torture and ill-treatment of Mr Al-Nashiri, including by providing questions to US officials to be put to Mr Al-Nashiri during interrogation and/or receiving information obtained by Mr Al-Nashiri during interrogation, while being aware that Mr Al-Nashiri was being subjected or was likely to be subjected to torture and/or ill-treatment."

Material legislation

18. According to section 65(2) of RIPA, the jurisdiction of this Tribunal shall be:

> "(a) to be the only appropriate Tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;
>
> (b) to consider and determine any complaints made to them which, in accordance with subsection (4) …, are complaints for which the Tribunal is the appropriate forum;
>
> …"

19. Section 65(3) provides that proceedings fall within that subsection if:

> "(a) they are proceedings against any of the intelligence services;
>
> …"

There can be no doubt that the first three Respondents are the intelligence services of the UK. There may be doubt about whether the Fourth Respondent is correctly named as a respondent to these proceedings but we have not heard any submissions about that, so we will say no more about it here.

20. Section 65(4) provides that the Tribunal is "the appropriate forum" for any complaint if it is made by a person who is "aggrieved" by any "conduct" falling within subsection (5) which he believes "(a) to have taken place in relation to him …; and (b) … to have been carried out by or on behalf of any of the intelligence services."

21. Section 67 governs the exercise of the Tribunal's jurisdiction. Subsection (1) provides that, subject to subsections (4) and (5), it shall be the duty of the Tribunal:

> "(a) to hear and determine any proceedings brought before them by virtue of section 65(2)(a) …; and
>
> (b) to consider and determine any complaint … made to them by virtue of section 65(2)(b) …"

22. Section 67(2) provides that, where the Tribunal hear any proceedings by virtue of section 65(2)(a), they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review.

23. Section 67(3) provides that, where the Tribunal consider a complaint made to them by virtue of section 65(2)(b), it shall be the duty of the Tribunal –

> "(a) to investigate whether the persons against whom any allegations are made in the complaint have engaged in relation to –
>
> (i) the complainant, … in any conduct falling within section 65(5);
>
> …
>
> (b) to investigate the authority (if any) for any conduct falling within section 65(5) which they find has been so engaged in; and
>
> (c) in relation to the Tribunal's findings from their investigation, to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review."

24. Section 67(5) provides that the Tribunal shall not consider or determine any complaint made by virtue of section 65(2)(b) if it is made more than one year after the taking place of the conduct to which it relates, except where the Tribunal, having regard to all the circumstances, are satisfied that it is "equitable" to do so.

The Tribunal's jurisdiction

25. In its recent judgment in *Al-Hawsawi v Security Service & Ors* [2023] UKIPTrib 5, this Tribunal described its jurisdiction in the following terms, at paras. 36-40:

> "36. The Tribunal is the creature of statute. It does not have a general jurisdiction, for example to consider or determine civil proceedings. The extent of its jurisdiction is as set out by Parliament in RIPA, no more and no less.
>
> 37. Under the provisions of RIPA which are currently in force, the Tribunal has jurisdiction to consider two types of case. The first is a claim under section 7(1)(a) of the Human Rights Act 1998 ('HRA') in relation to any proceedings which fall within section 65(3) of RIPA: see section 65(2)(a) of RIPA. For some such proceedings the Tribunal has exclusive jurisdiction, in particular a claim under the HRA against one of the intelligence services: see *R (A) v Director of Establishments of*

> *the Security Service* [2009] UKSC 12; [2010] 2 AC 1. The present case, however, is not a claim under the HRA.
>
> 38. The second type of case which falls within this Tribunal's jurisdiction is a 'complaint' made under section 65(2)(b) of RIPA. For such a complaint the Tribunal is 'the appropriate forum': see section 65(4).
>
> 39. A complaint in this context is not 'proceedings'. In part at least the Tribunal has an investigatory role: see section 67(3)(a) and (b). This is why the Tribunal's procedure is not only a conventional adversarial one but includes an inquisitorial element.
>
> 40. Once the Tribunal has conducted the 'investigations' referred to in section 67(3)(a) and (b), it then has the duty 'to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review': see section 67(3)(c) of RIPA."

The European Convention on Human Rights

26. Section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. The Convention rights are set out in Schedule 1 to the HRA and reflect the main rights which are to be found in the ECHR.

27. Article 1 of the ECHR states that:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

It has long been established that, although Article 1 is not itself to be found in Schedule 1 to the HRA, the scope of the HRA is co-extensive with the ECHR, so that Article 1 is relevant when considering a case under the HRA: see the speeches of the majority in *R (Al-Skeini & Ors) v Secretary of State for Defence* [2007] UKHL 26; [2008] AC 153.

28. This is why the preliminary issue in this case relates to the meaning and application of the concept of "jurisdiction" in Article 1 of the ECHR.

Analysis

29. We will first set out our analysis in summary and will then address the submissions made to us in more detail.

30. The only issue before the Tribunal at present is the preliminary issue as to whether, at the material times, the Complainant fell within the "jurisdiction" of the UK for the purposes of Article 1 of the ECHR.

31. The leading authority on the concept of jurisdiction in Article 1 remains the judgment of the Grand Chamber of the European Court of Human Rights in *Al-Skeini & Ors v United Kingdom* (2011) 53 EHRR 18, in particular at paras. 133-140. That case arose out of the military occupation of south eastern Iraq by British forces in 2003. The principles set out by the Grand Chamber in *Al-Skeini* have been confirmed and applied ever since.

32. It is clear from the jurisprudence of the European Court of Human Rights that, in this context, jurisdiction is primarily territorial. Nevertheless, there are exceptions to that primary principle.

33. The first main exception is where a Contracting State to the ECHR has "effective control of an area" outside its own territory. This exception, sometimes known as the concept of "spatial" jurisdiction, is not relevant in the present case.

34. The second main exception is the concept of "personal" jurisdiction, arising from the exercise of "State agent authority and control" over a person. This can arise, for example, where a person is arrested or detained by the authorities of a Contracting State outside its own territory. The events may even occur outside the territory of any member of the Council of Europe, sometimes referred to as the "legal space" of Europe.

35. There are other decisions of the European Court which concern the use of force where there is a sufficient "proximity" between the Contracting State's authorities and the victim of the alleged violation of Convention rights, so that they may be regarded as coming within the authority and control of that State.

36. Mr Southey's core submission is that the alleged acts of "acquiescence and connivance" by UK agencies with the US authorities in the present case are sufficient to bring it within the concept of State agent authority and control. We reject that submission.

37. The fact is that, at all material times, the Complainant was within the authority and control of the US, although other States also had jurisdiction over him at various times, because he was on their territory, for example Poland and Romania. What is alleged is that it was the US authorities which inflicted torture or other ill-treatment upon him. In our judgement, acquiescence or connivance by the UK authorities would not be sufficient to bring the Complainant within its jurisdiction in this context. We also consider that the suggested analogy with cases of the direct use of force against a targeted individual is contrived and wrong.

38. We must also bear in mind that we must usually follow the "clear and constant jurisprudence" of the European court, no more and no less. It is not the function of the courts or tribunals of this country "to undertake a development of the Convention law of such a substantial nature": see *R (AB) v Secretary of State for Justice* [2021] UKSC

28; [2022] AC 487, at para. 54 (Lord Reed PSC). Re-affirming the principle first laid down in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, Lord Reed explained in *AB*, at para. 59, that:

> "it is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European Court, they can and should aim to anticipate, where possible, how the European Court might be expected to decide the case, on the basis of the principles established in its case law. … The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European Court, even if some incremental development may be involved. …"

39. In our judgement, the attempt by Mr Southey to bring the Complainant within the scope of "jurisdiction" would be much more than "incremental development" and would involve a fundamental step-change in the principles which have been established by the European Court. It is not open to this Tribunal to take that step.

40. In inviting us to do so, Mr Southey relies on the decision of the House of Lords in *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52, in particular at paras. 30 and 46 in the judgment of Lord Hope of Craighead DPSC, who said that the word "exceptional" does not set an especially high threshold for circumstances where there will be extra-territorial jurisdiction. It simply indicates that the normal presumption that applies throughout the State's territory does not apply. Further, Lord Hope emphasised, at para. 30, that the list of circumstances which may require and justify a finding that the State was exercising jurisdiction extra-territorially "is not closed." Nevertheless, it is clear from the judgment of Lord Hope, at para. 46, and consistently with other judgments from the Supreme Court, that the judgment of the Grand Chamber in *Al-Skeini* was:

> "designed to identify general principles with reference to which the national courts may exercise their own judgment as to whether or not, in a case whose facts are not identical to those which have already been held by Strasbourg to justify such a finding, the State was exercising jurisdiction within the meaning of Article 1 extra-territorially."

41. In our view, Lord Hope was not, in substance, saying anything different from what has been said, for example, by Lord Reed in the more recent decision of *AB*. There is a crucial difference between applying the general principles which have already been set down by the European Court to new facts as they emerge from time to time in domestic courts and tribunals, and embarking on a new, radical (and not merely incremental) development of those principles in a way which goes beyond what the European Court has decided. As we have said, in our view, what Mr Southey requires this Tribunal to do in the present case is to go well beyond the mere application of general principles which have been set out by the European Court.

The Complainant's submissions in more detail

42. At para. 53 of the Complainant's skeleton argument, it is accepted that, even taking his case at its highest, there is no allegation of UK personnel themselves administering torture. In that context reference is made to the key relevant findings of the ISC, which are summarised at para. 26 of the skeleton argument. Footnote 3 makes it clear, for the avoidance of doubt, that the ISC did not find evidence indicating that officers of the UK agencies personally administered physical mistreatment of detainees but it did find evidence of direct engagement of UK officials in mistreatment of detainees perpetrated by others, including, for example, being consulted about whether mistreatment should be administered.

43. The Complainant's case is that the UK Agencies "aided, abetted, encouraged, facilitated and/or conspired with the US authorities in his mistreatment." The submission for the Complainant is that framing the case in that way "is no impediment to a finding that the UK exercised authority and control over the Complainant…" This is said to be for three principal reasons.

44. First, the European Court in *Al-Skeini* did not consider it decisive (in relation to the third applicant in that case) that the identity of the killer was unknown. Mistreatment within the context of a broader UK operation was sufficient to establish the jurisdictional link. No requirement arises on the face of the caselaw that actual perpetration of torture is required. We do not accept those submissions.

45. The facts of the third applicant's case are summarised at paras. 43-46 of the European Court's judgment in *Al-Skeini*. The third applicant was the widower of a woman who was shot and fatally wounded in November 2003 at the Institute of Education where he worked as a night porter and lived with his wife and family. While they were having dinner, there was a sudden burst of machine-gunfire from outside the building. Bullets struck his wife in the head and ankles. His wife later died in hospital. It appeared that she was shot during a fight between a British patrol and a number of unknown gunmen. The important point for the purposes of jurisdiction is that this case fell squarely within the "effective control of an area" principle of extra-territorial jurisdiction. British forces were in occupation of Basra at the relevant time. It does not, in our view, assist the Complainant in the present case, since no reliance is, or could be, placed on that principle in the present case.

46. Secondly, Mr Southey submits that the principle that aiding or encouraging torture will suffice for the establishment of authority and control is consistent with the European

Court's approach to violation of Convention rights more generally. He relies on two particular decisions of the European Court.

47. The first decision is *Soering v United Kingdom* (1989) 11 EHRR 439, in particular at para. 86, where the European Court said that considerations such as the fact that the UK had no power over the practices and arrangements of the authorities in the state of Virginia in the USA could not "absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction."

48. In our view, reliance on *Soering* is misplaced in the present context. That was a case where it was proposed by the UK authorities to extradite the applicant to the USA in circumstances where there was a risk that he would be exposed to the "death row phenomenon" if he faced a trial in Virginia on a charge of capital murder. The applicant was on the territory of the UK and so *Soering* is not a decision about extra-territorial jurisdiction at all. It is certainly not a decision about the "State agent authority and control" principle of extra-territorial jurisdiction.

49. The second decision on which Mr Southey relies in this context is *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25, in particular at para. 206:

> "The Court must first assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State. In this connection it emphasises that the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials *on its territory* with the acquiescence or connivance of its authorities." (emphasis added).

50. In our view, that passage provides no support for Mr Southey's submissions in the present case. It is clear that the applicant in that case was on the territory of the respondent State itself and, further, the acts complained of were carried out in the presence of its officials. Again therefore that case is not one about extra-territorial jurisdiction.

51. Thirdly, Mr Southey submits that it is now established, particularly by *Al-Skeini*, that Convention rights may be "divided and tailored" for the purposes of jurisdiction. That is true but that simply means that a Contracting State may be exercising jurisdiction over a person for the purpose of one Convention right (for example Article 3) but not for others (for example the right to freedom of peaceful assembly in Article 11). That does not, however, help in answering the question which arises on the present preliminary issue, namely whether the Applicant was within the jurisdiction of the UK at all for the purposes of Article 3.

52. In this context, Mr Southey also submits that account may be taken of the need for Convention rights to be "effective". This is a trite proposition of ECHR law but again begs the question of whether a person is within the jurisdiction of a Contracting State in the first place.

53. Mr Southey also places reliance upon the fact that the prohibition of torture is a peremptory norm of international law which permits of no derogation (*ius cogens*). He submits that States are subject to a positive duty to eschew torture and must act to prevent it: see *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221, at paras. 33-34 (Lord Bingham of Cornhill). Nothing this Tribunal says should be taken in any way to dilute the importance of those fundamental principles. They do not, however, lead to the conclusion that there is jurisdiction for

the purpose of Article 3 of the ECHR. That is a logically prior question, which must be answered in the Complainant's favour before the substantive obligations (including any positive obligations) can be said to apply.

54. Mr Southey placed particular reliance at the hearing before us on the judgment of the European Court in the case of this Complainant himself: *Al-Nashiri v Poland* (2015) 60 EHRR 16. In particular he relies on the concept of "acquiescence and connivance", as used by the Court at para. 517, where it said:

> "… the Polish State, on account of its 'acquiescence and connivance' in the HVD [High Value Detainees] Programme must be regarded as responsible for the violation of the Applicant's rights under Article 3 of the Convention committed on its territory …"

55. Mr Southey submits that, since the acts of UK agencies which are said by him to violate Article 3 do not consist of direct ill-treatment but rather acquiescence and connivance, there is a sufficient link between those acts and the Complainant's ill-treatment such that there was jurisdiction for the purposes of Article 1 of the ECHR. In our judgement, this collapses the concept of whether there has been a substantive breach of Article 3 (in circumstances where there is jurisdiction) into the logically prior question of whether there is jurisdiction in the first place.

56. Furthermore, we bear in mind the very important point of distinction from the decision in *Al-Nashiri v Poland,* which is that the Applicant was on the territory of Poland itself at the material time. That decision is not therefore about extra-territorial jurisdiction at all.

57. In addition, as the Court explained earlier in para. 517 of its judgment, "… Poland, for all practical purposes, facilitated the whole process, created the conditions for it to

happen and made no attempt to prevent it from occurring." The facts as pleaded in the present case are very far removed from those facts.

The decisions on "proximity" relied on by the Complainant

58. Mr Southey relies on a number of decisions of the European Court which concern the use of force where there is a sufficient "proximity" between the Contracting State's authorities and the victim of the alleged violation of Convention rights, so that they may be regarded as coming within the authority and control of that State. We accept Mr Blundell's submission that the decisions on which Mr Southey relies need to be carefully examined on their own facts to see precisely what they decided. In our view, they do not establish any general principle which can properly be applied to the present case.

59. The first, *Issa v Turkey* (2005) 41 EHRR 27, was a case where, in the result, the European Court did not find, as a matter of fact, that it had been established to the required standard of proof that the Turkish armed forces had conducted operations in the area of northern Iraq in question. Accordingly, the outcome of the case was in fact that Turkey was *not* held to have exercised extra-territorial jurisdiction at the material time. Further, as is clear from paras. 74-75 of its judgment, the Court was simply considering the question whether it was possible that, as a consequence of military action, Turkey could be considered to have exercised, temporarily, "effective overall control of a particular portion of the territory of northern Iraq." In other words, if jurisdiction had been established on the facts of that case, it would have been on the basis of the "effective control of an area" principle. That is simply not relevant in the present case.

60. Mr Southey places considerable reliance on the judgment of the European Court in *Isaak and Ors v Turkey* (App. No. 44587/98; 28 September 2006). In particular, he relies upon page 20 of the judgment, where the Court said that accountability in such situations stems from the fact that Article 1 of the Convention "cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory …"

61. In our view, if read in isolation and driven to its logical conclusion, that proposition would abolish the distinction between territorial and extra-territorial jurisdiction completely. We note that *Isaak* was decided before *Al-Skeini*. The principled basis for the situations in which there may be extra-territorial jurisdiction is now set out in the judgment of the Grand Chamber in *Al-Skeini*, which has been reiterated ever since.

62. Turning to the specific facts of *Isaak*, in our view, the decision turned on the particular circumstances of that case. There was some dispute about whether the events complained of had taken place in the neutral UN buffer zone in Northern Cyprus but, even if they had, the Court considered that the deceased was under the authority and/or effective control of Turkey through its agents at the relevant time. It was not entirely clear how the deceased had come to die but there were Turkish armed forces and "TRNC" [Turkish Republic of Northern Cyprus] police officers in the area, who did nothing to prevent or stop the attack or to help the victim. It was in those circumstances that the Court referred to "the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction". The Court was not in that passage using the concept of "acquiescence or connivance" to establish that the State had jurisdiction

in the first place. It was using that concept to establish that the State had responsibility for the acts of private parties.

63. The decisions of the European Court in *Solomou v Turkey* (App. No. 36832/97; 3 June 2008) and *Andreou v Turkey* (App. No. 45653/99; 3 June 2008) arose from the same incident as each other. Mr Solomou had crossed the Turkish-Cypriot Ceasefire Line and started to climb a flagpole. He was shot and later died from his injuries. Subsequently Ms Andreou was hit by a bullet in the abdomen and subsequently lost one of her kidneys. The Court concluded that, in the circumstances of that case, even though the applicant had sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was "the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within [the] jurisdiction' of Turkey within the meaning of Article 1 and that the responsibility of the respondent State under the Convention is in consequence engaged." Again, in our view, those are very specific facts and are far removed from those of the present case as pleaded. We also reiterate our general observation that *Issa*, *Isaak*, *Solomou* and *Andreou* were all decided before the leading authority of *Al-Skeini*. As we shall see below, they have been explained by the European Court in more recent cases in a way which makes it clear that they do not establish a general principle which is as broad as Mr Southey suggests.

64. Finally, Mr Southey places great reliance on the decision of the European Court in *Carter v Russia* (2022) 74 EHRR 12, which arose from the notorious killing on British territory of Aleksandr Litvinenko, a Russian and British national. Mr Litvinenko drank some green tea at a hotel in London and was killed by polonium contamination. The issue of law was whether the circumstances had brought him within the jurisdiction of

Russia outside its own territory. In setting out the principles relating to jurisdiction, at paras. 123-130 of its judgment, the Court (which was a Chamber and not the Grand Chamber) did not, in our view, depart from the principles which by then had been well-established in judgments of the Grand Chamber, in particular *Al-Skeini* and *Georgia v Russia (II)* (2021) 73 EHRR 6, both of which were referred to by the Court in *Carter*: see paras. 125 and 129. In particular, at para. 126, the Court emphasised that, under the personal concept of jurisdiction "*the use of force* by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction" (expressly quoting the judgment in *Al-Skeini*, at para. 136; emphasis added). The Court emphasised that jurisdiction in such cases arises from the exercise of physical power and control over the person in question.

65. At paras. 127-128, the Court mentioned the specific decisions on which Mr Southey relies, in particular *Issa*, *Isaak*, *Solomou* and *Andreou*. The Court regarded those cases as being ones where there was "control over individuals on account of incursions and *targeting* of specific persons by the armed forces or police of the respondent State" (emphasis added). The Court also said that "*targeted* violations of the human rights of an individual by one Contracting State in the territory of another Contracting State undermine the effectiveness of the Convention both as a guardian of human rights and as guarantor of peace, stability and the rule of law in Europe." (emphasis added).

66. In our view, there are two points of distinction between *Carter* and the present case. First, and most important, this case does not involve the "targeting of specific persons". The suggested analogy by Mr Southey, that, for example, the provision of questions to be used in interrogation of the Complainant by the US authorities represents "targeting"

of him, is, in our view, contrived and wrong. That is not the sort of targeting to which the European Court was referring in *Carter*. As it made clear by reference to the facts of both that case and earlier cases, what was crucial was the use of force by a Contracting State which was targeted at a specific individual outside its territory.

67. Secondly, *Carter* concerned the exercise of jurisdiction by one Contracting State on the territory of another Contracting State. That rationale does not apply to the present case, save potentially insofar as there were "black sites" in Contracting States such as Poland and Romania.

68. Finally, it is important to note that the line of cases on which Mr Southey relies were all said by the Court in *Carter*, at para. 130 of its judgment, to be concerned with "the actions of the respondent States' armed forces *on or close to their borders*." (emphasis added). In *Carter* the Court was prepared to extend the principle that a State exercises extra-territorial jurisdiction in cases concerning "specific acts involving an element of proximity" to "cases of extrajudicial targeted killings by State agents acting in the territory of another Contracting State outside of the context of a military operation." But that is as far as the extension of that principle has gone in the decisions of the European Court. Those are facts very far removed from those as pleaded in the present case.

Recent judgments of the Grand Chamber

69. We consider that two recent judgments of the Grand Chamber of the European Court are of particular assistance, because they confirm the fundamental principles in relation

to the concept of jurisdiction in Article 1 of the ECHR. The first is *Georgia v Russia (II)*, in which the Court reiterated those fundamental principles.

70. First, at para. 134, the Court repeated that the condition of admissibility that a person must be a "victim" of a violation of rights guaranteed by the ECHR is "separate and distinct" from the condition that they must fall within the jurisdiction of a Contracting State. The Court emphasised that each of those admissibility conditions must be satisfied before an individual can invoke the Convention provisions against a Contracting State.

71. Secondly, at para. 124, the Court emphasised again, as it had done in *Banković v Belgium & Ors* (2007) 44 EHRR SE5, that Article 1 does not admit of a "cause and effect" notion of jurisdiction. In other words, the mere fact that actions of a Contracting State have effects outside its territory does not suffice to bring a person within its jurisdiction.

72. Thirdly, the Court explained the specific decisions, upon which Mr Southey relies in the present case, such as *Issa*, as concerning "isolated and specific acts involving an element of proximity": see para. 132 of its judgment. These are clearly regarded by the Grand Chamber as being decisions concerned with their specific facts and do not assist in addressing the preliminary issue which this Tribunal has to in this case.

73. At para. 115 of its judgment, the Court repeated that the two main criteria established by it as exceptions to the general principle that jurisdiction is primarily territorial are that of "effective control" by the State over an area, and that of "State agent authority and control" over individuals.

74. The most recent decision of the Grand Chamber of the European Court on the subject of extra-territorial jurisdiction is *Ukraine and The Netherlands v Russia* (Applications nos. 8019/16, 43800/14 and 28525/20; 30 November 2022). These were cases which arose from activities in Crimea, Eastern Ukraine and the downing of Flight MH17, causing the deaths of all 298 people on board. The Court set out the relevant principles on jurisdiction at paras. 547-575 of its judgment, where it brought together the earlier authorities, including *Al-Skeini* and *Georgia v Russia (II)*.

75. Mr Southey places particular emphasis on what the Court said at para. 551, where it said that, while the test for establishing the existence of jurisdiction under Article 1 of the ECHR is not the same as the test for establishing a State's responsibility for an internationally wrongful act under international law, now codified in the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA"),

> "there may be some areas of overlap insofar as the Court is invited to examine whether any acts of the perpetrators are to be attributed to the State in the context of its jurisdiction assessment. In determining whether an individual or entity may be considered a State agent, the rules set out in the ARSIWA as applied by international courts and tribunals are clearly relevant and the Court's caselaw shows that they are taken into account …"

One of the decisions which the Grand Chamber there cited was the decision of the Chamber in *Carter*, at paras. 162-169.

76. In our view, what the Court was there drawing attention to was a different issue, namely whether acts of persons who are not directly State agents are nevertheless to be attributed to the State. This is made clear from its earlier discussion at paras. 549-550. It was discussing the issue of whether particular individuals or entities could be considered to be State agents. We will return to ARSIWA later.

77. In any event, it is clear from the Court's summary of the relevant principles on jurisdiction at paras. 548 and 553-572 that the Court was not departing from what it had said in *Al-Skeini*. To the contrary, at para. 557, the Court quoted extensively from its earlier judgment in that case, in particular paras. 133-138. At para. 559, the Court again confirmed that the two main criteria for the establishment of extra-territorial jurisdiction are "effective control" by the State over an area (the spatial concept of jurisdiction) and "State agent authority and control" over individuals (the personal concept of jurisdiction). It mentioned a further criterion, which is relevant in some Article 2 cases, but that is not relevant in the present case.

78. When the Court came to address specifically the concept of State agent authority and control, at paras. 565-572, it said that this covers, first, the exercise by State agents of physical power and control over the victim or the property in question: see para. 569.

79. Secondly, it also covers "isolated and specific acts of violence involving an element of proximity", citing *Georgia v Russia (II)*, at paras. 130-132; and *Carter*, at paras. 129-130. It is important, in our view, to note how the Grand Chamber expressed itself in relation to such cases. It said that "jurisdiction has been found in respect of the beating or shooting by State agents of individuals outside that State's territory", citing, for example, *Isaak* and *Andreou*. Another example it gave was "the extrajudicial targeted killing of an individual by State agents in the territory of another Contracting State, outside the context of military operations": this is how the Court explained the decision in *Carter*.

80. At para. 571 of its judgment, the Court confirmed that, for this purpose the Convention rights can be "divided and tailored" and therefore the proposition to the contrary in

Banković, at para. 75, is therefore no longer an accurate statement of the Court's approach under Article 1 of the ECHR.

81. In our view, the most recent and authoritative judgment of the Grand Chamber in *Ukraine and The Netherlands v Russia* confirms what we understand to be the clear and constant jurisprudence of the European Court on the issue of jurisdiction under Article 1 of the ECHR. In our judgement, this Tribunal is required to follow that approach and not to go beyond it.

Ancillary points

82. Mr Southey submits that this Tribunal should be "cautious" about restricting itself to the allegations pleaded on behalf of the Complainant. He asks us to bear in mind that those pleadings are restricted by the lack of instructions resulting from the application of US law to detainees in the Complainant's position. It is possible, he submits, that the Complainant would make complaints that are not revealed by open-source material.

83. We would observe that the Complainant has been able to launch, and complete with success, two applications to the European Court (*Al-Nashiri v Poland*, to which we have referred above, and *Al-Nashiri v Romania* (2019) 68 EHRR 3). This is despite the serious restrictions on communication with lawyers to which he is subject. Furthermore, the Complainant has been able to achieve that success on the basis of open-source material. The European Court did not conduct closed hearings of the type which this Tribunal can and, where necessary, must conduct.

84. In support of his submission Mr Southey relies upon the decision of the European Court of Human Rights in *Klass v Germany* (1979-80) 2 EHRR 214, at para. 36:

> "The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for purposes potentially affected by secret surveillance is to be derived from Article 25, since otherwise Article 8 runs the risk of being nullified."

85. The reference to the Commission is no longer relevant, since the European Commission of Human Rights, which used to act as a "filter" before proceedings could be referred to the Court, was abolished in 1998. Further, the reference to Article 25 is now to be understood as a reference to Article 34, which contains the same provision, requiring that only a person who is a "victim" of an alleged violation of the Convention may bring proceedings under the ECHR. That is a requirement of standing and is expressly reproduced by cross-reference to Article 34 in section 7(7) of the HRA.

86. In our view, what the European Court said in *Klass*, at para. 36, must not be taken out of the context in which it was said, which was concerned with the question of standing. In the present case there is no question concerning the Complainant's standing to bring these proceedings. It is readily understandable that, in the context of secret surveillance measures, it is possible for an individual to be deprived of his rights under Article 8 without even being aware that any interference with them has taken place, as the Court itself observed earlier in para. 36. That is indeed the approach which this Tribunal itself applies in cases of secret surveillance. The requirement of standing in this Tribunal in such cases is a low one: see the judgment of the Divisional Court in *R (National Council for Civil Liberties) v Secretary of State for the Home Department* [2019] EWHC 2057 (Admin); [2020] 1 WLR 243, at paras. 99-112, in particular para. 109. But that does not mean, however, that, in the present context, the Tribunal is required to speculate about what might be in CLOSED material. The preliminary issue before

us at this time requires us to assume that the facts as pleaded in OPEN are established to be true but raises the question whether, on those assumed facts, the Complainant, at the material times, fell within the jurisdiction of the UK. We can and must answer that question on the basis of the pleading as it is framed and on the basis of OPEN material.

87. That is not to say that, if this Tribunal otherwise proceeds to consider this complaint, it would close its eyes to anything which may arise in CLOSED material. Our decision on the preliminary issue will not necessarily preclude this Tribunal from doing so if that should arise in the future.

88. Next Mr Southey draws attention to the fact that the allegations in the present case concern violations of one of the most fundamental rights in the ECHR, freedom from torture and inhuman or degrading treatment, under Article 3. He submits that, in Article 3 cases, the facts will often be known only to the Respondents. He relies in particular on the following passage in the judgment of the European Court in *Bouyid v Belgium* (2016) 62 EHRR 32, at paras. 82-83:

> "82. Allegations of ill-treatment contrary to art. 3 must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof 'beyond reasonable doubt' but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.
>
> 83. On this latter point the Court has explained that where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. The burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim. In the absence of such explanation, the Court can draw inferences which may be unfavourable for the Government. That is justified by the fact that persons in custody are in a vulnerable position and the authorities are under a duty to protect them."

89. In our view, this is to put the "cart before the horse". This is because, in addressing the preliminary issue which is before the Tribunal at present, it cannot be presumed that Article 3 does apply. The whole point of the preliminary issue is to address the question whether the substantive rights in the ECHR apply at all. If at all material times the Complainant was not within the jurisdiction of the UK for the purposes of Article 1 of the ECHR, then Article 3 simply does not apply. The way in which fact-finding might have to be done if Article 3 does apply does not help to answer that preliminary issue of law.

90. Mr Southey also relies upon the International Law Commission's ARSIWA, Article 16:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that State."

91. Again, in our view, this is to put the cart before the horse. The question of "state responsibility" for violations of international law only arises at the end of an inquiry into, first, whether an international legal obligation applies at all; and, secondly, that a breach of that obligation has been established. The concept of state responsibility, and Article 16 of ARSIWA in particular, are not relevant to the preliminary issue which this Tribunal currently has to decide. At this preliminary stage, the only question is whether the Complainant fell within the jurisdiction of the UK at all.

Factual matters

92. At para. 50 of the Complainant's skeleton argument, it was submitted that the participation of UK Agencies "conceivably ranged from *direct engagement* in the Complainant's torture to information sharing with the US to facilitate intelligence gathering (including the provision of suggested questions for interrogation)." (Emphasis added)

93. But, as we have explained above by reference to the terms of the pleading, there was no allegation in the pleaded case that there had been any *direct* engagement by UK agencies in the Complainant's ill-treatment, only that there had been "complicity" in the acts of the US authorities. As we have also said, if any such allegation were to be made, we would expect it to be made in clear and express terms.

94. It is also necessary at this juncture to clear out of the way one "red herring", which was raised in particular at paras. 30 and 51 of the Complainant's skeleton argument. This relates to the suggestion that the UK may have allowed rendition aircraft to refuel on British soil in circumstances where the UK agencies were aware of the widespread mistreatment of "high value detainees", such as this Complainant. Mr Southey submits that this is an example of "active participation within a programme where the Complainant was utterly under the control of his captors."

95. In particular, reliance was placed in the skeleton argument on flight data for flight M63MU, an aircraft whose flight path matches the Complainant's transfer between Thailand and Poland in December 2002, suggesting that the aircraft made a refuelling stop at Luton Airport *en route* to Washington DC between 12:52 hours and 21:14 hours on 6 December 2002.

96. We have considered that flight data. It shows that the Complainant was not on the aircraft when it landed at Luton Airport. The flight went from Bangkok in Thailand, via the United Arab Emirates, to Szymany in Poland. It was there that the passengers, including the Complainant, were allegedly taken off the aircraft to a "black site" in Poland. The aircraft then went to Warsaw, still in Poland, before landing at Luton Airport in order to refuel for its onward flight to Washington DC.

97. Accordingly, insofar as it may be implied that the Complainant was on the territory of the UK, that is simply not made out on the material that has been placed before the Tribunal.

Conclusion on the preliminary issue

98. We conclude on the only issue which is currently before us that the Complainant did not fall within the jurisdiction of the UK at any material time, even if the facts as pleaded were true. That disposes of the preliminary issue before this Tribunal. That is not, however, necessarily the end of the matter.

Consequential matters

99. Mr Southey submits that, even if the preliminary issue is decided against the Complainant, that does not mean that the Tribunal does not have jurisdiction to consider, investigate and determine his complaint.

100. It is important to bear in mind that the word "jurisdiction" is used in two very different senses in the present context. The way in which it is used in the earlier part of this judgment is concerned only with the jurisdiction of the UK under Article 1 of the ECHR. That is not the same thing as the jurisdiction of this Tribunal. As we explained in the recent judgment in *Al-Hawsawi*, cited above, the jurisdiction of this Tribunal is governed by RIPA. This does not depend on whether the Complainant fell within the jurisdiction of the UK for the purposes of the ECHR. As we have mentioned, a "claim" brought under section 7 of the HRA can be brought within this Tribunal and, if it is made against one of the intelligence services, it must be made in this Tribunal. However, this Tribunal also has jurisdiction to consider and determine a "complaint" if it falls within section 65(2)(b) of RIPA.

101. Mr Southey submits that, there is no requirement that, for this purpose, a complainant must be located, or the misconduct alleged must have taken place, in the UK.

102. Mr Southey expresses the submission in this regard more fully, at para. 64 of the Complainant's skeleton argument, as follows:

> "For the avoidance of doubt, and without prejudice to any argument relied upon by the Complainant at a future substantive hearing on the merits, his complaint proceeds on the grounds that the acts of the UK Agencies were unlawful as a matter of public law, including on the basis that:
>
> i. Any acts or omissions done for the purpose of aiding, abetting, encouraging, facilitating or conspiring in the infliction of torture or cruel, inhuman or degrading treatment against the Complainant would by their very nature:
>
> a. have been committed for an improper/unlawful purpose;
>
> b. be *ultra vires* any purported statutory basis; and/or
>
> c. have involved a failure to take into account a relevant consideration, namely the Complainant's right not to be

> subjected torture or cruel, inhuman or degrading treatment. The common law prohibits torture (*A*).
>
> ii. Further, at all material times, the UK Agencies were under a common law duty not to aid, abet, encourage or facilitate or conspire knowingly on the commission of any treatment by the US against the Complainant which constituted torture and/or cruel, inhuman or degrading treatment. Accordingly, any act or omission done by or on behalf of the UK Agencies for the purpose of aiding, abetting, encouraging, facilitating or conspiring in the infliction of such torture and/or cruel, inhuman and degrading treatment would therefore constitute an unlawful breach of that duty.
>
> iii. The Complainant's treatment by the US involved the commission of torts of false imprisonment and assault and battery (or the equivalent torts under any applicable foreign laws) by agents of the US. Any acts or omissions by the UK Agencies done for the purpose of aiding, abetting, encouraging, facilitating, procuring or conspiring in the commission of such tortious acts would (in addition to rendering the UK Agencies liable in tort) be unlawful as a matter of public law.
>
> Under RIPA s. 67(3)(c), the Tribunal is plainly capable of determining those elements of the complaint '*by applying the same principles as would be applied by a court on an application for judicial review*.' That is without prejudice to any further claims the Complainant may have in tort."

103. Mr Southey submits that the complaint was made using the appropriate form (Form T2), which is specified by the Tribunal as the form which should be used to make a complaint, rather than a claim, under section 65(2)(b) of RIPA. Further, he submits that it has always been clear that, as a matter of substance, the Complainant was making a claim under the HRA. The question is whether that was *the only thing* that was raised in the complaint form.

104. We accept that this Tribunal could in principle go on to consider whether to exercise its jurisdiction under section 65(2)(b) of RIPA. However, before that can be done, there must be fairness to both sides. In our view, what is set out at para. 64 of the Complainant's skeleton argument goes well beyond what was set out in the original

pleading. The Complainant therefore requires the permission of this Tribunal to amend the pleading. No formal application to amend has been made but we are prepared to proceed on the basis that the Complainant's skeleton argument includes by implication such an application.

105. Furthermore, the Respondents have not had the opportunity to consider this procedural question, since the only issue which was to be considered at the hearing before us was the one which we have addressed above, relating to the jurisdiction of the UK. Mr Blundell wishes to have the opportunity to argue on behalf of the Respondents that the Complainant should not be given permission to amend his pleading to argue the matters which are set out at para. 64 of his skeleton argument. Mr Blundell also submits that, before reaching a decision on whether to permit such an amendment to the pleading, this Tribunal would have to consider whether it would be "equitable" to extend time, some 17 years after the events complained about. The normal time limit in section 67(5) of RIPA is one year but this Tribunal has the discretion to extend time if it considers that it would be equitable to do so in all the circumstances of a case.

106. At the hearing before us Mr Blundell asked for a period of six weeks after judgment was handed down in which the Respondents would have the opportunity to consider whether they wished to raise any procedural objections to the Tribunal's exercise of jurisdiction, including whether they have any objection to make to the proposed amendment to the pleading, and any time limit point under section 67(5) of RIPA.

107. In the circumstances we consider that that would be the just and appropriate way to proceed.

Disposal

108. For the reasons we have given above, we conclude, on the preliminary issue, that the Complainant did not, at the material times, fall within the jurisdiction of the UK for the purposes of Article 1 of the ECHR, even on the assumption that the facts alleged in the pleading are true. Accordingly, the human rights claim under section 65(2)(a) of RIPA would fail.

109. This is a final decision on a preliminary issue within the meaning of section 68(4C)(a) of RIPA. Under section 67A(2) of RIPA we specify that the relevant appellate court is the Court of Appeal of England and Wales.

110. Subject to any appeal on the preliminary issue, we grant the Respondents six weeks from the date of the hand down of this judgment to file and serve, if so advised, any objections to the consideration by this Tribunal of the complaint under section 65(2)(b) of RIPA. This may include any objection on the ground that any application for permission to amend the pleading should be refused; and/or that permission to amend should not be granted because of the lapse of time since the events complained of.

111. We envisage that we shall be able to determine the next steps without the need for a further preliminary hearing. However, should a hearing become necessary, we will notify the parties accordingly.